

# Texas Historical Statutes Project

1922 SUPPLEMENT TO  
VERNON'S CIVIL AND CRIMINAL STATUTES  
VOLUME 2

Annotated Civil Statutes (Articles 4711 to End)  
Penal Code  
Code of Criminal Procedure



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SUPPLEMENT  
TO  
VERNON'S  
TEXAS CIVIL AND CRIMINAL  
STATUTES

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

ANNOTATED  
WITH HISTORICAL NOTES AND NOTES OF DECISIONS

IN THREE VOLUMES

**VOLUME 2**  
CIVIL STATUTES, TITLES 71 TO 136  
PENAL CODE  
CODE OF CRIMINAL PROCEDURE

KANSAS CITY, MO.  
VERNON LAW BOOK COMPANY  
1922

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(V. 2 SUPP. '22 VERN. TEX. CIV. & CR.)

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SUPPLEMENT TO VERNON'S SAYLES'  
 ANNOTATED CIVIL AND CRIM-  
 INAL STATUTES OF THE  
 STATE OF TEXAS

1922

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

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VOLUME 2

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v.2 SUPP.'22 VERN.TEX.CIV.& Cr. (1313A)

## TITLE 71

## INSURANCE

## Chap.

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2. Life, health and accident insurance companies.
4. Assessment or natural premium companies.
5. Mutual assessment accident insurance home companies.
6. Mutual life insurance companies.
7. Fraternal benefit societies.
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10. Mutual fire, lighting, hail, and storm insurance companies.
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## CHAPTER ONE

## INCORPORATION OF INSURANCE COMPANIES

**Article 4711. [3034] Capital stock shall consist of what.**

**Issuing stock for note and trust deed.**—Note of a subscriber to corporate stock in an insurance company, secured by valid first mortgage on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received," within the meaning of Const. art. 12, § 6, so that Acts 1909, c. 108, authorizing the incorporation of insurance companies whose capital consists of first mortgages on unincumbered realty in Texas, is valid. *General Bonding & Casualty Ins. Co. v. Moseley*, 110 Tex. 529, 222 S. W. 961, reversing judgment (Civ. App.) 174 S. W. 1031; *Prudential Life Ins. Co. of Texas v. Pearson* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) 188 S. W. 513; *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

Where subscriber to stock in insurance company agreed to pay in cash or securities approved by insurance department, and on organization of company organizing company by proper transfer delivered to it subscription contract and subscriber's notes and deed of trust executed to secure such contract, on acceptance they became binding contracts between insurance company and subscriber, who became obligated to pay for his stock in cash or approved securities. *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield* (Com. App.) 220 S. W. 322, reversing judgment (Civ. App.) 184 S. W. 776.

Stock subscription contracts, calling for payment in money or securities satisfactory to the insurance department of Texas, the corporation being a bonding and accident insurance company, held valid on their face. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

## CHAPTER TWO

## LIFE, HEALTH AND ACCIDENT INSURANCE COMPANIES

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**Article 4724. Terms defined.**

Cited, *Manhattan Life Ins. Co. v. Stubbs* (Civ. App.) 216 S. W. 896.

**Companies within act.**—The mere fact that a casualty insurance company incorporated under arts. 4942a-4942z, was authorized by its charter to write health and acci-



dent insurance, did not make it a health or accident insurance company, within the meaning of this act, or make applicable to it any of the provisions of such act. *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

#### Art. 4725. Who may incorporate.

**Payment for stock subscribed.**—Contract for purchase of increase of capital stock was not, where stock was not to be delivered until notes given therefor had been paid, an executed sale so as to be void under Const. art. 12, § 6, and Rev. St. 1911, art. 1146, and art. 4725, subd. "e," and arts. 4726, 4728, prohibiting issuance of stock except for money paid, etc.; "issue" meaning delivered. *Zapp v. Spreckels* (Civ. App.) 204 S. W. 786.

#### Art. 4726. Charter to be approved by attorney general, etc.

See *Zapp v. Spreckels* (Civ. App.) 204 S. W. 786.

#### Art. 4728. Examination by commissioner before commencing business.

**Notes received for stock.**—Note of a subscriber to corporate stock in an insurance company, secured by valid first mortgage on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received," within the meaning of Const. art. 12, § 6, so that this Act, authorizing the incorporation of insurance companies whose capital consists of first mortgages on unincumbered realty in Texas, is valid. *General Bonding & Casualty Ins. Co. v. Moseley*, 110 Tex. 529, 222 S. W. 961, reversing judgment (Civ. App.) 174 S. W. 1031; *Prudential Life Ins. Co. of Texas v. Pearson* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) 188 S. W. 513.

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Stock subscription contracts, calling for payment in cash or in securities meeting the approval of the insurance department of Texas, meant such securities as constitute property, in contemplation of law, proper to be used in payment and satisfaction of a stock subscription. *Mitchell v. Porter* (Com. App.) 223 S. W. 197, reversing judgment (Civ. App.) 194 S. W. 981.

#### Art. 4730. Renewal certificates.

Cited, *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

#### Art. 4733. Laws relating to corporations shall govern.

Cited, *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

#### Art. 4734. May invest in what securities.

**Securities.**—Note of a subscriber to corporate stock in an insurance company, secured by valid first mortgage on real estate to which the subscriber has title, accepted by the corporation in payment for the stock, is "property actually received," within the meaning of Const. art. 12, § 6, so that this Act, authorizing the incorporation of insurance companies whose capital consists of first mortgages on unincumbered realty in Texas, is valid. *General Bonding & Casualty Ins. Co. v. Moseley*, 110 Tex. 529, 222 S. W. 961, reversing judgment (Civ. App.) 174 S. W. 1031; *Prudential Life Ins. Co. of Texas v. Pearson* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) 188 S. W. 513.

#### Art. 4735. May hold real estate, etc.

**Real estate.**—The fact that a building acquired by an insurance company was equipped with a heating plant designed to heat an adjoining building also does not make the acquisition of such building an ultra vires act. *Farmers' Life Ins. Co. v. Foster Building & Realty Co.* (C. C. A.) 272 Fed. 864.

#### Art. 4737. May reinsure.

**Construction in general.**—Petition, in life insurance company's suit on premium note acquired by having taken over all assets and liabilities of another company, held not demurrable as showing that transaction whereby note was acquired was not authorized by this article, therefore repugnant to anti-trust statutes, arts. 7797, 7807. *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

#### Art. 4741. Policies shall contain what.

Cited, *Mitchell v. Southern Union Life Ins. Co.* (Civ. App.) 218 S. W. 586.

**Application.**—The provisions requiring payment of premiums in advance and forbidding discrimination between insureds, relating to what an insurance policy should con-

tain, do not have the effect of avoiding a policy issued in violation of their provisions. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

Statutory provisions as to what an insurance contract should contain cannot be waived by contract, and any attempt to do so, direct or indirect, is void. *Id.*

Fraternal benefit societies are not within the purview of this article, prescribing the provisions to be contained in insurance policy. *Sovereign Camp, W. O. W., v. Nigh* (Civ. App.) 223 S. W. 291.

Rev. St. 1911, art. 4741, forbidding issuance of a policy within the state unless it contains certain provisions, does not prevent suit within the state on a policy issued in another state, where the renewal premium was paid in still a third state in violation of one of the provisions of the policy required by the statute. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

**Payment of premiums.**—An insurer cannot declare a forfeiture of a life policy until 30 days from default in payment of premium, even though the policy has been issued without the statutory clause inserted therein, requiring 30 days of grace. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

Where life policy allowed 30 days of grace for payment of premium without interest, but on date premium was due insurer executed a note for the amount thereof maturing eight months later, bearing interest and reciting that it was subject to the provisions of the policy, insured was entitled to 30 days' grace after maturity of the note to pay the same, although the note contained the words "without grace"; an extension of time upon an agreement to pay interest not being considered "grace" (citing *Words and Phrases, Days of Grace; On Grace*). *Id.*

**Incontestability.**—Subd. 3, providing for clauses of incontestability in life policies, does not change the public policy of the state, so as to permit recovery for death of insured by legal execution as punishment for crime. *American Nat. Ins. Co. v. Munson* (Civ. App.) 202 S. W. 937.

There is no law requiring fraternal benefit insurance societies to put incontestable clauses in their certificates, as is demanded of health, life, and accident companies, and consequently clauses of that kind in certificates of fraternal insurers derive their authority, not from statute, but from contract. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669.

Policy issued by fraternal benefit society was not incontestable, unless so provided by the contract itself, since this article is not applicable to policy of a fraternal benefit society. *Sovereign Camp, W. O. W., v. Nigh* (Civ. App.) 223 S. W. 291.

Parties to a life insurance contract could not by contract put something into the policy repugnant to subd. 3, requiring policies to be made incontestable not later than two years from date except for nonpayment of premiums, etc., and thus destroy a benefit to insured which the statute was designed to guarantee, so that an attempted reservation by the insurer of right to interpose fraud by way of defense to a suit to enforce payment of the policy after it had been issued more than two years was void. *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

**Understatement of age.**—A life insurance policy issued in Texas to one aged 64 years at the premium rate for one aged 48 years violates the provision of Rev. St. art. 4954, against discrimination between policy holders, but may be enforced by the beneficiary; insured not being regarded as in *pari delicto* with insurer, in view of art. 4741 and Pen. Code, art. 416c. *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

**Representations and warranties.**—A misrepresentation in an application for life insurance is material, when knowledge of the truth by the insurer might reasonably have caused it to refuse to issue the policy. *Ætna Life Ins. Co. v. King* (Civ. App.) 208 S. W. 348.

In action on life policy, whether declaration in application as to cause of death of insured's brother and as to insured's use of alcoholic or malt liquors, was material, held for jury. *Id.*

**Conditions—Validity in general.**—Stipulations in a life insurance policy that same is to be null and void unless delivered to the insured or his beneficiary during his lifetime and while in good health are valid and binding and conditions precedent to the liability of the insurer. *Denton v. Kansas City Life Ins. Co.* (Civ. App.) 231 S. W. 436.

— **Suicide of insured.**—A clause reinstating insured, who was in good health, to the effect that insurer would not be liable for more than the reserve of the policy if the insured should commit suicide within a year, was void for want of consideration, where the policy provided that the company would reinstate the policy at any time upon evidence of "insurability satisfactory to the company and payment of all arrears"; such reinstatement being no more than the performance of insurer's legal obligation. *Missouri State Life Ins. Co. v. Hearne* (Civ. App.) 226 S. W. 789.

**Waiver of conditions.**—Provision in life policy exempting insurer from liability, except for amount of premiums paid, in case the insured should die while engaged in military service, authorized by subd. 3, could not be orally waived in view of further provision that the policy constituted the entire contract between the parties, required by article 4953, and provisions of art. 4954, that life insurance company or agent should make no agreement as to policy not expressed therein. *Caldwell v. Illinois Bankers' Life Ass'n* (Civ. App.) 226 S. W. 747.

While it is not within the power of life insurance companies in placing policies in certain forms on the market materially to change or evade the obligations imposed on them by statute for the protection and advantage of insured and their beneficiaries, such companies are bound by modifications of the contract which they have voluntarily made, and which have no effect other than to leave clauses authorized for their own benefit

somewhat less to their advantage than would be permissible under the statutes. *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

**Construction of policy.**—Doubt as to meaning of statements in a short form of application, which was presented to insured filled out as signed, will be resolved in favor of enforcement of the policy. *Ætna Life Ins. Co. v. King* (Civ. App.) 208 S. W. 348.

Where a note for a premium could have been given either for an illegal extension of time for payment of premium, or as a legal payment of the premium, the court will hold that it was given as payment of the premium in advance rather than a postponement. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

#### Art. 4742. Policies shall not contain what.

**Construction in general.**—The construction of subd. 3, as applied to a condition on the face of a life insurance policy reducing the amount of insurance in case of death from certain diseases beginning within one year, is not involved in such doubt as to make controlling the ruling of the insurance commissioner approving a form of the policy. *First Texas State Ins. Co. v. Smalley* (Sup.) 228 S. W. 550.

**Invalid provisions—In general.**—A condition on the face of a life insurance policy immediately following the statement of the amount of the insurance, providing for payment of one-half only of such amount for death from certain diseases having their beginning during the first 12 months of the policy, is void under subd. 3. *First Texas State Ins. Co. v. Smalley* (Sup.) 228 S. W. 550.

A policy cannot contain the prohibited provisions, though issued on the industrial plan in small amounts and for weekly or biweekly premiums. *Id.*

The provision of a life policy that it shall not take effect unless insured is in good health at the time of issuance is not prohibited by subd. 3, invalidating any provision for settlement for less than the amount insured on the face of the policy. *Federal Life Ins. Co. v. Wright* (Civ. App.) 230 S. W. 793.

A condition in an insurance policy that, if insured's death occurred within six calendar months from its date, the beneficiary would receive only one-half of the amount mentioned therein, and the full amount if death occurred thereafter, contravened subd. 3. *American Nat. Ins. Co. v. Dixon* (Civ. App.) 231 S. W. 165.

**Waiver of provisions.**—The provision in an insurance policy for shortening the period of limitation, being one for the benefit of the insurer, may be waived, and is waived where the beneficiary in an accident policy wrote to the insurer within 90 days after death of insured, as provided by the policy, to furnish blanks required for proof, but insurer failed to furnish same. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

**Art. 4743a. Corporations, partnerships, etc., shall have insurable interest.**—Any corporation, partnership, joint stock association or any trust estate doing business for profit, may be named beneficiary in any policy of insurance issued by a legal reserve life insurance company on the life of any officer or stockholder of said corporation, joint stock association or trust estate or any partnership or member thereof may be the beneficiary in any policy of insurance issued by a legal reserve life insurance company upon the life of any member of said partnership, or any religious, educational, eleemosynary, charitable or benevolent institution or undertaking may be named beneficiary in any policy of life insurance issued by any legal reserve life insurance company upon the life of any individual. The beneficiaries aforementioned shall have an insurable interest for the full face of the policy and shall be entitled to collect same. On all policies of life insurance heretofore issued by legal reserve companies in which any of the aforementioned shall have been designated beneficiaries in the policies, said beneficiaries shall have an insurable interest to the full extent of the face of the policy and be entitled to collect same. [Acts 1921, 37th Leg., ch. 84, § 1.]

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

#### Art. 4744. Venue of suits on policies.

Cited, *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 212 S. W. 630.

**Applicability.**—Under art. 4798, this article does not apply to mutual accident insurance companies, so that such company could agree to be sued only in county named in certificate. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

Cause of action against insurance company for return, in view of cancellation of policy, of money paid on first premium, is not a "suit upon an insurance policy" within this article. *Reliance Life Ins. Co. v. Robinson* (Civ. App.) 202 S. W. 354.

**Venue.**—Action was properly brought in county of policy holder's residence, notwithstanding contrary provision of certificate. *International Travelers' Ass'n v. Powell* (Civ. App.) 196 S. W. 957.

**Art. 4746. Losses shall be paid promptly.**

See *Southern Surety Co. v. Nelson* (Sup.) 229 S. W. 1113.

**Application to various kinds of insurance companies.**—In view of art. 4793, and this article, in action against mutual accident insurance company, recovery of attorney's fees and damages or penalties held not authorized. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

In view of this article, and Const. art. 3, § 35, held, that art. 4955 (originally Acts 31st Leg. c. 108, § 55), is void, so that a judgment awarding 12 per cent. penalty for failure to pay the loss on an indemnity bond was improper. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

Defendant held not a mutual assessment, health, and accident association, organized under arts. 4794-4808, but an accident insurance company, to which this article applies. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230.

The fact that policies of accident insurance were issued under the Workmen's Compensation Act does not affect application of this article. *Southern Surety Co. v. Nelson* (Civ. App.) 223 S. W. 298.

This article does not apply to indemnity insurance contracts against liability to another as distinguished from life, health, or accident insurance. *Ocean Accident & Guarantee Corporation, Limited, of London, England, v. Northern Texas Traction Co.* (Civ. App.) 224 S. W. 212.

This article does not authorize the recovery of attorney's fees in an action on an accident policy against an association incorporated under art. 4793, since the former, although subsequent, does not repeal the later article. *Pledger v. Business Men's Accident Ass'n of Texas* (Com. App.) 228 S. W. 110.

This article is a part (section 35) of an act of the Thirty-First Legislature (Acts 1909, c. 108), authorizing the incorporation and providing for the regulation of life, health, and accident insurance companies of a certain character, and relates only to the corporations authorized and regulated by such act. *Id.*

Defendant fraternal insurance order, not having been permitted to transact business in Texas as a fraternal society, the statutes controlling life insurance policies apply to it, particularly this article, and the order will not be protected by the exception named in art. 4830, exempting such societies from all provisions of the insurance laws, but will be held liable for an attorney's fee for delay in payment. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

**Liability.—In general.**—The survival of insured for the time limited in an endowment policy is a contingency involving a loss to the insurer, endowment insurance being life insurance, since the amount of loss depends on the duration of life, and the word "loss" being used in the statute as a synonym of liability. *Manhattan Life Ins. Co. v. Stubbs* (Civ. App.) 216 S. W. 896.

Where insured asserted his claim and sued for the full amount of loss by fire under all his policies, it was not required of defendant insurers, one of whom admitted liability on a policy, to pay or tender any part of the loss in order to escape penalty for delay. *Providence-Washington Ins. Co. v. Boatner* (Civ. App.) 225 S. W. 1115.

**Demand.**—Before the penalty of 12 per cent. damages for failure to pay a claim can be imposed, a demand for payment must be made, and evidence of the furnishing of proofs of loss and a statement that the company refused to pay is not sufficient. *International Travelers' Ass'n v. Powell* (Civ. App.) 196 S. W. 957.

Where the agent of an insurance company has authority to represent the company in respect to payment of claims when demand is made, a demand upon him as representative of the company for payment of policies is such a demand as to entitle beneficiary to recover the penalties and attorney's fees in case of refusal to pay. *American Nat. Ins. Co. v. Wallace* (Civ. App.) 210 S. W. 859.

Where the beneficiary under a life insurance policy makes demand on the insurer for the face amount of the policy, which is larger than the amount due, and recovers a less amount by suit, the insurance company is not liable to her for attorney's fees. *American Nat. Ins. Co. v. Turner* (Civ. App.) 226 S. W. 487.

Insurer held liable for the 12 per cent. statutory penalty and attorney's fee for failure to pay amount due on policy on demand, notwithstanding that demand was for an amount in excess of that due. *First Texas Prudential Ins. Co. v. Campos* (Civ. App.) 227 S. W. 244.

**Tender.**—Where on the maturity of a 15-year endowment policy, the amount due thereon was in dispute, company's act in sending to assignee of policy draft for its admitted liability thereon, payable, however, to both original insured and assignee, with payment further conditioned upon the execution by them both of a full release of any further claims or demands on account of the policy, was not such an unconditional tender of its admitted debts as assignee was entitled to, and the company was thus left liable for delay. *Manhattan Life Ins. Co. v. Stubbs* (Civ. App.) 216 S. W. 896.

Where, on maturity of \$5,000 endowment policy, assignee of the policy claimed about \$1,200 extra dividends, while insurer admitted, in addition to the \$5,000 face of policy, dividends due to extent only of \$90, assignee was entitled to have penalty and attorney's fee for delay in payment predicated upon the \$5,090, which was adopted by the court, rather than upon the \$1,200 involved in dispute between the parties, where no unconditional tender was ever made of the \$5,090, since, by reason of lack of unconditional tender of what was admittedly due, the assignee was forced into the courts in order to get, not only the disputed, but also the undisputed, portion of his claim. *Id.*

**Excessive damages.**—In action for \$165, unpaid portion of insurance policy, with 12 per cent. damages and reasonable attorney's fees, allowance by trial court of \$100 at-

torney's fees was excessive in sum of \$50. *American Nat. Ins. Co. v. Blalock* (Civ. App.) 200 S. W. 185.

#### Art. 4749. Deposit of securities.

See *Texas Fidelity & Bonding Co. v. City of Austin* (Civ. App.) 211 S. W. 818.

**Application of act.**—This act does not apply to casualty companies. *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

**Validity.**—The provision that for taxation purposes the situs of the deposited securities shall be at the home office of the companies, is unconstitutional in view of Const. art. 8, § 11, fixing the situs of personal property for taxation in the county where situated. *City of Austin v. Great Southern Life Ins. Co.*, 211 S. W. 482; *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

**Situs of property for purpose of taxation.**—Where promissory notes were deposited by an insurance company domiciled in another county with the state treasurer, the situs of such notes for taxation purposes was in the county where deposited, and could not be rendered for taxation in any other county. *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

#### Art. 4761. Must have certificate of authority.

**Noncompliance with requirement.**—Business done by a foreign insurance corporation prior to the issuance of a certificate of authority, cannot be validated by subsequent issuance of a certificate. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

**Right of action.**—Where an insurance company entered into contracts insuring shippers of live stock against loss arising from damage to stock in transportation prior to issuance to the insurer of a certificate of authority, and loss resulted in the shipments by reason of negligence of the carrier, and under the conditions of the policy the insurer paid the amount of the losses to the shippers and took an assignment of their claims against the carriers, it cannot maintain an action against the carriers on such claims, in view of arts. 4900, 4972; the courts not lending their support to a claim founded upon the violation of express law. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

Under art. 1319, an insurance company is not subject to arts. 1314 and 1319, prohibiting a foreign corporation without permit to do business in the state from maintaining a suit in any court in the state. *Peerless Fire Ins. Co. v. Barcus* (Civ. App.) 227 S. W. 368.

#### Art. 4764. Taxation of domestic insurance companies.

See *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

Cited, *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

**Ownership of lands.**—Within the provision for deduction from remainder of the assets of a domestic insurance company, of the value of real estate owned by it, for determining the taxable value of its personal property, it is the owner of land on which it held vendor's liens, and which the purchaser, unable or unwilling to pay for, surrendered possession of to it; but not of land on which it held some other kind of lien, and which the landowner, failing or being unable to pay the debt secured, surrendered to it; title of the other party being divested by the surrender in the former case, but not in the latter. *City of Waco v. Texas Life Ins. Co.* (Civ. App.) 228 S. W. 245.

**Deductions.**—The word "entire" in the finding in a suit relative to taxation of a domestic insurance company, that the entire assets of the company amounted to a certain sum, indicates that no sort of assets was excluded, but that nontaxable Liberty Bonds, in which its capital stock was invested, were included. *City of Waco v. Texas Life Ins. Co.* (Civ. App.) 228 S. W. 245.

In rendering property for taxation, a life insurance company is entitled to deduct its reserve unconditionally, regardless of whether it includes exempt or unexempt securities, and it is also authorized to exclude exempt securities, such as Liberty Bonds, which do not form a part of the reserve. *City of Waco v. Amicable Life Ins. Co.* (Civ. App.) 230 S. W. 698.

**Presumptions and burden of proof.**—In an action by a life insurance company to enjoin city officers from collecting taxes on the ground that exempt property was assessed, burden of proof was upon the company to show that there had been an illegal assessment of its property and that the assessment was upon nontaxable securities as claimed. *City of Waco v. Amicable Life Ins. Co.* (Civ. App.) 230 S. W. 698.

It is not presumed that the legal reserve of a life insurance company is invested in nontaxable securities; such question being one of fact. *Id.*

#### Art. 4773. Shall file power of attorney.

**Effect of repeal of statute.**—In view of Acts 31st Leg. c. 108, requiring foreign insurance companies to appoint the commissioner of insurance as their agent for the service of legal process, act of 1909, repealing prior statutes as to the service of process, did not cancel outstanding powers of attorney authorizing a foreign insurance company's agent to receive service of process until such company in lieu thereof gave new powers of attorney to the insurance commissioner. *Hagler v. Security Mut. Life Ins. Co.* (D. C.) 244 Fed. 863.

If the Legislature intended to cancel such outstanding powers of attorney, the act was unconstitutional as divesting vested rights and impairing the obligation of contracts, since while the Legislature may make any change it sees fit pertaining to the remedy, the manner of obtaining service, or the procedure at the trial, it cannot deprive plaintiffs altogether of any remedy by divesting the courts of jurisdiction which they had at the time the policies were written. *Id.*

Acts Tex. 31st Leg. c. 108, regulating domestic and foreign insurance companies, and expressly repealing prior statutes relating to service of process, must be construed with the act of 1909, requiring all foreign insurance companies to appoint the commissioner of insurance as their agent for the service of legal process, where the two acts were pending at the same time, and the last-mentioned act, though approved a few days after the first one, went into immediate effect more than two months before the first act was effective. *Id.*

**Revocation of power of attorney.**—Under Rev. St. Tex. 1895, art. 3070, and Sayles' Ann. Civ. St. Supp. 1904, art. 3096ee, if a foreign insurance company's revocation of powers of attorney to its agents defeated service of process on them, then as it had no agent in the state, service by publication was valid, as a stipulation to this effect in the policy would have been binding, and the existing statutes must be read into the policy. *Hagler v. Security Mut. Life Ins. Co. (D. C.) 244 Fed. 863.*

Under Rev. St. Tex. 1895, art. 3064, requiring insurance companies desiring to do business in the state to file a power of attorney authorizing each agent to accept service of process, and consenting that such service shall be valid; art. 3070, providing that process might be served upon any person in the state holding a power of attorney, and that if no such person could be found process might be served by publication; and Sayles' Ann. Civ. St. Supp. 1904, art. 3096ee, making the two articles mentioned conditions upon which foreign insurance companies were permitted to do business in the state, and providing that any such company engaged in issuing policies should be held to have assented thereto as a condition precedent to its right to engage in such business—the revocation by a foreign insurance company of a power of attorney to one of its agents, without the appointment at the same time of any successor, was illegal, and service on such agent was good, especially where the power of attorney was revoked after suit was filed, and seemingly for the express purpose of preventing service on him. *Id.*

Under Rev. St. Tex. 1895, art. 3070, and Sayles' Ann. Civ. St. Supp. 1904, art. 3096ee, if a foreign insurance company's revocation of powers of attorney to its agents defeated service of process on them, then as it had no agent in the state, service by publication was valid, as a stipulation to this effect in the policy would have been binding, and the existing statutes must be read into the policy. *Id.*

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## CHAPTER FOUR

### ASSESSMENT OR NATURAL PREMIUM COMPANIES

#### Article 4791. Foreign assessment companies.

See *North American Accident Ins. Co. v. Hodge (Civ. App.) 208 S. W. 700*; *Merchants' Life Ins. Co. v. Lathrop, 210 S. W. 593*; *Same v. Hanks (Civ. App.) 210 S. W. 596.*

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## CHAPTER FIVE

### MUTUAL ASSESSMENT ACCIDENT INSURANCE HOME COMPANIES

Art.		Art.	
4794.	Incorporation of.	4804.	Certificate of membership; reserve fund; admission fee; expense fund.
4798.	What constitutes business of mutual assessment companies.	4807.	Policy shall specify what; liability on.

#### Article 4794. Incorporation of.

Cited *International Travelers' Ass'n v. Branum, 109 Tex. 543, 212 S. W. 630.*

**Applicability.**—Defendant held not a mutual assessment, health, and accident association, organized under this chapter, but an accident insurance company, to which art. 4746, providing that failure to pay loss within 30 days shall subject insurer to additional damages and attorney's fees, applies. *Bankers' Health & Accident Ass'n v. Wilkes (Civ. App.) 209 S. W. 230.*

Rev. St. 1911, art. 4746, does not authorize the recovery of attorney's fees in an action on an accident policy against an association incorporated under this act, since

the former, although subsequent, does not repeal the later article. *Pledger v. Business Men's Accident Ass'n of Texas* (Com. App.) 228 S. W. 110.

**Art. 4798. What constitutes business of mutual assessment companies.**

**Construction and effect in general.**—In view of this article, and article 4746, in action against mutual accident insurance company, recovery of attorney's fees and damages or penalties held not authorized. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

Under provisions of this article, article 4744 does not apply to mutual accident insurance companies, so that such company could agree to be sued only in county named in certificate. *Id.*

**Art. 4804. Certificate of membership; reserve fund; admission fee; expense fund.**

Cited, *Pledger v. Business Men's Accident Ass'n of Texas* (Com. App.) 228 S. W. 110.

**Art. 4807. Policy shall specify what; liability on.**

**Amount to be paid.**—Though by-laws provide that, if a member files claim before his disability ceased, he waives all right to future benefit, insurer cannot reduce its true liability by means of a mere unaccepted offer on the part of insured to receive in satisfaction of his demand less than amount to which he is entitled under this article. *International Travelers' Ass'n v. Powell*, 109 Tex. 550, 212 S. W. 931; affirming (Civ. App.) *International Travelers' Ass'n v. Powell*, 196 S. W. 957.

## CHAPTER SIX

### MUTUAL LIFE INSURANCE COMPANIES

Art.	Art.
4809. Articles of incorporation; commissioner shall examine.	4817. May transact business in other states; form of policy; limitation of amount of policy.
4810. Directors; officers; by-laws; annual meeting of policy-holders; bonds of officers.	4818. Medical examination.
4811. Investment of funds; deposit of funds in bank.	4819. No deduction of amount of policy where premium payable other than annually.
4812. Shall not borrow money or create debts, except.	4820. Policy shall contain table of guaranteed values.
4813. Policies to be valued by commissioner.	4821. Annual statements.
4814. Net premiums to be computed.	4822. Agents shall have certificates.
4815. May set aside reserve.	4823. Annual examination and certificate.
4816. Shall make apportionment of surplus.	4824. Advances to company; repayment; impairment of reserve; receiver; re-insurance.
	4825. Taxes, how calculated.
	4826. Other provisions applicable; repeal.

**Article 4809. Articles of incorporation; commissioner shall examine.**—Nine or more persons, residents of the State of Texas, may form a mutual life insurance company for the purpose of insuring the lives of individuals on the mutual, level premium, legal reserve plan, subject to the conditions and limitations prescribed in this chapter, by executing and acknowledging before some officer authorized to take acknowledgments to conveyances of real estate, articles of incorporation for that purpose. Such articles shall set forth:

1. The name and residence of each of the incorporators.
2. The name of the proposed company, which shall contain the words, "Mutual Life Insurance Company", as a part thereof, and which shall not be so similar to that of any other life insurance company or association now authorized to transact business in this State as to mislead the public.

3. The location of the principal office from which the business of the company is to be transacted.

4. The number of directors and the name and place of residence of each of those who are to serve until the first regular election of directors as provided by this chapter. Such articles of incorporation shall be filed with the Commissioner of Insurance and Banking, who shall immediately submit them to the Attorney General for his examination and approval as complying in all respects with the law. If the Attorney General approves them, he shall so certify thereon in writing, and return them to the Commissioner of Insurance and Banking, who shall file the same in his office and issue to the company a certificate of authority, to which shall be attached a certified copy of the articles of incorporation, authorizing it to receive applications for insurance as provided in this chapter, and to collect premiums thereon, and to issue receipts therefor; which certificate shall expressly state that such company is not authorized to issue policies of insurance or transact any business other than that specifically authorized therein until it has received bona fide applications for insurance on the lives of at least two hundred individuals for not less than five hundred dollars each, aggregating at least two hundred thousand dollars of insurance, on which the aggregate net premiums shall be at least equal to the largest net risk assumed on any one life, which applications have been approved by a competent physician and on which the first annual premiums at adequate rates have been paid to the company, nor until these facts shall have been fully shown to the Commissioner of Insurance and Banking, and he shall have issued to the company a certificate of authority to transact business as a mutual life insurance company. If this showing is not made within six months after the date upon which such articles of incorporation are filed with the Commissioner of Insurance and Banking, it shall be his duty to cancel the certificate of authority of such company to receive applications for insurance, and to notify each incorporator of such action. When the Commissioner of Insurance and Banking shall be notified that any such company has complied with all the foregoing provisions of this Article, he shall make, or cause to be made, at the expense of such company, an examination thereof; and if he shall find that the law has been in all respects fully complied with, it shall be his duty to issue to it a certificate of authority to transact the business of a mutual life insurance company, in accordance with the terms of this chapter. [Acts 1909, p. 285, § 1; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4809, Rev. Civ. St.]  
Took effect 90 days after March 12, 1921, date of adjournment.

**Art. 4810. Directors; officers; by-laws; annual meeting of policyholders; bonds of officers.**—The business of a mutual life insurance company shall be controlled and directed by a board of directors consisting of not less than five nor more than twenty-five members, who shall be elected annually as provided in this chapter, those to serve until the first annual election to be named in the charter, and who shall hold office until their successors shall be elected and qualified, or until they shall be removed for improper practices. Such board of directors shall elect the officers of the company, which shall be a president, and such number of vice-presidents as their by-laws may provide; a secretary, a treasurer, a medical director and such other officers as the by-laws may provide for, and shall fix the compensation of all such officers. The duties of all officers shall be prescribed by the by-laws. The by-laws governing the company until the date of its first annual meeting, as provided by this chapter, shall be adopted by the board of directors at their first meeting after the certificate of authority shall be issued authorizing the company to transact the business of a mutual life insurance company. There shall



be an annual meeting of all the policy-holders of each mutual life insurance company at the home office of such company, or at such other place as may be properly announced to the policy-holders, on the second Tuesday in March after it shall have received a certificate of authority to transact the business of life insurance, and annually thereafter, at which the directors shall be elected for the succeeding year, and at which by-laws for the government of the company, not inconsistent with the provisions of this chapter or with the laws of this State may be adopted, and at which the existing by-laws may be repealed or amended. At such annual meeting, every policy-holder shall be entitled to one vote for each five hundred dollars of insurance held by him; and any policy-holder may execute his proxy authorizing and entitling the holder to exercise his voting powers, unless such proxy shall be revoked previous to such annual meeting. The president, secretary and treasurer shall each give bond for the protection of the policy-holders in amount and with securities to be approved by the Commissioner of Insurance and Banking, conditioned for the faithful performance of their respective duties. [Acts 1909, p. 285, § 2; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4810, Rev. Civ. St.]

**Art. 4811. Investment of funds; deposit of funds in bank.**—Mutual life insurance companies shall invest their funds in accordance with the provisions of Articles 4734 and 4735, Chapter 2 of this Title, concerning investments of life insurance companies in this State; all moneys of mutual life insurance companies, coming into the hands of any officer or officers thereof, when not invested as prescribed in the above-named articles, shall be deposited in the name of such company or companies in some bank or banks which are subject to either State or national regulation and supervision, and which have been approved by the Commissioner of Insurance and Banking as depositories therefor. [Acts 1909, p. 285, § 3; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4811, Rev. Civ. St.]

**Art. 4812. Shall not borrow money or create debts, except.**—No mutual life insurance company shall have the power except as provided in this chapter, to borrow money for any purpose other than the payment of death losses. No such company shall have the power to incur any debt on any account except under policies issued by it or for money borrowed to pay death losses, for which any portion of its assets over and above that which may represent or be derived from the expense loading of the premiums collected by it, shall in any event be subject to execution upon a judgment therefor. [Acts 1909, p. 285, § 4; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4812, Rev. Civ. St.]

**Art. 4813. Policies to be valued by commissioner.**—The Commissioner of Insurance and Banking shall annually make valuations of all outstanding policies of mutual life insurance companies as of December 31, of each year, in accordance with the one year preliminary term method based upon the American Experience table of mortality and three and one-half per cent interest per annum, assuming an average risk exposure of six months on all new policies issued within each calendar year. [Acts 1909, p. 285, § 5; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4813, Rev. Civ. St.]

**Art. 4814. Net premiums to be computed.**—The net premiums upon all policies issued by any such company shall be computed in accordance with the provisions of Article 4813, this Chapter and Title, the net premi-

ums on all new policies issued to be obtained by deducting from the total premium paid the amount of the preliminary term premium as above provided and allowing the remainder of the first annual premium as expense loading; no portion of such net premium collected upon any such policy shall ever be used or applied for the payment of any expenses of the company of any kind or character, or for any other purpose than the payment of death losses, surrender values, or lawful dividends to policyholders, loans on policies, or for the purposes of such investments of the company as are prescribed in the laws of this State. [Acts 1909, p. 285, § 5; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4814, Rev. Civ. St.]

**Art. 4815. May set aside reserve.**—Every mutual life insurance company may maintain and set aside, before declaring any dividends to policyholders, in addition to an amount equal to the net value of all its policies, computed as required by this Chapter, a contingency reserve not exceeding the following respective percentages of said net values, to wit: When said net values are less than one hundred thousand dollars, twenty per centum thereof, or the sum of ten thousand dollars, whichever is the greater; the percentage thereof measuring the contingency reserve shall decrease one-half of one per cent for each one hundred thousand dollars of said net values up to one million dollars, and thereafter, one-half of one per cent for each additional one million dollars of said net values; provided, that as the said net values of said policies increase, and as the maximum percentage measuring the contingency reserve decrease, such company may maintain the contingency reserve already accumulated hereunder, although for the time being it may exceed the maximum percentage herein prescribed, but may not add to the contingency reserve when the addition will bring it beyond the maximum percentage. [Acts 1909, p. 285, § 6; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4815, Rev. Civ. St.]

**Art. 4816. Shall make apportionment of surplus.**—Every mutual life insurance company organized under this Chapter shall make an annual accounting and apportionment of divisible surplus to each policyholder, beginning not later than the end of the second policy year on all policies issued; and each such policyholder shall be entitled to and credited with or paid, such a portion of the entire divisible surplus as has been contributed thereto by his policy. Upon the thirty-first day of December of each year, or as soon thereafter as may be practicable, every such company shall well and truly ascertain the surplus earned by it during such year; and, after setting aside from such surplus the contingency reserve provided in this Chapter, it shall apportion to each of its policies upon which all premiums due and payable for at least one year have been paid, the proportion of the remainder of such surplus which has been contributed by each such policy, and shall immediately submit a detailed report of such apportionment under oath of its president or secretary to the Commissioner of Insurance and Banking. If such Commissioner shall find such apportionment to be equitable and just to the policyholders and to be in accordance with the provisions of this Chapter, he shall approve the same, and it shall become effective; and, if he shall not approve such apportionment, he shall make such changes therein as he shall deem equitable and just and necessary to make the same comply with the provisions of this Chapter, and shall certify such changes to such company, whereupon such apportionment as changed by the Commissioner shall become effective. Each dividend declared as aforesaid shall be paid in cash, or in the equivalent of its cash value in any

option stated in the policy and selected by the policy-holder, notice of which selection by the policy-holder shall be given to the company in writing. [Acts 1909, p. 285, § 7; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4816, Rev. Civ. St.]

**Art. 4817. May transact business in other states; form of policy; limitation of amount of policy.**—Mutual life insurance companies are authorized to transact business throughout the State of Texas, and in other States to which they may be admitted; they shall issue no policies except upon the participating plan with dividends payable annually as elsewhere provided in this Chapter; the forms of all policies issued by any such company shall be approved by the Commissioner of Insurance and Banking, and all such policies shall have plainly printed on both the face and the reverse sides thereof the words, "The form of this policy is approved by the Commissioner of Insurance and Banking of the State of Texas;" and it shall be the duty of the Commissioner to revoke the certificate of authority of any company which shall issue any policy except upon such form so approved. No such company shall issue any policy or policies by which, after deducting reinsurance, if any, it shall be bound for more than five thousand dollars upon any one life at any time when the total amount of its insurance in force is less than ten million dollars. [Acts 1909, p. 285, § 8; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4817, Rev. Civ. St.]

**Art. 4818. Medical examination.**—No mutual life insurance company shall enter into any contract of insurance amounting to \$500.00 or more, upon the life of any person, without having previously made a medical examination, prescribed by its medical director and approved by its board of directors, of the insured, by a duly qualified and licensed practitioner, and without his certificate that the insured was in sound health at the date of examination. [Acts 1909, p. 285, § 9; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4818, Rev. Civ. St.]

**Explanatory.**—The latter part of this article imposes a criminal penalty and is set forth, post, as art. 686, Penal Code.

**Art. 4819. No deduction of amount of policy where premium payable other than annually.**—The policies issued by a mutual life insurance company shall provide, in the event that premiums are payable other than annually, that no deduction shall be made from the amount due on any policy in the event that the death of the policy-holder shall occur prior to the due date of any premium less than annual. [Acts 1909, p. 285, § 10; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4819, Rev. Civ. St.]

**Art. 4820. Policy shall contain table of guaranteed values.**—Each policy issued by a mutual life insurance company shall contain a table of guaranteed values, which shall become non-forfeitable not later than upon the payment of the third full annual premium; such tables of values shall be drawn in accordance with the provisions of Article 4741, Chapter 2, of this Title. [Acts 1909, p. 285, § 11; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4820, Rev. Civ. St.]

**Art. 4821. Annual statements.**—Mutual life insurance companies organized under the provisions of this Chapter shall file their annual statements with the Commissioner of Insurance and Banking, and receive from him their certificates of authority to transact the business of life insurance, in accordance with the provisions of Articles 4729 and

4730, Chapter 2, of this Title. [Acts 1909, p. 285, § 12; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4821, Rev. Civ. St.]

**Art. 4822. Agents shall have certificates.**—Any mutual life insurance company organized under the provisions of this Chapter, having received authority from the Commissioner of Insurance and Banking to transact business in this State shall receive from such Commissioner, upon written request therefor, a certificate of authority for each of its agents in this State. Contracts between such companies and such agents shall not provide for commissions or other compensation to such agents in excess of the expense loading in the premiums of policies issued upon the applications procured by such agents, collected therefor, and paid to the company in cash. [Acts 1909, p. 285, § 13; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4822, Rev. Civ. St.]

**Art. 4823. Annual examination and certificate.**—It shall be the duty of the Commissioner of Insurance and Banking to have made, once in each calendar year, a thorough and full examination of the affairs of each mutual life insurance company, the report of which examination shall be made to such Commissioner under oath; and it shall be the duty of the Commissioner of Insurance and Banking, if he shall approve the report of such examination, to furnish the company with certificate of approval. The expense of each such examination shall be borne by the company examined. [Acts 1909, p. 285, § 14; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4823, Rev. Civ. St.]

**Art. 4824. Advances to company; repayment; impairment of reserve; receiver; re-insurance.**—Any officer, director, or policy-holder of a mutual life insurance company, or any other person, may advance to such company any sum or sums of money for the purpose of promoting or conserving its business, or to enable it to comply with any requirements of the law; and such money, together with such interest thereon as may have been agreed upon, not exceeding ten per cent per annum, shall be payable only out of the surplus remaining after providing for all reserves and other liabilities, and shall not otherwise be a liability or claim against the company or any of its assets. No commission or promotion expenses shall be paid in connection with the advance of any such money to the company, and the amount of such advance shall be reported in each annual statement as provided in Article 4821, this Chapter and Title. At any time when the liabilities of any such company, computing its reserve liability upon the American Experience Table of Mortality and three and one-half per cent per annum interest, shall be in excess of its assets, the company shall cease the issuance of new policies until the impairment in its reserve shall be made good. Whenever the liabilities of any such company, computing its reserve liability upon the American Experience Table of Mortality and four and one-half per cent interest per annum, exceed its assets, the Commissioner of Insurance and Banking may request the Attorney General to file suit in the name of the State in the District Court of the county in which such company is located for the appointment of a receiver to terminate and liquidate the affairs of the company, and such action may be maintained. In any such action, such District Court, or judge thereof, in vacation, shall have the power, if in his opinion the interests of the policy-holders of the company require it, to enter an order for the re-insurance of all outstanding risks of such company in some other life insurance company authorized to do business in this State upon such terms and conditions as may be approved by the Commissioner of Insurance and Bank-

ing, and by such court, or the judge thereof, in vacation; and such court or judge may for that purpose direct the conveyance of the entire assets of any such company, or any portion thereof, to such re-insuring company in consideration of such re-insurance. [Acts 1909, p. 285, § 15; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4824, Rev. Civ. St.]

**Art. 4825. Taxes, how calculated.**—For the purposes of State, county and city taxation, the amount of the reserve and contingency reserve of all mutual life insurance companies shall be treated as debts due by them to their policy-holders; and the total value of their property for such purposes shall be ascertained by deducting from the total amount of their gross assets the amount of such reserves and contingency reserves. [Acts 1909, p. 285, § 16; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4825, Rev. Civ. St.]

**Art. 4826. Other provisions applicable; repeal.**—The provisions of Articles 4724 to 4774 inclusive, in Chapter 2 of this Title, when not in conflict with the several Articles of this Chapter, shall likewise apply to and govern mutual life insurance companies organized under the provisions of this Chapter. All laws and parts of laws in conflict with this Act are hereby repealed; provided, that such repeals and the provisions of this Act shall not apply to or affect any company or association now organized and doing business under the laws of this State. [Acts 1909, 2 S. S., p. 448, § 8; Acts 1921, 37th Leg., ch. 77, § 1, amending art. 4826, Rev. Civ. St.]

## CHAPTER SEVEN

### FRATERNAL BENEFIT SOCIETIES

Art.	Art.
4827. Fraternal benefit societies defined.	4847. Waiver of the provisions of the laws—separate jurisdiction.
4830. Exemptions.	4848a. Benefit not attachable.
4831. Benefits.	4849. Constitution and laws—amendments.
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4835. Funds.	4859. Provisions not to apply to local mutual aid associations; annual statement by such associations, etc.
4839. Organization.	
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4843. Admission of foreign society.	
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#### Article 4827. Fraternal benefit societies defined.

See *Green v. State*, 82 Cr. R. 420, 199 S. W. 622; *Modern Woodmen of America v. Atcheson* (Civ. App.) 219 S. W. 537.

Cited, *Concho Camp No. 66, W. O. W., v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

#### Art. 4830. Exemptions.

See *Gilmore v. Grand Temple & Tabernacle in State of Texas of Knights & Daughters of Tabor of International Order of Twelve* (Civ. App.) 222 S. W. 294.

**Exemption from other statutes.**—Art. 5714, enacted in 1907, providing that stipulations limiting the time for giving notice of claim for damages to less than 90 days are void, and, like article 5713, as to agreements shortening the time for suit, being applicable to all contracts, applies to fraternal benefit associations, this article enacted in 1913, being inapplicable as art. 5714 is a prior existing statute and not an insurance law. *Independent Order of Puritans v. Lockhart* (Civ. App.) 212 S. W. 559.

Art. 4947, providing that misrepresentation in application shall not constitute any defense to suit on policy unless it was material to the risk, or actually contributed to the contingency or event on which the policy became due and payable, has no application to contracts of insurance made by fraternal benefit societies. *Modern Woodmen of America v. Atcheson* (Civ. App.) 219 S. W. 537.

Defendant fraternal insurance order, not having been permitted to transact business in Texas as a fraternal society, the statutes controlling life insurance policies apply to it,

particularly art. 4746, imposing penalty for failure or refusal to pay a policy when due under its terms, and the order will not be protected by the exception named in this article, but will be held liable for an attorney's fee for delay in payment. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

#### Art. 4831. Benefits.

Cited, *Concho Camp No. 66, W. O. W., v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

#### Art. 4832. Beneficiaries.

Cited, *Concho Camp No. 66, W. O. W., v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

**Law governing.**—In a controversy to determine the right to the proceeds of a mutual insurance certificate, the laws of the state control, especially where the association was engaged in business in the state with its members. *Phillips v. Phillips* (Civ. App.) 226 S. W. 477.

**Beneficiaries in general.**—An aged, infirm, and childless member, separated from his wife, and dependent on one not a relative for support, may designate the person supporting him as beneficiary. *Jones v. Holmes* (Civ. App.) 195 S. W. 306.

If beneficiary of fraternal benefit certificate was eligible under statute at time he was designated, but not under statute in force at time of member's death he may not be deprived of rights acquired by him under certificate, where laws of association did not require that beneficiary belong to one of statutory classes at death of member. *International Order of Twelve Knights and Daughters of Tabor v. Reynolds* (Civ. App.) 195 S. W. 330.

A man named as beneficiary in wife's death benefit certificate will not be permitted after murdering wife to recover on the certificate. *Grand Lodge, United Brothers of Friendship of Texas and Sisters of Mysterious Ten v. Lawson* (Civ. App.) 203 S. W. 394.

A beneficiary named in fraternal benefit certificate, providing for change of beneficiary, has no vested interest in the contract of insurance which will prevent the insured from changing any of the terms of the contract, but has a mere expectancy, which may be defeated by a change of beneficiary. *Bills v. Bills* (Civ. App.) 207 S. W. 614.

A life insurance policy in favor of one who has no insurable interest in the insured's life is against public policy, and will not be enforced in such beneficiary's favor. *Hand v. Sovereign Camp, Woodmen of the World* (Civ. App.) 214 S. W. 718.

Where a mutual benefit insurance certificate designates the beneficiary as insured's wife, but she is not so in fact, she has no interest in the proceeds of the certificate. *Phillips v. Phillips* (Civ. App.) 226 S. W. 477.

In determining the right to proceeds of a mutual benefit insurance certificate, the rules prescribing the manner in which the names of the beneficiaries are to be inserted in the certificate must be strictly followed. *Id.*

Where the by-laws of a fraternal insurer provided that a defendant of a member might be named beneficiary, a "dependent" is one who is maintained by the member upon some merely legal or equitable ground, and a mere gratuitous maintenance does not satisfy the requirement; therefore, a child who was not legally adopted by the member cannot be a beneficiary, where it was removed by the member's wife on her leaving him and the member no longer contributed to its support. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

**Failure to make valid designation.**—Where a man murders his wife, and commits suicide, the wife's death benefit certificate in which husband was beneficiary will be payable to her heirs, where policy contains no provision as to payment in the event of murder of insured by beneficiary. *Grand Lodge, United Brothers of Friendship of Texas and Sisters of Mysterious Ten, v. Lawson* (Civ. App.) 203 S. W. 394.

Death benefit under fraternal certificate payable to estate of member who had received a prior certificate held payable to his sister as his sole residuary legatee, the others having renounced. *Anderson v. Grand Lodge, United Brothers of Friendship of the State of Texas* (Civ. App.) 223 S. W. 237.

Under Rev. St. 1911, art. 4832, confining the payment of benefits by fraternal societies to the wife, husband, relatives by blood to the fourth degree, etc., and the laws of a fraternal order similarly providing, and also providing that, where the beneficiary died and there was no other designation, the benefit should be paid, first to the husband or wife, then to the children, etc., where a wife named as beneficiary obtained a divorce, and the husband remarried, and did not change the beneficiary, the second wife was entitled to the death benefit. *Appleby v. Grand Lodge, Sons of Hermann* (Civ. App.) 225 S. W. 588.

The classes named in this article are entitled to benefits in the order named, when there is no beneficiary designated. *Id.*

In an interpleader to determine the right to proceeds of a mutual benefit insurance certificate, where it appeared that the original beneficiary, who was designated as insured's wife, was not entitled to take because she had another husband living, insured's children held entitled to the proceeds under the laws of the association, as well as under the laws of the state as against a claim by insured's mother that an oral gift of half the proceeds had been made to her. *Phillips v. Phillips* (Civ. App.) 226 S. W. 477.

**Oral appointment of beneficiaries.**—Since the only interest a member in a mutual benefit insurance association has in the certificate is to designate in writing under the rules of the association which one of the class of persons named in the by-laws or

recognized by statutory law is eligible to take, he cannot by parol assignment invest another than the named beneficiary with an interest in the proceeds of the certificate. *Phillips v. Phillips* (Civ. App.) 226 S. W. 477.

**Change of beneficiary.**—Failure of a member to comply strictly with the laws of a fraternal benefit association in making change in the beneficiary of his certificate can be asserted only by the association. *Jones v. Holmes* (Civ. App.) 195 S. W. 306; *International Order of Twelve Knights and Daughters of Tabor v. Reynolds* (Civ. App.) 195 S. W. 330; *Bills v. Bills* (Civ. App.) 207 S. W. 614.

A change of beneficiary under a benefit insurance certificate, made at a time when the certificate holder was insane and without legal capacity to contract, was voidable at the instance of the original beneficiary. *Turner v. Turner* (Civ. App.) 195 S. W. 326.

Where a member of a fraternal insurance order who had designated two beneficiaries attempted to displace one by causing his name to be erased from the certificate, held that the insurer by admitting its liability for the sum specified in the certificate, and paying the money into the registry of the court, ratified the certificate in its altered form; no new consideration being necessary. *Bills v. Bills* (Civ. App.) 207 S. W. 614.

**Evidence.**—In action on life policy involving question of whether insured had authorized change of the beneficiary by substitution of his wife's name in place of that of his mother, evidence held insufficient to sustain judgment for the mother. *Gardner v. Sovereign Camp, W. O. W.*, (Civ. App.) 227 S. W. 215.

### Art. 4834. Certificate.

See *Celli v. Sanderson* (Civ. App.) 207 S. W. 179; *Gilmore v. Grand Temple & Tabernacle in State of Texas of Knights & Daughters of Tabor of International Order of Twelve* (Civ. App.) 222 S. W. 294.

Cited, *Concho Camp, No. 66, W. O. W., v. City of San Angelo* (Civ. App.) 231 S. W. 1106.

**Construction in general.**—There is no law requiring fraternal benefit insurance societies to put incontestable clauses in their certificates, as is demanded by art. 4741, of health, life, and accident companies, and consequently clauses of that kind in certificates of fraternal insurers derive their authority, not from statute, but from contract. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669; *Sovereign Camp, W. O. W., v. Nigh* (Civ. App.) 223 S. W. 291.

In view of express repeal by Acts 33d Leg. c. 113 (arts. 4827-4859a), of Acts 31st Leg. (1st Called Sess.) c. 36, requiring false representations to be material in order to avoid policy in fraternal order, and construction of art. 4947, providing that misrepresentation, to avoid policy, must be material, so as to except fraternal orders, the common-law rule applies to fraternal policies. *Modern Order of Prætorians v. Davidson* (Civ. App.) 203 S. W. 379.

Insurance certificate of member of fraternal association, being a written contract between him and association, fact he could not read or write is no excuse for his not knowing terms thereof, not having been prevented from having same read to him by any fraud or device of association. *Grand Lodge, A. O. U. W., v. Schwartz* (Civ. App.) 205 S. W. 156.

It was not necessary that fraternal insurance association's prohibition against a member's engaging in saloon business should be stated in either member's application or certificate, being stated in by-laws of association, which were part of contract of insurance. *Id.*

The certificate of the medical examination by the physician of a fraternal insurance society is made part of the insurance contract, and as such may be received in evidence in an action thereon. *Sovereign Camp, Woodmen of the World, v. Martin* (Civ. App.) 211 S. W. 270.

Where deceased from time of his application for membership until death was a member of a partnership engaged in the hotel and saloon business, deceased managing the hotel, and his partner the saloon, he was engaged in the saloon business within the by-laws of a fraternal insurer prohibiting the insuring of persons in such business, notwithstanding the clerk of the insurer construed the prohibition to extend only to those actively selling intoxicants, etc. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669.

An incontestable clause added by the by-laws to a fraternal insurance certificate does not have a retroactive effect so as to make incontestable a certificate which had already been issued for a period of five years, after expiration of which time it was provided there should be no contest; hence, where the incontestable clause was, in less than the five years fixed, changed so as to allow contests when insured shall die while engaged in prohibited occupations, a certificate issued on deceased's false representation that he was not engaged in prohibited occupation may be contested, though it had been issued more than five years. *Id.*

Where deceased at the time of his application for membership in a fraternal insurer falsely represented that he was not engaged in the saloon business, whereupon he was admitted to membership and paid assessments until death, no recovery can be allowed on the certificate because of those provisions of by-laws of the insurer which, after forbidding the insuring of persons engaged in the saloon business, allowed members who thereafter entered such prohibited occupation to continue their insurance upon payment of an additional assessment. *Id.*

The word "disease," as used in an insurance contract, made by a fraternal order and application question as to previous medical attendance comprehended a cold and fever, being a morbid condition of body, and having as synonyms "disorder," "distemper," and

"malady." *Sovereign Camp of the Woodmen of the World v. Treanor* (Civ. App.) 217 S. W. 204.

Where fraternal benefit society member lost his original certificate, in which his mother was beneficiary, and applied for and was issued a new one in which his wife was made beneficiary, in an action by the wife on the second one it was not a sufficient defense to show that prior to the issue of the second certificate the member had forfeited the original by engaging in an extrahazardous occupation without notifying the clerk of the local camp and paying extra premiums, in the absence of a showing that the second certificate was procured by false representations or some form of deception, the member not having engaged in the prohibited occupation after the issuance of the second certificate. *Sovereign Camp of Woodmen of the World v. Akins* (Civ. App.) 219 S. W. 492.

Such a construction of a life certificate will not be adopted as will work a forfeiture, if there is any other reasonable one which may be applied. *Id.*

A fraternal benefit society member who was a fireman in the boiler room of a plant engaged in generating electricity and making ice was not employed "in electric works" or "in an electric current generating plant" within the meaning of a life certificate classifying such employments as extrahazardous, and providing that certificate should be suspended while a member is employed in such places unless he pays an extra premium, where the boiler room was separated from the electric current generating machinery by a partition, and the member was never required to go into the room where such machinery was located. *Id.*

Where application for readmission and for insurance were accepted by fraternal society and where applicant was accepted as a member and paid the money entitling him to issuance of the beneficiary certificate, the insurance went into effect upon his admission and payment of the dues for the current month, notwithstanding that certificate itself had not been issued or delivered, in absence of anything in the constitution or application for readmission or for insurance making the delivery of the certificate a condition to the taking effect of insurance, since such insurance contract is not required to be in writing. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

**Forfeiture of certificate of membership.**—Where the constitution of a fraternal insurance organization, made a part of the benefit certificate, provided that the certificate should be void and all payments thereunder forfeited if beneficiary murders insured, the certificate was void, where a man murdered his wife, in whose death benefit certificate he was named beneficiary. *Grand Lodge, United Brothers of Friendship of Texas and Sisters of Mysterious Ten, v. Lawson* (Civ. App.) 203 S. W. 394.

Where a fraternal order's life policy provided that persons engaged in the business of selling malt or intoxicating liquors should not be admitted, and that the certificate of any member who should engage in any prohibited occupation should become void except on notice and payment of an additional assessment, and insured, without notice or payment of the additional assessment, engaged for three months in the business of selling intoxicants, his beneficiaries cannot recover on his death. *Sovereign Camp, Woodmen of the World, v. Lenhard* (Civ. App.) 215 S. W. 979.

Where fraternal benefit certificate provided that it would be suspended while the member was working in certain prohibited occupations, beneficiary cannot recover where the member was employed in a prohibited occupation at the time of his death, although his death was from natural causes, and not the result of exposure to dangers incident to such employment. *Sovereign Camp of Woodmen of the World v. Akins* (Civ. App.) 219 S. W. 492.

Whether or not member of fraternal benefit order was employed "in an electric current generating plant," within the meaning of his benefit certificate, is to be determined by the physical situation, and not by the identity of his employer. *Id.*

Where the by-laws of a fraternal benefit association provided that a beneficiary certificate should become null and void if insured engaged in the saloon business without giving notice to the clerk of the camp and paying an additional assessment, the failure of the beneficiary to give such notice after engaging in that business is an absolute defense to recovery on the certificate unless the association is estopped to rely thereon. *Carter v. Sovereign Camp, Woodmen of the World* (Civ. App.) 220 S. W. 239.

Where the by-laws of a fraternal insurer named as prohibited occupations saloon keeping, bartending, retailing of intoxicating liquors as a beverage, and the making of intoxicants, such by-law does not extend to the wholesale distribution of intoxicants by one who did not personally handle the same save by construction, and hence is no basis for forfeiture of insurance on the ground the member had become a wholesaler, and did not pay the increased rate for engaging in prohibited occupation; for a forfeiture must be clear and definite. *Sovereign Camp of Woodmen of the World v. Miller* (Civ. App.) 220 S. W. 635.

Where laws of fraternal benefit society required member to give the society 30 days' notice and to pay increased assessment on his engaging in any of specified hazardous occupations, a member who entered into one of the hazardous occupations and continued working therein for three months, without giving the necessary notice of the change in occupation or paying the increased assessment, and without such fact being known, by the society or any officer, forfeited the contract of insurance, notwithstanding acceptance of assessments by the clerk during such three months. *Sovereign Camp, W. O. W., v. Nigh* (Civ. App.) 223 S. W. 291.

Under fraternal organization's by-law providing: "If a member engages in any of the occupations or businesses mentioned in this section, he shall within 30 days notify the clerk of his camp of such change of occupation. \* \* \* Any such member failing to notify the clerk \* \* \* shall stand suspended"—a member who dies within 30 days after the change without having given the notice is in good standing at the time



of his death; the suspension not taking effect until after the expiration of the 30-day period. *Sovereign Camp, W. O. W., v. James* (Civ. App.) 230 S. W. 435.

— **Nonpayment of dues or assessments.**—Where mutual benefit certificate stipulated society should not be liable unless insured when he died was in good standing with his tabernacle, endowment department, and grand temple and tabernacle, certificate accordingly was not binding on society when member died, not in good standing, but suspended for failure to pay endowment tax on certificate for a quarter. *Gilmore v. Grand Temple & Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve* (Civ. App.) 222 S. W. 294.

The right to benefits is immediately lost on default of a member, where the laws of a fraternal benefit society provide that no affirmative action of the lodge is necessary to effect suspension for nonpayment of dues. *Calhoun v. The Maccabees* (Civ. App.) 225 S. W. 95.

Under fraternal society's by-law requiring a member who changes his occupation to one of specified occupations or businesses to "pay on each monthly installment or assessment 30 cents for each \$1,000 of his beneficiary certificate, in addition to the regular rate," the additional 30 cents did not become due at the time of the change, but at the time that the regular rate became due. *Sovereign Camp, W. O. W., v. James* (Civ. App.) 230 S. W. 435.

— **False statements in application or examination.**—Where insured made false representations in application for fraternal accident policy regarding previous sickness, etc., which he warranted to be true, a peremptory instruction for defendant should have been given. *Modern Order of Pratorians v. Davidson* (Civ. App.) 203 S. W. 379.

A question in application, "Have you consulted or been under the care of a physician any time within the past ten years? (Explain fully giving cause of illness, dates and names and address of all physicians consulted)," required applicant to answer only as to consultation for illness, and sunburn resulting in peeling of skin was not an "illness"; that meaning more than a temporary and trivial indisposition not substantially impairing the health. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

In action on benefit certificate, falsity of statement in application that applicant had not been treated by a physician for "liver disease" would not be established by showing that applicant had been treated for "biliousness" when he had a "bilious attack," as a "bilious attack" from which applicant completely recovered would not necessarily be a "liver disease," as that term was used in the application. *Knights and Ladies of Security v. Russell* (Civ. App.) 209 S. W. 756.

Where a fraternal insurance certificate was void because of false representations made by the applicant in his application, it was never in force, and could not be validated by an incontestable clause. *Sovereign Camp, Woodmen of the World, v. Wermette* (Civ. App.) 216 S. W. 669.

Where an applicant for membership in a fraternal insurer which classed saloon keeping as a prohibited occupation falsely represented that he was not engaged in the saloon business, and thus procured a certificate, such certificate is null and void because of the misrepresentation, and recovery cannot be allowed, though the member paid assessments for long period. *Id.*

An insurance contract written by a fraternal order, making it the duty of the examining doctor to require answer to every question, and to explain to the applicant the meaning of terms used, does not give the doctor or the applicant the right not to require or give an answer to a question as to previous medical attendance, because he may not have thought the thing for which he previously prescribed and treated the applicant was a disease within the meaning of the term as used. *Sovereign Camp of the Woodmen of the World v. Treanor* (Civ. App.) 217 S. W. 204.

A fraternal order had a right to a truthful answer from its applicant for membership as to whether he had consulted physicians prior to his application; and, failing to get such answer, the applicant in fact having consulted physicians for a cold and fever, coming within the term "disease" as used in the contract of insurance, though he represented he had not done so, the insurance was rendered void. *Id.*

The law that misrepresentations do not avoid a policy of life insurance unless material to the risk or actually contributing to the contingency has no reference, and does not apply, to fraternal benefit societies, such as the *Woodmen of the World*. *Id.*

In the absence of statute to the contrary, false representations in an application for insurance which the applicant warrants to be true will avoid the policy without reference to the materiality of such statements. *Modern Woodmen of America v. Atcheson* (Civ. App.) 219 S. W. 537.

Where insured's statement, made in his application for the policy, with reference to previous consultation of physicians, was false, the falsity of such statement avoids the liability of defendant benefit association, unless the defense was waived, or defendant association is estopped from asserting it either by requiring additional proofs or in its statement of the grounds for rejection of the claim. *Security Ben. Ass'n v. Webster* (Civ. App.) 230 S. W. 219.

Where there was no evidence of any falsity or intent to deceive in the assured's representations in her application for a life insurance policy as to her family history, an incorrect history did not vitiate the policy. *Sovereign Camp, W. O. W., v. Hubbard* (Civ. App.) 231 S. W. 828.

A misrepresentation or mistake as to family history will not vitiate a life insurance policy conditioned to be void on certain grounds, of which incorrectness of family history is not one. *Id.*

— **Waiver.**—A fraternal insurance association receiving the same dues after notice that insured had entered a more hazardous occupation waived payment of larger premiums and is estopped to claim forfeiture of the policy. *Sovereign Camp, W. O. W., v. Little (Civ. App.) 225 S. W. 574; Sovereign Camp of Woodmen of the World v. Miller (Civ. App.) 220 S. W. 635.*

Where fraternal benefit society member lost his original certificate and applied for a new one, which was issued by the society with knowledge that prior thereto the member had engaged in a prohibited occupation, in which he was no longer engaged, and thereafter accepted payment of assessments, it was estopped to deny liability under the second certificate on the ground that the original certificate was forfeited by reason of the prohibited employment. *Sovereign Camp of Woodmen of the World v. Akins (Civ. App.) 219 S. W. 492.*

Where a medical examiner was notified that the applicant had suffered from influenza and such fact was noted in the report he made to the body having general authority over fraternal insurer, held, that the insurer was charged with knowledge of that fact, and cannot rely on the applicant's statement that he had not suffered from disease, etc. *Sovereign Camp, Woodmen of the World, v. Nash (Civ. App.) 220 S. W. 235.*

Where the by-laws of a benefit association provided for the expulsion or other punishment of a member engaging in the saloon business and required notice and payment of additional assessments to avoid nullification of the benefit certificate, the beneficiary cannot recover on the theory that the association was estopped to rely on the defense that insured engaged in such business without giving the required notice without showing reliance by insured upon his being expelled in accordance with the by-laws. *Carter v. Sovereign Camp, Woodmen of the World (Civ. App.) 220 S. W. 239.*

In an action on a fraternal benefit certificate issued to plaintiff's wife, liability whereon was denied because of misrepresentations by insured as to her health, that insurer's medical examiner was advised of an operation for appendicitis performed upon insured and that he knew the circumstances thereof and nevertheless recommended her as a first-class risk held to constitute a waiver by insurer of any right to show that insured was not a safe risk because of such operation. *Knights and Ladies of Security v. Shepherd (Civ. App.) 221 S. W. 696.*

On the certificate of a member of a fraternal society providing that the beneficiary would on the death of insured be paid \$1,000 if insured had complied with all by-laws then existing or thereafter in force, such sum is recoverable, the monthly assessment provided by the certificate having been regularly paid and accepted without any knowledge by insured that it was insufficient to maintain that amount of insurance. *Independent Order of Puritans v. Parker (Civ. App.) 228 S. W. 363.*

Provision in an insurance contract issued by a benefit association that a demand for proofs of loss or additional proofs should not be considered a waiver is valid and a requirement of additional proof of loss was not a waiver of misrepresentation by insured as to previous consultation of physicians, where the association had no knowledge at the time of calling for the additional proof that such representation in the application was false. *Security Ben. Ass'n v. Webster (Civ. App.) 230 S. W. 219.*

Defendant benefit association sued on its policy of life insurance held not to have waived, and not to be estopped from asserting, the defense of misrepresentations by insured as to previous consultation of physicians, by statements made in its letter of rejection of claim. *Id.*

In a suit on a life insurance certificate issued by a fraternal benefit society, where plaintiff proved a parol waiver of a condition requiring delivery of the policy to the assured, and there was no allegation or testimony that a waiver in writing, signed by the commander or clerk, was not made, plaintiff could recover; a parol waiver being good, though required to be in writing. *Sovereign Camp, W. O. W., v. Hubbard (Civ. App.) 231 S. W. 828.*

Where under the terms of the constitution and laws of a fraternal benefit society a life insurance certificate issued by it was not valid unless delivered to the assured, the society was estopped to set up nondelivery as a defense where it delivered the certificate without protest or notice to the beneficiary, accepted payment of dues from him, and did not call his attention to the requirement. *Id.*

— **Evidence.**—In suit on benefit certificate, held, on the evidence, that insured, who stated in her application as a warranty that she was in robust health and free from disease, was not then suffering from pellagra. *The Homesteaders v. Stapp (Civ. App.) 205 S. W. 743.*

In an action on a fraternal order's life policy, evidence held to show that insured sold liquor in violation of a clause of his policy every day for nearly three months, and that such selling was part of a service for which he was employed by a saloon keeper. *Sovereign Camp, Woodmen of the World, v. Lenhard (Civ. App.) 215 S. W. 979.*

In action on benefit certificate involving the issue of whether insured misrepresented the condition of his health in application for membership, evidence held insufficient to support judgment for beneficiary. *Modern Woodmen of America v. Atcheson (Civ. App.) 219 S. W. 537.*

In an action on a benefit certificate, the jury's finding that insured was in good health at the time of the application and at the receipt of the certificate held warranted. *Sovereign Camp, Woodmen of the World, v. Nash (Civ. App.) 220 S. W. 235.*

In an action on a fraternal life policy, evidence that insured's agent was told that insured was working at a more hazardous occupation and that the agent and insured had corresponded, etc., held to sustain a jury's finding that the insurer knew of insured's change of occupation. *Sovereign Camp, W. O. W., v. Little (Civ. App.) 225 S. W. 574.*

**Reinstatement.**—Since applicant for readmission to membership is to a large extent dependent upon the officers of the lodge and the members thereof who are inducting him into the order for instructions as to what is necessary to be done in such matters, he has a right to rely on the fact that proceedings to which he submits himself are regular and in compliance with the order. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

Where by-laws of benefit society expressly provided that, if insured was not in good health when payment of a delinquent quarterly endowment tax on his certificate was made, payment should not operate to reinstate him, provision must be given effect, such facts existing, as barring the beneficiary. *Gilmore v. Grand Temple & Tabernacle in State of Texas of Knights and Daughters of Tabor of International Order of Twelve* (Civ. App.) 222 S. W. 294.

### Art. 4835. Funds.

**Recovery of premiums paid.**—A fraternal insurance association's certificate held by a member having been automatically canceled on the date when that member engaged in the saloon business, there was no consideration for his premium payments made thereafter, and he was entitled to recover them, except those barred by limitations. *Grand Lodge, A. O. U. W., v. Schwartz* (Civ. App.) 205 S. W. 156.

### Art. 4839. Organization.

**Change in by-laws.**—Fraternal insurance company's by-law that absence for seven years shall not be evidence of death until full term of life expectancy of insured has expired was unreasonable as to a policy already existing. *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891.

If a subsequent by-law of a fraternal order is in conflict with its insurance certificate, and the contract of insurance legally entered into, the contract and certificate will control, since ordinarily there can be no change in the contract of insurance as made by a fraternal order except by consent of both parties. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

**Constitution, by-laws, and rules.**—Member of a fraternal insurance society was chargeable with the full knowledge of the terms of his contract, of which the constitution and laws of the society were a part. *Sovereign Camp, W. O. W., v. Nigh* (Civ. App.) 223 S. W. 291; *Carter v. Sovereign Camp, Woodmen of the World* (Civ. App.) 220 S. W. 239.

A by-law of a fraternal insurance company, providing that no action can be brought on a policy unless proof of death be furnished within one year, nor unless action is commenced within two years, does not apply, where plaintiff must rely upon art. 5707, relating to presumption of death, to establish death. *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891.

The constitution and by-laws of a fraternal benefit association form part of the policy of insurance of one holding a benefit certificate therein. *Carter v. Sovereign Camp, Woodmen of the World* (Civ. App.) 220 S. W. 239.

— **Change of rates.**—On the certificate of a member of a fraternal society providing that the beneficiary would on the death of insured be paid \$1,000 if insured had complied with all by-laws then existing or thereafter in force, such sum is recoverable, the monthly assessment provided by the certificate having been regularly paid and accepted without any knowledge by insured that it was insufficient to maintain that amount of insurance, notwithstanding a by-law enacted after issuance of certificate providing that the amount of insurance payable on a certificate shall depend on and be fixed and determined by the amount of monthly premium payments at the age attained by the member at the rate on the basis of the American Mortality Experience Tables; it being impossible for any one other than an expert actuary to determine from the tables that any greater payment was required, and the by-law being therefore inoperative. *Independent Order of Puritans v. Parker* (Civ. App.) 228 S. W. 363.

A fraternal benefit society may by by-law raise amount of assessments payable on an existing policy. *Id.*

### Art. 4841. Mergers and transfers.

**Application.**—This article is inapplicable to a society of another state. *Independent Order of Puritans v. Parker* (Civ. App.) 228 S. W. 363.

**Validity of merger.**—The presumption is in favor of the Commissioner of Insurance and Banking of the state having done his duty under this article. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

In the absence of evidence showing that the supreme president and secretary of defendant fraternal order were not authorized to make the contract of merger with another order which they did make, the presumption should prevail that such officers of defendant order were acting within their authority, and were authorized to execute the contract, especially where the supreme ruling body of the order affirmed and ratified their acts. *Id.*

**Liability of consolidated association in general.**—Defendant fraternal order, which through its supreme president and secretary executed a contract of merger with the order originally joined by decedent, which contract was approved by the supreme governing body of defendant order, held estopped, as against the beneficiaries of decedent, to repudiate the part of the merger agreement, adopting the other order's certificates.

stipulating against change of rates or amount, though such stipulation was against the law of defendant order. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

**Evidence.**—In an action on a beneficial certificate against a fraternal order which had assumed the insurance contracts of the order which decedent originally joined, under the facts tending to show that the original contract of merger between the two orders was executed in duplicate, and one copy filed with the Commissioner of Insurance, and defendant order at any rate having been notified to produce the original contract on trial, or that secondary evidence would be offered, the agreement of merger produced in court and certified to by the commissioner held admissible, as well as the agreement transcribed in the minutes of the order which decedent originally joined, which two instruments, together with certain oral testimony as to the adoption of the contract by the two orders, established it as made. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

#### Art. 4843. Admission of foreign society.

See *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

#### Art. 4844. Power of attorney and service of process.

**Service in general.**—This article clearly requires service of citation upon the commissioner of insurance in all suits against fraternal benefit societies and no other service of citation is sufficient to authorize default judgment against the defendant. *Haitian Tabernacle No. 604, International Order of Twelve Knights and Daughters of Tabor, v. McKinney* (Civ. App.) 224 S. W. 202.

#### Art. 4847. Waiver of the provisions of the laws—Separate jurisdiction.

**Estoppel or waiver affecting right of forfeiture.**—Where holder of certificate of fraternal insurance, relying on presumption arising from seven years' absence of insured, waited seven years before attempting to prove death, action of insurer, in refusing payment by reason of by-laws concerning proof of death of absentees, was of itself sufficient to justify finding that it would have been useless to attempt to furnish proof of death under a by-law requiring proof to be made within a year. *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891.

If both insured and insurer's examiner and agent knew of falsity of statement in application and insured was not acting in good faith, and if agent acted in collusion with insured, the insured could not claim benefit of an estoppel on account of agent's knowledge. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

Fraternal insurance association, acting through officers and local agents, is as much subject to operation of principle of estoppel, despite by-laws prohibiting any local clerk or organization from waiving provisions, as any other association, or as an individual. *Sovereign Camp, Woodmen of the World, v. Putnam* (Civ. App.) 206 S. W. 970.

Where the applicant for membership in a fraternal insurer falsely stated that he was not engaged in the saloon business, and the clerk issuing the certificate testified he did not know that the applicant was so engaged, the insurer cannot be estopped to rely on the false statement in the application because it was well known in the community that the applicant was engaged in the saloon business, which was one of the occupations prohibited by the by-laws of insurer, etc. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669.

Provision in the by-laws of a fraternal insurer that no officer of the Sovereign Camp should have power of waiver is not authorized by this article. *Sovereign Camp, Woodmen of the World, v. Nash* (Civ. App.) 220 S. W. 235.

A fraternal insurer itself may with notice or knowledge of the facts waive compliance with the by-laws, although such by-laws take from the officials of the subordinate body, as a camp, general powers to create waiver. *Sovereign Camp of Woodmen of the World v. Miller* (Civ. App.) 220 S. W. 635.

**Waiver by local lodge or agent.**—Knowledge acquired by an association's medical examiner and local agent in the discharge of their duty in connection with the application, and in reporting it to insurer for its information before its final action on application, was to be imputed to insurer. *The Homesteaders v. Stapp* (Civ. App.) 205 S. W. 743.

Fraternal order may by by-law curtail and circumscribe right of local clerk or local organization of order to waive provisions of by-laws. *Sovereign Camp, Woodmen of the World, v. Putnam* (Civ. App.) 206 S. W. 970.

Where collector of fraternal order's local organization failed to demand higher assessments from member, who had notoriously entered occupation of retail liquor dealer, requiring, under by-laws, payment of higher assessments, his acts having misled member, order will not be permitted to take advantage of default by insisting on forfeiture after death. *Id.*

No estoppel can arise against a fraternal insurer because of the acts or knowledge of a subordinate officer, where the by-laws contain such prohibition against waiver, etc. *Sovereign Camp, Woodmen of the World, v. Wernette* (Civ. App.) 216 S. W. 669.

To estop a fraternal insurer to claim a forfeiture of the certificate because of the member's false statements that he was not engaged in a prohibited occupation, it must

appear that the clerk had actual knowledge that deceased was engaged in the prohibited occupation, and such knowledge cannot be presumed. *Id.*

Where, at the time deceased became a member of a fraternal insurance society which included saloon keeping within the prohibited occupations, the clerk of the fraternal insurer knew that deceased was engaged in the business of a saloon keeper, the insurer, having accepted premiums paid, is estopped from asserting the invalidity of the certificate, although it was provided in the policy that an agent might not waive its conditions. *Id.*

Where applicant for readmission had submitted to the required medical examination, had been accepted and recognized as a member and elected as such by the subordinate lodge, and had paid subordinate lodge treasurer the necessary dues, his failure to sign the constitution even though the signing thereof was required by the constitution as a prerequisite to membership, did not preclude him from becoming a member and recovering insurance where he had no knowledge of such requirement, and where subordinate lodge did not require him to sign constitution; such requirement under the circumstances being waived, in view of arts. 4847, 4855. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

The grand body of a fraternal benefit society is not estopped to claim a suspension and consequent forfeiture, where the member fails to pay assessments within the time provided by the laws of the order, notwithstanding the fact that a belated payment thereof may have been made to and accepted by the local officers or tent. *Calhoun v. The Maccabees* (Civ. App.) 225 S. W. 95.

#### **Art. 4848a. Benefit not attachable.**

**Validity.**—This article is not repugnant to Const. U. S. Amend. 14, providing that no state shall deny equal protection of its laws to persons within its jurisdiction, or Const. Tex. § 3, art. 1, prohibiting exclusive privileges, on the ground that such special benefits are not conferred on other insurance companies, which are separately classified in the statutes; such classification not being an arbitrary one, but based on sufficient reason. *Supreme Lodge United Benev. Ass'n v. Johnson* (Civ. App.) 77 S. W. 661.

#### **Art. 4849. Constitution and laws—Amendments.**

See *Merchants' Life Ins. Co. v. Lathrop* (Civ. App.) 210 S. W. 593; *Same v. Hanks* (Civ. App.) 210 S. W. 596.

**Amendments.**—A fraternal benefit society may by by-law raise amount of assessments payable on an existing policy. *Independent Order of Puritans v. Parker* (Civ. App.) 228 S. W. 363.

If a subsequent by-law of a fraternal order is in conflict with its insurance certificate, and the contract of insurance legally entered into, the contract and certificate will control. *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

#### **Art. 4854. Revocation of license.**

See *Independent Order of Puritans v. Brown* (Civ. App.) 229 S. W. 939.

#### **Art. 4855. Examination of certain societies.**

Cited, *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

**Prior act.**—Act May 12, 1899, relative to fraternal benefit associations, section 16 of which excludes from its provisions certain designated orders which issue policies of insurance or benefit certificates to their members, and are, as to their insurance provisions, substantially fraternal benefit orders, is repugnant to Const. U. S. Amend. 14, guarantying equal protection of the laws, and Const. Tex. § 3, art. 1, in that it imposes on fraternal benefit associations generally certain conditions for the transaction of business, and grants certain privileges, such as exemption from garnishment, from both of which the designated orders are excluded. *Supreme Lodge United Benev. Ass'n v. Johnson* (Civ. App.) 77 S. W. 661.

**Art. 4859. Provisions not to apply to local mutual aid associations; annual statement by such associations, etc.**—The provisions of this chapter shall not apply to incorporated or unincorporated mutual relief or benefits, or burial associations, operating upon the assessment plan, whose business is confined to not more than one county in the State of Texas, or to a territory in two or more adjacent counties included within a radius of not more than 50 miles surrounding the city or town in which its principal office is to be located, which is designated in its charter and which at no time shall have a membership exceeding 2000 members which are hereby denominated local mutual aid associations, provided that such associations are in no manner directly or indirectly connected, federated or associated with any such association and do not directly or indirectly contribute to the expense or support of any other such association, or to the officers, promoters, or manager thereof, and provided that no person

or officer shall receive from said association any payment on account of organization or other expenses or salaries who is not a bona fide resident of the county or area in which such association is domiciled. The association above mentioned shall annually, on or before March 1, file a statement with the Commissioner of Insurance and Banking, which shall be signed and sworn to by the president, Secretary and treasurer, or the officer holding positions corresponding thereto. Such statement shall show whether the association has, during the preceding year, done any business outside of the county or areas in which it is domiciled, and shall state whether or not said association is associated, federated or directly or indirectly connected with any other, and shall show what, if anything, has been contributed during the preceding year by said association or the members, to any person or officer, or director thereof for salaries, commissions or promotion expenses, and the name and residence of the party or parties receiving the same. The Commissioner of Insurance and Banking may, at his option and it shall be his duty, if not satisfied with said statement, to demand other and additional statements and examine the books, papers, and records of said association, either himself or by some other suitable person authorized by him. Should it appear to the Commissioner of Insurance and Banking that any such local mutual aid association is not carrying on business as set forth in this article, and is not entitled to the exemption therein set forth, such association shall be subject to and comply with all provisions of this chapter, as a fraternal beneficiary association. Every such local association claiming to be entitled to the benefit of the exemption created by this Article shall plainly state upon its certificates, applications and all advertising matter, in a conspicuous manner, that said association is a local mutual aid association, or same shall be deemed subject to all provisions of this chapter concerning fraternal beneficiary associations. [Acts 1913, p. 220, § 31; Acts 1919, 36th Leg., ch. 50, § 1.]

**Explanatory.**—Sec. 2 of the act repeals all laws in conflict. The act took effect March 13, 1919.

#### DECISIONS RELATING TO SUBJECT

**Agents of association.**—The Grand Master of a lodge in the absence of pleading or evidence to show authority upon his part, held not authorized to bind the lodge in an application for fidelity insurance for the treasurer. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

Where the by-laws of a fraternal insurer directed a member on changing occupation to give notice to the clerk of the local camp, notice to such clerk is notice to the insurer itself. *Sovereign Camp of Woodmen of the World v. Miller* (Civ. App.) 220 S. W. 635.

The subcommittee of a building commission of a fraternal organization held not to have ostensible authority sufficient to bind the organization by an oral contract with subcontractor for extras. *Grand Lodge of Colored K. P. of Texas v. Allen* (Civ. App.) 221 S. W. 675.

Where a fraternal organization designated a building commission, consisting of several individuals, the authority will be deemed conferred on each of the commissioners as joint agents, and no one or more of the commissioners less than the whole has power to bind the organization. *Id.*

The order of which the grand lodge and its officers are the controlling body acts through the local lodge and its officers in the matter of the reception and readmission of members; the local lodge and its officers being the agents of the grand lodge in such matters. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

**Contingency upon which benefits become payable.**—Fraternal benefit society policy for \$1,000 held to entitle beneficiary to only \$200 where insured had suicided before proof of incurable insanity had been furnished the society or it had paid anything on account thereof. *Eminent Household of Columbian Woodmen v. Freeman* (Civ. App.) 200 S. W. 186.

Where plaintiff was injured by dust blowing in his eyes while driving his wagon around a street corner on a spring day, during a high wind, prevalent in West Texas at such times, the cause of his injury was an "accident," being "an unusual effect of a known cause," and he was entitled to recover upon a benefit certificate carrying an accident clause. *Independent Order of Puritans v. Lockhart* (Civ. App.) 212 S. W. 559.

A requirement that insured in a health insurance certificate should give notice of

his claim within 7 days after his disability accrues, and within 30 days after recovery, is void. *Independent Order of Puritans v. Manley* (Civ. App.) 220 S. W. 647.

— **Evidence.**—In an action on a death benefit certificate, circumstantial evidence held sufficient to show beneficiary killed insured, where same evidence would have sustained a conviction of murder in the first degree, with death penalty. *Grand Lodge, United Brothers of Friendship of Texas and Sisters of Mysterious Ten, v. Lawson* (Civ. App.) 203 S. W. 394.

**Amount recoverable.**—In suit by widow of member of fraternal order, trial court, having held order estopped, by collection of assessments through local agent, to declare forfeiture on account of failure to pay higher assessments due after change in occupation, properly deducted, from amount due under certificate, amount of additional assessments member should have paid. *Sovereign Camp, Woodmen of the World, v. Putnam* (Civ. App.) 206 S. W. 970.

**Actions for breach of contract.**—Limitations do not begin to run against an action on the policy of a member of a mutual society who disappeared from home until the expiration of seven years from the disappearance, when the beneficiary's cause of action accrues under the presumption of death. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

## CHAPTER EIGHT

### FIRE AND MARINE INSURANCE COMPANIES

<p>Art. 4874. Policy shall be considered a liquidated demand.</p> <p>4874a. Breach or violation by insured of policy, etc., on personal property, not a defense, when.</p>	<p>Art. 4875a. Interest of mortgagee or trustee not invalidated.</p>
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**Article 4874. [3089] Policy shall be considered a liquidated demand.**

See *Farmer v. State*, 69 Tex. 561, 7 S. W. 220.

**Construction and effect in general.**—This article does not invalidate a clause forfeiting the policy in case the insured takes out additional insurance without the insurer's written consent. *Home Ins. Co. v. Boatner* (Civ. App.) 218 S. W. 1007.

**Total loss.**—Stipulation for arbitration in fire insurance policy is nullity where there is total loss. *National Fire Ins. Co. v. House* (Civ. App.) 197 S. W. 476.

**Liquidated demand.**—A demand is "liquidated" to begin to carry interest when the amount due or to become due is fixed by law or by agreement between the parties. *Fire Ass'n of Philadelphia v. Strayhorn* (Com. App.) 211 S. W. 447.

Despite this article, in an action on a fire policy providing loss should be payable 60 days after furnishing proof of loss, interest on the amount of the policy from the date of loss was improperly allowed; the parties having contracted that 60 days should be allowed the insurer before liquidation of the demand. *Id.*

A demand of payment of loss and a refusal to pay was not necessary before bringing suit on fire insurance policy, where the loss was total, for the amount became a liquidated demand upon the total destruction of the building by fire, or as a direct result thereof. *Northwestern Nat. Ins. Co. v. Westmoreland* (Civ. App.) 215 S. W. 471.

**Measure of recovery.**—The parties to an insurance contract may agree upon the value of the property insured and the specific amount to be paid for its loss or damage, and, in the absence of fraud, such agreed valuations are conclusive. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

Despite art. 5714, an insurer of property which was not totally destroyed by fire, the policy providing that the loss should not become payable until 60 days after notice, ascertainment, and proof of loss, in the absence of denial of liability, was not liable for interest from the date of the loss. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

Where an insurer wrongfully refused to pay insurance proceeds to a mortgagee and for several years retained the money pending litigation, it should be made to pay the mortgagee the amount of his debt with attorney's fees as well as interest. *Home Ins. Co. v. Boatner* (Civ. App.) 218 S. W. 1097.

**Art. 4874a. Breach or violation by insured of policy, etc., on personal property, not a defense, when.**

See *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365; *Home Ins. Co. v. Flewellen* (Civ. App.) 221 S. W. 630; *Providence-Washington Ins. Co. v. Boatner* (Civ. App.) 225 S. W. 1115.

**Constitutionality.**—This act entitled "An act to prevent fire insurance companies from avoiding liability for loss and damage to personal property under technical and

immaterial provisions of the policy or contract of insurance where the act breaching such provision has not contributed to bring about the loss, and declaring an emergency," held not violative of Const. art. 3, § 35, providing that no bill shall contain more than one subject, to be expressed in its title; the statute having reference only to immaterial provisions. *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

**Construction in general.**—This article being a remedial statute, should be liberally construed to effect its purpose. *Allemania Fire Ins. Co. v. Angier* (Civ. App.) 214 S. W. 450.

**Application.**—This article is applicable only to those warranties and provisions the breach of which might have contributed to bring about the loss, but which in fact did not, and not to such provisions the violation of which could not have contributed to bring about the loss. *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055; *Ætna Ins. Co. v. Waco Co.* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 189 S. W. 315.

The taking out of additional insurance in excess of that allowed under a concurrent insurance clause, in violation of provision of fire policy making policy void if insured procured other insurance on the property covered by the policy, held a good defense in action on the policy, this article having no application to breach of such provision of policy; it being material to the risk. *Ætna Ins. Co. v. Waco Co.* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 189 S. W. 315; *Providence-Washington Ins. Co. v. Levy & Rosen* (Com. App.) 222 S. W. 216, reversing judgment (Civ. App.) 189 S. W. 1035.

This article includes all promissory warranties, and promissory warranties, breach whereof could in no event, contribute to or bring about loss under the policy, are not impliedly excluded from the effect of the statute. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

By virtue of the agreement of a cotton gin owner embodied in his fire policy that each item of the insured property other than the buildings should be considered as personalty, the machinery and other property must be treated as personal property, as respects the application of this article; promissory warranties not contributing to the loss. *Westchester Fire Ins. Co. v. Roan* (Civ. App.) 215 S. W. 985.

This article is not applicable to the proof of loss clause of standard policy, the three-fourths value clause, the coinsurance clause, the incumbrance clause, the iron safe clause requiring inventory books, etc., to be kept in fireproof safe, or any other clauses, the breach of which could not bring about a loss by fire. *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

The antitechnicality law does not affect the record warranty clause in a fire policy. *Merchants' & Manufacturers' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Com. App.) 229 S. W. 312.

This article does not apply to any provision the breach of which could in no event contribute to loss, and hence does not apply to breach of condition that insured shall submit to examination after fire occurs, as such breach could not contribute to the fire. *Humphrey et al. v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750.

**Effect of breach in general.**—Where a policy insured a gin plant, including buildings and personal property, failure to operate gin during ginning season, as provided in a promissory warranty clause, voided policy as to buildings, but not as to personal property, unless the breach increased the hazard or contributed to the loss. *Ætna Ins. Co. v. Lewis* (Civ. App.) 204 S. W. 1170.

In a suit on a fire insurance policy, wherein defendant alleged the insured had failed to keep a set of books as provided for in the policy, such failure did not defeat the right to recover. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

If as a matter of fact the removal of insured goods from one town to another did not contribute to bring about the destruction of such goods by fire, the insurer would be liable for loss in the latter town, although policy provided that goods were covered only while in place where they were when insured. *Standard Fire Ins. Co. of Hartford, Conn. v. Buckingham* (Civ. App.) 211 S. W. 531.

The owners of household goods, in storage, and insured against fire while on the particular premises, and not elsewhere, could recover for their destruction in premises to which the warehousemen removed the goods; such removal by insured through their agents being a breach of "condition," and not having caused the loss. *Allemania Fire Ins. Co. v. Angier* (Civ. App.) 214 S. W. 450.

Insured could recover from his fire insurer for destruction of his cotton gin, personal property, in the absence of proof to show that his breach of warranty to operate the gin during the season brought about or contributed to its destruction. *Westchester Fire Ins. Co. v. Roan* (Civ. App.) 215 S. W. 985.

**Art. 4875a. Interest of mortgagee or trustee not invalidated.**—The interest of a mortgagee or trustee under any fire insurance contract hereafter issued covering any property situated in this state shall not be invalidated by any act or neglect of the mortgagor or owner of said described property or the happening of any condition beyond his control,



and any stipulation in any contract in conflict herewith shall be null and void. [Acts 1919, 36th Leg., ch. 15, § 1.]

Took effect 90 days after March 19, 1919, date of adjournment.  
See note 122 at end of title.

## CHAPTER NINE

### STATE INSURANCE COMMISSION

Art. 4876. Companies deemed to have accepted provisions of law.	Art. 4896. Insurance companies not to do certain things.
4884. Action of fire marshal not to affect policies, etc.	4897. Unlawful to accept rebate.
4891. Commission to establish uniform policies, etc.	4900. Unlawful for company or agents to evade law.
4892. Certain provisions in policies void.	4902. Law not to apply to certain companies.
4893. Co-insurance clauses.	4903. Gross premiums tax; limitation on amount.

**Article 4876. Companies deemed to have accepted provisions of law.**

See *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211.

**Art. 4884. Action of fire marshal not to affect policies, etc.**

**Effect of investigation.**—Examination of insured by state fire marshal held not to satisfy provision of policy for examination by person named by insurer. *National Fire Ins. Co. of Hartford, Conn., v. Humphrey* (Civ. App.) 199 S. W. 865.

**Art. 4891. Commission to establish uniform policies, etc.**

See *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

**Construction and application in general.**—Breach of the "iron-safe clause," requiring inventory books, etc., to be kept in fireproof safe, required to be inserted in all policies covering stocks of merchandise by the Fire Commission Act, held a good defense in action on policy insuring stock of millinery, notwithstanding art. 4874a; such statute having no application to the iron-safe clause. *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

**Evidence.**—In an action against a fire insurance company for loss sustained after the insurer had neglected to renew policies under an oral agreement, evidence held insufficient to prove that the fire insurance commission had made an order changing the form of policies, so as to make compliance with the verbal agreement unlawful. *Austin Fire Ins. Co. v. Adams-Childers Co.* (Civ. App.) 232 S. W. 339.

**Art. 4892. Certain provisions in policies void.**

See *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

**Art. 4893. Co-insurance clauses.**

See *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

**Amount of recovery.**—In an action on an insurance policy wherein defendant company claimed a reduction of the amount of loss because of a co-insurance clause, defendant was not entitled to such reduction, where it did not plead the clause nor prove facts showing it was entitled to the reduction. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

**Art. 4896. Insurance companies not to do certain things.**

**Effect of violation.**—Where insurance agents suing for premiums due on fire policies were guilty of unjust discrimination, by agreeing to contribute their premiums to the cost of erection of the hotel insured, the party insured violated art. 4897 by accepting such rebate, all of the parties were in pari delicto, and the courts will leave them where found, and will extend no aid to the insurance agents to recover back the money paid under such an illegal contract. *Wright v. Wight & Wight* (Civ. App.) 229 S. W. 381.

**Art. 4897. Unlawful to accept rebate.**

**Rebate—Recovery of premiums.**—Where insurance agents suing for premiums due on fire policies were guilty of unjust discrimination under art. 4896, by agreeing to con-

tribute their premiums to the cost of erection of the hotel insured, the party insured violated art. 4897 by accepting such rebate, all of the parties were in pari delicto, and the courts will leave them where found, and will extend no aid to the insurance agents to recover back the money paid under such an illegal contract. *Wright v. Wight & Wight* (Civ. App.) 229 S. W. 881.

**Art. 4900. Unlawful for company or agents to evade law.**

**Effect of violation.**—Where an insurance company entered into contracts insuring shippers of live stock against loss arising from damage to stock in transportation prior to issuance to the insurer of a certificate of authority, required by art. 4761, and loss resulted in the shipments by reason of negligence of the carrier, and under the conditions of the policy the insurer paid the amount of the losses to the shippers and took an assignment of their claims against the carriers, it cannot maintain an action against the carriers on such claims, the courts not lending their support to a claim founded upon the violation of express law. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

**Art. 4902. Law not to apply to certain companies.**

See *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

**Art. 4903. Gross premiums tax; limitation on amount.**—That there shall be assessed and collected by the State of Texas an additional one and one-fourth per cent. of the gross fire insurance premiums of all fire insurance companies doing business in this State, according to the reports made to the Commissioner of Insurance and Banking as required by law; and said taxes when collected shall be placed in a separate fund with the State Treasurer to be expended during the current year, or so much thereof as may be necessary in carrying out the provisions of this Act, provided that such expenditures, including the salaries of the members of the Commission, shall not exceed in the aggregate the sum of two hundred and twelve thousand five hundred dollars per annum; and should there be an unexpended balance at the end of any year, the State Fire Insurance Commission shall reduce the assessment for the succeeding year so that the amount produced and paid into the State Treasury, together with said unexpended balance in the Treasury, will not exceed the amount appropriated for the current year, to pay all necessary expenses of maintaining the Commission, which funds shall be paid out upon requisition made out and filed by a majority of the Commission, when the Comptroller shall issue warrants therefor. All funds collected from the fire insurance companies under this section, or so much thereof as may be necessary, are hereby appropriated to the State Fire Insurance Commission for the payment of all necessary expenses of maintaining the Commission for the remainder of the fiscal year ending August 31, 1920, and the fiscal year ending August 31, 1921, which appropriation is in lieu of the unexpended portion of the appropriation for such purpose for the fiscal year ending August 31, 1920, and the fiscal year ending August 31, 1921, as contained in Chapter 87 of the Acts of the Second Called Session of the Thirty-sixth Legislature, and the Commission is empowered to fix the salaries, compensation and expenses for the fiscal year ending August 31, 1920, in similar amounts and proportions to those fixed by this called session of the Legislature for the Commission for the fiscal year beginning September 1, 1920. [Acts 1913, p. 195, § 29; Acts 1917, 35th Leg., ch. 73, § 5; Acts 1920, 36th Leg. 3d C. S., ch. 60, § 1 (§ 29).]

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

## CHAPTER TEN

## MUTUAL FIRE, LIGHTNING, HAIL, AND STORM INSURANCE COMPANIES

Art.  
4907k. Laws applicable.  
4907n. Fees; taxes.

Art.  
4908-4918. [Repealed.]

**Article 4907k. Laws applicable.**

See *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

**Art. 4907n. Fees; taxes.**

**Nature of tax.**—This article provides for an occupation tax, and not an ad valorem tax on property, and the exemption or commutation of other taxes applies alone to occupation, and not to ad valorem, taxes. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

**Arts. 4908-4918.** [Repealed.] See Art. 4907p, *Vernons Sayles* Ann. Civ. St. 1914.

Cited, *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

## CHAPTER THIRTEEN

## FIDELITY, GUARANTY AND SURETY COMPANIES

Art.		Art.	
4928.	To act as trustee, etc., and do general fiduciary and depository business; to act as surety, etc.	4932.	Certificate to be surrendered, how.
4929.	Surety company's bond is a legal bond, when.	4935.	Defaulting company; claims paid how.
4930.	Requirements to be complied with; minimum capital; securities to be deposited.	4936.	Who are agents.

**Article 4928. To act as trustee, etc., and do general fiduciary and depository business; to act as surety, etc.**

See *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.  
Cited, *Texas Fidelity & Bonding Co. v. Rosenberg Independent School Dist.* (Civ. App.) 196 S. W. 366.

**Contracts of indemnity.**—A corporation, having the power in its charter to act as surety on any bond required in the course of any judicial proceeding may enter into an indemnity agreement to indemnify a surety on a bail bond, the character of the instrument by which the corporation binds itself being immaterial, where it in fact furnished security on the bond. *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.* (Com. App.) 216 S. W. 144.

**Art. 4929. Surety company's bond is a legal bond, when.**

**Nature of contract.**—Fidelity bonds issued by a surety company to a bank, in consideration of premiums paid, indemnifying the bank against defalcation of its cashier, are insurance contracts, though such bonds recite that the cashier is principal and the surety company surety, the bonds containing an express obligation running from the cashier to the surety company to reimburse the latter for any loss suffered. *Southern Surety Co. v. Citizens' State Bank of Hempstead* (Civ. App.) 212 S. W. 556.

**Art. 4930. Requirements to be complied with; minimum capital; securities to be deposited.**—Such company, to be qualified to so act as surety or guarantor, must comply with the requirements of every law of this State applicable to such company doing business therein; must be authorized under the laws of the State where incorporated, and under its charter, to become surety upon such bond, undertaking, obligation, recognizance or guaranty; must have a fully paid up and safely invested and unimpaired capital of at least one hundred thousand dol-

lars; must have good available assets exceeding its liabilities, which liabilities for the purpose of this Chapter shall be taken to be its capital stock, its outstanding debts and a premium reserve at the rate of fifty per centum of the current annual premiums on each outstanding bond, undertaking, recognizance and obligations of like character in force; must file with the Commissioner of Insurance, Statistics, History and Agriculture (Commissioner of Insurance and Banking), a certified copy of its certificate of incorporation, a written application to be authorized to do business under this Chapter, and also, with such application, and in each year thereafter, a statement verified under oath made up to December 31, preceding, stating the amount of its paid up cash capital, particularizing each item of investment, the amount of premiums upon existing bonds, undertakings, recognizances and obligations of like character in force upon which it is surety; the amount of liability for unearned portion thereof estimated at the rate of fifty per centum of the current annual premiums on each such bond, undertaking, recognizance and obligation in force, stating also the amount of its outstanding debts of all kinds, and such further facts as may be by the laws of this State required of such company in transacting business therein; and, if such company be organized under the laws of any other State than this State, it must, also have on deposit with a State officer of one of the states of the United States, not less than One Hundred Thousand Dollars in good securities, deposited with and held by such officer for the benefit of the holders of all its obligations wheresoever incurred; must also appoint an attorney in this State upon whom process of law can be served, which appointment shall continue until revoked or another attorney substituted, and must file with the Commissioner of Insurance, Statistics and History and Agriculture (Commissioner of Insurance and Banking), written evidence of such appointment, which shall state the residence and office of such attorney; and such service of process may also be made upon the Commissioner of Insurance of this State by virtue of his office, and shall be as effective as if made upon said attorney; and must, also, have on deposit with the Treasurer of this State at least Fifty Thousand Dollars in good securities worth at par and market value, at least that sum of the value of which securities the Commissioner of Insurance shall judge, held for the benefit of the holders of all the obligations of such company wheresoever incurred; said securities so deposited with said Treasurer to remain with him in trust to answer any default of said company as surety upon any such bond, undertaking, recognizance or other obligation established by final judgment in whatsoever court and wheresoever rendered upon which execution may lawfully be issued against said company; said Treasurer and his successors in office being hereby directed to so receive and hereafter retain such deposit under this Act in trust for the purposes hereof; such company, however, at all times to have the right to collect the interest, dividends and profits upon such securities, and, from time to time, to withdraw such securities, or portions thereof, substituting therefor others of equally good character and value, to the satisfaction of said Treasurer; and such securities and substitutes therefor shall be, at all times, exempt from and not subject to levy under writ or process of attachment; and, further, shall not be sold under any process against such company until after thirty days notice to said company, specifying the time, place, and manner of such sale, and the process under which and purposes for which it is to be made accompanied by a copy of such pro-

cess; provided, however, that whenever any such company, domestic or foreign, has been engaged in this State in the business contemplated by this Act, has made deposit in this State, in trust or otherwise, of securities, to answer any default of such company upon any such bond, undertaking, recognizance, guaranty or stipulation, such securities so deposited shall be by the trustee or custodian thereof transferred and delivered to said Treasurer of this State in trust for the same purposes under and subject to all the rights and equities of all parties interested; and to the terms and provisions of this Act; and, thereupon, such deposit shall remain in trust under and subject to the terms and provisions of this Act; and, whenever such deposit has been made with a trustee by order of any court or other authority, it shall be the duty of the court or other authority, by order or otherwise, to direct such transfer to said Treasurer; and, in case such deposit is less than the sum of fifty thousand dollars, then said company must deposit with said Treasurer securities sufficient to increase said deposit to said sum of fifty thousand dollars as required by this chapter; provided, domestic corporations chartered for the purpose of doing business under this Chapter within this State alone shall be required to deposit securities as hereinbefore provided for to the amount of twenty-five thousand dollars. [Acts 1897, p. 244, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 4, § 1, amending art. 4930, Rev. Civ. St.]

Took effect Nov. 15, 1921.

**Validity.**—It was fully within the power of the state to prescribe the conditions on which a foreign corporation might pursue its business within the state, and it could require a special deposit from casualty company as a trust fund to protect its obligations arising under policies issued within the state. *Phillips v. Perue* (Sup.) 229 S. W. 849.

#### Art. 4932. Certificate to be surrendered, how.

**Withdrawal without bond.**—Where a foreign casualty insurance corporation had withdrawn from the state without giving a bond, but leaving money on deposit with the state treasurer, it was proper, at the instance of its creditors, for the district court to appoint a receiver to handle such fund and disburse it as directed by the court, rather than to handle it through the state treasurer. *Phillips v. Perue* (Sup.) 229 S. W. 849.

Where the corporation withdrew from the state without putting up the required bond, the deposit constituted a special trust fund for the protection of its policy obligations issued in the transaction of its business in Texas, and the right of the holders of such obligations to the fund was superior to that of its liquidator under the laws of another state. *Id.*

**Art. 4935. Defaulting company; claims paid, how.**—Should any company of the character named or enumerated in this chapter fail or refuse to pay any loss by it wheresoever incurred within sixty days after its liability thereupon shall have been finally determined by the judgment of any court of competent jurisdiction wheresoever rendered, upon satisfactory proof, to the treasurer of this State, of such liability and of its non-payment, said treasurer shall, out of the deposits so made with him, as by this chapter provided, pay said loss and, when he shall have done so, he shall at once certify to the Commissioner of Insurance and Banking the fact of such default on the part of said company; whereupon said Commissioner shall forthwith cancel and annul the certificate of authority of such company to do business in this State; provided, that such payment shall not operate to release the company from payment of any balance which it still may owe after such payment by the Treasurer of this State has been made. [Acts 1897, p. 244, § 7; Acts 1921, 37th Leg. 1st C. S., ch. 4, § 2, amending art. 4935, Rev. Civ. St.]

Took effect Nov. 15, 1921.

**Liability of deposit.**—Where the corporation withdrew from the state without putting up such a bond, the deposit constituted a special trust fund for the protection of its

policy obligations issued in the transaction of its business in Texas, and the right of the holders of such obligations to the fund was superior to that of its liquidator under the laws of another state. *Phillips v. Perue* (Sup.) 229 S. W. 849.

**Art. 4936. Who are agents.**

**Compensation of agent.**—Under contract providing that all interest of surety company's agent in any premium to accrue on business secured should cease on termination of contract, unpaid portion of premium on bond executed and in force at time contract was terminated was not premium which might "accrue." *American Surety Co. v. Sheerin* (Civ. App.) 203 S. W. 1120.

Where continuation certificate was unnecessary to continue liability of defendant surety company on bond, its local agents would be entitled to no commission for writing to and procuring from defendant's state agent such certificate, and in turn delivering it to principal on bond. *Id.*

Under contract by which surety company agreed to pay to those who succeeded its local agent 20 per cent. on all renewal business effected, successors would not be entitled to commissions on a bond procured by an insurance broker during employment of local agent, although premium therefor had not been paid. *Id.*

**CHAPTER FOURTEEN A**

**CASUALTY AND OTHER INSURANCE COMPANIES, EXCEPT FIRE, MARINE AND LIFE INSURANCE COMPANIES**

<p>Art. 4942a. May be incorporated for what purposes. 4942aa. Incorporation; additional purpose.</p>	<p>Art. 4942e. Capital stock, amount of; how paid or invested; deposit of securities; certificate authorizing to do business, etc. 4942z. Provisions cumulative.</p>
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**Article 4942a. May be incorporated for what purposes.**

**Construction and application in general.**—The mere fact that a casualty insurance company incorporated under Acts 32d Leg. c. 117 (arts. 4942a-4942z), was authorized by its charter to write health and accident insurance, did not make it a health or accident insurance company, within the meaning of Acts 31st Leg. c. 108 (art. 4724), or make applicable to it any of the provisions of such act. *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

A charter of an insurance company, authorizing it to "grant insurance against loss or damage which may be caused to all kinds of property by the elements, \* \* \* including fire, \* \* \* and against the hazards of inland navigation and transportation," authorized the company to insure shippers of live stock against the hazards of transportation with the agreement that upon the payment of losses, the shippers would assign their cause of action to insurer, which should be subrogated to all their rights in the premises. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

**Art. 4942aa. Incorporation; additional purpose.**—Casualty insurance companies incorporated under Chapter 117 General Laws passed by the Regular Session of 32nd Legislature, shall hereafter have authority to write marine insurance in which may be included the hazards and perils incident to war. [Acts 1918, 35th Leg. 4th C. S., ch. 20, § 1.]

Took effect March 21, 1918.

**Art. 4942e. Capital stock, amount of; how paid or invested; deposit of securities; certificate authorizing to do business, etc.**

See *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

**Taxation of securities.**—Under its charter the city of Austin had power to make, for a period of more than two years back, assessments of securities of a fidelity and bonding company, also doing a casualty insurance business, deposited with the state treasurer as required by this article, which had been omitted from taxation. *Texas Fidelity & Bonding Co. v. City of Austin* (Civ. App.) 211 S. W. 818.

**Art. 4942z. Provisions cumulative.**

See *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812.

## CHAPTER FIFTEEN

### GENERAL PROVISIONS

<p>Art. 4946a. Consolidation of companies. 4946b. Same; meeting and voting. 4946c. Same; name and stock of consolidated companies. 4946d. Same; other method. 4946e. Same; commissioner to deliver charter. 4946f. Same; effect of consolidation. 4946g. Same; policies assumed by new company. 4947. Misrepresentation must be material to avoid contract. 4948. No defense based upon misrepresentation valid, unless. 4949a. Forfeiture of interest of beneficiary in life policy. 4951. Policies of insurance to be accompanied by copies of questions, etc.</p>	<p>Art. 4953. Policies shall contain entire contract. 4954. Companies shall not discriminate. 4955. Shall apply to all companies. 4957. Chapter not to apply to fraternal beneficiary associations. 4960. Insurance shall be unlawful unless authorized by commissioner of insurance. 4961. Who are agents. 4964. Affidavit to be filed before certificate will issue. 4968. Solicitor deemed agent of company. 4969. What persons debarred from acting as agent. 4970. Company to notify commissioner of appointment of general agent. 4972. Foreign corporations held to accept provisions of this title.</p>
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**Article 4946a. Consolidation of companies.**—Any two or more insurance companies doing a similar line of business which are and have been substantially owned by same controlling stockholders and which have never been actually competing companies with each other, and where all of them have been previously organized under the laws of this State, may unite or consolidate upon a compliance with the terms of this Act; provided, that such consolidation shall not be effectuated in violation of the anti-trust and anti-monopoly laws of this State. [Acts 1919, 36th Leg., ch. 57, § 1.]

Took effect March 13, 1919.

**Art. 4946b. Same; meeting and voting.**—Before any such consolidation shall take place the parties holding at least two-thirds of the capital stock of each of the companies shall vote in favor thereof at a separate meeting of the stockholders of each company called for such purpose. Such meeting may be called in the manner provided in the by-laws of the respective companies or the laws under which such companies are organized, for calling special meetings of stockholders, except that each stockholder shall be notified by mail of the time and place and object of such meeting. [Id., § 2.]

**Art. 4946c. Same; name and stock of consolidated companies.**—Such companies proposing to consolidate may unite their assets or any part thereof and become incorporated in one body under the name of any one or more of such companies or under any other name that may be agreed upon, and issue stock in such corporation to the stockholders of each of the companies consolidated, the actual value of which stock in the new company shall bear the same proportion to the actual value of the stock surrendered by such stockholder as the entire assets of the company surrendering such stock bears to the entire assets of the new company which value shall be agreed upon by the Board of Directors of each company; provided that said stockholders (holding two-thirds of the stock) may at the meeting provided for in Section 2 of this Act [Art. 4946b], delegate the valuation of assets to a committee of stockholders appointed by their respective Boards of Directors. [Id., § 3.]

**Art. 4946d. Same; other method.**—Instead of the method provided in Section 3 of this Act [Art. 4946c], one company may take over all the assets of the other companies proposing to consolidate and issue stock to their stockholders in proportion that the value of their stock bears to the entire value of the assets of the company in which they are stockholders, and for this purpose the capital stock of such purchasing company may be increased, as now or may be hereafter provided by law. [Id., § 4.]

**Art. 4946e. Same; commissioner to deliver charter.**—In case of consolidation under Section 3 of this Act [Art. 4946c] the Insurance Commissioner shall upon proof furnished of a compliance with the terms hereof and being satisfied that the proposed consolidation is for the best interests of the policy holders of the respective companies and made in accordance with law, and upon the filing of articles of incorporation and other due proceedings had as required by the laws of this State, issue and deliver a charter to such new company. [Id., § 5.]

**Art. 4946f. Same; effect of consolidation.**—Such consolidation shall work a dissolution of the companies absorbed but shall in no wise prejudice the right of any creditors of any such corporation to have payment of his debt out of the assets and property thereof, nor shall any creditor be thereby deprived of, nor prejudiced in any right of action then pending or existing or which may thereafter arise against said company, and service or summons of the proper officers or agents of such new or reorganized corporation shall be deemed sufficient as to all or any of such companies. [Id., § 6.]

**Art. 4946g. Same; policies assumed by new company.**—All policies of insurance outstanding against all such companies shall by reason of such consolidation be assumed by the reorganized company, and they shall carry out the terms of such policy on the part of the insurer and be entitled to all the rights and privileges thereof and the reserves accumulating on such policy prior to such consolidation. [Id., § 7.]

**Art. 4947. Misrepresentation must be material to avoid contract.**

**Construction in general.**—The law that misrepresentations do not avoid a policy of life insurance unless material to the risk or actually contributing to the contingency has no reference, and does not apply, to fraternal benefit societies, such as the Woodmen of the World. *Sovereign Camp of the Woodmen of the World v. Treanor* (Civ. App.) 217 S. W. 204; *Modern Woodmen of America v. Atcheson* (Civ. App.) 219 S. W. 537; *Modern Order of Prætorians v. Davidson* (Civ. App.) 203 S. W. 379.

One who procures issuance of policy by intentional fraud cannot invoke benefits of statute. *St. Paul Fire & Marine Ins. Co. v. Carnier* (Civ. App.) 196 S. W. 980.

Representations made by the owner of an oil mill seeking to bond an employé that such employé was to render a trial balance each month, etc., having been made a part of the contract with the surety company, and having been contained in questions asked and answers given thereto, were within article 4951, providing every contract of insurance shall be accompanied by a written photographic or printed copy of application as well as a copy of all questions asked and answers given thereto. *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Com. App.) 229 S. W. 479.

**Warranties.**—This article does not invalidate a clause forfeiting a fire policy in case insured takes out additional insurance without the insurer's consent, since such an action would be material to the risk, and the provision as to additional insurance is a "promissory warranty" not within the statute. *Home Ins. Co. v. Boatner* (Civ. App.) 218 S. W. 1007.

**Avoidance of policy for misrepresentation or breach of warranty or condition.**—Where letter sent with policy asked for additional information, held response thereto by brokers with knowledge and consent of insured was essentially part of written application, and fraud perpetrated therein would avoid policy. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

In absence of statute to contrary, false representations in application for insurance, which applicant warrants to be true, avoid policy, without reference to their materiality. *Modern Order of Prætorians v. Davidson* (Civ. App.) 203 S. W. 379.

Insurer may avoid life policy where reinstatement was secured by fraudulent repre-



sentations, though representations were made orally. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

Where applicant for a life insurance policy makes no statement as to age, or imperfectly and incompletely states it, insurer, by issuing a policy, waives the information and is bound, notwithstanding that the age, if given, would have caused a refusal of insurance. *Royal Neighbors of America v. Sims* (Civ. App.) 216 S. W. 240.

— **Title or interest.**—Under this article, and a provision in policy that it would be void if insured was not sole unconditional owner, it was question of fact whether such provision was material where insured was only a mortgagee. *National Fire Ins. Co. of Hartford, Conn. v. Carter* (Civ. App.) 199 S. W. 507.

An application for hail insurance, requesting insurance "on all interest in" a specified number of acres of which applicant was tenant, was not an assertion that applicant owned all the interest in the insured property, but that he desired to insure all his interest, and hence was not a misrepresentation avoiding the policy. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

— **Value of property.**—Representations that barn was worth \$5,000 and that another company would have insured it for \$4,000 were material, where made with intent to induce insurer to consent to policy becoming effective, constituted fraud. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

— **Health and physical condition.**—In action on insurance certificate involving the question whether insured's statement in application that he had never suffered from syphilis was misrepresentation, verdict for plaintiff held so manifestly contrary to the evidence as to justify reversal. *Sovereign Camp of Woodmen of the World v. Cooper* (Civ. App.) 208 S. W. 550.

— **Habits and age.**—In an action on an insurance policy, wherein insurer pleaded that insured had misrepresented the date of her birth, evidence held to support a finding that the year of birth on the application had been left blank by insured, and subsequently erroneously filled in by some one else. *Royal Neighbors of America v. Sims* (Civ. App.) 216 S. W. 240.

— **Other insurance.**—A short form application for additional insurance held susceptible of meaning only that declarations, concerning applications for insurance in other companies, in the original application, were true when made. *Ætna Life Ins. Co. v. King* (Civ. App.) 208 S. W. 348.

Insured's false statement in application for reinstatement of lapsed policy that he had not applied for insurance in any other company which had not been issued was a material misrepresentation, constituting fraud. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

#### **Art. 4948. No defense based upon misrepresentation valid, unless, etc.**

**Construction and application in general.**—This article applies to hail insurance. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

Representations made by the owner of an oil mill seeking to bond an employé that such employé was to render a trial balance each month, etc., having been made a part of the contract with the surety company, and having been contained in questions asked and answers given thereto, were within art. 4951, providing every contract of insurance shall be accompanied by a written photographic or printed copy of application as well as a copy of all questions asked and answers given thereto. *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Com. App.) 229 S. W. 479.

**Health and physical condition.**—Where a life policy provided it should not take effect as a contract of insurance unless actually delivered to the applicant therefor while he was in good health, plaintiff beneficiary, suing after insured's death, having admitted in her pleadings and in open court at the trial that insured was afflicted with tuberculosis of the lungs when the policy was delivered to him, and that such disease caused his death, the policy by its terms never became an obligation of the insurer, and the beneficiary can recover only the amount of premiums paid, despite the failure of the insurer, in case of misrepresentations, to give notice to the insured or the beneficiary, within a reasonable time after discovery that insured had tuberculosis of the lungs, that it would not be bound by the policy. *Federal Life Ins. Co. v. Wright* (Civ. App.) 230 S. W. 795.

**Notice.**—Where obligee on treasurer's bond at request of surety made up report, which was required more than four months after notice of the default and notice of the falsity of the statements in the application, the defense of falsity of such statements was waived. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

A surety company, upon being sued by a bank for breach of a fidelity bond, cannot interpose as a defense representations by the bank's president that the books of the cashier had been found correct, where it was not shown that the company ever notified the bank of refusal to be bound because thereof or set them up in defense at all until the filing of its amended answer, more than one year after commencement of suit. *Southern Surety Co. v. Citizens' State Bank of Hempstead* (Civ. App.) 212 S. W. 556.

**Art. 4949a. Forfeiture of interest of beneficiary in life policy.**—The interest of a beneficiary in a life insurance policy or contract heretofore or hereafter issued shall be forfeited when the beneficiary is the princi-

pal or an accomplice in willfully bringing about the death of the insured. However, providing when such is the case, the nearest relative of insured shall receive said insurance. [Acts 1919, 36th Leg., ch. 16, § 1.]

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

**Rule prior to enactment of statute.**—Right of wife who killed husband to insurance on his life, see *Murchison v. Murchison* (Civ. App.) 203 S. W. 423; *Mutual Life Ins. Co. v. Mellott* (Civ. App.) 57 S. W. 887.

**Art. 4951. Policies of insurance to be accompanied by copy of questions, etc.**

**Application to surety or fidelity bonds.**—Representations made by the owner of an oil mill seeking to bond an employé that such employé was to render a trial balance each month, etc., having been made a part of the contract with the surety company, and having been contained in questions asked and answers given thereto, were within this article; but questions asked the owner as to whether the employé was to render a trial balance each month and be checked by an auditor once a year, etc., and the answers to such questions, were not; the application having been made by the employé. *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Com. App.) 229 S. W. 479 affirming judgment *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Civ. App.) 203 S. W. 137.

**Failure to attack application, etc., to policy.**—A written agreement and representations not complying with these requirements, made by the president of a bank contemporaneously with the issue of a fidelity bond to the bank by a surety company, is not a good defense in an action for breach of the bond. *Southern Surety Co. v. Citizens' State Bank of Hempstead* (Civ. App.) 212 S. W. 556.

Defendant surety company, having failed to accompany the bond of an employé sued on by the employer with a copy of the questions asked the employer and his answers given thereto, cannot prove its defense of false answers or representations made by the employer, whether such misrepresentations were made to induce the issuance of the contract or were such as to form part of the contract. *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Com. App.) 229 S. W. 479 affirming judgment (Civ. App.) *Southwestern Surety Ins. Co. v. Hico Oil Mill*, 203 S. W. 137.

**Art. 4953. Policies shall contain entire contract.**

See *Union Cent. Life Ins. Co. v. Short* (Civ. App.) 212 S. W. 225.

Cited, *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

**Construction and application of statute in general.**—This article is binding upon the insured as well as the insurer. *Gause v. Security Life Ins. Co. of America* (Civ. App.) 207 S. W. 346.

Defendant, accident insurance company, which, under policy sued on, required premiums to be paid monthly, was not engaged in the insurance business upon the "annual premium plan," within art. 4957, providing that chapter does not apply to companies carrying on business upon such plan, and it was not exempt from arts. 4953 and 4955. *North American Accident Ins. Co. v. Hodge* (Civ. App.) 208 S. W. 700.

Insurer can avoid policy issued prior to January 1, 1910, upon ground that reinstatement of policy subsequent to such date was procured by fraudulent statements; this statute not applying to policy originally issued prior to such date. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

— **Parol promise.**—Policy held conclusive evidence of contract as to time of commencement of risk, unless impeached by fraud or mistake, though application was made with different understanding. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

**Oral evidence.**—In action on accident policy, held, testimony as to agreement with company's agent not contained in policy or application should have been excluded. *National Life & Accident Ins. Co. v. Reams* (Civ. App.) 197 S. W. 332.

Evidence that insurance application was accepted under understanding that it would be effective 24 hours after being wired to state agency, held not to contradict the application. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

**Parol waiver.**—Provision in life policy exempting insurer from liability, except for amount of premiums paid, in case the insured should die while engaged in military service, authorized by art. 4741, subd. 3, could not be orally waived, in view of further provision that the policy constituted the entire contract between the parties, required by art. 4953, and provisions of art. 4954, that life insurance company or agent should make no agreement as to policy not expressed therein. *Caldwell v. Illinois Bankers' Life Ass'n* (Civ. App.) 226 S. W. 747.

**Parts of policy.**—Where accident company agreed to furnish a copy of its by-laws to the insured, but failed to do so, and the insured had no knowledge of a condition in the by-laws making a claim for partial disability final and precluding recovery of a greater amount, he was not bound thereby. *International Travelers' Ass'n v. Powell* (Civ. App.) 196 S. W. 957.

Application for accident policy or certificate becomes part of it when issued. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

Application, certificate, and by-laws are all parts of a contract of mutual insurance, and full effect must be given to each if there is no ambiguity or contradiction, although in case of contradiction certificate will prevail. *Pledger v. Business Men's Acc. Ass'n of Texas* (Civ. App.) 197 S. W. 889.

Medical examiner's report not mentioned or referred to in policies, held no part of contract, and misrepresentation therein could not annul the policies. *American Nat. Ins. Co. v. Hicks* (Civ. App.) 198 S. W. 616.

#### Art. 4954. Companies shall not discriminate.

See *Union Cent. Life Ins. Co. v. Short* (Civ. App.) 212 S. W. 225.

**Rebate in general.**—An agreement of an insurance company to lend money to one at a low rate of interest if he would take out insurance, not being mentioned in the policy, was void. *Morris v. Ft. Worth Life Ins. Co.* (Civ. App.) 200 S. W. 1114.

Provision in life policy exempting insurer from liability, except for amount of premiums paid, in case the insured should die while engaged in military service, authorized by art. 4741, subd. 3, could not be orally waived, in view of further provision that the policy constituted the entire contract between the parties, required by art. 4953, and of this article, that life insurance company or agent should make no agreement as to policy not expressed therein. *Caldwell v. Illinois Bankers' Life Ass'n* (Civ. App.) 226 S. W. 747.

**Effect of discrimination.**—See *Cause v. Security Life Ins. Co. of America* (Civ. App.) 207 S. W. 346.

A policy holder cannot claim rescission of policy, in that he was deceived by a promise to lend him money at a low rate of interest if he would take out a policy, being charged with a knowledge of its invalidity. *Morris v. Ft. Worth Life Ins. Co.* (Civ. App.) 200 S. W. 1114.

An agreement of an insurance company to lend money to one at a low rate of interest if he would take out a certain amount of insurance, not being mentioned in the policy, was void, and the policy holder could not in an action on a note given as a premium set up the defense that the insurer refused to lend the money. *Gause v. Security Life Ins. Co. of America* (Civ. App.) 207 S. W. 346.

Arts. 4741, 4954, as to payment of premiums in advance and forbidding discrimination between insureds, relating to what an insurance policy should contain, do not have the effect of avoiding a policy issued in violation of their provisions. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

**Recovery of premiums.**—A life insurance policy issued in Texas to one aged 64 years at the premium rate for one aged 48 years violates the provision of this article, against discrimination between policy holders, but may be enforced by the beneficiary; insured not being regarded as in pari delicto with insurer. *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

#### Art. 4955. Shall apply to all companies.

See *North American Accident Ins. Co. v. Hodge* (Civ. App.) 208 S. W. 700.

**Constitutionality.**—In view of art. 4746, and Const. art. 3, § 35, held, that this article is void, so that a judgment awarding 12 per cent. penalty for failure to pay the loss on an indemnity bond was improper. *Western Indemnity Co. v. Free & Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

This article is null and void because not within the purview of the caption of the act of the Legislature adopting it. *Ocean Accident & Guarantee Corporation, Limited, of London, England, v. Northern Texas Traction Co.* (Civ. App.) 224 S. W. 212.

#### Art. 4957. Chapter does not apply to fraternal beneficiary companies.

**Construction and application in general.**—Defendant, accident insurance company, which, under policy sued on, required premiums to be paid monthly, was not engaged in the insurance business upon the "annual premium plan," within this article, and it was not exempt from arts. 4953 and 4955, requiring policy to contain all the terms of the contract, and providing that application may be made a part thereof. *North American Accident Ins. Co. v. Hodge* (Civ. App.) 208 S. W. 700.

Rev. St. 1911 constitutes a mere codification and continuation of laws formerly enacted, and therefore this article, which was intended to be a codification of section 65, Acts 31st Leg. c. 108, is controlled thereby. *Id.*

#### Art. 4960. [3061] [2943] Insurance unlawful unless authorized by commissioner of insurance.

Cited, *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

**Application to agent of foreign insurance company.**—One licensed to solicit insurance as agent under art. 4960, need not procure an additional license as agent of a particular company under art. 4970, requiring agents of foreign companies to be licensed. *National Surety Co. v. Murphy* (Civ. App.) 215 S. W. 465.

#### Art. 4961. [3093] Who are agents.

**Existence of agency.**—E., who had been furnished by a foreign insurance company with blank applications for insurance, supplied some to A., who solicited insurance from plaintiff, took his application, and forwarded it to E., who sent it to the company. The company sent a policy to A. through E., and A. delivered it to plaintiff, and collected and

paid over the premium. Held, that A. was the company's agent. *Southern Ins. Co. of New Orleans v. Wolverton Hardware Co.* (Sup.) 19 S. W. 615.

One who turns over an application for insurance from a third party to an agent of an insurance company and collects the premium thereon is an agent of the company. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

Evidence held to warrant finding that insurance was solicited and obtained on soliciting agent's authority to wire in application, liability to commence 24 hours later, and that there was an agreement to this effect. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

The fact that a fire insurance agent has the policies of an insurance company signed by its officials, to become effective when countersigned by an agent, is sufficient evidence of agency for such company. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

Uncontradicted testimony by a witness that he knew the agent of an insurance company, that the agent stated he was such, and talked with witness about the policy, held sufficient to warrant a finding that the person named by the witness was the agent of the insurance company. *American Nat. Ins. Co. v. Allen* (Civ. App.) 226 S. W. 823.

**Authority of agent.**—Uncommunicated understanding of representative of insurer's general agent that policy was in force and fact that after fire adjuster entered into negotiations looking to settlement held not delegation of authority by insurer's agent to brokers to deliver policy contrary to terms of letter sent therewith. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

Evidence held to authorize finding that soliciting agent had authority to contract that insurance should be effective 24 hours after being wired to insurer's state agency. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

Where insurer's agent in renewing policy promised insured that he would attend to insurance of insured's property, such promise did not bind insurer to renew upon expiration, in absence of showing that agent had been authorized to bind insurer by such agreement. *Aetna Ins. Co. v. Richey* (Civ. App.) 206 S. W. 383.

Where one desiring tornado insurance expressed his wish to a general agent for several companies, the agent was authorized to substitute a binder in one insurance company in lieu of a binder in another insurance company, where the insured had not been advised that any company had been selected. *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939.

In the absence of information that an agent has no authority to write fire insurance except at the place where his office is located, an insured may presume that he does have authority to cover property located elsewhere. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

Where local fire insurance agents have agreed to keep a certain property insured and have entered a memorandum on their books binding one company, they may, prior to loss, upon the cancellation of the first agreement, bind another company by a subsequent binder entry. *Dalton v. Norwich Union Fire Ins. Soc.* (Com. App.) 213 S. W. 230.

Local insurance agents have authority, upon a request by an insured for further fire insurance, to obligate their principals by entering a binding memorandum for further insurance, where they would have had authority to place such insurance with the principal forthwith. *Id.*

— **Restriction.**—Where an insurance policy provided that only certain named officers had the power in behalf of the insurer to make or modify any contract of insurance, a promise of a general agent in consideration of an application of insurance to lend the insured money was not binding upon the company. *Gause v. Security Life Ins. Co. of America* (Civ. App.) 207 S. W. 346.

Provisions of application and policy, limiting agent's authority, are binding upon both insurer and insured. *Northwestern Nat. Life Ins. Co. v. Evans* (Civ. App.) 214 S. W. 598.

Where application and policy were expressly made the entire contract between insurer and insured, and application provided that insurer was not bound by any statements or representations of the agent, and where insured signed receipt stating that he had examined policy and found it as represented, neither insured nor beneficiary could legally claim that the policy, as issued, was not the contract between the parties. *Id.*

Where express limitation on agents' authority that no statements or promises by them, unless written on the application, shall bind the company, was contained in an endowment policy itself and the application therefor, assignee of the policy was bound thereby, and could not claim to have relied upon any apparent authority in agents to commit the insurer by their individual statements as to the amount of dividends there would be on the policy at its maturity, where no such statements appeared in application or policy. *Manhattan Life Ins. Co. v. Stubbs* (Civ. App.) 216 S. W. 896.

**Ratification of unauthorized acts.**—Where an insurance adjuster had prevailed upon his own and other insurance companies to refuse to write insurance for an individual, the act of such companies in complying with his request did not constitute a ratification of his unauthorized act, so as to make them liable therefor. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

Where fire insurance policy was canceled by agent under orders from company and property destroyed by fire after another policy had been written in another company, that ratification of such new policy taken out by agent who was instructed to keep up insurance did not occur until after the fire did not prevent ratification from being binding on insurer. *National Fire Ins. Co. v. Oliver* (Civ. App.) 204 S. W. 367.

Where a contract is made by fire insurance agents to keep certain property insured,

the owner need not subsequently ratify such insurance. *Dalton v. Norwich Union Fire Ins. Soc.* (Com. App.) 213 S. W. 230.

If insurer issued policy with knowledge that agent had represented that premiums paid on a canceled policy would be credited on the new policy, it would be bound by such representation. *Northwestern Nat. Life Ins. Co. v. Evans* (Civ. App.) 214 S. W. 598.

**Agent of insured or insurer.**—Agent of fire insurance company held to be agent of owner of property insured for purpose of acquiescing in cancellation of policy, notwithstanding that five-day notice thereof was not given. *National Fire Ins. Co. v. Oliver* (Civ. App.) 204 S. W. 367.

There is no inconsistency between the duties of an officer of a bank which was the collecting agent of an insurance company with reference to the collection of the premium and his acting as agent for the insured in paying the amount of the premium into the bank; for the collecting of premiums by an insurance agent and the payment of such premiums by an agent for insured are merely ministerial, not fiduciary, acts, so that they can both be performed by the same person. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

**Liability of agent.**—A general agent for several insurance companies owes the duty, to one applying for insurance without naming a company, to use his discretion in securing a company that will carry the risk, and to furnish insurance about which there will be no question. *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939.

It was not essential as a prerequisite to the right of the manager of insurance companies to recover on a bond given by a defendant appointed by him as agent, the other defendants being his sureties, to prove that he, the appointing manager, had paid the insurance companies on defendant agent's default or become liable to them. *Chapman v. Gross R. Scruggs & Co.* (Civ. App.) 230 S. W. 471.

**Bond of agent.**—The manager of insurance companies, who, as such, appointed a defendant agent for such companies, and took the bond sued on from defendant with other defendants as sureties to secure the payment to him of money coming into the agent's hands under such appointment, had a special property in the premiums charged for policies written by the agent in such companies, and was entitled to recover against a surety on the bond, where it was shown that default had been made by the agent in the payment of the money required by the terms of the bond; it being sufficient to authorize recovery by such insurance companies' manager to show that the conditions of the bond had been breached and the amount owing to him by reason thereof. *Chapman v. Gross R. Scruggs & Co.* (Civ. App.) 230 S. W. 471.

**Liability of insurer.**—Criminal acts of defendant fire insurance company's general agent, who reinsured fictitious dwelling with plaintiff fire insurance company as its agent, and collected insurance for himself, held to create no liability against plaintiff, which could recover amount paid on fraudulent proofs of loss. *Rio Grande Fire Ins. Co. v. Concordia Fire Ins. Co.* (Civ. App.) 199 S. W. 824.

Where a fire insurance adjuster, without authority to write insurance, agreed to enter into conspiracy with other insurance companies to prevent an individual from obtaining insurance, his act did not bind his principal. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

Where the agent and employé of insurance agents issued a policy of the principal, assurance company, on his own property in the face of an approaching tornado without the knowledge and consent of the insurance company and without the knowledge and consent of his principal, agents of such insurance company, he perpetrated a legal fraud against the defendant insurer and cannot recover his loss. *Commercial Union Assur. Co. v. Winstead* (Civ. App.) 213 S. W. 955.

A parol contract of insurance, made with an insurance agent representing several companies, the company to take the risk not being specific, and the agent not designating any company before the fire, is unenforceable, especially against a company that had forbidden him to write any such risk. *Grimes v. Virginia Fire & Marine Ins. Co.* (Civ. App.) 218 S. W. 810.

— **Waiver and estoppel.**—Where insurance agent at time of issuing or renewing policy had in mind fact that insured was not owner, but only a mortgagee, of insured property, company is estopped to deny that it waived provision in policy that policy would be void if insured was not unconditional owner. *National Fire Ins. Co. of Hartford, Conn., v. Carter* (Civ. App.) 199 S. W. 507.

Where a fire insurance company ratified acts of its agents and accepted the benefits, it could not deny their agency or avoid responsibility therefrom. *St. Paul Fire & Marine Ins. Co. v. Clark* (Civ. App.) 200 S. W. 229.

After receiving several notices that assessments on him had not been paid, the holder of a policy in a mutual assessment insurance association had no right to continue to rely on the agreement of the secretary of the association to collect assessments on the policy holder by checks on the bank account of a brother-in-law of the policy holder. *Hobson v. Wise County Home Protective Ass'n* (Civ. App.) 214 S. W. 583.

Where the cashier of a bank which acted as agent of an insurance company to collect premiums deposited as agent for insured the amount of such premiums, his knowledge of the acts of the insurance company with reference to such premiums is imputed to insured so as to establish reliance thereon by insured essential to show estoppel of the insurance company to assert want of agency. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

Condition of fire policy on the stock of an automobile dealer that he should report to the company each car owned by him and its location as soon as known, and have an

entry thereof made in passbooks provided therefor, was waived, the policy being, in effect, in renewal of a like policy for the previous year, and the agent having agreed with insured at the time of issuing the prior policy that he would from time to time visit insured's place of business and check up cars on hand and make the necessary reports and entries, and a report having been made during the life of the first policy of all the cars which were burned during the life of the second policy, and the agent having attempted to make an entry thereof, in the passbook; and this though by mistake he failed to make entry therein of some of them, and though the policy provided that no agent could waive any provision thereof unless the waiver was written thereon. *California Ins. Co. v. Bishop* (Civ. App.) 228 S. W. 1010.

**Commissions.**—In suit for agent's commission on life policy alleged to have been procured through joint efforts of plaintiff and one who was vice president and general manager of defendant insurer, held, under evidence, that plaintiff was in no sense the procuring cause, and was not entitled to recover, conceding existence of custom that, where two or more agents were interested, commissions were to be divided. *Wichita Southern Life Ins. Co. v. Davis* (Civ. App.) 206 S. W. 728.

Insurance company's agreement with agent providing for continuous renewal commissions upon policies thereafter written, without any limitation with reference to agent's voluntarily ending his service or any other limitation, held not to supplant previous agreement providing for continuance to renewals so long as agent did not voluntarily sever his connections with company; there being no such inconsistency between the two agreements as to preclude agent's recovery on renewals upon policies written prior to the execution of the subsequent agreement. *Hartford Life Ins. Co. v. Patterson* (Civ. App.) 231 S. W. 814.

**Termination of agency.**—Where the agent for life insurance company bound himself to engage in no other business during the life of his contract, traveled over his territory and spent both time and money in establishing agencies, which both parties contemplated would be done, and company did not quit doing business as provided in contract, but voluntarily amended its charter so that it could not thereafter continue the business under the contract of writing insurance on the assessment plan, and there could be no renewals or commissions thereon, it terminated the agency, and the company was liable for damages for breach. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

Where an insurance agent was under contract to sell insurance on the assessment plan, and the contract was breached by the company ceasing to sell such insurance and adopting the level premium plan, the agent was under no obligation to accept employment of an inferior quality under the latter plan until he had tried to obtain other satisfactory employment. *Id.*

An agreement on the part of the former secretary of a mutual assessment insurance association to collect assessments on a policy holder by check on his brother-in-law's account did not justify either the brother-in-law or the policy holder in relying on the arrangement after a new secretary had taken office and notified the policy holder that four assessments against him had not been paid. *Hobson v. Wise County Home Protective Ass'n* (Civ. App.) 214 S. W. 583.

A contract between a life insurance company and its agent, consisting in part of writing and in part of oral agreements, the writing containing provisions that, upon resignation, dismissal, death, or other termination of the agency during the year, the salary or commission which the agent had received should be in full of all his claims and demands upon the company, construed as meaning what agent had received up to such time, and that he forfeited anything that might afterward accrue on business done subsequent to his retirement, and also to contemplate a full adjustment and settlement of accounts on termination of agency. *Teague v. American Nat. Ins. Co.* (Civ. App.) 215 S. W. 131.

Where a life insurance company gave its agent a contract terminable at will of either party, without cause or notice, the original terms of which were modified to provide additional reward for additional services, provisions that should the contract terminate by resignation, death, dismissal, or otherwise during the year, the salary or commission which the agent had received should be in full of all his claims and demands, were in the nature of forfeitures, not favored in law, and will not be enforced in the absence of clear proof that they were so intended. *Id.*

— **Right of recovery in general.**—Where an insurance company breached its contract with its agent by ceasing to write the kind of insurance embraced in the employment agreement, it became liable to him for all damages reasonably resulting from such breach. *Merchants' Life Ins. Co. v. Griswold* (Civ. App.) 212 S. W. 807.

Where an insurance company breached its contract with an agent both as to commissions on assessment policies that might have been written, and as to renewals thereof which would otherwise have accrued, the agent's suit for damages was properly brought for the breach, although before the stipulated termination of the contract, and it was not error to submit that the company was indebted to the agent on renewal contracts. *Id.*

In an action by an insurance agent against the company for breach of an employment contract, where the amount of damages depended largely upon the number of policies written and which would have been written, and which would not have lapsed during the period of his contract, which amount in no case could have been reduced to a certainty, and which might have been most satisfactorily shown by experts, evidence held such that the jury's verdict for plaintiff cannot be said to be unsupported. *Id.*

In an action by an insurance agent against the company for breach of an employment contract, such profits as it reasonably appeared were a loss to the agent by reason of the company's breach of the contract were proper elements of damages. *Id.*

In an action against an insurance company for breach of an agency contract to write insurance on the assessment plan, by ceasing to write such insurance an offer to the agent of a contract to write on the level premium plan, is material only in so far as it tends to reduce the amount of recovery by showing what he could have earned during the life of his contract and after its breach. *Id.*

**Art. 4964. Affidavit to be filed before certificate will issue.**

See *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.  
Cited, *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

**Art. 4968. Solicitor deemed agent of company.**

See *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.  
**Waiver of terms of policy.**—In action on accident policy, held, testimony as to agreement with company's agent not contained in policy or application should have been excluded. *National Life & Accident Ins. Co. v. Reams* (Civ. App.) 197 S. W. 332.

**Art. 4969. What persons debarred from acting as agent.**

**Construction and operation in general.**—This article does not prohibit a bank from receiving the money due a life insurance company for premiums. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

**Art. 4970. Company to notify commissioner of appointment of general agent.**

**Construction and operation in general.**—One licensed to solicit insurance as agent need not procure an additional license as agent of a particular company under this article. *National Surety Co. v. Murphy* (Civ. App.) 215 S. W. 465.

**Art. 4972. [3096ee] Foreign corporations held to accept provisions of this title.**

**Construction and operation in general.**—Where an insurance company entered into contracts insuring shippers of live stock against loss arising from damage to stock in transportation prior to issuance to the insurer of a certificate of authority, required by art. 4761, and loss resulted in the shipments by reason of negligence of the carrier, and under the conditions of the policy the insurer paid the amount of the losses to the shippers and took an assignment of their claims against the carriers, it cannot maintain an action against the carriers on such claims, in view of arts. 4900, 4972; the courts not lending their support to a claim founded upon the violation of express law. *Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.* (Civ. App.) 220 S. W. 781.

**Revocation of power of attorney.**—Under Rev. St. Tex. 1895, art. 3064, requiring insurance companies desiring to do business in the state to file a power of attorney authorizing each agent to accept service of process, and consenting that such service shall be valid; art. 3070, providing that process might be served upon any person in the state holding a power of attorney, and that if no such person could be found process might be served by publication; and Sayles' Ann. Civ. St. Supp. 1904, art. 3096ee, making the two articles mentioned conditions upon which foreign insurance companies were permitted to do business in the state, and providing that any such company engaged in issuing policies should be held to have assented thereto as a condition precedent to its right to engage in such business—the revocation by a foreign insurance company of a power of attorney to one of its agents, without the appointment at the same time of any successor, was illegal, and service on such agent was good, especially where the power of attorney was revoked after suit was filed, and seemingly for the express purpose of preventing service on him. *Hagler v. Security Mut. Life Ins. Co.* (D. C.) 244 Fed. 863.

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## CHAPTER SIXTEEN

### INDEMNITY CONTRACTS

**Article 4972a. Subscribers may exchange reciprocal contracts of indemnity.**

Cited, *Merchants' & Mfrs.' Lloyds' Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

## CHAPTER SEVENTEEN

## LLOYDS PLAN

Art.		Art.	
4972 $\frac{1}{4}$ .	Articles of agreement.	4972 $\frac{1}{4}$ f.	Additional or substituted underwriters; deputy or substitute attorney.
4972 $\frac{1}{4}$ a.	Attorney in fact.	4972 $\frac{1}{4}$ g.	Limitation of risks.
4972 $\frac{1}{4}$ b.	Application for license.	4972 $\frac{1}{4}$ h.	Action on policy or contract; judgment; process; fee.
4972 $\frac{1}{4}$ c.	Issuance of license; fee; duration.	4972 $\frac{1}{4}$ hh.	Revocation of license.
4972 $\frac{1}{4}$ d.	Amount of assets; impairment.	4972 $\frac{1}{4}$ i.	Application of insurance law.
4972 $\frac{1}{4}$ e.	Examinations; revocation or suspension of license.		

**Article 4972 $\frac{1}{4}$ . Articles of agreement.**—That individuals, partnerships or associations of individuals, hereby designated “underwriters,” are authorized to make any insurance, except life insurance, on the Lloyds plan, by executing articles of agreement expressing their purpose so to do and complying with the requirements set forth in this Act. [Acts 1921, 37th Leg., ch. 127, § 1.]

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

**Art. 4972 $\frac{1}{4}$ a. Attorney in fact.**—That policies of insurance may be executed by an attorney in fact or other representatives, hereby designated “attorneys” authorized by and acting for such underwriters under powers of attorney. The principal office of such attorney shall be maintained at such place as may be designated by the underwriters in their articles of agreement. [Id., § 2.]

**Art. 4972 $\frac{1}{4}$ b. Application for license.**—The attorney shall file with the Commissioner of Insurance and Banking a verified application for license setting forth and accompanied by:

(a) The name of the attorney and the title under which the business is to be conducted, which title shall contain the name Lloyds and shall not be so similar to any name or title in use in this State as to be likely to confuse or deceive.

(b) The location of the principal office.

(c) The kind or kinds of insurance to be effected, which kinds of insurance may be as follows:

1. Fire insurance, which term shall be construed to include tornado, hail, crop and floater insurance.

2. Automobile insurance, which term shall be construed to include fire, theft, transportation, property damage, collision, liability and tornado.

3. Liability insurance.

4. Marine insurance.

5. Accident and health insurance.

6. Burglary and plate glass insurance.

7. Fidelity and surety bonds insurance.

8. Any other kind or kinds of insurance, not above specified, the making of which is not otherwise unlawful in this State, except life insurance.

(d) A copy of each form of policy or contract by which such insurance is to be effected.

(e) A copy of the form of power of attorney by virtue of which the attorney is to act for and bind the several underwriters and a copy of the articles of agreement entered into between the underwriters themselves and the attorney.



(f) The names and addresses of all underwriters, whose number shall not be less than ten.

(g) A financial statement showing in detail the assets and liabilities accumulated and incurred and the income and disbursements received and made by the attorney for the underwriters.

(h) An instrument executed by each and all of the underwriters specially empowering the attorney to accept service of process for each underwriters in any action on any policy or contract of insurance, and an instrument from the attorney to the Commissioner of Insurance and Banking delegating the attorney's powers in this respect to the Commissioner of Insurance and Banking. [Id., § 3.]

**Art. 4972 $\frac{1}{4}$ c. Issuance of license; fee; duration.**—That upon compliance with the requirements of this Act and upon a showing of assets as provided in Section Five hereof [Art. 4972 $\frac{1}{4}$ d] the Commissioner of Insurance and Banking shall, upon payment of a fee of Ten (\$10.00) Dollars issue a license to any attorney applying therefor specifying the kind or kinds of insurance which he is authorized to make and containing the name of the attorney, the location of his principal office, and the title under which such business of insurance is to be conducted. Such license shall continue in force until surrendered by the attorney or revoked or suspended by the Commissioner of Insurance and Banking as authorized by this Act. [Id., § 4.]

**Art. 4972 $\frac{1}{4}$ d. Amount of assets; impairment.**—That no attorney shall be licensed for the underwriters at a Lloyds under this Act, unless the net assets, including the guarantee fund provided for in the articles of agreement, held by the attorney, committee of underwriters, trustee or other officer, as provided for in the articles of agreement, shall be at least Forty Thousand (\$40,000.00) Dollars in cash or convertible securities; nor shall any attorney be licensed for the underwriters at a Lloyds to transact more than two kinds of insurance as defined in Section Three hereof, unless the net assets as above defined and held shall be as much as Ten Thousand (\$10,000.00) Dollars additional for each additional kind of insurance designated in the application for license; provided that if the underwriters have net assets as above described in an amount equal to One Hundred Thousand (\$100,000.00) Dollars, they may write any kind of insurance that may be lawfully written in this State except life insurance. If the Commissioner of Insurance and Banking shall find upon any examination of a Lloyds that the net assets as above defined are less than the amount required, the impairment shall be made good within thirty days from the service of a requisition for that purpose by the Commissioner of Insurance and Banking upon the attorney for the underwriters. If any such attorney or other person shall make any advancement to make good any such impairment, the claim for the same against the assets of the underwriters shall be deferred to claims for losses under policies or contracts of insurance. [Id., § 5.]

**Art. 4972 $\frac{1}{4}$ e. Examinations; revocation or suspension of license.**—That the Commissioner of Insurance and Banking may make examinations of the books and affairs of any attorney for underwriters at a Lloyds, the expense of any such examinations to be borne by the underwriters and the attorney and his deputies shall facilitate such examinations and furnish all information which the Commissioner of Insurance and Banking may reasonably demand. The Commissioner of Insurance and Banking may revoke or suspend the license of any attorney in case

of breach of any of the conditions imposed by this Act and upon reasonable notice in writing to the attorney so that he may appear and show cause why such license should not be revoked or suspended. [Id., § 6.]

**Art. 4972<sup>1</sup>/<sub>4</sub>f. Additional or substituted underwriters; deputy or substitute attorney.**—That additional or substituted underwriters shall be bound in the same manner and to the same extent as though they had been original subscribers to the articles of agreement and power of attorney on file with the Commissioner of Insurance and Banking; and that the acts of the duly appointed deputy or substitute attorney of any attorney licensed under this Act in accepting powers of attorney from underwriters and in making and issuing policies and contracts of insurance and in doing any additional acts incident thereto shall be deemed authorized by the license issued to the original attorney. [Id., § 7.]

**Art. 4972<sup>1</sup>/<sub>4</sub>g. Limitation of risks.**—That no attorney for underwriters at a Lloyds shall assume any one insurance risk exceeding one-fifth of the amount of the net assets of the underwriters as above defined and the additional liability assumed by the individual underwriters in the articles of agreement and in the policies or contracts of insurance, unless such excess shall be promptly reinsured. [Id., § 8.]

**Art. 4972<sup>1</sup>/<sub>4</sub>h. Action on policy or contract; judgment; process; fee.**—That action on any policy or contract of insurance made by the attorney for the underwriters may be brought against the attorney or against the attorney and the underwriters or any of them. In such action, summons and process shall be served on the Commissioner of Insurance and Banking or on the attorney in fact and when so served shall have the same force and effect as if served on the attorney and on each underwriter personally. A judgment in any such action against the attorney or against any of the underwriters shall be binding upon and be a judgment against each and all of the underwriters as their several liabilities may appear in the contract of insurance on which the action is brought.

Whenever any summons or other process is served on the Commissioner of Insurance and Banking the same shall be served in duplicate and the Commissioner of Insurance and Banking shall forthwith by registered mail send one copy of the summons or other process to the attorney for the underwriters at the principal office designated in the application for license or latest amendment thereof. The party commencing any action against the underwriters at a Lloyds and securing service of process in this manner shall at the time of such service pay to the Commissioner of Insurance and Banking for the use of the Department a fee of Two (\$2.00) Dollars, which he shall be entitled to collect as taxable costs in the action if he shall prevail. [Id., § 9.]

**Art. 4972<sup>1</sup>/<sub>4</sub>hh. Revocation of license.**—That all such underwriters, their attorneys, agents, and representatives transacting the business of insurance in this State on the Lloyds plan shall be governed and regulated by the provisions of this Act and upon violation of any of the provisions hereof the Commissioner of Insurance and Banking may revoke or suspend any license or certificate of authority issued under the provisions of this Act and \* \* \*. [Id., § 10.]

**Explanatory.**—The latter part of this article imposes a criminal penalty and is set forth, post, as art. 693*ll*, Penal Code.

**Art. 4972½i. Application of insurance law.**—That except as herein provided no other insurance law of this State shall apply to insurance on the Lloyds plan unless it is specifically so provided in such other law that the same shall be applicable. [Id., § 11.]

DECISIONS RELATING TO TITLE OF INSURANCE IN GENERAL

**3. Insurable interest in property.**—Any one deriving benefit from existence of property or who would suffer from its loss has an "insurable interest," though having only an equitable title or other qualified property. *Rolater v. Rolater* (Civ. App.) 198 S. W. 391.

A tenant farming land under agreement with the owner to do the work, the owner to furnish the money, that whatever was made over living expenses was to be paid on a debt owing by the owner for half of the land, and that half of the land when so paid was to belong to the tenant, had an insurable interest in the grain growing thereon. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

**4. Insurable interest in human life.**—Where beneficiaries were grandnieces of insured, relationship was too remote to constitute insurable interest, unless they had reasonable ground to expect that she would have contributed to their welfare. *American Nat. Ins. Co. v. Wallace* (Civ. App.) 210 S. W. 859.

In an action on a life policy payable to plaintiff as guardian no recovery can be had unless plaintiff be the guardian of some person who had an insurable interest in the life of the insured or unless she herself had such interest. *Id.*

On divorce being decreed, wife's insurable interest in her husband's life ceases, and she ceases to be a beneficiary under a policy naming her as such. *Whiteselle v. Northwestern Mut. Life Ins. Co.* (Com. App.) 221 S. W. 575, affirming judgment (Civ. App.) *Northwestern Mut. Life Ins. Co. v. Whiteselle*, 188 S. W. 22.

**5. Existence of contracts.**—Application for insurance must be accepted by the proposed insurer before it can become a contract of insurance, but if an application for hail insurance was accepted by soliciting agent with understanding that it should be effective 24 hours, after being wired to state agency, insurer could not accept the application and reject this condition. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

**6. Executory agreement to insure.**—Where soliciting agent accepted application on understanding that insurance would be effective 24 hours later, policy commencing insurance more than 24 hours thereafter could not be corrected except for fraud or mutual mistake. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

Contractor to erect church, and sureties, held liable for cost of insurance paid by church trustees for breach of contract obligation to keep building insured and to carry liability insurance. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where plaintiff made a "John Doe" application for life insurance and defendant instructed him to make formal application in his own name agreeing that the policy would be issued, there was a contract to insure for which the submission to examination was sufficient consideration. *Capitol Life Ins. Co. of Denver, Colo., v. Driscoll* (Civ. App.) 199 S. W. 872.

Where one desiring insurance applied to a general agent for a number of companies for insurance, without naming any company, he was chargeable with knowledge of a general custom to the effect that, when a binder was made in one company and no notice of the name of the company was given to the insured, the agent placing the binder could substitute one company for another without communicating with the insured. *Shippers' Compress Co. v. Northern Assur. Co.* (Civ. App.) 208 S. W. 939.

A contract of fire insurance executed by the entry of a binder memorandum by local agents must be construed in accordance with the terms and subject to the conditions of the standard form of policy in use by the insurer at the time. *Dalton v. Norwich Union Fire Ins. Soc.* (Com. App.) 213 S. W. 230.

An action may be maintained upon a contract to renew a pre-existing policy. *American Cent. Ins. Co. v. Robinson* (Civ. App.) 219 S. W. 277.

**7. Oral contracts.**—Evidence in action on alleged oral contract of life insurance held to warrant finding that it was understood between the parties that the making of the contract of insurance would not be consummated till the policy should be issued, and that till then the company could, as it did, refuse the application in accordance with the stipulations in the receipt given to applicant. *Magness v. Great Southern Life Ins. Co.* (Civ. App.) 219 S. W. 280.

On proper allegations and proof, that provision was fraudulently omitted from the policy recovery could be had on insurance contract as it should have been without bringing an independent suit to reform the contract. *National Union Fire Ins. Co. v. Patrick* (Civ. App.) 198 S. W. 1050.

An insurance contract may be entirely oral and is not objectionable as varying the terms of the written application for insurance. *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

**8. Ratification of contract.**—Uncommunicated understanding of insurer's agent that policy was in force and that after fire adjuster entered into negotiations for settlement held not ratification of unauthorized delivery of policy or waiver of rights to complain thereof. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

**9. Acceptance of application.**—Where an applicant for fire insurance covering a cotton gin agreed with a soliciting agent that the company should distribute the insurance in the policy among various items of property particularly described therein, and the company did so and sent the policy to the applicant, such apportionment, if fairly made, could not, especially upon insurer's insistence, prevent the policy from being an acceptance instead of a counter offer to insure. *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

Where an application for fire insurance covering a cotton gin did not directly specify that loss was to be payable to lienors as their interests might appear and the policy as written provided for payment of loss to such lienors, such fact did not make the policy a counter offer not binding until acceptance by insured; there being no variance in fact between the application and the policy, and the application not being presumed to contain all the details of the policy. *Id.*

Where an application for life insurance itself provided that the policy should be void unless delivered to applicant while in good health, there was no unconditional acceptance of the risk, so that the company was not liable to the applicant's beneficiary upon refusal of its local agent to deliver the policy to her after applicant's death, from a disease contracted after the application was signed. *Denton v. Kansas City Life Ins. Co.* (Civ. App.) 231 S. W. 436.

**11. Policy.**—In absence of a statute governing such contract, the parties to an insurance contract may stipulate *ad libitum*. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

**13. — What law governs.**—Where property in Oklahoma was insured by Oklahoma standard policy after negotiations in such state, the effect of policy provisions as to the right of insurer's agent to bind insurer by agreement to renew was governed by laws of Oklahoma. *Gallagher v. Liverpool & London & Globe Ins. Co.* (Civ. App.) 206 S. W. 212.

Art. 4741, forbidding issuance of a policy within the state unless it contains certain provisions, does not prevent suit within the state on a policy issued in another state, where the renewal premium was paid in still a third state in violation of one of the provisions of the policy required by the statute. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

**14. — Construction in general.**—An insurance policy will be construed strictly against the insurer, and in case of any doubt, ambiguity, or uncertainty in its terms, it will be resolved in favor of insured. *Ocean Accident & Guarantee Corporation, Limited, of London, England, v. Northern Texas Traction Co.* (Civ. App.) 224 S. W. 212; *Hardin v. Continental Casualty Co.* (Civ. App.) 195 S. W. 653; *O'Leary v. St. Paul Fire & Marine Ins. Co.* (Civ. App.) 196 S. W. 575; *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237; *Pledger v. Business Men's Acc. Ass'n of Texas* (Civ. App.) 197 S. W. 889; *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891; *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352; *Western Indemnity Co. v. Murray* (Civ. App.) 208 S. W. 696; *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254; *Missouri State Life Ins. Co. v. Hearne* (Civ. App.) 226 S. W. 789.

A provision of accident policy insuring against loss of a hand by complete severance at or above the wrist is not uncertain or ambiguous. *Hardin v. Continental Casualty Co.* (Civ. App.) 195 S. W. 653.

In construing a policy of accident insurance in absence of evidence to the contrary, it should be assumed that duties of general manager and his assistant of railroad company were same. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

The application, certificate and by-laws of a mutual association, constituting the contract, should, if possible, be so construed as to harmonize with each other. *Pledger v. Business Men's Acc. Ass'n of Texas* (Civ. App.) 198 S. W. 810.

Where a certificate of a mutual association refers to the by-laws as part of the contract of insurance and a copy of the by-laws is furnished, the member is presumed to have read the same. *Id.*

A fidelity company guaranteeing honesty of persons holding places of trust and performance of contracts and undertakings is an insurance company, and the same rules of construction apply to its contracts as to other insurance contracts. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

The provision in an insurance policy for shortening the period of limitation, being one for the benefit of the insurer, may be waived, and will be construed strictly against the insurer and liberally in favor of the beneficiary. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

That a policy is a poor one for the insured cannot alter or affect its provisions. *Hartwig v. Southern Surety Co.* (Civ. App.) 216 S. W. 455.

Generally, in construing contracts of insurance as in construing other contracts, conditions are to be taken most strongly against the writer of the policy. *Travelers' Ins. Co. of Hartford, Conn., v. Scott* (Civ. App.) 218 S. W. 53.

Where life policy which is ambiguous admits of a construction favorable to the insured, such construction will be enforced. *Mitchell v. Southern Union Life Ins. Co.* (Civ. App.) 218 S. W. 586.

Parties to an insurance contract are conclusively presumed to have entered into their contract with full knowledge of existing laws upon the subject which may affect the validity, formation, performance, operation, discharge, interpretation, or enforce-

ment thereof, and that such laws enter into and become a part of the contract, binding the parties. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

If one interpretation of an insurance policy, looking at the other provisions of the contract and to its general object and scope, would lead to an absurd conclusion, or a conclusion which violates the statute and renders the contract void, such interpretation must be abandoned, and that adopted which will be consistent with reason and the law. *Id.*

Where two interpretations of an insurance policy, equally fair, may be made, that which allows the greater indemnity must prevail. *Id.*

A rider appended to a policy of workmen's compensation insurance issued to an employer held not to have modified the short-rate cancellation clause which had been duly approved by the commissioner of banking and insurance, and hence, where the policy was canceled before expiration of the period it had to run, the premium must be computed according to the short-rate cancellation clause. *Joseph Weaver & Son v. Home Life & Accident Co.* (Civ. App.) 221 S. W. 299.

It is a rule of decision applicable to the construction of insurance policies that, in order to determine the extent of the risk insured against, the conditions existing at the time of their issuance may be looked to. *Ocean Accident & Guarantee Corporation, Limited, of London, England, v. Northern Texas Traction Co.* (Civ. App.) 224 S. W. 212.

Where an application for reinstatement and a note executed contemporaneously constituted a contract for reinstatement, and both instruments were prepared by insurer, inconsistent clauses, as well as all doubts or ambiguities arising upon the face of the contract, must be resolved against the insurer. *Missouri State Life Ins. Co. v. Hearne* (Civ. App.) 226 S. W. 789.

16. — **Delivery and acceptance.**—If there was authorized delivery conditional to take effect after furnishing further information and additional information when furnished consisted of material misrepresentations made with fraudulent intent policy never became effective. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

Where neither the application nor the policy made delivery by an agent of the insurer a condition precedent to liability, and the receipt for premium paid by the applicant for insurance, which declared that no obligation was incurred until the policy should be delivered, was not given to the applicant, the contract of insurance did not require delivery of the policy to the applicant as a condition to liability. *American Nat. Ins. Co. v. Blyard* (Civ. App.) 207 S. W. 162.

Contract of life insurance was not complete without delivery of policies to insured, and delivery to a bank was not a delivery to insured, unless they agreed to or instructed such delivery. *Wittliff v. Tucker* (Civ. App.) 208 S. W. 751.

The rule is that fraudulent representations of the agent, to be available to insured, must take place at the time of the delivery of the policy, at which time the contract is consummated, and a preliminary representation of insurer's agent that the premium would be a certain amount, when in fact the premium on the policy as delivered was more, was not fraud. *Union Cent. Life Ins. Co. v. Short* (Civ. App.) 212 S. W. 225.

Where a fire insurance policy was delivered to insured for his acceptance, as insurer claimed, and was retained by insured without objection beyond a reasonable time, such retention constituted an acceptance of the policy, even if the policy be construed to constitute a counter offer and not an acceptance of an offer contained in the application for insurance. *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

Where a fire insurance policy was delivered to insured on condition that it should be promptly returned if not satisfactory, with bill for premium inclosed with request for remittance if the policy was satisfactory, the condition was not one of payment and did not have the effect of making the delivery of the policy conditional. *Id.*

Under a policy conditioned on delivery during applicant's good health, the company is not liable, though there was an implied delivery by placing the policy in the mails addressed to the company's agent for delivery to the insured, where neither the company nor its agents knew of the illness of the insured subsequent to the acceptance of the application. *Denton v. Kansas City Life Ins. Co.* (Civ. App.) 231 S. W. 231.

Manual delivery of an insurance policy is not necessary, where there has been an acceptance of the application and the policy has been issued and mailed to the assured or to an agent of the company for unconditional delivery to the assured. *Denton v. Kansas City Life Ins. Co.* (Civ. App.) 231 S. W. 436.

Where policy, conditioned on delivery during applicant's good health, was mailed to the company's agent to be delivered only after he had ascertained whether applicant had had any attack of grippe, Spanish influenza, or pneumonia since being examined, and applicant, on the day before the mailing of the policy to the agent, was taken with influenza, developing into pneumonia, of which he died before receipt of the policy by the agent, who then refused to deliver it, there was no issuance and transmission of the policy through the mails for unconditional delivery. *Id.*

An applicant for a life insurance policy, who contracted influenza on the day before the policy was placed in the mails, and, before the policy was received, died from pneumonia resulting from influenza, was affected with a serious and dangerous disease, which directly contributed to the immediate cause of his death, and therefore, at the time the policy was placed in the mails, was not in "good health" within a policy condition of delivery during applicant's "good health," for the quoted phrase, although not implying that the applicant is free from slight ailments, means that he is not suffering from any serious or fatal illness or disease. *Id.*

17. **Validity of policy issued while another was in force.**—The issuance of an exact duplicate of original policy because of mutilation of the original is not the issuance of

a new policy, but simply the issuance of a duplicate, and does not affect the rights of the parties. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

18. — **Property covered.**—That a hail insurance policy insured "growing" grain did not prevent recovery, where the grain when destroyed by hail was ripe, in view of other provisions in the policy insuring the grain up to a certain date and exempting the insurer from liability after the grain was cut. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

Fire policies, describing goods as a stock consisting of display woollens and clothing, do not include the clothing belonging to customers of the insured, a tailor, which was in his hands for repairing or pressing. *Northern Assur. Co. v. Lawrence* (Civ. App.) 209 S. W. 430.

20. — **Estoppel of insured as to objections.**—Where insured made arrangements with the fire insurer's agent for his insurance and to get credit for the premium, and immediately after loss secured the policy and presented claim thereunder to the insurer under oath, and, failing to secure payment or recognition, sued on the policy and prosecuted the suit to judgment, he elected to stand on such policy, which was in fact void on account of other insurance, and is conclusively bound by his action and conduct. *Providence-Washington Ins. Co. v. Boatner* (Civ. App.) 225 S. W. 1115.

21. — **Modification.**—Acts of insured and insurer held not abandonment of negotiations for reduction of amount of policy but to constitute contract of insurance at reduced amount of risk.—*National Life Ins. Co. of United States v. Eggleston* (Civ. App.) 195 S. W. 942.

Failure to have guardian of minor beneficiary consent to reduction of amount of ordinary life policy held of no effect upon negotiations for reduction. *Id.*

22. — **Reformation.**—If by mutual mistake or fraud property was omitted from the policy, the insured, to recover, must set up facts which would authorize reformation of the policy and seek recovery as if it were reformed. *Northern Assur. Co. v. Lawrence* (Civ. App.) 209 S. W. 430.

23. — **Renewal.**—Where an indemnity bond issued by plaintiff provided it should remain in force for one year, unless canceled by plaintiff, the contract held, unilateral, and terminable at the will of either party, being enforceable only for the period for which plaintiff had received the premium. *Thomas v. Western Indemnity Co.* (Civ. App.) 206 S. W. 944.

Where a health and accident policy extended until February 1, 1908, and for such further periods as might be stated in renewal receipts, held that the insurer was authorized under the provision of the policy, declaring that acceptance of any renewal premium shall be optional, to terminate the policy by refusing to accept a renewal premium; it being immaterial that the insurer's agent, who gave notice of termination, referred to the policy having lapsed. *American Nat. Ins. Co. v. Ball* (Civ. App.) 218 S. W. 71.

An oral contract with an insurer's agent for the renewal of a fire policy at its expiration is binding on the insurer and sufficient, although it was not reduced to writing until after the fire. *American Cent. Ins. Co. v. Robinson* (Civ. App.) 219 S. W. 277.

The payment of a premium is not essential to the validity of a contract to renew a fire policy, and in ascertaining whether the premium has been paid or waived the habit, custom, and course of dealing between the insured and the insurer's agent may be considered. *Id.*

In an action on a fire policy, refusal of defendant's request, at close of plaintiff's testimony, to give a peremptory instruction for defendant because there was no evidence sufficient to support a judgment against it was not error, where the evidence justified the finding of the jury that before expiration of its first policy plaintiff had made a contract with defendant's agent for the renewal of such policy at its expiration. *Id.*

Without an agreement to the contrary, the presumption is that when a contract to renew a policy is made it contemplates that the same terms, time, and premium as formerly existed should apply to the contract of renewal. *Id.*

That a renewal policy differed from the original fire policy in the length of time it was to run and in the amount of the premium, etc., did not militate against a recovery, where the insurer's agent was empowered to write the insurance as it was written. *Id.*

Where an insurance company, through its agent, agreed with insured to renew a policy on expiration thereof, but neglected to do so, and a loss occurred, held, that the insurance company was liable for the amount of the loss as though the policy had been issued. *Austin Fire Ins. Co. v. Adams-Childers Co.* (Civ. App.) 232 S. W. 339.

Where, when defendant company issued its fourth insurance policy on plaintiff's cotton, its agent did not know that the cotton had been removed to the compress, and wrote the policy at a lesser rate than he would if he had so known, and the plaintiff, without reading it, put it away among his papers, and the cotton was destroyed, it was error to render a judgment against the defendant for the insurance, for, on renewal, the insurer may assume that the subject-matter and its location are as described in the former contract, and insured could not excuse his failure to notify the insurer of the change of location on the ground that he did not know a change of locations affected the risk, as that is matter too obvious to be overlooked by a person of ordinary prudence. *National Liberty Ins. Co. v. Kelly* (Civ. App.) 232 S. W. 895.

24. — **Loans on policies.**—Assuming that an agreement of an insurance company to make a loan to be secured by certain real estate and the insurance taken out could be deemed the legal and inducing cause of the contract of insurance, it would not be equitable to require the insurance company to make a loan at some time subsequent to the period for which the premium had been paid by note and at a time when the insured

was delinquent as to the payment of such note. *Gause v. Security Life Ins. Co. of America* (Civ. App.) 207 S. W. 346.

25. **Premiums.**—Where a workmen's compensation insurance policy issued to a master was canceled in less than the year it had to run, premiums up to the date of cancellation should be computed on the basis of remuneration paid by the master up to time of cancellation, and cannot be diminished on theory that the pay roll computed on basis of an entire year would be less than the amounts paid up to the time of cancellation. *Joseph Weaver & Son v. Home Life & Accident Co.* (Civ. App.) 221 S. W. 299.

An acknowledgment of receipt of the first premium contained in a life policy is conclusive, and will prevent the insurer from asserting invalidity of the policy delivered on ground of nonpayment, although the rule does not go so far as to prevent the insurer from recovering the amount actually due for premiums. *Dunken v. Ætna Life Ins. Co.* (Civ. App.) 221 S. W. 691.

Unconditional delivery of a policy, by its terms requiring payment of the premium as a condition precedent to its taking effect, is sufficient to constitute a waiver of such term; it being presumed from such delivery that the insurer intended to extend at least a temporary credit to insured. *Ginners' Mut. Underwriters' Ass'n v. Fisher* (Civ. App.) 222 S. W. 285.

26. — **Authority of agent.**—Where the agent writing a life policy was entitled to retain 60 per cent. of the first premium and the assured had paid with his application a sum sufficient to pay amount which the insurer was entitled to receive, held that, as the agent was authorized to make any arrangement with the assured he desired and the assured would have paid amount remaining due, a finding that the assured, who died before delivery of the policy, had paid the premium was warranted. *American Nat. Ins. Co. v. Blysard* (Civ. App.) 207 S. W. 162.

Insured, who accepted a policy containing provisions authorizing an agent to collect renewal premiums only upon receipt furnished and signed by the general officers, has notice of the limitation of the agent's authority, and, if he makes payment to an agent not holding the receipt, he in effect makes the agent his own, in the absence of agreement, waiver, or estoppel, and the payment must reach the insurer in time to satisfy the terms of the policy. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

It is the duty of an insurance company to see that a license required of its agent was taken out by him, and it cannot rely on his failure to have such license, where payment was made to the authorized agent, so that it was not error to exclude evidence of a statute of the state where the payment was made requiring the agent to have such license. *Id.*

Art. 4960, prohibiting a corporation from soliciting, selling, or placing life insurance policies in the state, does not prohibit a bank from receiving the money due a life insurance company for premiums. *Id.*

There is no objection to an officer of a bank which was an agent to collect premiums for an insurance company, acting as agent for the insured in paying the amount of the premium into the bank. *Id.*

28. — **Payment by check or note.**—A note given "in lieu of" an insurance premium was one given instead of, in place of, or in substitution of, the premium, and a receipt which so stated tended strongly to show that insurer had accepted and considered the note as a payment and not an extension of time. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

The tender of a bank check or certificate of deposit in payment of a premium is not sufficient compliance with the requirement of the policy. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

29. — **Liability for premiums paid by creditor or insurance agent.**—Where agents of a life insurance company had a physician who took out a policy appointed medical examiner for the insurer on his agreement to pay the note given for the premium advanced by such agents with funds received for examinations, such physician, who received some \$485, but paid only \$85 on the premium note of \$258, while tenaciously holding the policy, is estopped to deny his liability on his premium note to the agents, despite partial breach on the agents' part through failure to give the physician enough examinations in the six months at the end of which the note became due to pay it, such provision having been waived by the physician's agreement to give the agents all he might make for six months more. *Dobbs v. Johnson* (Civ. App.) 230 S. W. 1035.

33. — **Refunding or recovery of premiums paid.**—Iowa life insurance association, conducted on mutual assessment plan, by its reorganization into legal reserve or level premium company, pursuant to right under one of its articles of incorporation and Code Supp. Iowa 1913, § 1798b, a right conditional on change not affecting any membership dated prior to it, held to have breached contract with member, who became such prior to change, in respect of repayment of fund created for protection of certificate, and the member was entitled to recover sums theretofore paid by him with interest. *Merchants' Life Ins. Co. v. Lathrop* (Civ. App.) 210 S. W. 593; *Same v. Hanks* (Civ. App.) 210 S. W. 596.

In an action upon a policy for loss, where judgment was rendered in favor of the insurer declaring the policy void for breach of an iron-safe clause, it was error not to render judgment for plaintiff for the amount of premium paid and tendered to plaintiff by insurer's answer. *Walker v. National Union Fire Ins. Co.* (Com. App.) 210 S. W. 683.

Though agent represented to plaintiff that premium would be \$270 and plaintiff did not know that policy provided for an annual premium of over \$337, where no concealment or fraud was used when application was made and the policy followed the terms of the application, plaintiff, who could read, but who kept the policy and application

for about a year before examining them, cannot recover from the company the amount paid; he having actually received protection under the policy. *Union Cent. Life Ins. Co. v. Short* (Civ. App.) 212 S. W. 225.

**34. Right to assign policy.**—One holding a policy in a life insurance company or association, in the absence of any by-law or rule to prohibit, may assign or borrow money on it, or make it payable to his estate, or he may give it away by parol. *Phillips v. Phillips* (Civ. App.) 226 S. W. 477.

**41. Rights of assignee.**—Under employer's liability insurance policy, where surety on insured's appeal bond paid judgment and took assignment of the judgment and the policy, held, that it succeeded to rights of insured, and could recover against the insurer. *Home Life & Accident Co. v. General Bonding & Casualty Ins. Co.* (Civ. App.) 198 S. W. 1064.

Assignee or beneficiary of insurance policy takes policy subject to all defenses available before assignment, and is in no better position than insured, either before or after events insured against; the policy not being a negotiable instrument. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

**45. Cancellation of policy.**—A fire insurance policy could not be canceled without tender of unearned premiums. *St. Paul Fire & Marine Ins. Co. v. Clark* (Civ. App.) 200 S. W. 229.

Where a fire insurance policy provided for cancellation at any time upon notice by the company, unearned premiums to be returned on surrender of the policy, a tender of such premiums was unnecessary as a prerequisite to cancellation; notice of cancellation, when properly given, canceling the policy. *Austin Fire Ins. Co. v. Polemanakos* (Com. App.) 207 S. W. 922.

In an action on fire insurance policy, evidence held to show that the insured agreed to a cancellation of the policy and that he waived present repayment by the company of unearned premiums. *Id.*

Where a fire insurance policy was canceled by mutual agreement, a demand by the insurer's adjuster for an examination under oath as to liability thereunder, and submission thereto by insured, did not estop the company from asserting the cancellation where insured had obtained other insurance, and the expenses incurred by reason of the examination were but insignificant. *Id.*

The five-day cancellation notice in standard fire policy, being for the benefit of the insured, may be waived by him through agent who has contracted to keep him insured, by accepting notice of cancellation from the company and substituting other insurance before the expiration of the five days. *Dalton v. Norwich Union Fire Ins. Soc.* (Com. App.) 213 S. W. 230.

**47. Rescission of policy by insured.**—A policy holder cannot claim rescission of policy, in that he was deceived by a promise to lend him money at a low rate of interest if he would take out a policy, which violated art. 4954, being charged with a knowledge of its validity. *Morris v. Ft. Worth Life Ins. Co.* (Civ. App.) 200 S. W. 1114.

**48. Rescission of policy by agreement.**—In action on life insurance policies, evidence held to show release and surrender of policies not induced by fraud or false representations of insurer. *American Cent. Life Ins. Co. v. Smith* (Civ. App.) 203 S. W. 398.

Where fire policy with standard cancellation clause was canceled by insurer, insured, who, upon receiving notice of cancellation, immediately acquiesced therein, and surrendered policy to agent without demanding refund of the old premium, depending upon agent's assurance, that he would procure other insurance and apply overpaid premium upon new policy, could not recover upon the old policy, though agent failed to procure new one; the policy having been canceled by mutual agreement, and insured having waived the tender or return of unearned premium as a condition precedent to cancellation. *Insurance Co. of North America v. McWilliams* (Civ. App.) 213 S. W. 80.

**51. Damages recoverable from insurer on cancellation or breach of contract.**—Where applicant contracts for policy which is refused, and he can then only obtain a like policy at increased premium, the proper measure of damages is the difference between the premiums of the policy contracted for and the policy he can get. *Capitol Life Ins. Co. of Denver, Colo., v. Driscoll* (Civ. App.) 199 S. W. 872.

The repudiation and attempted cancellation, without cause, by an insurer of its contract of life insurance, during life of insured, though after a claimed total and permanent disability of insured which, if such, would entitle him to certain benefits, not terminating or impairing the contract, but it being terminated only by the voluntary election of insured to acquiesce in the abandonment, his measure of recovery is not the value of the policy, but, at most, the premiums paid with interest. *Grand Lodge Brotherhood of Railroad Trainmen v. Martin* (Civ. App.) 218 S. W. 40.

**52. Forfeiture of policy for breach of promissory warranty, covenants or condition subsequent.**—Although there was authorized delivery where there was understanding that policy should not remain in force unless further good faith assurances were furnished, fraudulent misrepresentations furnished inducing insurer's agent to take no steps to cancel policy, avoided it. *St. Paul Fire & Marine Ins. Co. v. Garnier* (Civ. App.) 196 S. W. 980.

Provisions making an insurance policy on a building void "if the interest of the insured be other than unconditional and sole ownership," or if the building be "on ground not owned by insured in fee simple," construed to avoid forfeiture, relate to time of issuance of policy, and subsequent sale of ground does not forfeit policy. *Insurance Co. of North America v. O'Bannon*, 109 Tex. 281, 206 S. W. 814, 1 A. L. R. 1407.

Warehousemen were the agents of the owners of insured goods for the purpose of storing the property, and the removal by them of the property was in law the act of



the insured owners, in so far as the insurer is concerned. *Allemania Fire Ins. Co. v. Angier* (Civ. App.) 214 S. W. 450.

A policy holder is bound by the printed conditions of the policy, though he failed to read them. *American Nat. Ins. Co. v. Ball* (Civ. App.) 218 S. W. 71.

The right of forfeiture must be expressly stated, and not by reference, and must be embodied in the contract in plain and unambiguous language. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

Provisions of forfeiture in fire policies will be construed with strictness, and clear and unambiguous language and acts plainly within such language are necessary before a forfeiture is enforced. *Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Moore* (Com. App.) 229 S. W. 490.

57. — **Building becoming vacant.**—Condition in fire policy avoiding liability if premises were vacant or unoccupied held not violated by mere temporary absence. *Westchester Fire Ins. Co. v. Redditt* (Civ. App.) 196 S. W. 334.

Provision invalidating fire policy if insured property became "vacant or unoccupied" for 10 days is breached where tenants moved from building expecting to return each week, but were prevented from doing so for several weeks by weather conditions. *Liverpool & London Globe Ins. Co. v. Baker* (Civ. App.) 198 S. W. 632.

A clause, in a fire insurance policy covering a gin plant, that policy should be void if building described become vacant or unoccupied for ten days, could mean no more than that building should be used for purpose of ginning during ginning season. *Ætna Ins. Co. v. Lewis* (Civ. App.) 204 S. W. 1170.

Under a fire policy covering a gin plant, assured warranting to operate gin plant during ginning season, it was no defense, regarding failure to operate plant during a season, that crop was so short that plant could not have been operated without loss. *Id.*

58½. **Removal of personal property.**—Where insured moved the insured goods to another residence situated on a different lot, there was no contractual relation between him and the insurer, unless breach of warranty of location was waived by insurer. *Camden Fire Ins. Ass'n v. Bond* (Civ. App.) 202 S. W. 220.

Where a fire insurance policy provides that goods are covered only while they remain in the place where they were when insured, in the absence of a statute, no recovery can be had if they are moved elsewhere without the consent of the insurer. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

61. — **Additional insurance.**—The taking out of additional insurance in excess of that allowed under a concurrent insurance clause, in violation of provision of fire policy making policy void if insured procured other insurance on the property covered by the policy, held a good defense in action on the policy notwithstanding arts. 4874a, 4874b, making breach of an immaterial provision of policy not contributing to bring about the destruction of the property no defense in action on policy, such statute having no application to breach of such provision of policy; it being material to the risk. *Ætna Ins. Co. v. Waco Co.* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 189 S. W. 315; *Providence-Washington Ins. Co. v. Levy & Rosen* (Com. App.) 222 S. W. 216, reversing judgment (Civ. App.) 189 S. W. 1035.

A fire policy clause permitting certain concurrent insurance held not to conflict with or set aside a provision invalidating the entire policy in case another contract of insurance was taken on the property without the insurer's written consent. *Home Ins. Co. v. Boatner* (Civ. App.) 218 S. W. 1097.

"Additional insurance" on a store building was another "contract of insurance on property covered in whole or in part by this policy," within the prohibition of a previous policy on the store and stock of goods in a warehouse. *Id.*

A fire policy clause, forfeiting the policy in case the insured takes out additional insurance without the insurer's consent, is not affected by the insured's good or bad intentions nor by his ignorance of the clause in the absence of fraud or mistake. *Id.*

Where a fire policy provided it should be void if insured had or should procure any other insurance valid or not on the property, and one day after such policy was secured insured secured another policy on the stock of goods covered, the first policy became void and subject to be forfeited on loss when the rights of the parties became fixed. *Providence-Washington Ins. Co. v. Boatner* (Civ. App.) 225 S. W. 1115.

62. — **Taking inventory and keeping books and safe.**—Where insured is "to keep a set of books showing a complete daily record of all cotton handled, the weight and classification of each bale, all purchases, sales, and shipments with the identity of each bale," etc., it is sufficient compliance therewith if the books are sufficient to enable the insurer with reasonable certainty to arrive at the amount of the loss, and whether the books so kept enable the insurer to determine the loss with reasonable certainty is an issue of fact. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

Insured under fire policy held to have substantially complied with clause requiring inventory to be taken at stated periods. *Westchester Fire Ins. Co. v. McMinn* (Civ. App.) 198 S. W. 638.

In a suit on a fire insurance policy, which defendant alleged insured had breached by failing to keep a set of books containing a record of the property on the premises, as provided by the policy, evidence held sufficient to support a finding that insured did keep the requisite books, "premises" including not only buildings, but land upon which they are situated. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

An inventory stating neither the value nor the grade of the grain on hand, but giving only the quantity, held not a substantial compliance with the portion of the iron-

safe clause requiring taking inventory, since by it the value of the stock insured could not be ascertained. *Hartford Fire Ins. Co. v. Walker* (Com. App.) 210 S. W. 682.

The proposition that, where a new business is begun within twelve months from the date of the fire insurance policy, with an entirely new stock, the original invoices preserved in such form as otherwise to comply with the iron-safe clause constitute a sufficient inventory, is without application, where the business is a continuation of an old business at a new place. *Id.*

The clause of a fire insurance policy requiring a complete itemized inventory of the stock insured constitutes a promissory warranty, and failure substantially to comply therewith avoids the policy. *Camden Fire Ins. Co. v. Yarbrough* (Com. App.) 215 S. W. 842.

Inventory of insured lumber furnishing data from which the number of feet of pine boards, oak boards, oak timber, and gum ties could be ascertained, but containing nothing to indicate the grades of any of the classes of lumber, or whether composed of different grades, held not a substantial compliance with the promissory warranty of the policy requiring a complete itemized inventory of the insured stock, though it appeared the lumber had a mill run value, and was sold by insured on such basis. *Id.*

That insured in preparing an inventory of stock omitted old, unsalable stock held not to avoid the fire policy, which required the taking of an inventory. *Westchester Fire Ins. Co. v. Biggs* (Civ. App.) 216 S. W. 274.

Where insured produced a memorandum of an inventory taken in July before the policies were issued, and a complete inventory taken in the following January, together with record of transactions occurring thereafter, held that the fact that the earlier inventory was burned, and so was not produced, would not defeat recovery, despite the requirements of the policy as to taking an inventory and keeping it in an iron safe. *Id.*

Where insured duly prepared an inventory and kept it in an iron safe, the fact that the inventory was removed from the safe shortly before the fire without the insured's knowledge, by one of those from whom he acquired the business, and, having been left in a desk, was destroyed, held not to avoid the policy. *Id.*

Provisions of an insurance policy on a stock of goods requiring insured to take, preserve, and produce inventories and to keep books are promissory warranties, and, unless the law has been changed by statute, a failure to comply with either will render the policy void, but a substantial compliance is sufficient. *Home Ins. Co. v. Flewellen* (Civ. App.) 221 S. W. 630.

Under a provision of an insurance policy requiring insured to take inventories and preserve and produce them after a fire, the failure to produce an inventory which was left at the bank with which insured did business, and was misplaced by it, and could not be found, did not avoid the policy, where a later inventory was produced, and invoices and account sales showing purchases and sales before and after such inventories to the time of the fire were produced. *Id.*

Where insured kept accounts of certain sales on pad slips placed on a spindle and recorded each sale on the cash register and each day compared the slips with the sales as indicated by the cash register, and added the items on an adding machine, the pad slips, cash register items, and adding machine slips, when pinned together and preserved, satisfied a provision of an insurance policy requiring the keeping of books, though they were not technically "books of account." *Id.*

Where insured kept invoices in a bound invoice book and a record of certain purchases on the stubs of his bound check book, the invoice book and check book constituted a substantial compliance with the provision of the policy requiring the keeping of books of account. *Id.*

Breach of the "iron-safe clause," requiring inventory books, etc., to be kept in fire-proof safe, required to be inserted in all policies covering stocks of merchandise by the Fire Commission Act, arts. 4876a-4904, held a good defense in action on policy insuring stock of millinery, notwithstanding art. 4874a, making breach of immaterial provision in policy not contributing to loss no defense in action on policy; such statute having no application to the iron-safe clause. *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

Failure to comply with record warranty clause in a fire policy did not affect the validity of the policy in so far as it insured the building, although the policy provided that a noncompliance with such clause would render the entire policy null and void. *Merchants' & Manufacturers' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Com. App.) 229 S. W. 312.

The anti-technicality law does not affect the record warranty clause in a fire policy. *Id.*

Where personal property, going into two buildings covered by two separate fire policies in separate amounts, was entered in insured's books in such a manner that the books themselves furnished no data from which it could be said that any of the property insured was covered by one or the other of the policies, there was no compliance by insured with the record warranty clause requiring a complete record of business transacted. *Id.*

Under a record warranty clause in a fire policy, the books themselves must reasonably and fairly afford the data contracted for, and resort cannot be had to extraneous sources for supplying this data in respect to matters essential to a substantial compliance. *Merchants' & Manufacturers' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Com. App.) 229 S. W. 312.

63. — **Change of title, interest or possession.**—Change of interest of insured within a provision avoiding a fire policy therefor did not result, from the execution of a deed and placing it in escrow with a bank, where the condition on which its delivery was to

be made was unfilled, and the deed was not delivered by the bank at the time of the fire. Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Moore (Com. App.) 229 S. W. 490 affirming judgment (Civ. App.) Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Moore, 202 S. W. 990; Pennsylvania Fire Ins. Co. v. Stockstill (Civ. App.) 197 S. W. 1036.

In action on fire policy requiring unconditional ownership, plaintiff having deeded the land in escrow, change in possession of property by tenants held immaterial, except so far as throwing light on issue as to change of title. Pennsylvania Fire Ins. Co. v. Stockstill (Civ. App.) 197 S. W. 1036.

Stipulation in fire policy that it should be void on any change in title of insured premises was valid. Springfield Fire & Marine Ins. Co. v. Morgan (Civ. App.) 202 S. W. 784.

If, when delivered from buyers of insured premises to vendor, their deed back became effective as conveyance, it passed title in buyers to vendor, and effected change in title, within policy stipulation avoiding it for such change. *Id.*

Agreement to sell insured goods, if insurance company would transfer insurance to purchaser, not carried out because insurance company refused to make transfer, is not change in interest or title or possession of the property, within meaning of policy provision avoiding policy in case of such change. Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co. (Civ. App.) 203 S. W. 382.

Where the owner of an insured building conveyed the land, reserving title to the building, with right to remove by a certain date, there was prior to such date no change of interest or title in the property, to work a forfeiture under a change of interest forfeiture clause. Insurance Co. of North America v. O'Bannon, 109 Tex. 281, 206 S. W. 814, 1 A. L. R. 1407.

A fire insurance policy is not violated by a change of title not of a nature to increase the motive to burn, or diminish the motive to guard the property from loss by fire. *Id.*

Fire policy, insuring a dwelling, furniture, and wearing apparel, as well as a barn and the contents thereof, in separate amounts, must be deemed as to the furniture and apparel, so that, where the policy was not canceled by the insured or his agent, the insured may recover for the loss of the furniture and wearing apparel, notwithstanding his sale of the barn and dwelling, where the property, when destroyed, was still in the dwelling; insured not yet having surrendered possession thereof. Westchester Fire Ins. Co. of New York v. Looney (Civ. App.) 219 S. W. 1116.

64. — **Incumbrances.**—A proceeding commenced with "knowledge of insured" within provision of fire policy, providing that it should be void if with knowledge of the insured foreclosure proceedings be commenced, etc., means foreclosure commenced with insured's knowledge, and not a foreclosure of which he gains knowledge after it is filed, but knowledge of immediate purpose to file is tantamount to knowledge of commencement. Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Moore (Com. App.) 229 S. W. 490, affirming judgment (Civ. App.) Philadelphia Underwriters' Agency of Fire Ass'n of Philadelphia v. Moore, 202 S. W. 990.

67. — **Nonpayment of premiums or assessments.**—Under accident policy providing for renewal, where renewal premium was not paid on 1st day of month when due but was tendered 7th day of month, policy was not in force on 4th. the day of accident. National Life & Accident Ins. Co. v. Reams (Civ. App.) 197 S. W. 332.

Under life policy containing nonforfeiture provisions, held that, where insured failed to pay third premium, which was paid from loan value, and he died after fourth premium became due, when loan value in excess of the indebtedness was not enough to pay fourth premium, there could be no recovery on the policy. Meserole v. Southwestern Life Ins. Co. (Civ. App.) 203 S. W. 1161.

Under life policy, giving 30 days' grace in payment of premium and providing that if premium has not been paid within period of grace and policy has not been surrendered the insurance will automatically continue for such term as is stated below (for one month in the instant case), held that period of automatic continued insurance began at the end of the grace period, so that where insured, who had paid first premium only, died after the expiration of the grace period for payment of second premium, but within one month after expiration of grace period, the policy was in force at the time of his death. Mitchell v. Southern Union Life Ins. Co. (Civ. App.) 218 S. W. 586.

A "Five-Year Term Nonrenewable Policy," providing for the payment of five annual premiums, "the first payable in advance, and a like sum upon each 28th day of February thereafter during the continuance of this policy until five full years' premiums have been paid, or until the prior death of the insured," was not a contract of "term insurance" under which an insured has only the right upon payment of an annual premium to insurance upon his life for the term paid for and the right to continue the insurance from year to year or term to term at the same rate, and default in payment of an annual premium did not ipso facto forfeit the policy. Southland Life Ins. Co. v. Hopkins (Civ. App.) 219 S. W. 254.

When the conditions as to forfeiture for nonpayment on maturity of a note given for a premium are contained only in the note, the mere fact that the note is not paid at maturity does not, of itself, avoid the policy, such a provision being a condition subsequent, of which the insurer must avail itself by clear and unequivocal acts, and insurer must demand payment at proper time, and, if no payment is made, must declare the policy forfeited or void. *Id.*

Provision in a life policy to the effect that it is issued in consideration of the payment of premiums in advance annually, and that the policy and application constitutes the entire contract, which "shall be incontestable except for the payment of premiums,"

are far from being express provisions that upon default of payment of premiums the policy is ipso facto forfeited, and they merely give the insurer the right to plead failure of consideration or contest payment in an action to recover on the policy. *Id.*

In action on life policy claimed by insurer to have lapsed, evidence held sufficient to warrant a finding that insurer had unconditionally extended premium note to a date beyond that of insured's death. *Roberts v. Wichita Southern Life Ins. Co.* (Com. App.) 221 S. W. 268, reversing judgment (Civ. App.) *Wichita Southern Life Ins. Co. v. Roberts*, 186 S. W. 411.

Payment of a renewal premium is sufficient to prevent forfeiture of the policy if made to an agent of the insurance company authorized to accept such payment either expressly or by waiver or estoppel, even though the payment is not thereafter transmitted to the insurance company before the expiration of the time for payment of premiums or at all. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

Where the beneficiary relied upon payment of a premium by a certificate of deposit sent to the insurance company, she must show that the certificate reached the company before the day of grace for payment expired, and was accepted by the company as a payment. *Id.*

Where an insurance application and policy contemplated the giving by insured of an order on his employer's paymaster for the premium and made such order a part thereof and the order given directed payment in installments, the first of which was to be paid from insured's wages for July, and the employer paid its employees' wages for the first part of the month on the 30th and for the last part of the month on the 15th of the following month, and insured died on August 7th, before the last of his July wages were payable, the premium was not overdue and the insurance had not lapsed. *Continental Casualty Co. v. Green* (Civ. App.) 227 S. W. 369.

68<sup>1</sup>/<sub>2</sub>. — **Interests of mortgagee.**—Where a mortgagee was made the owner of a fire policy as his interest might appear, with the provision that his interest should not be invalidated by any act or neglect of the mortgagor, the contract between the insurer and mortgagee is separate from that between the insurer and mortgagor, and the forfeiture of the mortgagor's rights by taking out additional insurance does not authorize the insurer to pay only three-fourths of the loss to the mortgagee under a clause restricting the recovery to such amount in case of other insurance. *Home Ins. Co. v. Boatner* (Civ. App.) 218 S. W. 1097.

69. — **Reinstatement of lapsed policy.**—Upon reinstatement of life policy, the policy as originally issued became as effective as if no forfeiture had been declared, unless the contract for reinstatement itself was tainted with such fraud as would justify the company in repudiating it. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

Contract for reinstatement of life policy is not a new contract of insurance, but a waiver of the forfeiture restoring the policy and making it as effective as if no forfeiture had occurred, but reserving the right of the insurer to avoid the effect of reinstatement by showing reinstatement was induced by unfair and fraudulent means. *Id.*

Insurer, having reinstated lapsed life policy, can defeat liability thereon by asserting and proving that contract by which policy was reinstated was induced by material false representations or warranties. *Id.*

Under a life policy providing that, if premium is not paid on date when due, insurer will reinstate the policy as of said due date at any time thereafter upon "evidence of insurability satisfactory to the company, and payment of all arrears," etc., an insured who was admittedly in excellent health was entitled to reinstatement as a matter of right; the word "insurability," when used in life policies, being no more comprehensive than that of good health and an insurable interest, such being its ordinary and plain meaning and the popular sense in which it is understood. *Missouri State Life Ins. Co. v. Hearne* (Civ. App.) 226 S. W. 789.

A clause in a note given upon reinstatement, that upon payment of the note "all rights under said policy shall thereupon be the same as if said premium had been paid when due," will not give way to a clause in the application for reinstatement providing that, in case of insured's death by suicide within one year, the company would be liable only for the reserve on the policy; the two clauses being inconsistent, and both instruments being prepared by the insurer. *Id.*

An application for reinstatement after lapse of policy and a note executed contemporaneously together constituted the contract of reinstatement. *Id.*

70. **Estoppel or waiver of conditions or right of forfeiture.**—Failure of insured to tender amount of premium notes on reduced policy held not to work forfeiture thereof, where insurer never accepted notes or made demand for payment. *National Life Ins. Co. of United States v. Eggleston* (Civ. App.) 195 S. W. 942.

Where insurer in negotiations recognizes continuing validity of policy, after knowledge of conditions upon which claim of forfeiture is based, or requires insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

Where, after damage to goods and removal to other location within knowledge of insurer, a duplicate receipt in sum of loss, providing "said policy is hereby reduced in said sum," and unearned premium was not returned, the insurer waived the right to avoid policy for removal of goods. *Camden Fire Ins. Ass'n v. Bond* (Civ. App.) 202 S. W. 220.

Whenever there arises a condition under which an insurer has the right on account of any failure of the insured to comply with any condition or warranty contained in the policy, to forfeit the same, the doing of any act inconsistent with the claim of forfeiture,

or any recognition of the existence of the policy waives the forfeiture if insurer had knowledge of the facts authorizing it. *Austin Fire Ins. Co. v. Polemanakos* (Com. App.) 207 S. W. 922.

Where insured sells and conveys property covered by policy to a third party, and with consent of insurer assigns policy, a new contract is entered into by insurer with purchaser which will not be affected by any previous breach on part of vendor. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

That insurer on the day of insured's death treated the policy as being still in existence by sending insured a notice of the premium to become due, and the fact that nothing appeared on the books of insurer previous to such time showing that it had exercised its right of forfeiture for nonpayment of past-due premiums, held to show that insurer had not seen fit to exercise the right of forfeiture for nonpayment of premium. *Roberts v. Wichita Southern Life Ins. Co.* (Com. App.) 221 S. W. 268, reversing judgment (Civ. App.) *Wichita Southern Life Ins. Co. v. Roberts*, 186 S. W. 411.

As the law abhors forfeiture, it will seize on slight circumstances to show that an insurance company has waived compliance with the provisions requiring prompt payment of premiums, and in such case conduct with respect to other premiums than those the failure to pay which is relied on as constituting a forfeiture may be considered. *Dunken v. Ætna Life Ins. Co.* (Civ. App.) 221 S. W. 691.

Where it is claimed that an insurer waived a forfeiture, no act by the insured is necessary; the waiver being essentially unilateral in character, and depending only on the acts and conduct of the insurer since waiver of forfeiture of provisions in a life policy need not be supported by consideration or based on estoppel. *Id.*

Where an indemnity policy provided that the insurer at its own expense would settle or defend suits and that the insured should not assume any liability or interfere with any negotiation or proceedings, the insurer by assuming to defend an action against the insured was made unconditionally liable for any judgment rendered against the insured up to the amount of the indemnity, and insured was not compelled to pay the judgment in order to recover from the insurer, nor could the insurer escape on the contention that the cause of action was not within the scope of the policy. *American Indemnity Co. v. Fellbaum* (Civ. App.) 225 S. W. 873.

One of several fire insurers, defendants, whose policy was void on account of other insurance effected by insured, held not estopped to make the defense of the invalidity of the policy on account of such other insurance, though counsel for all the insurers on trial did not contend the policy was void and should be annulled; it being set up by the insurers as the means to escape liability under provisions in other policies, etc. *Providence-Washington Ins. Co. v. Boatner* (Civ. App.) 225 S. W. 1115.

Courts are disposed to seize upon slight circumstances to prevent a forfeiture of an insurance policy, and, in the absence of fraud where insured made an effort to transmit his premium in time, trivial or technical objections to the manner of payment will not defeat it as a payment if there are acts or conduct on the part of the insurance company which would induce the insured to omit to follow the strict letter of the policy. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

The conduct and dealings of an insurance company may be such as to estop the company from declaring a forfeiture because payment of premium was not made in the manner required by the policy, but the tender of a bank check or certificate of deposit in payment of a premium is not sufficient compliance with the requirement of the policy unless in the course of dealings between the parties similar payments have been received so as to estop the insurer from claiming that payment in that manner was insufficient. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

Where the agent of insured notified the agent of the insurance company that he had the money and was ready and willing to pay the premium on the policy, the refusal of the company's agent to accept the payment unless an additional amount, unauthorized by the policy, was paid because the insured was then in France, waived tender of the premium by insured or his agent in money. *American Nat. Ins. Co. v. Allen* (Civ. App.) 226 S. W. 823.

71. — **What conditions may be waived.**—Notwithstanding art. 4968, a life company may waive provision that a soliciting agent shall have no power or authority to waive or change the terms of a policy, and waiver may result by acts of such agents authorized or acquiesced in by the officers. *Dunken v. Ætna Life Ins. Co.* (Civ. App.) 221 S. W. 691.

The stipulation in an insurance policy for payment only to an agent having the receipt furnished and countersigned by the general officers of the company may be waived so that it does not necessarily render inadmissible any other kind of receipt or proof of payment. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

73. — **Effect of provisions in application or policy.**—Insurer can avoid life policy more than a year after issuance thereof upon ground that reinstatement was procured by fraud, notwithstanding clause making policy incontestable after year from its date; such clause not applying to fraud inducing reinstatement. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

Provision in life policy exempting insurer from liability, except for amount of premiums paid, in case the insured should die while engaged in military service, authorized by art. 4741, subd. 3, could not be orally waived, in view of further provision that the policy constituted the entire contract between the parties, required by art. 4953, and provisions of art. 4954, that life insurance company or agent should make no agreement as to policy not expressed therein. *Caldwell v. Illinois Bankers' Life Ass'n* (Civ. App.) 226 S. W. 747.

In view of art. 4961, as to who are insurance agents, condition of fire policy on the stock of an automobile dealer that he should report to the company each car owned by him and its location as soon as known, and have an entry thereof made in passbooks provided therefor, was waived, the policy being, in effect, in renewal of a like policy for the previous year, and the agent having agreed with insured at the time of issuing the prior policy that he would from time to time visit insured's place of business and check up cars on hand and make the necessary reports and entries, and a report having been made during the life of the first policy of all the cars which were burned during the life of the second policy, and the agent having attempted to make an entry thereof, in the passbook; and this though by mistake he failed to make entry therein of some of them, and though the policy provided that no agent could waive any provision thereof unless the waiver was written thereon. *California Ins. Co. v. Bishop* (Civ. App.) 228 S. W. 1010.

74. — **Knowledge or notice of facts.**—Where the agent of an insurance company knew the facts in regard to the policy and caused it to be written with an erroneous ownership clause, the company is estopped from setting up such clause as a defense in an action on the policy. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

Insurer, having reinstated lapsed life policy, was not estopped from asserting invalidity of reinstatement because of consent to assignment, where it was ignorant of the deception practiced at time of reinstatement, and immediately on discovery thereof gave notice that it would no longer be bound by the policy. *State Mut. Life Ins. Co. v. Rosenberry* (Com. App.) 213 S. W. 242.

Clause of fire policy on cotton gin, whereby insured warranted under penalty of forfeiture that the property should be in active operation during the ginning season, held not waived by insurer because its soliciting agent was informed insured had not ginned any cotton during season preceding the policy year, while too little cotton was produced in the vicinity during the policy year to permit profitable operation. *Westchester Fire Ins. Co. v. Roan* (Civ. App.) 215 S. W. 985.

Where insured accepted a health policy, reserving to insurer the right to cancel the policy at any time on notice and return of unearned premiums, that insurer had knowledge that insured was ruptured prior to the execution of the policy did not constitute an estoppel on insurer to cancel the policy on that ground. *Massachusetts Bonding & Ins. Co. v. Florence* (Civ. App.) 216 S. W. 471.

A bank, which was a mere collecting agent for an insurance company as to notes given for premiums, could make no agreement with an insured which would waive insurer's rights under its contract, and notice to the cashier of the bank was not notice to insurance company of an intent to accept an offer of the insurer to extend a note. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

Acceptance by an insurance company of payment of a premium before the expiration of the time for payment may waive the right to forfeit the policy for failure to pay in the manner required, though the insurance company, when it accepted the payment, was ignorant of the serious illness of insured. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

75. — **Delivering policy with knowledge of facts.**—In a suit to reform an insurance policy erroneously stating the name of the owner of the property, defendant company was estopped to deny the validity of the policy when its agent, with knowledge of the true ownership, issued the policy in the name of the estate of a former owner and collected the premium therefor. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

Conditions of forfeiture, because insured was not the unconditional owner, are waived where agents of insurer knew, at time of issuance of policy, that insured was not the unconditional owner. *Northern Assur. Co. v. Lawrence* (Civ. App.) 209 S. W. 430.

Defendant fire insurer of a stock of lumber located on a railroad switch, which when plaintiff insured presented to its local agents the inventory required by the record warranty clause in the policy, did not, through such agents, object to the inventory as not a compliance with such clause, plaintiff insured believing he was meeting the requirements of the insurer, held to have waived the noncompliance with the record warranty clause, being estopped to set up the same as a defense to the suit after a loss, though the inventory was in part for the purpose of showing the value of the property to be insured. *Camden Fire Ins. Ass'n v. Yarborough* (Civ. App.) 229 S. W. 336.

76. — **Acceptance of premium.**—Under accident policy providing for renewal after 1st day of month when premium was due, but that company was not liable for accidents occurring between 1st day of the month and date premium was paid, held, previous acceptance of renewal premiums after 1st day of month was not waiver of condition mentioned. *National Life & Accident Ins. Co. v. Reams* (Civ. App.) 197 S. W. 332.

Under policy on the life of her son in the army taken out by his mother, which stipulated that, if permit for military service was not obtained and additional premium paid, the company's liability would be restricted to the net reserve on the policy, the insurer had no right to declare it forfeited for failure to obtain the permit, and the mother, the beneficiary, had the right to continue payment of the premiums stipulated, and to preserve the life of the policy, subject to such restriction, and acceptance of the premiums by the insurer did not estop it to deny liability for the face of the policy. *American Nat. Ins. Co. v. Turner* (Civ. App.) 226 S. W. 487.

Where a life insurance policy had been forfeited under its terms for nonpayment of a renewal premium, acceptance of payment of the premium by the insurance company without knowledge that the insured was then dead does not waive the forfeiture, since waiver presupposes a full knowledge of an existing right and an intentional surrender

or relinquishment of that right. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

Payment of a renewal premium on a policy containing the provision required by art. 4741, that payment shall be made to an agent on delivery of receipt signed by an officer of the company, if accepted by the company, though made to an unauthorized agent is not void so as to authorize forfeiture of the policy. *Id.*

77. — **Demand for payment of premium.**—Where a renewal policy was written up, and after being informed of the circumstances as to a loss and the renewal the insurer demanded of insured the payment of the premium thereon, which it received and retained, it was estopped from denying liability of the loss. *American Cent. Ins. Co. v. Robinson* (Civ. App.) 219 S. W. 277.

78. — **Extension of time for payment of premium.**—Insurer's proposal by letter that if insured would make partial payment of amount due on premium note the balance would be extended a reasonable time, although conditional, and not accepted by insured so as to become a binding contract, held to have waived forfeiture for nonpayment of the premium note at its maturity, under the principle of waiver of forfeiture by conduct leading insured to honestly believe premium would be received after the appointed day. *Southland Life Ins. Co. v. Hopkins* (Civ. App.) 219 S. W. 254.

An extension agreement was consummated when insured executed and returned to insurer a note given for a premium, and any attempt to ingraft further conditions or provisions upon it by a receipt sent him thereafter was without effect. *Id.*

If insurer on maturity of premium note offered to extend time for payment of insurance upon insured's making a new application and executing a new note, such offer, while not binding upon insurer until accepted by insured, would nevertheless constitute a waiver on the part of insurer of the right to enforce forfeiture. *Roberts v. Wichita Southern Life Ins. Co.* (Com. App.) 221 S. W. 268, reversing judgment (Civ. App.) *Wichita Southern Life Ins. Co. v. Roberts*, 186 S. W. 411.

86. — **Weight and sufficiency of evidence.**—In an action on a fire policy, evidence held to support a finding of the jury that the books of plaintiff were a substantial compliance with a warranty record clause in a policy requiring insured "to show a complete daily record of all cotton handled, the weight and classification of each bale, all purchases, sales, and shipments, with the identity of each bale." *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

88. **Risks and causes of loss—Marine insurance.**—A loss or damage is not prevented from being one by perils of the sea by the co-operation of such other causes as acts or omissions of the owner or his agent amounting to negligence, but not amounting to fraud or design so that where a vessel listed and sank while in harbor because a watchman neglected to close a sea cock opened to take in water for use in boilers, the accident was one of the perils of the sea, and a marine insurance company was liable under its policy for the expense of raising and repairing the vessel. *Charles Clarke & Co. v. Mannheim Ins. Co.* (Com. App.) 210 S. W. 528.

Any loss proximately caused by unseaworthiness of the vessel at the time of leaving port is not a loss by peril of the sea. *Id.*

Where the loss or damage is from causes independent of the sea or its action, or is not peculiar to navigation, it is not by a peril of the sea; in other words, the peril must be one "of the sea," and not merely one occurring "on the sea." *Id.*

Loss or damage occasioned by natural deterioration or decay, or by ordinary wear and tear of the vessel, are not within the term "perils of the sea." *Id.*

Generally, any loss or injury is occasioned by a peril of the sea which has for its proximate cause the fortuitous action of the sea, operating either singly or in conjunction with other elements or causes, or is peculiar to transportation by vessels supported by the sea or its buoyancy. *Id.*

89. — **Insurance of property.**—Under policy insuring automobile against collision, held, there could be no recovery for damages caused by second floor of garage falling upon it. *O'Leary v. St. Paul Fire & Marine Ins. Co.* (Civ. App.) 196 S. W. 575.

Policy insuring carriages against fire, "all while contained in the one-story metal roof, iron-clad building," at a certain address, did not render the insurer liable for damage to a carriage while in different shop undergoing repairs. *Home Ins. Co. of New York v. McClaran* (Civ. App.) 204 S. W. 718.

Where one leaving El Paso for Waco, Tex., had goods which he desired covered by fire insurance, and an agent in El Paso issued a policy to him to cover the goods in El Paso, and told him that the policy would cover the goods when moved from El Paso to Waco, which the policy did not in fact do, insured was entitled to recover for loss of the goods by fire in Waco, on the ground of mutual mistake, in that the policy did not express the real contract made, or on the ground that the same was the result of a mistake on the part of the insured and legal fraud on the part of the agent. *Standard Fire Ins. Co. of Hartford, Conn., v. Buckingham* (Civ. App.) 211 S. W. 531.

In an action on burglary and theft policy, evidence held sufficient to warrant a finding that articles disappearing from plaintiff's residence were taken by burglars or thieves without his consent. *National Surety Co. v. Murphy* (Civ. App.) 215 S. W. 461.

Under a policy of fire insurance providing that the company should not be liable for loss caused directly or indirectly by explosion of any kind, if a building fell by reason of an explosion before fire broke out, the policy was terminated by the falling of the building. *Northwestern Nat. Ins. Co. v. Westmoreland* (Civ. App.) 215 S. W. 471.

In an action on a policy, insuring an automobile against sinking in conveyance by water, where the petition alleged that a ferry carrying the car sunk when the car was on it, which was proved, it is immaterial that by way of implication the petition also charg-

ed the ferry was held down at the bottom of the stream by the car, and proof of the mere averment of sinking would fasten liability on the insurer, though there was showing that after the first sinking with the car, the ferry, relieved of weight by the car's having slid off, rose again to the surface. *American Automobile Ins. Co. v. Fox* (Civ. App.) 218 S. W. 92.

In an action on a policy insuring an automobile from fire, explosion, lightning, burning, derailment, collision, and stranding or sinking of any conveyance by land or water in which the car was being transported, the defense of unseaworthiness of the ferry in which the car was being carried when the ferry sunk was not applicable to the particular contract, in view of the nature of the risk. *Id.*

A policy insuring against damage by tornado, windstorm, or cyclone, expressly excepting damage through any tidal wave, high water, or overflow, and damage caused by water or rain, whether driven by wind or not, covered only losses resulting from wind and no other cause, and parties having stipulated it was impossible to determine to what extent wind and water were factors in causing a loss, it was excluded from indemnity provided. *Coyle v. Palatine Ins. Co.* (Com. App.) 222 S. W. 973, affirming judgment (Civ. App.) *Palatine Ins. Co. v. Coyle*, 196 S. W. 560.

Where fall of building was caused by an explosion upon which fire immediately ensued, the insurer was liable for the damage inflicted by the fire under provision of policy making insurer liable for damage caused by fire on an explosion, notwithstanding other provision providing for termination of the policy on the building or any part thereof falling, except as the result of fire, since the two clauses must be construed together. *Northwestern Nat. Ins. Co. v. Mims* (Civ. App.) 226 S. W. 738.

Under fire policy providing that insurer should not be liable directly or indirectly for damages caused by explosion, unless fire ensued, and in such case for fire damage only, insurer was not liable for explosion damages as distinguished from damages from fire following the explosion damage, where both resulted from an explosion in an adjoining building, which wrecked insured's building, which thereupon took fire; it being immaterial that the explosion in the adjoining building was caused by antecedent fire therein. *Id.*

If fire originated in insured building and spread to and caused explosion in adjoining building, insurer would have been liable for damage to insured building resulting from such explosion, notwithstanding clause in policy providing against liability for damage caused by explosion. *Id.*

**90. — Indemnity Insurance.**—A casualty insurance policy to cover all employes "legally employed" does not cover persons employed in violation of law as to age. *Wartman Lumber Co. v. Beatty* (Civ. App.) 204 S. W. 448.

Liability policy agreeing to indemnify insured, dealers in paper bags, against loss from liability for injuries sustained within premises designated as "store and warehouse," in which insured was to conduct no business "except as store and warehouse," held to cover accident to operator of printing press upon the premises, where the printing of bags and paper was a necessary part of the business of the store and warehouse of insured. *Continental Paper Bag Co. v. Bosworth* (Civ. App.) 215 S. W. 126.

Employe of pipe line contractor, hired in Texas, whose work took him into several states other than Texas, having been placed in charge of work in the Caddo oil field, including a part of Louisiana, and Marion and Panola counties, Tex., in view of such facts and others, held a Texas employe of the contractor when injured in Louisiana in his work of superintendence, and under the protection of the contractor's policy. *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 705.

Under provisions of liability policy issued by insurer to firm of engineers, insurer held liable to traction company for whom firm of engineers undertook to do work for amount paid to injured servant of subcontractor if it could be said his injuries were caused by the performance of the work undertaken by the firm of engineers. *Ocean Accident & Guarantee Corporation, Limited, of London, England, v. Northern Texas Traction Co.* (Civ. App.) 224 S. W. 212.

A liability policy, issued to a firm of engineers which undertook to do paving work for a traction company, providing that the injury must have been caused by the performance of the work, meant substantially that injury to an employe (in the particular case the employe of a subcontractor) must have been sustained by reason of the performance of the work and as an incident thereto. *Id.*

Work of paving between and outside of its tracks required by the city as a franchise condition of plaintiff traction company suing the liability insurer of the firm of engineers which had undertaken the work on its (the traction company's) behalf, held being done and conducted by the traction company within the meaning of certain stipulations in one of the liability policies. *Id.*

Construed with a liability policy issued to an employer before enactment of Workmen's Compensation Law (arts. 5246h-5246zzzz), and binders thereafter attached, a subsequent policy, in which were merged all previous obligations, and which was made retroactive, held to cover master's liability at common law as well as under the Compensation Act. *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Com. App.) 228 S. W. 114.

**91. — Life Insurance.**—Clause in mutual benefit policy, avoiding liability for death if insured was killed while engaged in any illegal business, does not release from liability where insured was shot while resisting arrest or attempting to escape from an officer. *American Mut. Benefit Ass'n v. Joshua* (Civ. App.) 200 S. W. 260.

An ordinary life policy, in the absence of provision regarding death of insured by



legal execution as punishment for crime, does not insure against death by such means. *American Nat. Ins. Co. v. Munson* (Civ. App.) 202 S. W. 987.

In an action on a life insurance policy stipulating against suicide, evidence held to show conclusively that the insured committed suicide intentionally by the use of carbolic acid. *Texas Life Ins. Co. v. Childress* (Civ. App.) 204 S. W. 1035.

In a suit against an insurance company on a life policy, the death of insured may be established, like any other fact, by direct proof or circumstantial evidence. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

An insurance policy containing a suicide clause, is forfeited by the suicide of insured, notwithstanding that his mind was impaired to the extent that he was not morally responsible for his act. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

92. — **Accident and health insurance.**—In action on accident insurance policy, evidence held to sustain a finding that plaintiff's hand was not completely severed at the wrist within policy. *Hardin v. Continental Casualty Co.* (Civ. App.) 195 S. W. 653.

Where insured under accident policy when he applied for insurance stated his occupation to be general manager for a railroad company, a by-law, made a part of policy relieving company of liability for death due to voluntary and unnecessary exposure, etc., would have no application, where insured was killed while discharging his duties as manager, or same duties as assisting manager. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

By-law made part of contract of accident insurance, exempting insurer from liability if insured was killed while riding a "motor inspection car," would not relieve insurer of liability for death of one insured as general manager of a railroad, which occurred while riding in a motor inspection car as part of his duties. *Id.*

By-law held ambiguous, so that fact that death was due to voluntary exposure to damage or obvious risk of injury or death did not warrant instruction for insurer. *Id.*

Where plaintiffs, suing on accident policy, proved insured's death was caused by external and violent means, to overcome this prima facie case by the defense that insured was killed in course of assault upon another, insurer must show that felonious assault was first made by insured upon other, and that he met death at hands of assaulted person in self-defense. *Georgia Casualty Co. v. Shaw* (Civ. App.) 197 S. W. 316.

In suit on accident policy, evidence held to justify finding that insured who was shot in a difficulty, was not the aggressor. *Id.*

If death of insured under mutual insurance certificate was caused by his act intentionally done in lifting cotton bales in manner in which he intended, his death was not caused by accidental means. *Pledger v. Business Men's Acc. Ass'n of Texas* (Civ. App.) 197 S. W. 889.

Where meaning of "accidental death" in legal terminology had been well settled before a certificate of mutual insurance was issued, insurer is presumed to have prepared such certificate with reference to such meaning. *Id.*

Accidental death is unintended and undesigned result arising from acts intentionally done, and death by accidental means is where the result arises from acts unintentionally done. *Id.*

A clause in by-laws of mutual association limiting liability to "death by accidental means" held not inconsistent with the policy allowing benefits for "accidental death." *Pledger v. Business Men's Acc. Ass'n of Texas* (Civ. App.) 198 S. W. 810.

Evidence held to sustain verdict for insured on accident policy as against insurer's contention that he was injured as result of violation of law in assaulting another. *Continental Casualty Co. v. Chase* (Civ. App.) 203 S. W. 779.

Under an accident insurance policy exempting the insurer from liability for indemnity for disability caused by cerebral hemorrhage, where insured accidentally fell, striking his head and rupturing a blood vessel in his brain, causing cerebral hemorrhage which caused partial paralysis and a total disability for eight weeks, he could not recover from the insurer. *Order of United Commercial Travelers of America v. Dobbs* (Civ. App.) 204 S. W. 468.

Clause in accident policy providing that policy did not cover railroad employes while on duty near track is not inconsistent with caption providing insurance against accident "to the extent herein provided," and precluded recovery under policy for accident to flagman while on duty at railroad crossing. *Southern Surety Co. v. Hartman* (Civ. App.) 206 S. W. 379.

Where an accident policy covering death through violent and external means expressly declared that it should not cover injuries intentionally inflicted upon the insured by himself or by any other person except by burglars and robbers, the company is not liable where one not a burglar or robber intentionally shot and killed the insured. *National Life & Accident Ins. Co. v. De Lopez* (Civ. App.) 207 S. W. 160.

That insured voluntarily exposed himself to unnecessary danger would not defeat recovery, unless his act in so doing was the proximate cause of the accident. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230.

A beneficiary can recover upon an accident policy for injury occurring during the period for which a premium was paid, though death from the injury took place after such period. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

Under accident policy insuring against bodily injuries inflicted, "directly and independently of all other causes," through accidental means, if disease with which insured was suffering caused apoplexy resulting in insured's death, or if injury received by insured in a fall concurred with such disease in causing such apoplexy, the insurance

company was not liable, but was liable if the injury from the fall was the sole cause of the apoplexy. *Western Indemnity Co. v. MacKechnie* (Civ. App.) 214 S. W. 456.

Where accident policy provided for specific indemnity for loss of life "only when \* \* \* sustained in the manner specified in section D, clause 1," which specified accidents while insured was traveling as a passenger, beneficiary could not recover thereon for death of insured, which occurred in a manner not specified in such clause, but in a manner specified in another clause of section D, even though there was no provision in policy for indemnity for death resulting from accidents sustained in manner specified in such other clause, where there was another section in policy referring to all clauses of section D. *Hartwig v. Southern Surety Co.* (Civ. App.) 216 S. W. 455.

A health insurance policy, covering disability resulting from illness, embraces disability of an insured who, while suffering from a hernia, accidentally stepped into a hole in the street, displacing the truss, and causing the hernia to come down, whereby he was incapacitated for two months. *Massachusetts Bonding & Ins. Co. v. Florence* (Civ. App.) 216 S. W. 471.

Within the terms of a health policy insuring against loss of time from disease or illness common to both sexes, a disease is common to both sexes unless one sex is immune therefrom, and the disease known as salpingitis, which is sort of an inflammation, is deemed a disease common to both sexes, as males are not immune, though it attacked insured, a woman, in her genital organs. *National Life & Accident Ins. Co. v. Weaver* (Civ. App.) 226 S. W. 754.

Under application, certificate, and by-laws providing for payment of \$5,000 for the death of the member caused "solely and exclusively by external, violent, and accidental means," held that beneficiary was entitled to recover for accidental death, member dying from a rupture of heart vessels at the time of lifting a cotton bale, in view of art. 4807, although the policy provided that there would be no liability for death resulting from any accident when no visible mark was on the body. *Pledger v. Business Men's Accident Ass'n of Texas* (Com. App.) 228 S. W. 110.

92½. — **Indemnity insurance.**—Where liability indemnity policy required insurer to defend suit against insured and provided that no action could be brought on the policy until after judgment has been rendered against insured, insurer, after being impleaded in suit against insured upon its denial of liability and refusal to defend, could be held liable in such suit upon judgment being rendered against insured. *Continental Paper Bag Co. v. Bosworth* (Civ. App.) 215 S. W. 126.

In an action on a policy of indemnity insurance where the administrator of the insured executed a note to pay a judgment rendered against the estate of the insured, a fact finding by the court that the note was executed in good faith to pay off the judgment held warranted. *American Indemnity Co. v. Fellbaum* (Civ. App.) 225 S. W. 573.

93. **Extent of loss and liability of insurer—Fire insurance.**—In action on fire policy, recovery could not be had beyond actual cash value of property destroyed with deduction for depreciation. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

Building was "total loss" after fire where reasonably prudent owner, uninsured, could not have used any substantial part of building left standing. *National Fire Ins. Co. v. House* (Civ. App.) 197 S. W. 476.

In an action for insurance on cotton lost by fire, evidence held to support finding of the jury as to the number of bales and their value. *Liverpool & London & Globe Ins. Co. v. Jones* (Civ. App.) 197 S. W. 736.

Under fire policy provision that the company shall not be liable for more than three-fourths of actual cash value, company's liability is not affected by fact that insured had offered to sell the property for less than its actual value. *Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co.* (Civ. App.) 203 S. W. 382.

A contract of insurance is one of indemnity, the property owner to be indemnified against loss of the thing insured, that is, in case of a building, the building as such, and not the materials composing it, so that, to constitute a "total loss," it is not necessary that all the materials be physically destroyed. *Fire Ass'n of Philadelphia v. Strayhorn* (Com. App.) 211 S. W. 447.

Whether the portion of a building remaining after a fire is reasonably adapted for use as a basis on which to restore the building to its old condition, so that it can be determined there is no total loss under a fire policy, depends on whether a reasonably prudent owner, uninsured, desiring such a structure as the old building, would in proceeding to restore it utilize the remnant as a basis. *Id.*

There can be no total loss of a building, within the meaning of a fire policy covering it, so long as a substantial remnant of the structure standing in place is reasonably adapted to use as a basis on which to restore the building to the condition in which it was before the injury. *Id.*

In action on fire policy on goods and fixtures in a store for partial loss by fire which covered an area of six feet square and did not burn through the floor, evidence held sufficient to support findings as to loss and damages sustained. *Barnett v. Prussian Nat. Ins. Co.* (Civ. App.) 212 S. W. 839.

Several underwriters issuing fire policies substantially under the Lloyd's insurance system could only be held bound severally for their proportion of a loss as designated in the policy. *Merchants' & Manufacturers' Lloyd's Ins. Exch. v. Southern Trading Co.* of Texas (Com. App.) 229 S. W. 312.

93½. — **Indemnity insurance.**—See *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

If the treasurer against whose defalcation a surety bond was taken had made a defalcation before the bond was taken, and borrowed money to cover the shortage, and after the execution of the bond repaid the money borrowed with the funds of the lodge, there was a new defalcation, for which the surety was liable. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

Where indemnity company refused to defend suit as specifically agreed in separate paragraph in policy, and insured had to employ attorneys and others to defend, insured could recover obligations so incurred, although not yet paid, regardless of no action clause in policy, providing liability only for money actually expended. *Western Indemnity Co. v. Walker-Smith Co.* (Civ. App.) 203 S. W. 93.

Where the contract between the master and insurer is one of indemnity against actual loss from personal injury to servants, there can be no liability of insurer until the master has suffered loss by payment of judgment for such injuries. *Owens v. Jackson-Hinton Gin Co.* (Civ. App.) 217 S. W. 762.

In an action on a policy insuring an automobile against sinking when in transport by water, the car having sunk with a ferry into salt water, evidence as to damages held sufficient to sustain the jury's finding of \$1,300 in favor of insured. *American Automobile Ins. Co. v. Fox* (Civ. App.) 218 S. W. 92.

Where an indemnity policy provided that the insurer at its own expense would settle or defend suits and that the insured should not assume any liability or interfere with any negotiation or proceedings, the insurer by assuming to defend an action against the insured was made unconditionally liable for any judgment rendered against the insured up to the amount of the indemnity, and insured was not compelled to pay the judgment in order to recover from the insurer. *American Indemnity Co. v. Fellbaum* (Civ. App.) 225 S. W. 873.

Where a bank was under contract to deliver certain bonds to plaintiff, for which he had paid, and the defendant insurance company contracted to indemnify the bank from loss in transmitting them through registered mail, and they were lost, held, that the bank had sustained a loss entitling it to indemnity from the insurance company, and which the bank could lawfully assign to plaintiff together with the policy. *St. Paul Fire & Marine Ins. Co. v. Charlton* (Civ. App.) 231 S. W. 862.

94. — **Accident insurance.**—Where by-laws provided that in making proof of partial loss the insured waived further claim, the insurer could not defeat an action for additional sums unless it had paid the initial claim and insured had waived the benefits. *International Travelers' Ass'n v. Powell* (Civ. App.) 196 S. W. 957.

In a suit upon accident policy, evidence held to sustain a finding of injury resulting directly and exclusively in immediate, continuous, and total disability, rendering insured incapable of performing duties pertaining to his occupation as a grain man. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

Evidence held to sustain finding that insured, claiming total disability under accident policy, had received injury preventing performance of anything pertaining to his occupation from date of accident September 15, 1915, to February 9, 1916, notwithstanding he had received his salary for 15 months after accident. *Id.*

Total disability does not mean absolute physical inability to transact any kind of business pertaining to insured's occupation; it is sufficient if injury is such that common care and prudence require him to desist from business so long as it is reasonably necessary to effectuate a cure, and that for a few days insured did not discover seriousness of injury would not disprove that he was not wholly disabled within meaning of policy. *Metropolitan Casualty Ins. Co. v. Edwards* (Civ. App.) 210 S. W. 856.

Self-destruction, inflicted purposely, is not classed as an "accident" within the meaning of a supplemental life insurance policy, providing for double liability in case of accidental death. *Federal Life Ins. Co. v. Wilkes* (Civ. App.) 218 S. W. 591.

In an action by an attorney on an accident insurance policy for the indemnity provided therein for immediate, continuous, and total disability, evidence held to show that the disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate. *Hefner v. Fidelity & Casualty Co. of New York*, 110 Tex. 596, 222 S. W. 966, answering questions certified to (Civ. App.) 160 S. W. 330.

95. — **Life insurance.**—Beneficiary cannot recover on 15-year settlement policy giving insured share in profits upon maturity of 15-year period to be creditable to future premiums, where insured had defaulted in payment of premium, without proof of the value of policy at time of insured's death, either as to the cash surrender value or as to the amount of profits earned by policy and apportionable to it, or proof of whether such profits, when applied to payment of future premiums, were sufficient to keep insurance in force at date of insured's death. *Northwestern Nat. Life Ins. Co. v. Evans* (Civ. App.) 214 S. W. 598.

Under art. 4742, forbidding provision for any mode of settlement at maturity of an insurance policy of less value than the face of the policy, except that a company may issue a policy "promising a benefit less than the full benefit" in case of insured's suicide, a policy provision was sufficient, as "promising a benefit," to validly reduce the amount payable under the policy, where the policy provided for payment "of the contribution to the mortuary fund," in case of suicide. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

Policy stipulating that, if permit for service in the army by insured after war began was not obtained and an additional premium paid, the insurer's liability would be restricted to the net reserve on the policy, rendered the insurer liable for its face amount.

if insured died from any cause other than the fact of service in actual war. *American Nat. Ins. Co. v. Turner* (Civ. App.) 226 S. W. 487.

Under a policy providing that the insurer's liability should be limited to the premiums paid if insured engaged in military service in time of war without the insurer's written consent, where insured entered the military service in time of war, and committed suicide while insane during such service, the insurer's liability was limited to the premiums paid, though the policy also provided that after one year it should be incontestable except for specified causes. *Field v. Western Life Indemnity Co.* (Civ. App.) 227 S. W. 530.

Where a life insurance policy did not understate the age of insured, though the premium was based on a lower age, there was nothing in its terms to authorize a reduction in the amount payable to the beneficiary, despite the policy provision that, if the age of insured was not correctly stated therein, no greater amount should be paid than the premium would have purchased at the true age. *American Nat. Ins. Co. v. Tabor* (Sup.) 230 S. W. 397.

**96. Notice and proof of loss.**—Evidence held to warrant finding of jury that the Grand Master of the lodge, indemnified in a fidelity policy against defalcation by its treasurer, had no knowledge of previous defaults or irregularities in auditing the books. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

An action by the obligee, on a bond indemnifying it against default of its treasurer, for the amount of a defalcation, is a claim for damages within art. 5714, so that a condition of the policy requiring immediate notice was void. *Id.*

Art. 5714, applies to notice and proofs of loss under a hail insurance policy. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

Where fire policy provided for examination of insured under oath by insurer's representative and insured, upon being notified by insurer to appear for examination at office of insurer's agent, only a few city blocks distant from her residence, failed to appear and submit to examination, as required by policy, insured could not recover upon policy. *National Fire Ins. Co. of Hartford, Conn. v. Humphreys* (Civ. App.) 211 S. W. 811.

In absence of statutory inhibition, conditions in employers' liability policies requiring that immediate written notice of an accident be given to insurer with the fullest information obtainable are valid. *Travelers' Ins. Co. of Hartford, Conn., v. Scott* (Civ. App.) 218 S. W. 53.

Under employers' liability policy requiring "immediate written notice" of "accident" to insurer with the fullest information obtainable, recovery could not be had where notice was not given until 17 months after accident, though it was given at the time of service of citation in employe's action for damages and though employer had no personal knowledge of the accident and insured was not prejudiced by the delay; such stipulation requiring reasonably early notice after the accident, not after action for injuries has been instituted. *Id.*

The fact that physicians, who attended a person accidentally injured attributed his condition to disease, and not to the accident, does not excuse a failure to give the company notice of the accident as soon as reasonably possible, as required by the policy. *Hefner v. Fidelity & Casualty Co. of New York*, 110 Tex. 596, 222 S. W. 966, answering questions certified (Civ. App.) 160 S. W. 330.

Art. 5714, making stipulation in contract fixing the time within which notice of claim for damages made a condition precedent to the right to sue thereon shall be given at a less period than 90 days void, held not applicable to provision in indemnity policy, requiring insured to give insurer notice of accident immediately on occurrence thereof. *Texas Glass & Paint Co. v. Fidelity & Deposit Co. of Maryland* (Civ. App.) 226 S. W. 811.

**98. — Estoppel or waiver as to proofs.**—Insurer, by declining to send blanks for making proofs of death, waived compliance with provision of policy, requiring such proofs of death. *Northwestern Nat. Life Ins. Co. v. Evans* (Civ. App.) 214 S. W. 598; *International Travelers' Ass'n v. Powell* (Civ. App.) 196 S. W. 957; *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

Condition of fidelity bond making it void if notice were not given within a stipulated period and which had not been complied with, held waived. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

That insurer was furnished sworn proof of loss and inventory, and that it made no objection and pointed out no defects, held not to excuse insured's failure to submit to examination as required by policy. *National Fire Ins. Co. of Hartford, Conn., v. Humphrey* (Civ. App.) 199 S. W. 865.

An insurer under a hail insurance policy, who, after having received an unsworn claim for damages, sent an adjuster who viewed the damage, admitted liability, presented a form of proof filling in only the percentage of loss, and subsequently tendered a settlement after the time limited for filing a formal proof of loss, thereby waived the formal proof, notwithstanding a provision in the policy that no denial of liability or other act by the company should be deemed to waive such proof. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 366.

Where insurer denied all liability beyond the amount paid it, proof of death was not required, and would have been a useless formality. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

**100. — Proofs of injury or loss.**—The insured under an accident policy does not forfeit his right to additional insurance by filing claim for partial disability when the claim was prematurely filed, and the insurer was not lawfully bound to pay it until the full amount suffered had accrued and proof had been made. *International Travelers' Ass'n v. Powell* (Civ. App.) 196 S. W. 957.

Plaintiff, who was in the room with insured, her husband, when he was shot, and who described minutely circumstances immediately preceding the occurrence, was an "eyewitness," within terms of policy requiring claimant to establish accidental character of injury by testimony of at least one eyewitness. *Bankers' Health & Accident Ass'n v. Wilkes* (Civ. App.) 209 S. W. 230.

In action upon accident policy, evidence that insured had no hernia previous to his fall, while attempting to alight from an automobile, that a hernia developed just after the fall, and a doctor's opinion that in all probability it was due to the fall, justified jury in finding that accident was sole cause of injury, "exclusively and independently of all other causes," within a policy provision. *Metropolitan Casualty Ins. Co. v. Edwards* (Civ. App.) 210 S. W. 856.

In action upon accident policy, evidence held to support jury's finding that insured was wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation for six weeks. *Id.*

A fire insurance policy provision requiring insured to submit to examination after loss is a material one, and if breached the insurer would be deprived of a valuable right for which it had contracted. *Humphrey v. National Fire Ins. Co. of Hartford, Conn.* (Com. App.) 231 S. W. 750.

A provision in a fire policy requiring insured to submit to examination after loss may be availed of by insurer only if it fixes a reasonable time and place for such examination, whether such qualification is expressed in the policy or not. *Id.*

Under a fire insurance policy requiring insured to submit to examination after loss, it is insured's right to have his or her attorney present at the examination. *Id.*

Insured, refusing to comply, even on reasonable notice, with a fire policy requirement of examination after loss could later recede from that position and offer to submit to such examination. *Id.*

**102. Adjustment of loss.**—Fire policy held to require selection of umpire by appraisers appointed by parties who should participate in award, and failure to select such umpire was an irregularity to be considered in determining whether award was fair. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

Where fire policy required appointment, in case of disagreement, of two disinterested appraisers, who should choose a third, such clause being for the benefit of the insurer, it waived such benefit by appointing an appraiser, who was not disinterested, but was in its employment, and it was no defense that the insured also appointed an interested appraiser. *Delaware Underwriters v. Brock* (Civ. App.) 206 S. W. 377.

Where fire policy provides for arbitration as to amount of loss in the event of a disagreement between the parties, such disagreement is prerequisite to right to demand such arbitration, and a mere arbitrary refusal to pay amount demanded and offering a less amount does not constitute such a disagreement. *Springfield Fire & Marine Ins. Co. v. Barnett* (Civ. App.) 213 S. W. 365.

A stipulation in fire policy to submit issues as to amount of loss to arbitration, where policy does not provide that same shall be done before any suit is brought, is collateral to insurance contract and will not defeat a suit brought thereon without such award. *Id.*

Fire policy may legally provide for determination of amount of loss by arbitration and make determination condition precedent to suit on policy. *Id.*

Where, on the maturity of a 15-year endowment policy, the amount due thereon was in dispute, company's act in sending to assignee of policy draft for its admitted liability thereon, payable, however, to both original insured and assignee, with release of any further claims or demands on account of the policy, was not such an unconditional tender of its admitted debt as assignee was entitled to. *Manhattan Life Ins. Co. v. Stubbs* (Civ. App.) 216 S. W. 896.

**103. — Demand of appraisal.**—Where extent of loss under a fire policy was submitted to arbitration held that insured was within her rights in making a request to be heard before appraisers. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

**104. — Waiver as to adjustment.**—Insurer under fire policy by standing on validity of award waived right to demand additional appraisal. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

When a fire insurer has wrongfully occasioned a failure of arbitration of loss under the policy by insisting upon retention of its disqualified appraiser, it releases insured from his obligation to enter the arbitration. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

**105. — Validity and effect of appraisal or award.**—Failure to give notice and opportunity to parties to be present at investigation by appraisers to determine amount of loss under fire policy held not of itself to render award invalid. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

In an action on a fire policy, finding of the jury that the appraiser chosen by the insurer on disagreement as to the loss as provided in the policy was not disinterested held supported by pleadings and evidence. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

An award of appraisers under a fire insurance policy and arbitration contract was not invalidated by their failure to give insured notice of their meeting, where there was no provision in the policy or the arbitration agreement for such notice, and no proof that insured requested permission to come before the appraisers and make any statement or offer any evidence. *Home Ins. Co. v. Walter* (Civ. App.) 230 S. W. 723.

Where the arbitration clause of a fire insurance policy and an arbitration agreement between the parties did not require the umpire to continuously participate in the appraisal from the beginning, but provided that he was to act only in matters of difference

between the appraisers, the fact that the umpire did not participate in the deliberations of the appraisers until after disagreement between them arose did not affect the validity of the award. *Id.*

The award of appraisers under an arbitration provision of a fire insurance policy may be set aside only upon clear evidence that it was the result of fraud, mistake, or accident, that is, that it was made by appraisers who were incompetent, interested, or partial. *Id.*

**106. — Settlement between parties.**—Receipt from insured of \$14 in payment of claim for total disability under an accident insurance policy, including doctor's bills, etc., which amount paid was only the amount of doctor's bills, was not a settlement in full for injuries sustained. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

Where an insured under a hail policy signed a proof claim submitted by the adjuster specifying the amount of damages, but subsequently claimed larger damages in writing, the proof of claim was not conclusive on insured as a settlement; since it was a mere offer which had not been accepted by the insurer prior to withdrawal. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

Where there was no controversy between the parties as to amount due under life policy when release in full was given, the payment of a lesser amount than was due under the policy in compromise would not supply the necessary consideration for the release, and, where there was no other independent consideration released, would not bar recovery of the balance. *First Texas Prudential Ins. Co. v. Connor* (Civ. App.) 209 S. W. 417.

Though by-laws provide that, if a member files claim before his disability ceased, he waives all right to future benefit, insurer cannot reduce its true liability by means of a mere unaccepted offer on the part of insured to receive in satisfaction of his demand less than amount to which he is entitled under Rev. St. art. 4807. *International Travelers' Ass'n v. Powell*, 109 Tex. 550, 212 S. W. 931.

Compromise and settlement of claim under fire policy cannot be avoided and recovery allowed on policy, because made on statement of insurer's adjuster to insured that the company was not liable on the policy, because the insured goods had, before the fire, without notice to or consent of insurer, been removed from the place where insured; this being but an expression of his opinion, and no fiduciary relation being shown between him and insured. *National Fire Ins. Co. v. Plummer* (Civ. App.) 228 S. W. 250.

**107. — Setting aside adjustment.**—In action on policy of fire insurance, irregularities in award, together with its inadequacy, held to authorize finding that there was a mistake as to amount, or that the appraisers intentionally found less than necessary to restore building. *Security Ins. Co. v. Kelly* (Civ. App.) 196 S. W. 874.

Where a mistake as to insured's right under a hail insurance policy inducing him to sign a compromise is mutual or induced by fraud, equity will not ordinarily refuse relief on the ground of negligence on plaintiff's part. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

In suit to set aside award of appraisers of loss under a fire insurance policy, evidence held not to show that the insurer's appraiser was incompetent, interested, or partial, as "competent," when generally applied to arbitrators, does not mean "expert." *Home Ins. Co. v. Walter* (Civ. App.) 230 S. W. 723.

**108. Right to proceeds.**—In an action on an insurance policy wherein the name of the owner of the property insured was erroneously given, evidence held to support a finding that the contract of insurance was in fact entered into between plaintiff and defendant company. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

That buyer of machinery, when he procured insurance, did not know of a stipulation for insurance in favor of the sellers in a chattel mortgage given by buyer for the purchase money, cannot be urged by a third lienholder, claiming proceeds of policy, as a reason why ordinary rule as to estoppel by contract should not apply. *Walter Connelly & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

In absence of stipulation in the policy, a contract of fire insurance is personal to insured, and does not indemnify the holder of a lien on the property insured. *Id.*

A chattel mortgage gives the mortgagee no lien upon proceeds of a fire insurance policy upon the property, where the policy is taken by the debtor for his own protection. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

Proceeds of life insurance policy is in nature of, and constitutes, personal property. *Murchison v. Murchison* (Civ. App.) 203 S. W. 423.

Where the agent of an insurance company has authority to act for the company, he may waive the provisions of the policy prescribing the mode to be pursued in changing the beneficiary, and bind his principal by verbal contract changing the beneficiaries. *American Nat. Ins. Co. v. Wallace* (Civ. App.) 210 S. W. 859.

Where agreement by a grantee and assignee of judgment debtor corporation to advance money for composition with its unsecured creditors was primarily between the original lienholders and himself, rather than the corporation, whether the purchaser at judicial sale can deduct from the amount paid to redeem from liens on properties actually covered by his purchase the amount paid from insurance money received for destruction of property acquired depends upon whether the destruction of the property was before or after judicial sale. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

Where the insurance policy taken out by the master is not one providing specially for the benefit of injured employés, but is merely one indemnifying against liability, the employé is not in privity with the parties thereto, and is without right to sue thereon. *Owens v. Jackson-Hinton Gin Co.* (Civ. App.) 217 S. W. 762.

110. — **Policy payable to mortgagee.**—In an action on an insurance policy, where in the defendant alleges that the policy is payable in case of loss to a mortgagee, a judgment for plaintiff was not erroneous, since the assured under the policy may maintain an action thereon in his own name, although the policy be payable to another. *Camden Fire Ins. Ass'n v. Wandell* (Civ. App.) 195 S. W. 289.

As a general rule, if mortgagor is charged with duty of insuring for benefit of mortgagee, mortgagee will have equitable lien upon money due on policy taken out by mortgagor to extent of mortgagee's interest in property destroyed. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

A vendor's lien claimant has no claim, because of stipulation in trust deed for insurance for his benefit, to insurance on machinery acquired after execution of such trust deed, for the price of which a chattel mortgage was given containing a stipulation for insurance in favor of the mortgagee, the seller of the machinery. *Id.*

Stipulations in contract and chattel mortgage requiring mortgagor to insure property in favor of mortgagee, held to create lien in favor of mortgagee on proceeds of policy, and not to transfer those proceeds to mortgagee. *Id.*

Where chattel mortgagee was entitled to lien on part of proceeds of insurance policy, if proceeds of policy had not been exempt from garnishment, service of writ on insurance company would have conferred on mortgagee right to such proceeds to extent of their lien superior to right of holder of vendor's lien. *Id.*

Under an agreement between mortgagee and mortgagor that the latter will insure the property for the benefit of the mortgagee, the latter has an equitable lien on the proceeds of the policy, even though the property itself was exempt from forced sale. *Mosley v. Stratton* (Civ. App.) 203 S. W. 397.

111. — **Trustee.**—In action involving right to proceeds of insurance policy covering machinery, as between sellers who claimed equitable lien under stipulations in chattel mortgage for insurance in their favor, and a vendor's lien claimant in whose favor trust deed had been executed, evidence held not to sustain finding that trustee, who was also agent of insurance company, after issuing policy, instead of delivering it, retained possession in his capacity as trustee until after fire occurred. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

113. — **Assignment of claim.**—Where the consideration for assignment of proceeds of insurance policy was then existing indebtedness of assignor to assignee, assignee is not entitled to protection as innocent purchaser of claim evidenced by policy. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Contract for sale of machinery and purchase-money chattel mortgage construed, and held that sellers had lien on proceeds of policy insuring machinery superior to one holding vendor's lien on land upon which machinery was situated, and who had an assignment indorsed on policy, after a loss occurred. *Id.*

114. **Time for payment.**—Under by-law made part of a policy of accident insurance, providing that payment shall become due and payable 90 days after receipt of proofs provided for, and in case of liability in excess of \$1,000, insurer reserved right to pay such sum in five equal payments, where insurer did not exercise its option to pay in installments within such 90 days, judgment for bulk sum of policy was not erroneous. *International Travelers' Ass'n v. Votaw* (Civ. App.) 197 S. W. 237.

117. **Subrogation of insurer.**—Where a fire policy was invalidated as to the mortgagor by his taking out additional insurance, but the insurer was required to pay the loss to the mortgagee under an independent contract contained in the mortgage clause of the policy after several years of litigation, held, that the insurance company was subrogated to the mortgagee's rights to the extent of the mortgage debt at the time the insurer should have paid the loss to the mortgagee. *Home Ins. Co. v. Boatner* (Civ. App.) 218 S. W. 1097.

Insurer of goods destroyed by fault of railroad company is subrogated to rights of assured to recover against railroad to extent to which insurer has been compelled to pay. *Hartford Fire Ins. Co. v. Triplett* (Civ. App.) 223 S. W. 305.

118. **Interest.**—A demand is "liquidated," to begin to carry interest, when the amount due or to become due is fixed by law or by agreement between the parties. *Fire Ass'n of Philadelphia v. Strayhorn* (Com. App.) 211 S. W. 447.

A fire insurer's denial of liability matures the demand for loss or damages and interest runs from the date of denial, regardless of whether 60 days has expired after proofs of loss were furnished, and regardless of whether proofs of loss were waived. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

121. **Defenses in general.**—Life insurance company's liability on policy is not canceled because beneficiary named in policy feloniously kills insured. *Murchison v. Murchison* (Civ. App.) 203 S. W. 423.

A bank may maintain a suit against a surety company to recover upon fidelity bonds the amount of its cashier's defalcations, although the directors have already refunded the money to the bank, the bank still retaining legal title to the bonds, and the surety company claiming no defense under the bonds as against the directors, who are not complaining. *Southern Surety Co. v. Citizens' State Bank of Hempstead* (Civ. App.) 212 S. W. 556.

122. **Defenses against mortgagee.**—Insurer of piano, having paid amount of loss on piano to insured after his notice to it to pay part to seller of piano, who retained mortgage on piano, and after garnishment by seller, could not avail itself of plea of exemption of such insurance proceeds, it having been waived by such debtor's notice. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

124. **Reinsurance.**—Criminal acts of defendant fire insurance company's general agent, who reinsured fictitious dwelling with plaintiff fire insurance company as its agent, and collected insurance for himself, held to create no liability against plaintiff, which could recover amount paid on fraudulent proofs of loss. *Rio Grande Fire Ins. Co. v. Concordia Fire Ins. Co.* (Civ. App.) 199 S. W. 824.

Reinsurer's payment of amount of reinsurance to the insurer, upon proofs of loss fraudulently made by agent, held a mutual mistake not entitling the insurer to retain the money. *Id.*

The common acceptance of the term "reinsurance" is to assume the obligation imposed by a policy of insurance. *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

A contract of one company assuming the liabilities of another company does not constitute an issuance of a new policy upon the life of one dead at the date of such contract, nor an extension of the period of limitation which had begun to run. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.



## TITLE 72

## INTEREST

Art.	Art.
4973. Definition of "interest."	4980. Contracts for a greater per cent. void.
4974. Legal interest.	4981. Judgments to bear six per cent. when not otherwise stipulated.
4975. "Conventional interest."	4982. Double the amount of usurious interest recovered, when.
4976. Distinction between the two.	4983. Usury, how pleaded.
4977. Six per cent. the legal rate.	
4978. Six per cent. on open accounts, when.	
4979. Ten per cent. the conventional rate.	

**Article 4973. [3097] Definition of "interest."**

Cited, *Barker v. Torrey*, 69 Tex. 7, 4 S. W. 646; *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930.

1. "Interest."—"Interest" is of three kinds, conventional interest, fixed by parties in contract, legal interest, allowed by law when parties have not agreed upon rate, and interest which is allowed as damages for detention of money. *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

2, 3. **Interest as damages—Indemnity for loss or injury.**—If an injury to land is temporary, the measure of damages is the amount necessary to repair the injuries and place the land in the condition it was immediately preceding the injury, with interest. *Houston & T. C. R. Co. v. Wright* (Civ. App.) 195 S. W. 605.

Measure of damages for permanent injuries to land held the difference between the actual cash value immediately preceding and immediately after the injury with interest. *Id.*

In equity, interest is allowed in order to afford compensation, and is given or withheld as under the circumstances of the case appears just. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

In an action against one obtaining goods by false pretenses, by fraudulent statements as to his financial status, measure of damages is ordinarily the value of the goods obtained, with 6 per cent. interest. *Sanger Bros. v. Barrett* (Civ. App.) 221 S. W. 1087.

Interest from time of injury to abutting property from elevation of highway is allowable as part of the damages, though at time of action they are unliquidated. *Dallas County v. Barr* (Civ. App.) 231 S. W. 453.

4. — **Breach of contract.**—Measure of damages for breach by purchaser of a contract to purchase land is difference between price seller was to receive and market value of land at date of breach, plus interest from date of such default. *Runnells v. Pruitt* (Civ. App.) 204 S. W. 1017.

Interest, as such, cannot be recovered upon fixed amount due under express parol contract, but is recoverable only as damages. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

Where plaintiff and defendant, jointly interested in a fund placed in a bank, entered into a contract whereby one of them was given control thereof for the purpose of making payment of claims of certain third persons, such fund was a special fund, and, when defendant refused to apply it in accordance with the agreement, he did more than breach an ordinary contract for the payment of money in discharge of debt, and should be held liable for all loss directly occasioned by his breach of contract, and recovery should not be limited to the principal sum, with interest. *Ferguson v. Mansfield* (Civ. App.) 215 S. W. 234.

In suit for unliquidated damages for a breach of contract, it was improper to add to the verdict interest from date of breach, since interest, when allowed in such contracts, is allowed as a part of the damages. *Faulkner v. Reed* (Civ. App.) 229 S. W. 945.

Interest on damages caused by buyer's breach of an oil purchase contract are recoverable as an element of damages. *Pierce Oil Corporation v. Gilmer Oil Co.* (Civ. App.) 230 S. W. 1116.

Repudiation of an oil contract by the purchaser gave the seller the right to treat the contract as breached, and where the seller did this by selling the oil to other parties the seller had the right immediately to sue for the breach and recover damages as of that date, and interest on the difference between the resale and contract price was properly allowed from that date, although under the contract the seller would not have received payment for such oil until much later dates, the purchaser's acts having made necessary an antecedent ascertainment of the damages. *Id.*

5. — **Breach of warranty.**—In an action for damages for breach of covenant against incumbrances consisting of an outstanding lease of the granted property, interest was properly allowed on the amount found by the jury as the amount by which the value of the use and enjoyment of the land by the grantee was diminished by occupation of the premises by the lessee. *Morriss v. Hesse* (Civ. App.) 210 S. W. 710.

Upon a breach of warranty of soundness of a mule sold, the measure of damages is

the difference between the mule's value at the time of sale, with the defect or unsoundness constituting the breach, and what would have been its value without such defect, with interest thereon at 6 per cent. from date of sale. *Fulwiler Electric Co. v. Jinks McGee & Co.* (Civ. App.) 211 S. W. 480.

8. — **Wrongful seizure under attachment or other writ.**—See *Hyway Motor Co. v. Saulsbury* (Civ. App.) 223 S. W. 322.

9. — **Conversion.**—See *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

Where a bailee of property, as security for money loaned, sold and converted it, interest could be allowed only upon the difference between the value of the property and the amount loaned, instead of upon the total value of the property. *Early-Foster Co. v. Mid-Tex Oil Mills* (Civ. App.) 208 S. W. 224.

10. — **Claim against carrier.**—Amount of damage sustained by shipper of cattle from carrier's negligence in transit, plus 6 per cent. interest from date of loss, is correct measure of shipper's damage at date he recovers judgment against carrier. *International & G. N. Ry. Co. v. Reed* (Civ. App.) 203 S. W. 410.

11. — **Rate and computation.**—The only heir of deceased, as trustee, because concealing a will making bequests to others and naming him as executor, and using the property, became liable to them for the highest rate of interest allowed by law. *Van Orden v. Pitts* (Com. App.) 206 S. W. 830.

Liability as trustee for highest rate of interest of sole heir of deceased, who, concealing will naming other beneficiaries, used the property as his own, is limited to the period from his discovery of the will to his death; the principal and interest at his death becoming a claim against his estate. *Id.*

A demand is "liquidated" to begin to carry interest when the amount due or to become due is fixed by law or by agreement between the parties. *Fire Ass'n of Philadelphia v. Strayhorn* (Com. App.) 211 S. W. 447.

12. — **Destruction of property.**—If the value of land is totally destroyed by negligence or wrongful act, the owner is entitled to recover its actual cash value at the time its value was destroyed, with legal interest. *Houston & T. C. R. Co. v. Wright* (Civ. App.) 195 S. W. 605.

A party who recovers damages for destruction of property by fire is entitled to interest on value of property from time of destruction. *Wiess v. Gordon* (Civ. App.) 209 S. W. 486.

Generally the measure of damages when a crop is totally destroyed, whether it is matured or growing, is its market value, if it has one, at the time and at the place it is destroyed, and legal interest thereon from the date of its destruction; and, when the crop is partially destroyed, it is the difference between its market value if it had one, as it stood immediately preceding and its market value immediately following the injury with legal interest on the amount of such difference. *Bowman & Blatz v. Raley* (Civ. App.) 210 S. W. 723.

The amount recoverable from a railroad for stock killed does not include interest. *St. Louis Southwestern Ry. Co. of Texas v. Post* (Civ. App.) 220 S. W. 129.

16. **Interest on recovery of money paid.**—In suit to rescind contract to purchase land and recover amount paid, measure of recovery is sum which plaintiff paid for land, with 6 per cent. interest from payment. *Rascoe v. Myre* (Civ. App.) 202 S. W. 780.

Intervener's suit being on an implied contract for reimbursement for what he had paid, the interest to be recovered is the legal rate and not the rate stated in the notes sued on. *Miller v. Guaranty Trust & Banking Co.* (Civ. App.) 207 S. W. 642.

Where purchaser of an interest in oil, gas, and mineral lease recovered from the seller a sum paid in advance to the seller for the interest, which the seller could not convey, the purchaser was also entitled to interest on such sum from the date of its payment. *Wilcox v. Crawford* (Civ. App.) 231 S. W. 1104.

19½. **Interest on deposit with third person.**—Where a vendor of land which was subdivided into many different parcels agreed to deposit \$50,000 with trustees to be paid as bonus to the first railroad coming through the land, held that under the agreement the vendor or his heirs were entitled to the interest on the fund during the time it was held by the trustees, before a railroad was constructed. *West Texas Bank & Trust Co. v. Matlock* (Com. App.) 212 S. W. 937.

20. **Interest on insurance, dividends and premiums.**—See *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 705.

A fire insurer's denial of liability matures the demand for loss or damages and interest runs from the date of denial, regardless of whether 60 days has expired after proofs of loss were furnished, and regardless of whether proofs of loss were waived. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

25. **Interest on note.**—Upon a promise to pay with interest at a specified rate, interest runs from the date of the instrument, and not maturity, as a matter of law. *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

26. **Interest on purchase price.**—In action for purchase price of personalty, where there is nothing to indicate with reasonable certainty date upon which personalty was to be paid for, no interest should be allowed prior to judgment. *Trevathan v. G. M. Hall & Son* (Civ. App.) 209 S. W. 447.

In action for purchase price of potatoes to be shipped by carrier, it was error to allow a recovery for interest for any period of time prior to actual shipment or prior to seller's compliance with contract. *Id.*

A contract providing for execution of notes by purchaser at the time the property was conveyed by warranty deed to her is not uncertain as to the date when interest

begins, since upon a promise to pay with interest at a specified rate interest runs from the date of the instrument, and not of maturity, as a matter of law. *Wilson v. Beaty* (Civ. App.) 211 S. W. 524.

Where a purchaser, who was induced by fraud to buy an oil lease in part payment for which he executed notes bearing interest at a stipulated rate, thereafter elected to ratify the contract by suing for damages for the deceit, he is liable for the interest on the purchase-money notes as well as the principal, against which he is entitled to set off the damages occasioned by the deceit. *Pickrell v. Imperial Petroleum Co.* (Civ. App.) 231 S. W. 412.

**32. Tender of principal or interest.**—See *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Parsons* (Civ. App.) 226 S. W. 418.

If the maker of a promissory note tenders an amount insufficient to discharge it in full, he does not stop the running of interest even on the sum tendered; it being not a question of what he believes to be due, but of what is actually due. *Barreda v. Merchants' Nat. Bank* (Civ. App.) 206 S. W. 726.

A tender of payment not accepted cannot reduce the amount of interest recoverable from the purchaser under an oil purchase contract, where the amount tendered was not the full amount then owing, so that the seller was not bound to accept it, and where it was not shown that the tender was kept good. *Pierce Oil Corporation v. Gilmer Oil Co.* (Civ. App.) 230 S. W. 1116.

#### Art. 4974. [3098] "Legal interest."

See *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

Cited, *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930; *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470; *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

#### Art. 4975. [3099] "Conventional interest."

Cited, *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930; *Yates v. Watson* (Com. App.) 221 S. W. 966.

**Art. 4976. [3100] Distinction between legal and conventional recognized by law.**

Cited, *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930; *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

#### Art. 4977. [3101] Six per cent the legal rate.

See *Walker v. Alexander* (Civ. App.) 212 S. W. 713; *Nueces Hotel Co. v. Ring* (Civ. App.) 217 S. W. 255.

Cited, *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930; *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

**Law not retroactive.**—Act April 13, 1891, providing the rate of interest when none is specified, is not retrospective, so as to affect causes of action theretofore accrued, retroactive laws and laws impairing obligation of contracts being inhibited by Const. art. 1, § 16. *Landa v. Obert*, 5 Civ. App. 620, 25 S. W. 342.

**Liquidated damages.**—Under this article, interest, although prayed for, was not recoverable in suit for damages under contract providing for \$500 liquidated damages for breach, and district court had no jurisdiction, amount in controversy being exactly \$500. *Escue v. Hartley* (Civ. App.) 202 S. W. 159.

**Computation.**—Where district attorney made payments of fees to county under duress, he was entitled to interest from time of the payment, and not merely from the time of demanding return of the money. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

In buyer's suit against seller for fraud, where considerable portion of sum paid by buyer for repairs was expended during summer of 1915, and some installments of price were paid as late as 1916, trial court improperly allowed buyer interest from January 1, 1915, on all sums paid seller on price, and also on all sums paid out for repairs. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

**Street paving certificate.**—In judgment upon a street paving certificate a provision that the aggregate sum of principal and interest should bear interest from its date at the rate of 8 per cent. per annum and the attorney's fees at 6 per cent. per annum was erroneous so far as providing that interest should bear interest at 8 per cent., and not 6 per cent.; that certificate not providing that past due interest should bear interest at 8 per cent. *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189.

**Liability of guardian.**—Under art. 4150, a guardian who neglected to invest or loan surplus moneys in his hands belonging to his wards held liable for the principal and 10 per cent. interest as the highest legal rate thereon defined by art. 4977 not 4974, for the time he neglected to invest. *Yates v. Watson* (Com. App.) 221 S. W. 966, affirming judgment (Civ. App.) 187 S. W. 548.

#### Art. 4978. [3102] Six per cent on open accounts, when.

See *Cooper v. Gordon* (Civ. App.) 23 S. W. 608.

Cited, *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930; *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

**"Open account."**—Suit to recover real estate sale commissions is not one upon an "open account," within this article. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

**Computation.**—Under this article, a judgment allowing interest in such case from the date of the account will be modified to conform to the statute, and the costs of the appeal taxed to the appellee. *Ft. Worth & D. C. Ry. Co. v. White* (App.) 14 S. W. 1068.

### Art. 4979. [3103] Ten per cent the conventional rate.

Cited, *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930.

**In general.**—Under Const. art. 5, § 16, county court had no jurisdiction of suit by subscribers to corporate stock on defendant's agreement to take stock off their hands after year if not satisfied; interest in addition to \$1,000 prayed for by plaintiffs being merely damages, and contract not coming within this article. *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

The mere fact that an agent had authority in writing to make such a contract would not make a written contract within this article. *Id.*

**Alteration.**—Where a duplicate contract for purchase of land reciting the purchase price to be "one thousand one hundred dollars, payable fifteen dollars cash in hand and monthly payments of ten dollars each, until the total amount of \$1,100 has been paid," was altered by placing the words "including interest eight per cent.," after the words "ten dollars each," of which alteration the holder had notice, the instrument was in its legal effect a forgery and unenforceable in law. *Forrest v. Tobin* (Civ. App.) 226 S. W. 466.

### Art. 4980. [3104] Contracts for greater per cent void.

Cited, *Bell v. C. J. Gerlach & Bro.* (Civ. App.) 205 S. W. 470.

**1. In general.**—Any advantage or benefit exacted, which, added to interest reserved, increases compensation received for loan to an amount in excess of the lawful interest, constitutes usury. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

The right to lend money at interest is a creature of statute, and not an inherent right. *Juhan v. State*, 86 Cr. R. 63, 216 S. W. 873.

The taking of interest, or as it was then called usury, was looked upon in early times with great disfavor, and actually prohibited, not only by the old English law, but by the Mosaic law of the Jews, and to this day the calling of lending money at interest is subject to regulation. *Id.*

**3. Intent.**—A collateral transaction between borrower and lender, whereby lender takes profit, will not render loan usurious when entered into in good faith and without usurious intent. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

In absence of express reservation of more than legal interest to establish usury, it must be shown that there was a corrupt agreement or device to cover usury, and that it was in full contemplation of parties. *Id.*

**4. Loans in general.**—A contract by which defendant, under the guise of purchase of wages to be earned by the borrower in the future, charged 30 per centum a month interest for a loan, is usurious, under Const. art. 16, § 1, fixing the maximum rate of interest at 10 per centum. *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

If the amount paid by the borrower to the lender in excess of legal interest was intended as compensation for the use of money loaned, it is usury, regardless of what manner or form or under what pretense cloaked. *Hudmon v. Foster* (Civ. App.) 210 S. W. 262.

**5. Bills, notes and other instruments for the payment of money.**—Under the provision that all contracts which directly or indirectly stipulate for a greater rate of interest than permitted shall be "void and of no effect for the whole rate of interest," a note for \$1,380 bearing interest at 12 per cent., the then permissive rate, the only consideration received therefor by the maker being \$1,200, is usurious. *Gilder v. Hearne*, 79 Tex. 120, 14 S. W. 1031.

Contract for extension of time of payment of note which provides means whereby payee might keep informed of condition of business of maker, held not necessarily usurious. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

Payments of money or property made by an indorser upon notes of a corporation, he being a party to the notes, and to the corporation's suit against the lender, constituted usury, if thereby the lender obtained more than 10 per cent. per annum as compensation for the use of his money by the company. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

A note for \$1,800, secured by deed of trust, bearing interest at 6½ per cent. per annum, payable annually, on principal until due, and 10 per cent. interest on principal and interest after due until paid, together with an interest installment note for \$148.80, secured by second deed of trust, reciting that it bore interest at 10 per cent. per annum after due until paid, such second note representing the interest on the principal sum of \$1,800, calculated at 1½ per cent. per annum for five years, the period of loan, held not usurious. *Shear Co. v. Hall* (Civ. App.) 215 S. W. 567.

**6. — Renewal note.**—Usury in a note is not purged by giving a new note for the balance due on the first, where the new note was not given in compromise or settlement of claim of usury in the first note. *Dean v. Maxfield* (Civ. App.) 209 S. W. 466.

**9. Extension of time on contract.**—If, to compensate a vendor of land for giving time on the purchase price, a sum is added to the agreed price greater than the per-

mitted rate of interest, though such sum is incorporated as principal in the purchase-money notes, the contract is usurious. *Fisher v. Hoover*, 3 Civ. App. 81, 21 S. W. 930.

If a transaction between a company, the indorser of its notes, and the payee, was intended as compensation for the use of the payee's money, and was more than 10 per cent. per annum, the transaction was usurious, but if it was compensation for the payee's agreement to extend time for payment of the notes, it was not usurious. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

**10. Compound interest.**—A contract for the legal rate of interest during the time of forbearance, and for interest upon interest thereafter, is not usurious. *Shear Co. v. Hall* (Civ. App.) 215 S. W. 567.

**13. Payment of installments of principal.**—Contract of loan company extending \$1,400 loan, to be repaid at 6 per cent. interest in 34 monthly payments of \$21.42, is not usurious on its face. *Harrop v. National Loan & Investment Co. of Detroit, Mich.* (Civ. App.) 204 S. W. 878.

**14. Commissions.**—Any usury in transaction by which parties arranging loan retained 10 per cent. thereof would not be eliminated merely because certain of lenders did not receive part of amount retained. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

Loan out of which lender retained 10 per cent. in addition to interest is usurious. *Id.* Where one party to a written contract agreed to give \$5,000 in stock of a corporation to be organized by him, for services to be rendered by the other party in finding some person who would make him a loan of \$17,500, or a part thereof, and, if part, then to advance the remainder, such contract will be enforced as against a claim of usury; no fraud, accident, or mistake being alleged. *Hudmon v. Foster* (Civ. App.) 210 S. W. 262.

Where defendants did not loan or advance to the borrower any money but secured other parties to do so, the amount paid them was not for the use or detention of money belonging to them, and was therefore not interest, so as to be usurious. *Id.*

**17½. Purging contract of usury.**—Contract may be purged of usury by subsequent agreement. And where borrower gave lenders option to purchase property, and later secured release from such agreement by giving his notes, any usurious element was eliminated by later contract providing for cancellation of such notes if the borrower did not redeem his property after foreclosure, and such property was not redeemed. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

**18. Rights and remedies of parties.**—An agreement to extend the time of payment of a note bearing 12 per cent. interest, in consideration of the payment by the maker of the interest then due and 3 per cent. additional interest, discharges the liability of the sureties, without whose knowledge and consent it is made; the validity of the agreement not being affected by arts. 4979, 4980. *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111.

The charging of usurious interest does not render unenforceable the agreement to pay the principal. *Watson v. Evans* (Civ. App.) 195 S. W. 1170.

That a contract is usurious does not entirely discharge sureties, but they are liable for principal. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

**19. — Application of payments.**—Where notes, on their face, do not show usury, and there is nothing to show that any payment was made on usurious interest, payment will be applied to principal, and not to usury. *Bowman v. Bailey* (Civ. App.) 203 S. W. 922.

Where a contract was usurious, amounts paid as interest are by law applied to the principal sum due. *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

**21. Rights and remedies of third persons—Assignees.**—Where, at time claim for usury was assigned, maker assignor had not paid any amount as interest on notes, and amount paid did not exceed amount received from payee, lender, assignment amounted to nothing. *Bowman v. Bailey* (Civ. App.) 203 S. W. 922.

**22. — Party assuming to pay note or loan.**—Plaintiff, who purchased automobile mortgaged to secure notes and assumed notes, is in no position to plead usury, since his liability arises from assumption of notes. *Bowman v. Bailey* (Civ. App.) 203 S. W. 922.

**25. Penalties and forfeiture.**—A contract, by which defendant, under the guise of purchase of wages to be earned by the borrower in the future, charged 30 per centum a month interest for a loan, is usurious, under Const. art. 16, § 1, fixing the maximum rate of interest at 10 per centum, and under this article, is void as to the interest. *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

**26. Who may plead.**—Where borrowing companies conveyed all their property to the lender to satisfy indebtedness, which was usurious, and the lender conveyed to a new company formed to unify business of borrowing companies, the new company could not avail itself of fact of usury in contract between lender and borrower companies, transaction not constituting an "amalgamation," "merger," or "consolidation" of borrower companies. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

Plaintiffs not being parties to a usurious contract, and having acquired no rights based upon such contract, the contract affords them no grounds for relief against defendant, the lender under the contract. *Id.*

Where new company, as principal and stockholder, as surety, pursuant to transactions between the old companies and a lender to them, agreed to pay indebtedness of old companies to lender, new company and its stockholder, as against lender, are not entitled to plead usury as to transactions between lender and old dissolved corporations. *Id.*

**27. Waiver and estoppel.**—A claim founded upon usury may be compromised, settled, and released. *Dean v. Maxfield* (Civ. App.) 209 S. W. 466.

**Art. 4981. [3105] Judgments, rate of interest on.**

**In general.**—In action for breach of covenant against incumbrances, consisting of retention of possession of the premises by a tenant of the vendor for several months after the conveyance, it was improper to allow interest on the amount specially found by the jury to be the value of the diminution of the use and enjoyment of the land by such occupancy from the date of the accrual of the cause of action therefor, there being no jury finding awarding such interest; but interest on such amount was recoverable only from the date of the judgment of the trial court on the finding. *Morriss v. Hesse* (Com. App.) 231 S. W. 317.

**Judgment on contract.**—Under Rev. St. 1879, art. 2980, providing that all judgments shall bear 8 per cent. interest, except when the contract upon which they are founded bears a specified rate greater than 8 per cent., but less than the highest rate allowed by law, in which case the judgment shall bear the rate specified in the contract, it is not error, when the contract provides for 5 per cent., to render judgment on such contract for 5 per cent. until date of judgment, and 8 per cent. thereafter. *Sheldon v. Martin* (Sup.) 8 S. W. 61.

**Judgment on note.**—Under Rev. St. 1879, art. 2980, providing that on contracts bearing interest at more than 8 per cent. the judgment shall bear the same rate from its date, a judgment on a note calling for 12 per cent. interest and 10 per cent. attorney's fees is properly entered for the sum of principal, interest, and attorney's fees, the whole to bear 12 per cent. interest from date. *Liano Improvement Co. v. Watkins*, 4 Civ. App. 428, 23 S. W. 612.

Where the note sued on provided for an interest rate of 10 per cent., the judgment thereon properly bore interest at that rate from the judgment date under this article. *Stanton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

**Judgment on certificate of assessment.**—A judgment upon a certificate of assessment providing for 8 per cent. interest only bears 6 per cent. interest, in view of this article, and art. 1011. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

**Judgment for broker's commission.**—Under this article, all judgments not entered upon contracts ascertaining rate of interest shall bear 6 per cent. per annum from date, and a judgment for broker's commission, bearing 8 per cent. was erroneous. *Hodde v. Malone Real Estate Co.* (Civ. App.) 196 S. W. 347.

**Art. 4982. May recover double usurious interest paid.**

See *Cotton v. Cooper* (Com. App.) 209 S. W. 135.

**In general.**—In view of Const. art. 16, § 11, as to interest and usury, this article, authorizing recovery of double amount of usurious interest paid, did not abrogate existing rule concerning application to principal of payments made upon usurious interest. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

**Election of remedies.**—Under Const. art. 16, § 11, as to interest and usury, and this article, authorizing recovery of double amount of usurious interest paid, in case of usury debtor has election to sue for penalty, or to have amount paid as usurious interest credited upon principal. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

**Usurious interest—Necessity of payment.**—Where there was nothing to show that payments made were made on usurious interest, there could be no recovery of double amount of usurious interest paid, as provided by this article. *Bowman v. Bailey* (Civ. App.) 203 S. W. 922.

The mere claim of usurious interest in an account which had not been paid does not subject the claimant to the statutory penalty for usury, which applies only where usury is collected or received. *Driscoll v. Dennis* (Civ. App.) 220 S. W. 576.

— **What is payment.**—Under this article, taking by creditor under sale by virtue of a mortgage in satisfaction of the usurious portion of the debt, was a payment, entitling mortgagor to recover double interest. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Civ. App.) 203 S. W. 1167.

Usury is paid and received, allowing recovery of double penalty under this article, where holder of usurious note secured by deed of trust, at trustee's sale thereunder bought for more than was due, excluding usury, and the full amount of the bid was credited on the note, and a deed was made by the trustee to the purchaser; the title to the property thereby passing to him. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Com. App.) 231 S. W. 738.

— **Necessity that payment be pursuant to contract for usury.**—The inclusion in an account which had been paid of an amount representing interest above the legal rate does not subject the party receiving it to the penalty for usury, where the other party denied any contract to pay usurious interest, since the penalty can be recovered only on proof that the payment was received and accepted upon a contract for usurious interest. *Driscoll v. Dennis* (Civ. App.) 220 S. W. 576.

**Persons entitled to enforce penalties.**—The maker of notes who has paid nothing thereon cannot sue the payee for the penalty for charging usury imposed by this article, where another has assumed payment of the notes; such action being maintainable only by the party paying the usurious interest or his legal representatives. *Burch v. First Guaranty State Bank of Quanah* (Civ. App.) 207 S. W. 552.

**Actions for penalties.**—In action under this article, to recover a penalty for collection of usurious interest on notes, paid by plaintiff makers to defendant, since such

payments did not inure to benefit of one who had signed notes as surety and paid nothing thereon, he was not a necessary party. *Dean v. Maxfield* (Civ. App.) 209 S. W. 466.

In an action to recover statutory penalties for extorting usurious interest, under a contract whereby defendants were to obtain \$5,000 worth of stock for themselves for providing, or finding others willing to provide, a loan of \$17,500, evidence held to support a finding that the contract was not usurious. *Hudmon v. Foster* (Civ. App.) 210 S. W. 262.

Evidence held not to establish payment of usurious interest so as to entitle plaintiff to recover penalty under this article. *Gunter v. Merchant* (Com. App.) 213 S. W. 604.

A petition held to allege that defendant loaned plaintiffs \$6,800 for one year, and took their note for \$8,000 incorporating therein \$1,200 as interest for the use of \$6,800, and that the supplemental petition admits that they only paid on the note \$6,600, so that, usurious interest not having been actually paid, the petition does not show a cause of action for penalty for usury under this article. *Id.*

#### Art. 4983. [3107] Usury, how pleaded.

See *Bexar Bldg. & Loan Ass'n v. Robinson*, 78 Tex. 163, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. Rep. 36.

**Necessity of pleading usury.**—Under direct provisions of this article, defense of usury must be interposed by special plea under oath. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

Usury being a defense which is required to be specifically pleaded, such issue cannot be raised for the first time in a suit to set aside the judgment on a note asserted to be usurious. *Chandler v. Young* (Civ. App.) 216 S. W. 484.

**Sufficiency of pleading.**—Petition for statutory penalty for collecting and receiving usurious interest held not subject to general demurrer. *Dean v. Maxfield* (Civ. App.) 209 S. W. 466.

**Sufficiency of verification.**—Under this article, a plea of usury set up by several co-defendants, but verified by one who refuses to join in it, or to avail himself of it, is bad. *Cherryhomes v. Carter*, 66 Tex. 166, 18 S. W. 443.

## TITLE 73

## IRRIGATION AND OTHER WATER RIGHTS

## Chap.

1. Regulating the mode of irrigation and the use of water.
2. Water improvement districts.
3. Water control and preservation districts.

## Chap.

4. Fresh water supply districts.
5. Conservation and reclamation districts.
6. Power plants.

## CHAPTER ONE

## REGULATING THE MODE OF IRRIGATION AND THE USE OF WATER

## Art.

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**Article 4991. [3115] Conservation and development of natural resources.**—The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams for irrigation, power and all other useful purposes; the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation; the reclamation and drainage of its overflowed lands, and other lands needing drainage; the conservation and development of its forest, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared



public rights and duties. [Acts 1895, p. 25; Acts 1913, p. 358, § 1; Acts 1917, 35th Leg., ch. 88, § 1; Acts 1921, 37th Leg., ch. 124, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.  
See *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Art. 4992. [3116] Certain waters declared state property; purposes for which waters may be diverted; owner of mining land to have prior right on application therefor.**—The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this Act. Provided that when an application is made for appropriation of such water for mining purposes, the owner of the land through which the water flows and which is to be appropriated shall have the prior right to appropriate same, and shall be permitted to exercise such right although such owner may not have made application prior to such application by another, and such owner shall have only ten days after notice of application to appropriate such water in which to exercise his prior right to appropriate, which he shall do by written application filed with the Board of Water Engineers within such time. [Acts 1895, p. 25; Acts 1913, p. 358, § 2; Acts 1917, 35th Leg., ch. 88, § 2; Acts 1921, 37th Leg., ch. 124, § 2.]

**Art. 4993. [3117] Storage or diversion; vested rights not prejudiced.**—The waters described in the preceding section may be held or stored by dams, in lakes or reservoirs, or diverted by means of canals, ditches, intakes, pumping plants, or other works constructed by any person, corporation, association of persons, or irrigation district created under the Statutes, for the purpose of irrigation, mining, milling, manufacturing, the development of power, the construction and operation of waterworks for cities and towns, or for stock raising, the waters of any arm or inlet of the Gulf of Mexico, or of any salt water bay, may be changed from salt to sweet or fresh water, and held or stored by dams, dikes, or other structure, and taken or diverted for any of the purposes expressed in this chapter. Provided that nothing in this Act shall prejudice vested private rights. [Acts 1895, p. 25; Acts 1913, p. 358, § 3; Acts 1917, 35th Leg., ch. 88, § 3; Acts 1921, 37th Leg., ch. 124, § 3.]

**In general.**—The act of 1895 relative to the diversion of waters from streams does not preclude the acquisition of prescriptive rights in view of the express authorization of diversion by the consent of the owners, as the presumed grant necessarily includes consent. *Martin v. Burr* (Sup.) 228 S. W. 543.

The act of 1895 relative to the diversion of water from streams does not repeal the statute of limitations of four years as applied to suits involving the rights of private riparian owners. *Id.*

**Art. 4994. [3118] Purposes of appropriation.**

**In general.**—That federal government, under "McAdoo statute," was exercising supervision over defendant's line of railway, would not enlarge defendant's right to trespass upon plaintiff's land and take water from a stream thereon, since even sovereign cannot exercise right of eminent domain, except by condemnation under due process of law. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

**Art. 4995. [3119] Priority of appropriation; who deemed an appropriator; this act not to work a forfeiture of rights acquired under declaration of appropriation duly acted upon; forfeiture.**

**Prescriptive right.**—Evidence held to show prior appropriation and use by defendants and their vendors of one head of water for irrigation for a period of more than 10 years. *Kountz v. Carpenter* (Civ. App.) 206 S. W. 109.

An upper riparian proprietor may, by prescription for 10 years, acquire the right to use the waters of a running stream in a special way and in excess of the right arising from ownership of his land to the injury and detriment of lower riparian proprietors. *Martin v. Burr* (Sup.) 228 S. W. 543.

— **Notice of claim.**—Though prescription does not begin to run in favor of a riparian owner diverting water to the detriment of lower owner until the party against whom the prescriptive right is claimed has notice, constructive notice has the same effect as actual notice. *Martin v. Burr* (Sup.) 228 S. W. 543.

— **Tacking.**—Deeds to land, together with all rights and appurtenances thereto, connected the grantee with the grantor's claim of right to divert water from a stream, though the right was inchoate and had not ripened into a prescriptive right. *Martin v. Burr* (Sup.) 228 S. W. 543.

— **Continuity of use.**—The use of water from a stream whenever the user needs it from time to time will support a prescriptive right to divert the water, and the continuity of the use is not broken because of the omission to use the water when not needed by the user. *Martin v. Burr* (Sup.) 228 S. W. 543.

— **Interruption.**—Where, after defendants' use of water for irrigation purposes for 14 years, plaintiff began using the excess water running through defendants' ditches, such use did not destroy defendants' already acquired prescriptive title to all of such water, or prevent the continued running of the statute of limitations. *Kountz v. Carpenter* (Civ. App.) 206 S. W. 109.

**Limitations applicable.**—The right to the use of water for irrigation runs with and is appurtenant to the land, and hence, like land, is subject to the 10-year statute of limitations. *Kountz v. Carpenter* (Civ. App.) 206 S. W. 109.

**Art. 4996c. Persons desiring to appropriate water shall make application to board of water engineers; requisites of application; map; no application required in certain cases.**

**Permit necessary.**—A municipal corporation, owning a waterworks system, is not entitled to injunction restraining others from using water from a stream, unless it shows that it has that right as a riparian owner, or by limitations, or by permit, under arts. 5107—1 to 5107—105 with reference to use of public water. *Miller v. City of Ballinger* (Civ. App.) 204 S. W. 1173.

**Arts. 4996f—4996s. [Repealed.]**

Art. 4996m cited, *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.

**Art. 4999a. Time limit for construction of reservoirs; extension; fee.**—Whenever the State Board of Water Engineers shall grant a permit for the use of water which use contemplates the construction of a storage reservoir, they shall fix the time actual construction work shall be commenced thereon not to exceed two years from the granting of such permit and such time limit may be extended by order of said Board upon the payment of such fees as the said Board may fix not to exceed the sum of one thousand dollars. [Acts 1920, 36th Leg. 3d C. S., ch. 46, § 3.]

**Explanatory.**—Took effect 90 days after June 13, 1920, date of adjournment. Sec. 4 repeals all laws in conflict.

**Art. 5001dd. Ascertainment of quantities of water required.**

**Validity.**—This article, empowering board of water engineers to determine the amount of irrigation water necessary for land, and to fix the rates to be charged for delivery, is not so lacking in mutuality of remedies, and does not so completely fail to make estoppel by judgment of the board mutual, as to be inoperative and without force. *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Decree of board.**—A decree of the board of water engineers that an irrigation company be not required to furnish any land with water which cannot be supplied by gravity flow from the canals of the company does not absolve the company from its duty of furnishing water to its canals, but does absolve it from again pumping the water from the canals onto the lands to be irrigated. *Nueces Valley Irr. Co. v. Howard* (Civ. App.) 206 S. W. 575.

**Art. 5001ff. Fees for permits.**—That the fees to be paid for filing in the office of the State Board of Water Engineers of applications for permits for the storage, diversion and use of water shall not exceed the sum of six thousand dollars for any one such application, permit or project. [Acts 1920, 36th Leg. 3d C. S., ch. 46, § 1.]

**Art. 5001fff. Fees, how paid.**—The fees provided by law to be paid to the State Board of Water Engineers upon applications for permits for the storage, diversion and use of water for any and all statutory purposes when such fees exceed one thousand dollars shall be paid as follows:

One-tenth shall be paid when the application is filed.

One-tenth shall be paid within thirty days after notice is mailed the applicant that the permit is granted. The balance shall be paid before the use of water is commenced under the permit; and a failure to so pay same shall annul such permit. [Id., § 2.]

**Explanatory.**—Act took effect 90 days after June 18, 1920, date of adjournment. Sec. 4 repeals all laws in conflict.

**Art. 5001ll. Corporations may sell or lease water or water rights; lien; obligation under contracts; priority of appropriators not affected.**

**Representations by lessee.**—Plaintiff's representation to lessor when procuring lease of water rights that he would build a refinery near said land within a reasonable time, held not misrepresentation of fact, but contractual in its nature, and not of itself a basis for cancellation of lease, unless made to deceive and cheat lessor, and with no intention on plaintiff's part to perform. *Osborn v. Texas Pac. Coal & Oil Co.* (Civ. App.) 229 S. W. 359.

**Rights of purchaser of irrigated lands.**—The fact that a water company actually and voluntarily delivered more water than was called for in a contract, without extra charge, had no binding effect on water company in favor of a subsequent purchaser of irrigated lands, who had knowledge thereof. *Rowles v. Hadden* (Civ. App.) 210 S. W. 251.

**Art. 5001p. Injunction authorized.**

**Right to injunction.**—A municipal corporation, owning a waterworks system, is not entitled to injunction restraining others from using water from a stream, unless it shows that it has that right as a riparian owner, or by limitations, or by permit, under arts. 5107—1 to 5107—105, with reference to use of public water. *Miller v. City of Ballinger* (Civ. App.) 204 S. W. 1173.

**Art. 5002. [3125] Formation of corporations authorized.**

See *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Obligations assumed.**—The purpose of permitting incorporation under this article, is to enable the corporation to furnish water for irrigation to those entitled to the same; and while this can be done by contract, those owning or holding a possessory right or title to land adjoining or contiguous to canal, are entitled to water at a just and reasonable rate, regardless of contract. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Com. App.) 208 S. W. 904.

Defendant irrigation company, organized under this article, was, without contract, obligated to deliver water to plaintiff for the purpose of irrigating the latter's lands adjacent or contiguous to defendant's canal upon reasonable demand, reasonable terms, and within the ability of defendant to supply the same by the exercise of reasonable diligence. *Id.*

Irrigation companies and those under whom they hold are quasi public service corporations, required to perform their duty to the public when paid therefor. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

**Limitation of liability.**—Defendant irrigation company, organized under this article, cannot by contract limit its liability for failure to furnish water to land adjacent to its canals to an arbitrary amount, regardless of damage. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Com. App.) 208 S. W. 904.

Provision of contract of defendant irrigation company, organized under this article, that it should not be liable for more than \$10 per acre for failure to supply water, was unreasonable and void. *Id.*

**Art. 5002a. [3125] Same; sale or lease of water and water rights; compliance with statute.**

See *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Art. 5002b. [3125] Persons entitled to use water.**

See *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Right to water at reasonable rate.**—In an action to compel a public water supply company to furnish water for irrigation purposes at a stated price, evidence held to show that plaintiff had acquired a right to receive water at a reasonable rate from the plant prior to a receiver's sale wherein plaintiff's easements were alleged to have been sold. *McBride v. United Irr. Co.* (Civ. App.) 211 S. W. 498.

**Duty to supply water.**—Since this article provides that all persons holding a possessory right to land adjoining an irrigation plant can compel the furnishing of water to irrigate crops, the duty to furnish water is statutory and can be enforced by mandamus. *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

Public irrigation company's legal liability to furnish water for irrigable and cultivated lands contiguous to canals, when requested to do so by one in rightful possession, rendered it liable, for violation of duty, for damages proximately caused to landowner or possessor. *Louisiana Rio Grande Canal Co. v. Frazier* (Civ. App.) 196 S. W. 210.

An irrigation company, being a quasi public concern, vested with the power of eminent domain and obligated to furnish water for irrigation, must, when water in its reservoir is so low as to prevent the flow to its canals by gravity, supply such water to its canals by pumping. *Nueces Valley Irr. Co. v. Howard* (Civ. App.) 206 S. W. 575.

A notice to defendant irrigation company by plaintiff, entitled to be supplied with water, that it had about 100 acres of cabbage that would need irrigation, was not a due demand for water for a specific tract, as required by the rules of the company. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Com. App.) 208 S. W. 904.

Substantial compliance with rule of defendant irrigation company, requiring applications for water to state the number of acres to be irrigated and the location of the same, was a condition precedent to the right to water. *Id.*

In a proceeding to compel an irrigation plant to supply water at reasonable rates for irrigation purposes, evidence held not to support a finding that the president and owner of the irrigation plant was an innocent purchaser without notice of plaintiff's rights. *McBride v. United Irr. Co.* (Civ. App.) 211 S. W. 498.

An irrigation company cannot defend suit for mandatory injunction to compel it to furnish water to landowners as contracted by setting up that it has sold and continues to sell more land than it can reasonably put water upon. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

**Contracts to supply water.**—Under contract of landowner to raise a rice crop, and water company to furnish water for irrigation, it to be owner of one-fifth of crop when threshed and sacked, it was the owner of a fifth interest, though landowner stored all in his name. *Blair v. Colorado Canal Co.* (Civ. App.) 203 S. W. 176.

Landowners holding contracts of irrigation company to supply water to their lands were not affected by published notice in receivership proceedings against company to present claims, though such notices are binding on parties having claims against property of company in receivership, proceedings not having been instituted to affect rights of landowners. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

**Liability for breach.**—The proper basis for determination of damage for loss of crop of cabbage, due to failure to supply water for irrigation, was the value of the yield when matured and ready for sale. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.* (Com. App.) 208 S. W. 904.

Contract between landowner and water supply company, requiring the company to furnish irrigation contracts to purchasers of land from such owner, and providing that the owner was to sell stock of water company by adding the price of the stock to the purchase price of the land sold by it for a specified commission, held insufficient to make owner of land liable to purchaser for water company's breach of irrigation contract on the ground that they were so closely allied as to be jointly liable. *Harper v. Lott Town & Improvement Co.* (Com. App.) 228 S. W. 188.

### Art. 5002c. [3125] No discrimination against users.

Cited, *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

**Right to water at reasonable rate.**—Though public irrigation company is obligated by law to furnish owner of land contiguous to canal with water, this article exonerates company from liability if it is shown that landowner had no contract for water, and others had contracts, and all water was used for those holding contracts. *Louisiana Rio Grande Canal Co. v. Frazier* (Civ. App.) 196 S. W. 210.

An irrigation company, by its contracts with landowners, having fixed rates for land, the court, in suit by other owners of like lands to compel the company to furnish water as its predecessor had contracted, could require it to comply with its obligations on the same terms as to rates as the other lands without invading rate-making power of Legislature. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

**Appeal from decision of board fixing rates.**—See note under art. 5002jj.

### Art. 5002e. [3125] Permanent water right and easement.

See *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

**Water rights are easements.**—Water in canals for irrigation purposes is real estate, and landowner's right to the use of a portion thereof is a servitude upon such real estate. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

Water rights originally granted to landowners are easements carved out of the fee simple of an irrigation system, attached to the respective tracts, appurtenant thereto, and part thereof from execution and delivery of the deeds conveying the rights, under this article. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

**Art. 5002f. Regulation of rates; discrimination; complaint; deposit.**

Cited, *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

**Pleading.**—Where landowners intervened in receivership proceedings against irrigation company after sale of plant under order of court, and alleged water rights under contract with former owner, the court will not pass upon such question as against purchaser, where interveners did not plead an application to board of water engineers to fix water rates. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

**Jurisdiction of board.**—State board of water engineers, by this article, has power and authority to determine the amount of irrigation water necessary for lands, and to fix the rates to be charged for delivery. *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

Irrigation company not organized under art. 5002, which privately acquired and owned its waters, lands, ditches, canals, etc., without invoking power of condemnation provided for in statute, held in view of arts. 5011½uu, 5011½v, not subject to control of state board of water engineers under this article, so that, if purchasers from the company had any rights against its successors, it was by virtue of their contracts, enforceable only by the courts. *Id.*

**Appeal from decision of board fixing rates.**—See note under art. 5002jj.

**Art. 5002hh. Power to fix rates.**—The said Board shall have power and authority and it shall be its duty to fix reasonable rates for the furnishing of water for the purposes or any purpose mentioned in this Chapter. [Acts 1918, 35th Leg. 4th C. S., ch. 55, § 1 (§ 61a).]

Added to Acts 1917, 35th Leg., ch. 88, as § 61a.

**Validity.**—This article, empowering board of water engineers to determine the amount of irrigation water necessary for land, and to fix the rates to be charged for delivery, is not so lacking in mutuality of remedies and does not so completely fail to make estoppel by judgment of the board mutual as to be inoperative and without force. *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Art. 5002i. Appeal; supersedeas.**

Cited, *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

**Appeal from decision of board fixing rates.**—See note under art. 5002jj.

**Art. 5002kk. Petition to district court from decision, etc., of board; appeal to appellate court.**—If any person, firm, association of persons, or corporations engaged in furnishing water, or other persons at interest be dissatisfied with the decision of any rate, charge, order or Act of regulation adopted by the Board, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rule, rate, charge or order, or to either or all of them, in a District Court of Travis County, Texas, against said Board as defendant. Said Action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said Court. Any party to said action may appeal to the Appellate Court having jurisdiction of said cause; and said appeal shall be at once returnable to said Appellate Court at any term thereof; said action so appealed shall have precedence in said Appellate Court of all causes of a different character therein pending; provided that if the Court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice. [Acts 1918, 35th Leg. 4th C. S., ch. 55, § 1 (§ 64a).]

Added to Acts 1917, 35th Leg., ch. 88, as § 64a.

**Appeal from decision of board fixing rates.**—Landowners entitled to water rights under contract with irrigation company had no right to appeal from decision of board of water engineers fixing rates, to district court of county in which the irrigation system was located, art. 5002i having no application to such an appeal, in view of arts. 5002c, 5002f; their remedy, under this article, being a suit in district court of Travis county to set aside the rates so fixed. *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

**Art. 5002kkk. Trials under preceding article.**—In all trials under the foregoing article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations,

acts, orders or charges complained of are unreasonable and unjust to it or them. [Id., (§ 64b).]

Added to Acts 1917, 35th Leg., ch. 88, as § 64b.  
Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 5004a. Eminent domain; application to board; institution of proceedings by board.**

Cited, *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

**Arts. 5009, 5009a. [Repealed.]**

Art. 5009 cited, *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

**Art. 5011e. Alienation of land required, etc.**

**Public policy as to acquisition of lands by irrigation companies.**—The public policy of the state being determined by the enactments of the Legislature, it cannot be said, in view of this article, that it is against the public policy of the state for an irrigation company to acquire land. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

Art. 1177, forbidding the acquisition of lands by corporations whose main purpose is the acquisition of land, and this article, as to incorporation of irrigation companies, permitting such companies to acquire land, are not irreconcilable, and art. 1177 does not impliedly repeal this article. Id.

**Art. 5011ff. Preference lien upon crops raised on land irrigated.**

**Validity.**—Statute giving priority to a lien created by tenant over lien of landlord held valid. *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

**Priority of lien.**—Lien on crops given irrigation company furnishing water by this article, held superior to landlord's lien under art. 5475. *Texas Bank & Trust Co. of Beaumont v. Smith* (Civ. App.) 195 S. W. 617; *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

Since the landlord's lien is given by statute, the Legislature may restrict it as it deems best for the public interest or entirely abolish it, and no vested right of the landlord is invaded by a statute authorizing a tenant to create a lien upon a crop superior to any lien in favor of the landlord. *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

This article gives a preferred lien to an irrigation company furnishing water to one entitled to compel it to furnish water, upon the crops raised under such irrigation and against all persons asserting a lien of any kind against the crop. Id.

Under this article, irrigation company furnishing water to tenant held to have lien superior to mortgagee who loaned money for purpose of producing crops. *Texas Bank & Trust Co. of Beaumont v. Smith* (Civ. App.) 195 S. W. 617.

**Lien for water furnished tenant.**—Under the prior statute, a lien exists in favor of the irrigation company, though it furnishes the water under contract with the tenant, since the word "owner" includes a person having a possessory right to the land. *Texas Bank & Trust Co. of Beaumont v. Smith* (Civ. App.) 195 S. W. 617; *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

**Art. 5011ss. Construction of gates, breakwaters, dams or dikes in tide waters to prevent pollution of fresh water.**—Persons, associations of persons, corporations or districts, operating under the statutes of Texas relating to irrigation, are hereby authorized, (subject to the conditions and regulations which may be required or prescribed by the authorities of the United States Government in respect to navigation), to construct such gates or breakwaters, dams or dikes, with gates, as may be required in any waters wholly in the State of Texas where gulf tides ebb and flow to prevent the pollution of the fresh water of any stream, river or bayou, through ebb and flow of salt tides from the Gulf of Mexico and to conserve such fresh water in a condition fit for irrigation; provided that such work shall, in every case, be done so as not to obstruct navigation by any vessels operated on such waterway, and provided that in every case where gates are required to avoid obstruction of navigation, such persons, association, corporation or district responsible for the construction shall at all times keep a competent person at such gates to operate same when required for purposes of navigation; provided further that such dam, dike or breakwater hereby authorized shall not be placed at any point in such waters, except where the gulf tides ebb and flow, and not so as to obstruct the flow of fresh water to any appropriator or

riparian owner below on the same stream. [Acts 1918, 35th Leg. 4th C. S., ch. 35, § 1.]

Took effect March 30, 1918.

#### Art. 5011t. Diversion of surface waters; remedies; provisos.

Cited, *Wilkerson v. Garrett* (Civ. App.) 229 S. W. 666.

**Right to repel surface water.**—By express provision of this article, the natural flow of surface water may not be diverted in such manner as to damage the property of another. *Bevers v. Hughes* (Civ. App.) 195 S. W. 651.

Common-law rule that owner of land may for his own protection divert natural surface water, although it results in injury to land of his neighbor, has been changed by this article. *Hester v. McAdams* (Civ. App.) 203 S. W. 121.

— **Incidental to erection of building.**—That erection of building, or excavation therefor, may divert slightly water falling on lot or lots to be used in connection with building, does not constitute diversion of natural flow of surface water as prohibited by this article. *Shamburger v. Scheurrer* (Civ. App.) 198 S. W. 1069.

#### Art. 5011½f. Board to determine relative rights of claimants to waters; taking testimony; transfer of cases from courts to board.

**Constitutionality.**—This article, requiring the Board of Water Engineers to determine the relative rights of claimants to waters of any stream, art. 5011½jj, authorizing a contest of the rights of persons submitting evidence to the board, and art. 5011½ll, requiring the board to make an order of determination, undertake to empower the board to adjudicate vested water rights and to give its determination when not appealed from the effect of a judgment and violate Const. art. 2, § 1, dividing the powers of government into three departments, etc., and article 5, § 1, vesting the judicial power in the courts. *Board of Water Engineers v. McKnight* (Sup.) 229 S. W. 301; *McKnight v. Pecos & Toyah Lake Irr. Co.* (Civ. App.) 207 S. W. 599.

This article, authorizing the Board of Water Engineers to determine and adjudicate water rights, is not saved from invalidity by the provision that any person dissatisfied may appeal to the court for a trial de novo, nor by the provision of art. 5011½v that nothing therein shall affect, impair, or destroy vested rights, as the subject-matter of the determinations and orders provided for are vested rights. *Board of Water Engineers v. McKnight* (Sup.) 229 S. W. 301.

#### Art. 5011½i. Notice of completion of testimony; inspection by claimants.

See *McKnight v. Pecos & Toyah Lake Irr. Co.* (Civ. App.) 207 S. W. 599.

#### Art. 5011½jj. Contest of claims; notice.

**Constitutionality.**—Art. 5011½f, requiring the Board of Water Engineers to determine the relative rights of claimants to waters of any stream, this article, authorizing a contest of the rights of persons submitting evidence to the board, and art. 5011½ll, requiring the board to make an order of determination, undertake to empower the board to adjudicate vested water rights and to give its determination when not appealed from the effect of a judgment and violate Const. art. 2, § 1, dividing the powers of government into three departments, etc., and article 5, § 1, vesting the judicial power in the courts. *Board of Water Engineers v. McKnight* (Sup.) 229 S. W. 301.

#### Art. 5011½l. Examination of stream or water supply; measurements; map.

**In general.**—On the facts appearing in a proceeding by landowners to enjoin an irrigation company from interfering with their operation of the company's plant based on an agreement whereby they were to organize an irrigation district and buy the plant and water appropriations, held that contract was terminated when by this article, right to organize district was made certain and landowners failed to organize district. *Porterville Irr. Co. v. Goodrich* (Civ. App.) 202 S. W. 745.

#### Art. 5011½ll. Findings of fact and determination; rights determined; certified copy sent to counties through which stream flows.

**Constitutionality.**—Art. 5011½f, requiring the Board of Water Engineers to determine the relative rights of claimants to waters of any stream, art. 5011½jj, authorizing a contest of the rights of persons submitting evidence to the board, and this article, requiring the board to make an order of determination, undertake to empower the board to adjudicate vested water rights and to give its determination when not appealed from the effect of a judgment and violate Const. art. 2, § 1, dividing the powers of government into three departments, etc., and article 5, § 1, vesting the judicial power in the courts. *Board of Water Engineers v. McKnight* (Civ. App.) 229 S. W. 301; *McKnight v. Pecos & Toyah Lake Irr. Co.* (Civ. App.) 207 S. W. 599.

**Art. 5011½uu. Recognition of riparian rights.**

See *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

**Art. 5011½v. Not to affect vested rights.**

See *Knight v. Oldham* (Civ. App.) 210 S. W. 567.

Cited, *Grogan v. City of Brownwood* (Civ. App.) 214 S. W. 532; *Board of Water Engineers v. McKnight* (Sup.) 229 S. W. 301.

## DECISIONS RELATING TO SUBJECT IN GENERAL

Liabilities of railroad companies, see notes under art. 6495.

Powers, rights and liabilities of cities, see notes under art. 865.

**Rights of riparian owners.**—Although plaintiff, who owned land on both sides of stream, had consented for a consideration to defendant's taking water through pipes on plaintiff's land, where consideration had failed, plaintiff would have the right to prevent defendant's use of pipes. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

Water in canals for irrigation purposes is real estate and landowner's right to the use of a portion thereof is a servitude upon such real estate. *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

A riparian proprietor cannot rightfully take water for the operation of a railroad in such quantities as to materially reduce the volume of a stream to the detriment of the lower riparian proprietors. *Martin v. Burr* (Sup.) 228 S. W. 543.

Upper riparian owners cannot lawfully use the waters of a flowing stream for irrigation when such use materially interferes with the supply required to meet the reasonable domestic needs of lower riparian owners, including water for stock. *Id.*

— **Navigable waters.**—Channel of navigable stream held in state so that riparian proprietor cannot complain that a municipality dammed such stream under authority of state. *Moore v. City of Dallas* (Civ. App.) 200 S. W. 870.

Although stream running through plaintiff's land was navigable, defendant would not have the right to trespass upon plaintiff's land in order to take water from the stream, regardless of method employed. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

Although stream running through plaintiff's land was navigable, plaintiff had the right to use water therefrom for domestic purposes or natural wants, so long as such use was reasonable, regardless of effect upon lower riparian owners. *Id.*

The general rule is that the right of a riparian owner to the use of the waters of a navigable stream for domestic purposes is superior to the right of a similar owner to use them for irrigation. *Grogan v. City of Brownwood* (Civ. App.) 214 S. W. 532.

**Accretion.**—Where receding of river and consequent accretion of land are gradual and slow, added land becomes part of adjoining land. *Rosetti v. Camille* (Civ. App.) 199 S. W. 526.

**Rights under grants and conveyances.**—Where a landowner who had operated a small waterworks system from a well on his property sold the well and surrounding land to plaintiff, agreeing that plaintiff might use the pipes so long as he would supply the landowner with water, held that, as the contract would expire upon plaintiff's failure to furnish the landowner with water, upon the wearing out of the pipes, or on the death of either party, it cannot be deemed invalid because it might continue indefinitely, at the option of plaintiff; for where a contract is not revocable at the will of either party, or otherwise limited, it is presumed to be permanent, etc. *Foster v. Wright* (Civ. App.) 217 S. W. 1090.

**Actions to establish or protect rights.**—Measure of plaintiff's damage by erection of dam impounding waters of a stream upon which his land abutted held difference between value of his land immediately before and after injury. *Moore v. City of Dallas* (Civ. App.) 200 S. W. 870.

In action for diversion of surface water onto plaintiff's land, where there was no allegation that defendant had caused such diverted water to augment the flow of water from other land being drained by ditch between such land and plaintiff's land to such extent as to cause water to overflow onto plaintiff's land, defendant was entitled to have submitted to jury special issue as to whether jury was able to ascertain the proportion of the loss, if any, caused by surface water from such other land which had not flowed over defendant's land, since in such case defendant was liable only for the portion of the injury caused by the water diverted by it, and was entitled to judgment in its favor if the jury was unable to ascertain the amount of the proportion of injury. *Houston & T. C. R. Co. v. Hanson* (Civ. App.) 227 S. W. 375.

In action for injuries from overflow of surface waters caused by defendant's obstruction of a natural waterway by his construction of an embankment and insufficient diverting ditch, an instruction that if, by plaintiffs' cleaning out and changing ditches on their land the natural flow of the water was narrowed or changed, and that such construction and diversion proximately caused "or contributed to" the accumulation of water and the overflowing and damage to plaintiffs' land and crops, to find for defendant, was error, as denying to plaintiffs a recovery, although their ditches and levees were not the proximate and sole producing cause of the overflow, for, although defendant was entitled to show in mitigation that his ditch and levee were not the cause of all the damages, he would be liable for all damages resulting from his acts. *Frazier v. Rollins* (Civ. App.) 230 S. W. 874.

**Right to repel surface water.**—Company owning rice irrigation canal right of way was protected by the common-law immunity of a fee-simple owner from liability for



damages in repelling surface water, and would be liable for obstructing the natural flow of surface water only if it did something in the construction or operation of its canal that amounted to an undue exercise of dominion. *Old River Co. v. Barber* (Civ. App.) 210 S. W. 758.

In Texas the common-law rule obtains that, surface water being considered a common enemy, any owner of land has the right to protect himself against it and to do anything upon his own premises with that end in view, so long as what he does amounts to no more than a due exercise of dominion over his own premises. *Id.*

Where grant to rice irrigation canal company of right of way for canal did not require the company to construct drains or openings in its canal, its operation of the canal without doing so did not render it liable for damages for surface water impeded and backed upon the premises of another by the canal embankment; nor would the company be liable because it failed to cut its canal to allow escape of such surface water after being requested to do so by such landowner. *Id.*

A landowner is liable in compensatory damages for the construction of dams and ditches on his land so as to concentrate surface water and discharge it on the land of another. *Wilkerson v. Garrett* (Civ. App.) 229 S. W. 666.

Where landowner by construction of dams and ditches on his land has concentrated surface water and discharged it on the land of another, the injured party is not only entitled to damages, but may abate the nuisance. *Id.*

Where a landowner built a dam on his land to obstruct the flow of waters from a hill diverting them from a former course, and opened a new ditch casting all the water which would have gone across his land into a drain that ran across plaintiff's land, such action constituted a flagrant invasion of the rights of plaintiff. *Id.*

While a landowner may use proper means to protect his land from water, he must not use his neighbor's land nor his own in such a manner as to destroy or deteriorate the property of another nor interfere with the lawful use or enjoyment thereof. *Id.*

**Liability for injury to property.**—All parties contributing to overflowing of land with surface water held liable jointly or severally when acts of different parties are concurrent and not plainly separable. *Houston & T. C. R. Co. v. Wright* (Civ. App.) 195 S. W. 605.

The fact that the dam constructed by defendants on their property and the ditch therefrom discharged more water and discharged it more rapidly on plaintiffs' land, over which the surface water from defendants' land naturally flowed, does not impose liability on plaintiffs. *Isbell v. Lennox* (Civ. App.) 224 S. W. 524.

Where a landowner constructed a dam on his property concentrating surface water and discharging it on plaintiff's land, and thereafter sold the land to another, who built the dam higher, dug new ditches, and cleaned out the old ones, thus increasing the flow of surface water, such purchaser thereby made the nuisance his own and became liable for all damages caused by it after his connection therewith. *Wilkerson v. Garrett* (Civ. App.) 229 S. W. 666.

## CHAPTER TWO

### WATER IMPROVEMENT DISTRICTS

Art. 5012-5107.	[Repealed.]	Art. 5107-19.	Same; order excluding non-irrigable land; effect.
5107-1.	Commissioners' court may establish districts; boundaries; powers; petition and proceedings thereon.	5107-21.	Powers of board of directors; employés; general manager; contracts; contracts with United States; levy of tax; district as federal fiscal agent.
5107-4.	Appeal to district court; certification of result.	5107-23.	District may sue and be sued; judicial notice of district; contracts.
5107-6.	Notice of election.	5107-24.	Construction of works; acquisition of right of way by condemnation or otherwise; purchase of established works; conveyance to United States.
5107-7.	Election, how conducted; ballots.	5107-25.	Duties of assessor and collector; assessment of lands; listing of lands not rendered by owners.
5107-8.	List of property tax payers to be furnished for judges of election; oath of voters.	5107-33.	Compensation of members and secretary.
5107-9.	Return and canvass of election; directors.	5107-41.	Lien for taxes delinquent; sale of land.
5107-10.	Orders establishing district; name and number; change of name; number created.	5107-41a.	District shall not become party to pre-existing contracts; statute of limitations; pre-existing liens.
5107-13.	Organization of directors; quorum.		
5107-15.	Assessor and collector; bond; qualifications; compensation; additional bond; duties; additional compensation; deputies.		
5107-17.	Exclusion of land from district; petition of owner.		
5107-18.	Same; notice.		

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| <p><b>Art.</b><br/>5107—45. <b>Suit for delinquent taxes; employment of attorney; petition; precedence over other cases.</b></p> <p>5107—46. <b>Same; parties and process; sale in parcels; disposition of proceeds.</b></p> <p>5107—50a. <b>[Repealed.]</b></p> <p>5107—53. <b>Order for election to determine question of issuance of bonds and making of contract with United States.</b></p> <p>5107—54. <b>Notice of election.</b></p> <p>5107—57. <b>Returns of election; canvass and declaration of result.</b></p> <p>5107—58. <b>Order for issuance of bonds; amount of bonds; additional bonds; election.</b></p> <p>5107—61. <b>Validation of bonds; form of suit; notice.</b></p> <p>5107—66. <b>Record of bonds kept by county clerk.</b></p> <p>5107—67. <b>Sale of bonds; exchange of bonds for property, work, etc.</b></p> <p>5107—68. <b>Construction and maintenance fund.</b></p> <p>5107—69. <b>Levy of tax to pay interest on bonds and to create a sinking fund; in case of contract with United States.</b></p> <p>5107—70. <b>Interest and sinking fund.</b></p> <p>5107—71. <b>Maintenance and operating fund.</b></p> <p>5107—72. <b>Terms of office of district officers.</b></p> <p>5107—76. <b>Vacancies in board of directors; order for election.</b></p> <p>5107—79. <b>District, when and how dissolved; debts, how collected, etc.</b></p> <p>5107—80. <b>Districts in two or more counties; how established.</b></p> <p>5107—81. <b>Same; Board of Water Engineers shall designate county judge to canvass vote; returns and certificates of result to designated judge; certificate of election issued to directors.</b></p> <p>5107—82. <b>Same; board of directors shall proceed as in districts composed of single county; district as body corporate.</b></p> <p>5107—83. <b>Lands in adjoining county may be included; notice of election.</b></p> <p>5107—85. <b>Contracts, how let; notice; contracts with United States.</b></p> <p>5107—86. <b>Bidders to receive copies of reports and profiles; bids, how made, etc.</b></p> <p>5107—87. <b>Contracts to conform to act; how executed, filed and recorded.</b></p> <p>5107—89. <b>Contracts to contain specifications; supervision; reports of engineer; bridges and culverts across railroads.</b></p> <p>5107—92. <b>Duties of directors; inspection; payment of contract price; contracts with partial payments.</b></p> <p>5107—95. <b>Persons desiring to receive water to furnish statement; directors to estimate expense; expense, how paid; assessments; contracts with users; borrowing money; liens; interest; delinquents; contracts with United States.</b></p> | <p><b>Art.</b><br/>5107—96. <b>Notice of additional assessments.</b></p> <p>5107—100. <b>District depositories.</b></p> <p>5107—108. <b>Power to construct works for irrigation of lands, etc.; authority of directors.</b></p> <p>5107—118. <b>Election in town, city or municipal corporation within district; separate canvass of result; district not to include town, etc., when.</b></p> <p>5107—119. <b>Maintenance charges, how fixed; measuring devices.</b></p> <p>5107—120. <b>Contract with city or town to supply water.</b></p> <p>5107—121. <b>Consolidation of districts; election; procedure; taxes; debts; officers.</b></p> <p>5107—122. <b>Repeal.</b></p> <p>5107—122a. <b>Mode of taxation in case of extension or consolidation of districts.</b></p> <p>5107—122b. <b>Location of office of directors where towns are excluded from district.</b></p> <p>5107—122c. <b>Mode of assessment for taxation in district constituted a conservation and reclamation district.</b></p> <p>5107—122d. <b>Commissioners of appraisalment.</b></p> <p>5107—122e. <b>Same; notice to and proceedings of commissioners.</b></p> <p>5107—122f. <b>Same; assessment and report of commissioners; compensation.</b></p> <p>5107—122g. <b>Same; proceedings on report; objections; notice of hearing.</b></p> <p>5107—122h. <b>Same; exceptions; decision; costs; record.</b></p> <p>5107—122i. <b>Same; basis for levy of tax; process for witnesses.</b></p> <p>5107—122j. <b>Election to determine mode of assessment of tax.</b></p> <p>5107—122k. <b>Apportionment and assessment of benefits in districts operating under contract with United States; notice and hearing.</b></p> <p>5107—122l. <b>Contracts for sale of water power privileges; reserving supply for irrigation and other purposes.</b></p> <p>5107—122m. <b>Districts operating under ad valorem basis of taxation may adopt assessment and equalization plan; mode of assessment; compensation of tax collector; remedies of security holders; appeal; districts embracing two or more counties.</b></p> <p>5107—122n. <b>Sale of surplus water.</b></p> <p>5107—122o. <b>Water improvement district which is also a conservation and reclamation district may hold election to impose limitation on debt or bond issue; completion of works.</b></p> <p>5107—122p. <b>Former proceedings validated.</b></p> <p>5107—122pp. <b>Districts may maintain suits.</b></p> <p>5107—122q. <b>Districts may sue to protect water supply.</b></p> <p>5107—122qq. <b>State Board of Water Engineers constituted a commission to investigate feasibility of projects involving issuance of bonds.</b></p> |
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**Articles 5012—5107. [Repealed.]**

Art. 5065, cited in *State v. Settegast* (Civ. App.) 227 S. W. 253.

**Constitutionality.**—Acts 29th Leg. c. 122, §§ 34, 48, providing for assessments in irrigation districts organized under the act, in addition to bonds that may be issued, cannot be held invalid simply because limitations under Const. art. 3, § 52, as to amount of obligations that district may assume, are not stated in the sections; the constitutional limitations being binding, though not stated. These sections were not intended to authorize additional taxation within the constitutional sense of that term, but to authorize assessments based on property benefits, and are ineffectual in that they do not provide for any hearing for determination of benefits accruing to property upon which assessments are made. *White v. Fahring* (Civ. App.) 212 S. W. 193.

Const. art. 3, § 52, authorizing the granting of credit by the district for the construction and maintenance of pools, lakes, reservoirs, dams, canals, and waterways for the purpose of irrigation, authorizes an act of the Legislature (Acts 29th Leg. c. 122) permitting irrigation districts to issue bonds for the purpose of constructing irrigation works, and acquiring the necessary property and rights therefor, and for the operation of an irrigation plant. *Id.*

The Legislature having by timely enactment (Acts 33d Leg. c. 172, § 72 [*Vernon's Sayles' Ann. Civ. St. 1914, art. 5107—72*]) remedied the defect in Acts 29th Leg. c. 122, § 20, fixing terms of office of members of board of directors of irrigation districts at four years, contrary to Const. art. 16, § 30, before any of the directors of district in question had served two years, and having in express terms validated districts created under the act of 1905, and the acts of the directors and officers of such districts, no one can complain of section 20. *Id.*

The \$2,000 indebtedness for organization purposes of irrigation districts authorized by Acts 29th Leg. c. 122, § 50, is to be paid out of assessments which can only be made after being authorized by two-thirds of the voters of the district, and the section, when so construed, is not in violation of Const. art. 3, § 52, as to two-thirds vote being required to lend credit of district. *Id.*

**Forfeiture of corporate existence of district.**—Evidence held to show due diligence on the part of an irrigation district organized under Acts 29th Leg. c. 122, to carry out the purpose of its organization, so that its legal existence had not been forfeited on that account. *White v. Fahring* (Civ. App.) 212 S. W. 193.

**Art. 5107—1. Commissioners' Court may establish districts; boundaries; powers; petition and proceedings therein.**—The county commissioners' court of any county in this State at any regular or called session thereof may establish one or more water improvement districts in their respective counties, or parts of such districts therein, in the manner hereinafter provided. Such districts may or may not include within their boundaries villages, towns, cities and municipal corporations, or any part thereof, but no land shall be at the same time included within the boundaries of more than one water improvement district created under this Act. Such districts when so established may make improvements or may purchase improvements already existing, or may purchase improvements and make additions thereto, and may issue bonds in payment therefor, as herein provided. Such districts being authorized to provide for the irrigation of the land included therein, and when operating under Section 59 of Article 16 of the Constitution, furnish water for domestic, power and commercial purposes. Such districts may be formed for corporation with the United States under the Federal Reclamation Laws for the purpose of the construction of irrigation works, including drainage works, necessary to maintain the irrigability of the land for the purchase, extension operation or maintenance of constructed works or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands.

The petition herein provided for to be presented to the county commissioners' court shall be signed by a majority in number of the holders of title to the lands situated within the proposed district and representing a majority in value of the lands therein as indicated by the county tax rolls; provided, however, that such petition shall be sufficient if same is signed by fifty holders of title or evidence of title to the land situated within the proposed district, in the event that the number of such land owners should be greater than fifty in number. Upon presentation to the Commissioners' court either at a regular or special session, of a peti-

tion as herein provided, praying for the establishment of a water improvement district, setting forth the boundaries thereof and designating a name for the district, the commissioners court shall set the same for hearing at some regular or special session to be held not less than fifteen days nor more than forty days from the presentation of said petition. The Clerk of said court shall issue a notice of the said hearing, giving the date and place of hearing, and a copy of the order of the court setting same for hearing. Said notice shall be directed to the sheriff of the county requiring him to serve the notice in the manner provided by law. Said notice shall be sufficient if it contains the matter herein provided, and all persons interested shall take notice of the boundaries of said district as set out in the petition and may inspect same by examining the same in the office of the clerk of said court.

The sheriff shall execute said notice by posting true copies thereof in three public places within said proposed district and one at the courthouse door of the county, or on the bulletin board used for public notices at the county courthouse. Said notices shall be posted for ten full days prior to the date of said hearing. Said notice shall also be published in a newspaper of general circulation in the county, if a newspaper is published therein, one time and at least five days prior to such hearing. The sheriff shall make due return of a true copy of said notice, showing the time when and the places where such notice was posted and published. The said return to be delivered to the clerk of the commissioners court, and to be recorded in the minutes of said court.

The duties herein imposed upon the clerk and sheriff may be performed by them acting by themselves or their deputies as provided by law for other similar duties. When conditions may make desirable, the petition herein provided for may be signed and presented to the court in several copies. When such petition is so presented in more than one copy the clerk shall file all such copies and shall make a true copy thereof, including a list of all those who have signed the several copies, and certify thereto and file same. Such certified copy shall be considered the petition in all other proceedings provided for by this Act.

Water improvement districts to be organized as provided herein are defined districts under the authority granted by Section 52 of Article 3 of the Constitution of the State. [Acts 1905, p. 235; Acts 1913, p. 380, § 1; Acts 1917, 35th Leg., ch. 87, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1.]

**Explanatory.**—Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1, amends §§ 1, 7-10, 13, 17, 19, 23, 33, 53, 56, 57, 60, 65, 70, 80, and 108 of Acts 1917, 35th Leg., ch. 87, and § 15 of said act, as amended by Acts 1918, 35th Leg. 4th C. S., ch. 53, § 1, and adds sections 118a, 119, 120, and 121.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting; Peyton Creek Irr. Dist. v. White (Civ. App.) 230 S. W. 1060.

**Art. 5107—4. Appeal to district court; certification of result.**—If at the hearing provided for in Section 3 of this Act [1918 Supp., Art. 5107—3], the court shall enter an order granting or refusing the petition for the organization of said district at the cost of petitioners, then in that event the petitioners, or any one or more of them, or any one owning land in such district, may appeal from said order to the District Court, provided, however, any such appeal shall only be taken in the event notice thereof is filed with said County Commissioners' Court at the time of said hearing, and that same is perfected by filing with the clerk of said court an appeal bond in a sum of not less than \$2,000.00 or more than \$5,000.00, to be fixed by said County Commissioners' Court, payable to the County Judge for the benefit of adverse parties, at the time notice of

appeal is given, and said bond shall be filed with the clerk of said court within ten days thereafter. In the event of such appeal said cause shall be tried under the rules prescribed for practice in the District Court, and to be de novo, and the clerk of the Commissioners' Court shall transfer to the clerk of the District Court within ten days from the date of filing of an appeal bond such judgment and all records filed with the County Commissioners' Court, and it shall be unnecessary to file any other additional pleadings in said cause. The final judgment on appeal shall be certified to the Commissioners' Court for their action within ten days after same has become final. [Acts 1913, p. 380, § 4; Acts 1917, 35th Leg., ch. 87, § 4; Acts 1921, 37th Leg. ch. 13, § 1 (§ 4).]

**Art. 5107—6. Notice of election.**

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

**Art. 5107—7. Conduct of election; ballots.**—The manner of conducting elections herein provided for shall be governed by the general election laws of the State, except as herein otherwise provided. At such elections none but resident property tax payers who are qualified voters under the laws of the State shall be entitled to vote. The county commissioners court shall at the time of ordering said first election by an order entered of record, create said proposed district, or the part thereof within said county, into one or more election precincts and shall name a polling place in each voting precinct, and shall appoint two judges and two clerks for each polling place, one of the judges to be designated as presiding judge. If said officers so selected fail to serve, his place shall be filled in the manner provided by the general election laws. The court shall order printed one and a half times as many ballots for said election as there are estimated to be qualified voters within such district. Said ballots for said first election shall have printed thereon substantially the following: "For Water Improvement District" and "Against Water Improvement District," and said ballot shall contain five blank lines on which to write names "of the persons voted for, for the office of director, with a heading "For Directors, five to be elected." No other matter shall be placed on said ballot except the heading "Official Ballot."

The election precincts herein provided to be created shall be and continue the election precincts of said district until changed by an order of the board of directors. [Acts 1913, p. 380, § 7; Acts 1917, 35th Leg., ch. 87, § 7; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 7).]

**Art. 5107—8. List of property tax payers to be furnished for judges of election; oath of voters.**—It shall be the duty of the tax collector of the county before a water improvement district is formed, and of the tax collector of the district after its organization, to make a certified list of the property tax payers of said district, or part thereof in the county, and to furnish same to the officers of the election of each polling place, and before any person is entitled to vote at any election under this Act his name must appear in said certified list of property tax payers; provided, however, that a qualified voter who is a property tax payer in said district or proposed district, and whose name does not appear upon said list, shall be entitled to vote if he shall first take the following oath, to be administered by an election judge and which the judges of the election are authorized to administer; "I do solemnly swear (Or affirm) that I am a qualified voter under the laws of the State of Texas, and that I am a resident property tax payer of \_\_\_\_\_ (inserting the name of the district) and I did not acquire such property prior to this election for the

purpose of voting, but I am a bona fide property taxpayer." [Acts 1913, p. 380, § 8; Acts 1917, 35th Leg., ch. 87, § 8; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 8).]

**Art. 5107—9. Returns and canvass of election; directors.**—The officers of the election shall make returns for each polling place in the same manner as provided by law for general elections, and the county commissioners court shall canvass said returns in the manner provided by law. If a majority of said votes be cast in favor of the organization of said district, then the court shall declare the result of said election in favor of the establishment of said district and shall enter same in the minutes of said court. The court shall also canvass the votes for directors and declare the election of the five persons receiving the highest number of votes for said office; provided, that should it be found that two or more persons had received the same number of votes so as to make it a tie for the office between them, then the said court shall select one of said persons to fill such position. In the event said district is composed of territory lying in two or more counties the said returns shall be canvassed and the result declared as hereinafter provided. [Acts 1913, p. 380, § 9; Acts 1917, 35th Leg., ch. 87, § 9; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 9).]

**Art. 5107—10. Order for establishment of district; name and number of district; change of name; number created.**—If the result of said election be in favor of the establishment of the district, the county commissioners court shall make and enter in the minutes of said court an order setting forth facts substantially as follows: "In the matter of the petition of ———, and others praying for the establishment of a water improvement district, as in said petition described, and named: ———, be it known that an election was called for that purpose in said district, and held on the ——— day ——— A. D. 19—, and a majority of the resident tax payers voting thereat voted in favor of the creation of said district. Now, therefore, it is declared that said district has been legally established under the name of ——— with the following metes and bounds: (here copy description of boundaries.)"

When a district is created including territory in two or more counties the officer charged with the duty of declaring result of said election shall use substantially the same form.

All districts lying wholly in one county shall include in its name the name of the county in which it is located as a part of its name, and shall be numbered consecutively as created and established. A district lying partly in two or more counties may include the names of said counties in its name or may adopt any appropriate name.

The numbers of districts created hereafter shall not conflict with the numbers of irrigation or water improvement districts heretofore created, but shall be consecutively continued, and when a district lying in two or more counties has adopted a number as part of its name such number shall not be the same as that of any other district in either of said counties, and the numbers of districts created in either of said counties shall not conflict therewith. [Acts 1913, p. 380, § 10; Acts 1917, 35th Leg., ch. 87, § 10; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 10).]

**Art. 5107—13. Organization of directors; quorum.**—The directors of such district shall organize by electing one of their number as president and one as secretary. The directors may elect a president pro tem, and a secretary pro tem, to act in the absence or inability of the pres-

ident or secretary. Any three directors shall constitute a quorum at any meeting, and a concurrence of three shall be sufficient in all matters pertaining to the business of the district except the letting of construction contracts and the drawing of warrants on the depository, which shall require the concurrence of four of such directors; provided, however, warrants to pay the current expenses, salaries, and labor and material accounts, may be drawn by an officer or employee, designated by standing order of the directors, when such accounts have been contracted and ordered paid by the directors. [Acts 1913, p. 380, § 13; Acts 1917, 35th Leg., ch. 87, § 13; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 13).]

**Concurrence in contracts.**—In a contractor's action against an irrigation district for the balance due for construction work, a contention that the contract sued upon should not have been admitted in evidence because not signed by all five of the district's directors is untenable, because this article requires concurrence of but four members of the board of directors. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—15. Assessor and collector; bond; qualifications; compensation; additional bond; duties; additional compensation; deputies.**—The office of tax assessor and collector is one office to be filled by one person. The tax assessor and collector shall be appointed by the directors, or if the directors so order, may be elected by an election held for that purpose. He shall qualify by making and entering into a good and sufficient bond, signed also by at least two good and sufficient sureties, to be approved by the board of directors, in the sum of five thousand dollars (\$5,000.00), conditioned for the faithful performance of his duties as tax assessor and collector and for the paying over to the depository all funds or sums of money or other thing of value, coming into his hands as such collector. The directors may require additional bonds or a bond in a larger amount or additional security at any time that same may be advisable in their judgment. The assessor and collector shall be a resident of the district, or any town within the general boundaries of the district, and shall be a qualified voter in the county of his residence. The compensation to be paid to the tax assessor and collector, or deputy tax assessor and collector shall be fixed by the board of directors, but shall not exceed \$3,000.00 per year. One or more deputies may be appointed by the board of directors to assist the tax assessor and collector for such time not to exceed one year as may be ordered by the board. Such deputies shall perform such duties as the board may order and may be discharged at any time by the board. The amount of bond given by such deputies shall be determined at the time of their appointment or as occasion may require. The board of directors may require the tax assessor and collector to perform other duties than those herein fixed and may fix his additional compensation if any therefor. In case any district organized hereunder is appointed fiscal agent of the United States, or by the United States is authorized to make collections of money for and on behalf of the United States in connection with any Federal reclamation project, such assessor and collector and each director, shall execute a further additional bond in such sum as the Secretary of the Interior may require, conditioned for the faithful discharge of the duties of his respective office and the faithful discharge by the district of its duties as fiscal or other agent of the United States under such appointment or authorization; such additional bonds to be approved, recorded and filed as herein provided for other official bonds, and any such additional bonds may be used on by the United States or by any person injured by the failure of such officer or the district, to fully, promptly and completely perform their respective duties. [Acts 1913, p. 380, §

15; Acts 1915, 34th Leg., ch. 138, § 1; Acts 1917, 35th Leg., ch. 87, § 15; Acts 1918, 35th Leg. 4th C. S., ch. 53, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 15).]

**Explanatory.**—Acts 1915, 34th Leg., ch. 138, § 1, amends §§ 15, 21, 58, 59, 69, 70, 75, 83, 85, and 97 of chapter 172 of Acts 33d Leg., regular session. Acts 1915, 34th Leg., ch. 138, is expressly repealed by Acts 1917, 35th Leg., ch. 87, § 107 (post, art. 5107—107).

**Art. 5107—17. Exclusion of land from district; petition of owner.**—

The owner or owners of the fee of any land constituting a portion of any district may file with the board of directors of such district a petition praying that certain lands owned by them be excluded from and taken out of said district. The petition shall describe the lands which the petitioners desire to have excluded by metes and bounds and such petition must be acknowledged in the same manner and form as is required by law for the conveyance of real estate. Such petition may be filed at any time prior to the issuance of bonds by such district. [Acts 1913, p. 380, § 17; Acts 1917, 35th Leg., ch. 87, § 17; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 17).]

**Effect of failure to exclude nonirrigable lands.**—Under arts. 5107—1 to 5107—117, relative to water improvement districts, which provide for a hearing and the exclusion of nonirrigable lands, it is not a defense to a delinquent tax suit after the organization of the district, the issuance and sale of bonds, and the making of tax assessments, that the lands are nonirrigable. *Wheat v. Ward County Water Improvement Dist. No. 2* (Civ. App.) 217 S. W. 713.

**Art. 5107—18. Same; notice.**

See 1918 Supp., acts 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 5107—19. Same; order excluding non-irrigable land; effect.**

—The board of directors, at any time and place designated in such notice, or at such time and place as such hearing may from time to time be adjourned to, shall proceed to hear the petition and all objections thereto, and shall determine whether or not said lands, or any portion thereof, shall remain as a portion of said district or be excluded therefrom; and if upon such hearing the directors shall determine that the land desired to be withdrawn or any portion thereof is not susceptible to irrigation by gravity from the system to be provided, or for other reasons should be allowed to be withdrawn, then such lands shall be excluded by granting such petition in whole or in part, and such excluded lands and the owners thereof thereby waive all right to be served with water from such irrigation system or by said district. [Acts 1913, p. 380, § 19; Acts 1917, 35th Leg., ch. 87, § 19; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 19).]

**Art. 5107—21. Powers of board of directors; employees; general manager; contracts; contracts with United States; levy of tax; district as federal fiscal agent.**

See *Miller v. City of Ballinger* (Civ. App.) 204 S. W. 1173.  
Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—23. District may sue and be sued; judicial notice of district; contracts.**—All districts established under the provisions of this Act may sue and be used in any and all courts of this State in the name of such district, and all courts of this State shall take judicial knowledge and notice of the establishment of such district and the boundaries thereof, and such district shall contract and be contracted within the name of such districts. [Acts 1913, p. 380, § 23; Acts 1917, 35th Leg., ch. 87, § 23; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 23).]

**In general.**—In view of art. 1118, and articles 4991-5011, an irrigation district is a "public corporation," which cannot be dissolved or have its powers destroyed at the suit of any one except the state. *J. C. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.



A water improvement district established by commissioners' court under arts. 5107—1 to 5107—117, while authorized to sue and be sued, and under arts. 5107—1, 5107—24, 5107—108 empowered to provide for irrigation of the land in the district, to own and construct reservoirs, etc., to acquire right of way, and to acquire water rights and privileges in any way that an individual or corporation may, cannot maintain action to adjudicate riparian water rights; it not having acquired them. *Ward County Water Improvement Dist. No. 2 v. Ward County Irr. Dist. No. 1* (Civ. App.) 222 S. W. 665.

**Art. 5107—24. Construction of works; acquisition of right of way by condemnation or otherwise; purchase of established works; conveyance to United States.**—Districts created under the provisions of this Act are hereby empowered to own and construct reservoirs, dams, wells, canals, etc., and to acquire the necessary rights-of-way for, and buy or construct all reservoirs, dams, wells, canals, laterals, sites for pumping plants and all other improvements required for the irrigation of the lands in such district by gift, grant, purchase or condemnation, and they may acquire the title to any and all lands necessary or incident to the successful operation thereof, in addition to any of the above, in the manner provided, including the authority by purchase or condemnation, to acquire rights-of-way for the enlargement, extension or improvement of any existing canals, or ditches for the purpose of raising such canals and ditches jointly with the owners thereof.

Any property acquired may be conveyed to the United States in so far as the same shall be necessary for the construction, operation and maintenance of works by the United States for the benefit of the district under any contract that may be entered into thereunder. [Acts 1913, p. 380, § 24; Acts 1917, 35th Leg., ch. 87, § 24; Acts 1919, 36th Leg. 2d C. S., ch. 77, § 1 (§ 24).]

**Art. 5107—25. Duties of assessor and collector; assessment of lands; listing of lands not rendered by owners.**

See *White v. Fahring* (Civ. App.) 212 S. W. 193.

**Taxing power strictly construed.**—The grant of taxing power to any county or district by the Legislature should be construed with strictness, the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

**Art. 5107—33. Compensation of members of Board of Equalization and its secretary.**—The members of the board of equalization and the secretary while acting as secretary of said board, shall receive such compensation for their services as may be fixed by the board of directors of the district, not to exceed, however, the sum of six dollars per day for the time actually engaged in the discharge of such duties. [Acts 1913, p. 380, § 33; Acts 1917, 35th Leg., ch. 87, § 33; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 33).]

**Art. 5107—41. Lien for taxes delinquent; sale of land.**—All lands and other property which have been returned delinquent, during the existence of such district, shall be subject to the provisions of this Act, and said taxes shall be and remain a lien upon said land, and upon all other property against which same were assessed, although the owner be unknown or though such land be listed in the name of a person not the actual owner, and though the ownership be changed the land may be sold under the judgment of the court for all taxes, interest, penalty, and costs shown to be due by such assessment for any preceding year or years, provided the record owner of such land or lands at the date of filing such suit be made a party to such suit and be properly cited, and such districts shall have authority to file suits for the collection of taxes due upon land and also personal property or property of any character. No law providing for a period of limitation on debt or actions

shall apply to such taxes, accruing after the formation of such district. [Acts 1913, p. 380, § 41; Acts 1917, 35th Leg., ch. 87, § 40; Acts 1921, 37th Leg. ch. 13, § 2 (§ 40); Acts 1921, 37th Leg. 1st C. S., ch. 46, § 1 (§ 40).]

Took effect Nov. 15, 1921.

**Art. 5107—41a. District shall not become party to pre-existing contracts; statute of limitations; pre-existing liens.**—No district created or existing or to be created under the provisions of this Chapter shall have the right to become a party to, or purchase, or hold under or assign or seek to enforce or receive the fruits or benefits from any contract between any land owner and private canal company or corporation made prior to the formation of such district, but all rights and privileges owned or possessed by such district are those arising or inherent in such district by virtue of this Chapter. The statutes of limitation of two years as well as the provisions hereof may be pleaded in bar of all actions for the recovery of water rents or other assessments accruing on land in such district prior to the formation of such district and cannot acquire or enforce any lien against such land fixed by any contract existing prior to the formation of such district, and cannot prosecute or cause to be prosecuted for it any suit or cause of action or claim of any character for its use for the recovery of any such water taxes or assessments accruing prior to the formation of such district and cannot foreclose any lien on such lands by reason of such unpaid water assessments and taxes accruing prior to the formation of such district and cannot avail itself of any rights under any private contracts made with reference to said lands prior to the formation of such districts, and cannot be held liable for the breach, of any such contract. [Acts 1921, 37th Leg. 1st C. S., ch. 46, § 2 (§ 40a).]

**Explanatory.**—The act adds section 40a to Acts 1917, 35th Leg. ch. 87.

**Art. 5107—45. Suit for delinquent taxes; employment of attorney; petition; precedence over other cases.**

**Evidence making prima facie case.**—In a water improvement district's suit for delinquent taxes, evidence that the lands were in the district, that defendants were record owners, and evidence showing a proper tax levy, the valuation of lands, and the tax rate, that the tax was uniform, the amount of the tax, interest, penalties, and costs, the time of the tax levy and year for which made, and demand and nonpayment, made a prima facie case. *Wheat v. Ward County Water Improvement Dist. No. 2* (Civ. App.) 217 S. W. 713.

**Art. 5107—46. Same; parties and process; sale in parcels; disposition of proceeds.**

**Process.**—Under this article, requiring the process in suits for delinquent taxes by water improvement districts to be served as provided for suits of like character, the citation is not governed by art. 1874, relative to suits in general, but by article 7698, relative to suits for delinquent taxes, which requires the citation to be directed to all persons owning, having, or claiming any interest instead of to the sheriff or constable. *Wheat v. Ward County Water Improvement Dist. No. 2* (Civ. App.) 217 S. W. 713.

The citation in a water improvement district's suit for delinquent taxes under this article, need not state the file number of the suit nor the date of filing suit. *Id.*

**Art. 5107—50a. [Repealed.]**

**Explanatory.**—This section was added to Acts 1918, 35th Leg. 4th C. S., ch. 25, as § 5a, by Acts 1919, 36th Leg. 2d C. S., ch. 12, § 3. For the remainder of said Acts 1918, 35th Leg. 4th C. S., ch. 25, see post, arts. 5107-267 to 5107-276. It was repealed by Acts 1921, 37th Leg. ch. 13, § 136.

**Art. 5107—53. Order for election to determine question of issuance of bonds and making of contract with United States.**

**Suit to cancel bonds.**—A taxpayer cannot maintain a suit to cancel bonds of an irrigation district without alleging and proving that the board of directors of the district has refused to institute such suit. *White v. Fahrning* (Civ. App.) 212 S. W. 193.

**Art. 5107—54. Notice of election.**—Notice of such election stating the maximum amount of bonds to be issued, which amount shall not exceed the engineers estimate, together with the amount of incidental expenses, organization expenses, and the cost of additional work which it may become necessary to add to the engineer's estimate by any change or modification made by the directors of the district in the proposed work; also stating the proposed maximum interest rate thereon, and the proposed maximum maturity date of said bonds; also stating the time and place or places of holding the election, shall be given by the secretary of the board of directors, as ordered by the directors, by posting notices thereof in four public places in such district and one at the courthouse door of the county or counties in which said district is situated. Such notice shall be posted for at least twenty days prior to the date of the election. Said notice shall also be published in the manner prescribed in Section 43 Chapter 87, Acts Thirty-fifth Legislature Regular Session.

The said notice shall contain substantially the proposition to be voted on as herein provided; provided, however, the bonds so voted upon may be issued to mature in serial form at any date not to exceed the maximum date stated in the notice and may be issued at any rate of interest not to exceed the rate of interest stated in such notice. Said notice shall also contain a summary of the engineer's estimate of the cost of construction of the proposed improvements, and estimate of cost of purchase of any existing improvements to be purchased, together with additions thereto as herein provided. If, however, contract with the United States is proposed for election, the notice shall state the maximum amount of money payable for construction purposes, exclusive of penalties and interest. [Acts 1913, p. 380, § 54; Acts 1917, 35th Leg., ch. 87, § 53; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 53).]

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

**Art. 5107—57. Returns of election; canvass and declarations of result.**—Immediately after the election the presiding judge at each polling place shall make return of the result in the same manner as provided by law in general elections, such return to be made to the Secretary of such district, who shall keep same in a safe place, and deliver them together with the returns from the several polling places to the directors of such district, who shall at a regular session or a special session called for that purpose, canvass said returns and declare the results thereof. In a district operating under authority of Section 59 of Article 16 of the Constitution a majority vote is required in favor of the issuance of bonds and in other districts a two-thirds majority is required. If said canvass of said returns shows said bond issue to have been adopted or said election to have been in favor of making contract with the United States, as the case may be, and the levy of tax, then said directors shall declare the result of said election to be in favor of the issuance of the bonds, or in favor of the making of contract with the United States, and the levy of tax and payment therefor, and shall cause the same to be entered in their minutes. [Acts 1913, p. 380, § 57; Acts 1917, 35th Leg., ch. 87, § 56; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 56).]

**Art. 5107—58. Order for issuance of bonds; amount of bonds; additional bonds; election; notes.**—After the canvass of the vote and declaring the result, as provided for in the preceding section, the directors for said district shall make, enter and order directing the issuance of bonds, or authorizing the execution of contract with the United States for such district, as the case may be, sufficient in amount to pay

for such proposed improvements, together with all necessary incidental expense connected therewith, not to exceed the amount specified in the order for the election and the notice of election. In districts organized under the authority of Article 52 of Section 3 of the Constitution the amount of such bonds, or the amount of contract indebtedness with the United States, shall not exceed in amount one-fourth of the actual assessed value of the real property in such district, as shown by the assessment thereof made for the purpose of determining the value thereof, or at the last annual assessment as provided for in this Act. This limitation of indebtedness of one-fourth of the assessed value shall not apply to districts organized under the authority of Section 59 of Article 16 of the Constitution. Provided, however, that if, after an election has been held for the issuance of bonds or for contract with the United States, and the tax authorized and levied, and bonds have been authorized to be issued, or have been issued as provided for in this Act, or contract with the United States authorized or executed, as the case may be, the directors for said district shall consider it necessary to make any modifications in said district, or in any of the improvements thereof, or shall determine to purchase or construct any further or additional improvements therein and issue additional bonds upon the report of the engineers, or shall determine to make supplemental contract with the United States, or upon its own motion may find it necessary to make said additional improvements, or purchase additional property in order to carry out the purpose for which said district was organized, or to best serve the interests of said district, said finding shall be entered of record, and notice of an election for the issuance of said bonds, or for the authorization of contract with the United States, shall be given, and such election held within such times, and the returns of such election made as hereinbefore provided for in cases of original election, and the result thereof determined in the same manner. If the result of such election be declared to be in favor of the issuance of such bonds or the making of such contract with the United States, said directors may order such bonds to be issued, or may negotiate and execute supplemental contract with the United States as in the manner provided in this Act. And provided, that if a contract is made with the United States as in Section 21 [art. 5107—21] hereof provided, and bonds are not to be deposited with the United States in connection with said contract, bonds need not be issued, or if required to raise funds in addition to the amount of such contract, said bonds shall be issued only in the amount needed in addition thereto. Provided, further, that whenever such a district shall have constructed or purchased improvements and same shall be damaged so that it may be necessary to raise funds to repair such damage, such district may either issue bonds to secure such funds or may issue its notes to run not to exceed twenty years, and to bear interest at not to exceed six per cent per annum. Before such notes are issued, the board of directors shall order an election and give notice thereof as required in bond issues stating the purpose for which they are to be issued, the time they are to run, and the rate of interest they are to bear, and the time and place of said election. The ballots for such election shall have printed thereon "For Issuance of Notes" and "Against Issuance of Notes". The election shall be held and returns made and canvassed as provided for bond elections. If two-thirds majority of those voting at such election voted in favor of the issuance of such notes, the board of directors may issue same and sell same for the benefit of said district. Such notes shall not be issued in an amount of more than thirty thou-

sand dollars. At the time such notes are issued or sold the board of directors shall levy a tax for the purpose of paying the interest thereon and creating a sinking fund sufficient to pay such interest and to pay said notes within the time of their maturity. Said notes may be issued in serial form to mature in installments as determined by the directors. [Acts 1913, p. 380, § 58; Acts 1915, 34th Leg., ch. 138, § 1; Acts 1917, 35th Leg., ch. 87, § 57; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 57).]

See *White v. Fahrning* (Civ. App.) 212 S. W. 193.

**Art. 5107—61. Validation of bonds; form of suit; notice.**—Any such district in this State desiring to issue bonds in accordance with this Act shall, before such bonds are offered for sale, bring an action in the district court in any county of the judicial district in which said district, or any part thereof, may be situated or in the district court of Travis county, to determine the validity of any such bonds, or such district contracting with the United States in accordance with this Act, shall, if requested by the Secretary of the Interior, bring an action in said court to determine the validity of said contract. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of a general notice thereof once each week for at least two consecutive weeks in some paper of general circulation published in the county or counties in which such district is situated, and if no paper is published in the county then same shall be published in a paper in the nearest county thereto where a paper is published. Notice shall also be served upon the Attorney General of the State of Texas of the pendency of said action in the same manner as in civil suits. The Attorney General may waive service in such suits when furnished a full transcript of the proceedings had in the formation of such district and in connection with the issuance of said bonds, or in connection with the authorization of said contract with the United States and a copy of the contract. [Acts 1913, p. 380, § 61; Acts 1917, 35th Leg., ch. 87, § 60; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 60).]

**Art. 5107—66. Record of bonds kept by county clerk.**—The county commissioners court in the county in which such district may be situated, in whole or in part, shall provide a well bound book in which a list of said bonds shall be kept by the county clerk, showing their numbers, amount, rate of interest, date of issue, when due, where payable, and said book shall be a public record. [Acts 1913, p. 380, § 66; Acts 1917, 35th Leg., ch. 87, § 65; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 65).]

**Art. 5107—67. Sale of bonds; exchange of bonds for property, work, etc.**—After the issuance of said bonds, and after the registration by the Comptroller of Public Accounts for the State of Texas, as provided by this Act, the board of directors for such district shall offer for sale, and sell said bonds on the best terms and for the best possible price, but none of said bonds shall be sold for less than ninety per cent of their face value. When said bonds are sold, all money received therefrom shall immediately be paid over by the board of directors to the depository for said district, provided, however, that the board of directors may exchange bonds for property to be acquired by purchase under contract or in the payment of contract price for work to be done for the use and benefit of said district. [Acts 1913, p. 380, § 67; Acts 1917, 35th Leg., ch. 87, § 66; Acts 1921, 37th Leg., ch. 13, § 3 (§ 66).]

**In general.**—Under this article, and arts. 5107—68, 5107—71, it is the duty of an irrigation district to provide a fund for the construction of improvements; and, in a

contractor's action for balance due for construction of a dam, the court was not without authority to decree that the defendant pay plaintiff's judgment out of the funds provided and secured for the construction of such improvements; such being necessary to enforce the judgment. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Validating sale for less than par.**—Where sale of \$40,000 of bonds of irrigation district for 90 per cent. of their face value was properly advertised and conducted, and the purchaser did not know that the statute prohibited sale for less than face value, the court did not err in validating the title to purchaser to \$36,000 par value of said bonds, and requiring surrender of the \$4,000 par value. *White v. Fahring* (Civ. App.) 212 S. W. 193.

#### **Art. 5107—68. Construction and maintenance fund.**

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

#### **Art. 5107—69. Levy of tax to pay interest on bonds and to create a sinking fund; in case of contract with United States.**

See *White v. Fahring* (Civ. App.) 212 S. W. 193.

**In general.**—In a contractor's action against an irrigation district for balance due on contract, a counterclaim by the district for damages from plaintiff's failure to complete the system whereby the district lost by being unable to irrigate is not allowable, since under arts. 5107—69 to 5107—71, the irrigation district is a quasi public corporation, supported by direct taxation, and limited to raising funds for current expenses in connection with its plant for furnishing water to others. *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—70. Interest and sinking fund.**—There is hereby created what shall be termed the "Interest and Sinking Fund" for such district, and all taxes collected under the provisions of this Act, for such fund, shall be credited to such fund, and shall never be paid out, except for the purpose of satisfying and discharging the interest on said bonds, or for the payment of such bonds, and to defray the expense of assessing and collecting such tax, and for the payment of principal and interest due or to become due to the United States under any contract between the district and the United States accompanying which bonds of the district have not been deposited with the United States, as in Section 21 hereof [1918 Supp. Art. 5107—21] provided, such fund shall be paid out upon order of the directors of such district upon warrants drawn therefor, as hereinbefore provided, and at the time of such payment the depository for such district shall receive and cancel any interest coupon so paid or any bond so paid, and when any such interest coupon or bond has been paid it shall be delivered to the directors and be cancelled and destroyed. [Acts 1913, p. 380, § 70; Acts 1915, 34th Leg., ch. 138, § 1; Acts 1917, ch. 87, 35th Leg., § 69; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 69).]

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—71. Maintenance and operating fund.**—There shall also be created a fund to be known as "Maintenance and Operating Fund" and such fund shall consist of all moneys collected by assessment or otherwise for the maintenance and operation of the properties owned or acquired by such district, or for temporary annual rental due to the United States, and out of this fund shall be paid all expenses of operation of every kind except the expenses of assessing and collecting taxes for the interest and sinking fund; and for the payment of any balance due on construction or for extensions and improvements, not otherwise provided for, such debts to be paid upon warrants executed as otherwise provided herein. [Acts 1913, p. 380, § 71; Acts 1917, 35th Leg., ch. 87, § 70; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 70).]

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

#### **Art. 5107—72. Terms of office of district officers.**

**Effect as remedying prior act.**—The Legislature having by timely enactment of this article, remedied the defect in Acts 29th Leg. c. 122, § 20, fixing terms of office

of members of board of directors of irrigation districts at four years, contrary to Const. art. 16, § 30, before any of the directors of district in question had served two years, and having in express terms validated districts created under the act of 1905, and the acts of the directors and officers of such districts, no one can complain of section 20. *White v. Fahring* (Civ. App.) 212 S. W. 193.

**Art. 5107—76. Vacancies in board of directors; notice of election.**

See 1918 Supp. arts. 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 5107—79. District, when and how dissolved; debts, how collected, etc.**

**Dissolution and receivership.**—In view of art. 1118, and arts. 4991-5011, an irrigation district is a "public corporation," which cannot be dissolved or have its powers destroyed at the suit of any one except the state. *J. S. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.

A receiver cannot be appointed at the instigation of creditors to take charge of the affairs of an irrigation district, and consequently no restraining orders against its directors can be issued. *Id.*

**Art. 5107—80. Districts in two or more counties, how established.**

—When any district proposed to be established embraces lands located in two or more counties the owners of title, or evidence of title of a majority of the acreage of the proposed district, or fifty property tax paying voters of the territory proposed to be embraced within a district may petition the State Board of Water Engineers for a hearing to determine the advisability of the creation of such district, and for an order of election creating such district, and for the election of five directors of the proposed district. Upon the filing of such petition the Board of Water Engineers shall set the same down for a hearing at a date not less than fifteen nor more than thirty days from the date of the filing of such petition, and shall cause notice to be given to the Commissioners' Courts of each county in which lands are located proposed to be embraced in the district, and stating the date and place of the hearing, and upon receipt of such notice by the Commissioners' Courts from the State Board of Water Engineers it shall be the duty of the clerk of the said Commissioners' Courts to post a notice at the courthouse door of the date and place of hearing. At such hearing on said petition to the Board of Water Engineers any person whose land would be affected by the organization of such district may appear before the Board of Water Engineers and protest against or contend for the creation of the proposed district, and may offer competent testimony to show that the said district, would or would not serve a beneficial purpose, and that the organization of such district would or would not be practicable or capable of accomplishing the purposes intended by its organization.

If upon hearing of such petition it shall appear to the Board of Water Engineers that the proposed plan of water conservation, irrigation and use presented in the petition praying for the organization of the district, is practicable and would present a public utility; then the said Board of Water Engineers shall so find and enter such finding in the records of the Board, and shall transmit a certified copy of such findings to the Commissioners' Court in each county in which lands proposed to be embraced within said district are situated, and naming a date on which an election shall be held in the territory to be comprised within the district to determine whether or not the proposed district shall be created in accordance with the provisions of this Act, and for the election of a board of five directors of such district. But should the Board of Water Engineers upon such hearing determine that said proposed district is not practicable and will not serve a beneficial purpose, and that it would not be possible to accomplish through its organization the purposes proposed, then it shall so find and enter its findings of record, and

the petition shall be thereupon dismissed. Provided, that the boundary lines of the proposed district may be so changed in the course of such hearing as to meet objections urged to the practicability and feasibility of the district, in accordance with the findings of the Board of Water Engineers, if such changes will result in bringing the proposed district within the provisions of the statute, and will make such district serve a beneficial purpose.

Upon the receipt of a certified copy of the findings of the Board of Water Engineers authorizing an election to determine whether or not the proposed district shall be formed, the Commissioners' Court of each county and part of county which is embraced within the proposed district shall give notice of an election to be held on the date named in the finding and order of the Board of Water Engineers, which notice shall be posted as provided in this Act for other elections for not less than fifteen, nor more than thirty days before the date fixed for the election.

At the said election there shall be submitted for the decision of the voters the question whether or not the proposed district shall be created, and for the election of five directors for the district. Persons desiring to vote for the creation of such district and for the election of five directors for such district shall have written or printed on their ballots the words "For the District" and those desiring to vote against the creation of the district shall have written or printed on their ballots the words "Against the District." At such election the names of the directors may be written or printed upon said ballot, or a separate ballot may be used for such purpose. [Acts 1913, p. 380, § 80; Acts 1917, 35th Leg., ch. 87, § 80; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 80); Acts 1921, 37th Leg., ch. 13, § 4 (§ 80).]

**Art. 5107—81. Same; Board of Water Engineers shall designate county judge to canvass vote; returns, and certification of result to designated judge; certificate of election issued to directors.**—In certifying the result of its findings upon the petition for an election to create a district, and for the election of the Board of Directors, the Board of Water Engineers shall designate the County Judge in one of the counties in the proposed district as a canvassing board to receive and canvass and declare the result of the election for the creation of the proposed district. When the election for the creation of the district has been held the officers named by the Commissioners' Court of the different counties to hold the elections in the proposed district shall make returns of the election to the Commissioners' Court of their respective counties and return all ballot boxes to the clerk of the Commissioners' Court of the county, and it shall be the duty of the Commissioners' Court of each county in the proposed district upon receiving returns of the election to canvass the same and certify the result of the election in the county to the County Judge of that county named by the Board of Water Engineers as the canvassing board in the election for the creation of the district, and for the election of the board of directors. Upon receipt of the returns of the election in the different counties of the district the County Judge designated to canvass the vote shall canvass such vote and certify the result to each county in the proposed district. If a majority of the votes cast in the district are in favor of the creation of the district, this finding shall be entered of record in the permanent records of the Commissioners' Court in each county embraced in whole or in part in the proposed district, and the County Judge of the county canvassing the vote of the district shall certify the result to the five



persons receiving the highest number of votes for directors, and issue to them a certificate of election, and the said directors shall after having been notified proceed with the organization of the district as provided in this Act. [Acts 1913, p. 380, § 81; Acts 1917, 35th Leg., ch. 87, § 81; Acts 1921, 37th Leg., ch. 13, § 5 (§ 81).]

**Art. 5107—82. Same; Board of directors shall proceed as in districts composed of single county; district as body corporate.**—The board of directors, as soon as they shall have qualified, shall proceed to the selection of all administrative officers and necessary employes for the direction of the affairs of the district in the manner provided in this Act for districts lying wholly in one county, except as may be specifically provided in these Sections. The board of directors elected for such district shall qualify and meet as hereinabove provided, and shall have charge of the affairs of the district in the same manner as herein provided for districts lying wholly within one county. All such districts shall be governmental agencies, and body politic and corporate, and be governed by and exercise all the rights, privileges and powers provided by law as pertaining to districts lying within one county, and as embodied in the provisions of this Act. [Acts 1913, p. 380, § 82; Acts 1917, 35th Leg., ch. 87, § 82; Acts 1921, 37th Leg., ch. 13, § 6 (§ 82).]

**Art. 5107—83. Lands in adjoining county may be included; notice of election.**

See 1918 Supp. arts. 6016½-6016½c, as to publication in newspaper instead of posting.

**Art. 5107—85. Contracts, how let; notice; contracts with United States.**

**Alleging compliance with requirements.**—See *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—86. Bidders to receive copies of reports and profits; bids, how made, etc.**

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—87. Contracts to conform to act; how executed, filed and recorded.**

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—89. Contracts to contain specifications; supervision; reports of engineer; bridges and culverts across railroads.**

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—92. Duties of directors; inspection; payment of contract price; contracts with partial payments.**

Cited, *Peyton Creek Irr. Dist. v. White* (Civ. App.) 230 S. W. 1060.

**Art. 5107—95. Person desiring to receive water to furnish statement; directors to estimate expense; expense, how paid; assessments; contracts with users; borrowing money; liens, interest; delinquents; contracts with United States.**—Every person desiring to receive water during the course of the year, or at any time during the year, shall furnish to the secretary of the board of directors a statement in writing of the acreage intended by him to be put under irrigation, and for which water is to be used, and as near as may be, a statement of the several crops to be planted, with the acreage of each, and shall at the same time pay such proportion of the water charge or assessment therefor as may be prescribed by the board of directors. If such statement should not be furnished, or such payment should not be made before the date for fix-

ing the assessments, there shall be no obligation upon the district to furnish such water to such person for that year. The board of directors, on or as soon as practicable after a date in each year to be fixed by a standing order of the board, shall carefully estimate the expense to be incurred during the course of the next succeeding twelve months for the maintenance and operation of the irrigation system. A proportionate part of the amount so estimated not less than one-third, nor more than two-thirds, to be determined from year to year, by the board of directors, shall be paid by assessment against all irrigable lands within the district, pro rata per acre; that is to say, against all lands to which the district is in condition to furnish water by its then system of canals and laterals, or through extensions thereto of then existing laterals, but without reference as to whether such land is to be actually irrigated or not; and the remainder of the amount so estimated shall be paid by the persons taking water; or applying for water as aforesaid. This remaining amount shall be equitably pro rated, as nearly as may be, among the applicants for water, and in pro rating same, the board of directors may take into consideration the acreage to be planted by each application for water, the crop to be grown by him, and the amount of water per acre to be used by him provided, however that each water user shall pay the same price per acre for use of upon the same class of crops. All assessments shall be paid in installments and at times to be fixed by the order of the board of directors, but if the crop for which such water was furnished shall be harvested prior to time fixed for the payment of any installment, the entire unpaid assessment shall at once become due and shall be paid within ten days after the harvesting of such crop and before the removal of same from the county or counties in which grown. The board of directors shall have power and authority from time to time to adopt, alter and rescind rules, regulations, standing orders and temporary orders, not in conflict with this Act, governing the methods, ways, terms and conditions of water service, applications for water, assessments for maintenance and operation and the payment and the enforcement of payment of such assessments, and the furnishing of water to persons who have not applied for same before the date of assessment, and to persons who desire to take water for irrigation in excess of their original applications, or for use on other lands than those covered by such applications. The board of directors may, at their discretion, require every person desiring water during the course of the year to enter into a contract with the district, which contract shall indicate the acreage to be watered, the crops to be planted, and the amount to become due and the terms of payment; and it may be further required that the water taker shall execute a negotiable note or notes for such amounts, or for parts thereof. The making of such contracts shall not constitute a waiver of the lien given by this Act upon the crops of the water taker for the service furnished to him. If the water taker shall water more land than is called for in his contract, he shall pay for the additional service rendered as and at the times hereinbefore indicated. To secure money for the operating and maintenance expense of the district, the board of directors shall have authority to borrow money with interest not exceeding ten per cent per annum, and may hypothecate any of its notes or contracts with water takers or accounts against them. The district shall have a first lien superior to all other liens upon all crops of whatsoever kind grown upon each tract of land in the district to secure the payment of the assessment herein provided for, and all such assess-

ments shall bear interest from the time due and payable at the rate of ten per cent per annum. And if suit should be filed therefor, or the same should be collected by any legal proceedings, an additional amount of ten per cent on unpaid principal and interest shall be added to the same as collection or attorney's fees, which collection fees, as well as principal and interest of such assessments shall stand secured by the lien aforesaid. Suits for delinquent water assessments may be brought either in the county in which the irrigation district is situated or in the county in which the defendant resides. All land owners shall be personally liable for all assessments herein provided for, and if they shall fail or refuse to pay same when due the water supply shall be cut off and no water shall be furnished to the land until all back dues are fully paid. This provision shall bind all parties, persons and corporations owning or thereafter acquiring any interest in said lands; provided however, that each and every person, land owner and tenant holding, owning or possessing land in an irrigation or water improvement district shall be entitled to the use of his proportionate part of the available water supply and whenever he shall have paid or make a proper tender of the current annual dues or assessments under the rules of such districts due for the maintenance fund, he shall be supplied such water without discrimination, and such district shall be liable for a failure to furnish same or for any discrimination against him and his right thereto may be protected by the issuance of an injunction. The directors of all districts shall within ten days after any assessment is due post at a public place in said district a list of all delinquents and shall thereafter keep posted a correct list of all such delinquents; provided however, that if the parties owning such assessments shall have executed notes and contracts as hereinbefore provided they shall not be placed upon such delinquent list until after the maturity of such notes and contracts. In the event that contract shall be made with the United States, the remedies in this Section hereinbefore provided in favor of the district shall apply with regard to the operation and maintenance and rental charges which may become due to the United States. Provided, however, that the Federal reclamation laws and in particular the Reclamation Extension Act approved August 13, 1914, and any Acts amendatory thereof, shall be applicable. Moreover, all water the right to the use of which is acquired by the district under contract with the United States, shall be distributed and apportioned by the district in accordance with the Acts of Congress and rules and regulations of the Secretary of the Interior and the provisions of such contract in relation thereto. [Acts 1913, p. 380, § 95; Acts 1917, 35th Leg., ch. 87, § 95; Acts 1919, 36th Leg. 2d C. S., ch. 76, § 1 (§ 95).]

**Curing defects in former act.**—The presence in Acts 29th Leg. c. 122, of sections 34, 48, which are inoperative because they do not provide for any hearing for determinations of benefits, to property within irrigation districts, does not render the whole act violative of the Constitution, since the main purpose of the act can be given effect without regard to the sections, and must be upheld, this article having cured the defects. *White v. Fahring* (Civ. App.) 212 S. W. 193.

#### **Art. 5107—96. Notice of additional assessments.**

See 1918 Supp. arts. 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 5107—100. District depositories.**—The directors for such district shall select a depository for such district under the same provisions as are now or may hereafter be provided for the selection of the depository for the counties in this State. The duties of such depositories shall be the same as are now or may hereafter be prescribed by

law for county depositories. However, in the selection of depositories the directors of such district shall act in the same capacity and perform the same duties as is incumbent upon the County Judge and members of the County Commissioners' Court in the selection of the county depository; provided, however, that in the event the highest and best bidder for the handling of such funds as the depository of such district should be a bank in which members of such board should be a stockholder or director, that then in that event such bank may be selected as such depository by the other directors being a majority of said board, and the bond given by such depository may be approved by them, but in such event before said order so selecting said such depository or approving such bonds shall be effective, the same shall be filed with and approved by the County Judge of the county in which such district is situated, and such approval by such County Judge shall make such action final, but in the event the County Judge of said county shall, for any reason, fail to approve said selection or to approve said bond, then said bank shall not be selected, but new bids shall be called for, and some other bank be selected. [Acts 1913, p. 380, § 100; Acts 1917, 35th Leg., ch. 87, § 100; Acts 1921, 37th Leg., ch. 13, § 7 (§ 100).]

**Art. 5107—108. Power to construct works for irrigation of lands, etc.; authority of directors.**—All districts organized under the provisions of this Act shall have full authority, acting by and through its board of directors, to construct all works and improvements necessary for the irrigation of lands in said districts, and to supply, deliver and sell water for domestic power, and commercial purposes when operating under the authority of Section 59 of Article 16 of the Constitution; and to fully carry out the purpose of its organization and the conservation and use of water for the several purposes authorized by the Constitution and laws of this State, and to acquire the right to the use of water in the manner provided by law, and the directors of such districts, subject only to the provisions hereof, shall have full authority to manage such districts and the business of such districts for the purpose of carrying out the intention and purposes of the organization. [Acts 1917, 35th Leg., ch. 87, § 108; Acts 1919, 36th Leg. 2d C. S., ch. 28, § 1 (§ 108).]

**Art. 5107—118. Election in town, city or municipal corporation within district; separate canvass of result; district not to include town, etc., when.**—Whenever a district proposed to be organized as herein provided contains within its boundaries as proposed and described in the petition for organization, a town, city or municipal corporation, or part thereof, when the county commissioners court calling the election to determine said question as herein provided shall constitute said territory within said town, city or municipal corporation, a separate election precinct, with one or more polling places, and the vote received for and against the proposition within said town, city or municipal corporation shall be separately canvassed by the court to determine whether or not a majority of those voting at said election within said town, city or municipal corporation voted for or against said proposition. If a majority of those voting at said election within such town, city or municipal corporation vote against the formation of such district the same shall not be formed including such town, city or municipal corporation, but if the majority of the votes therein is in favor of the formation of such district then such votes shall be canvassed with the

votes of the balance of said entire district to determine the result of said election. [Acts 1919, 36th Leg. 2d C. S., ch. 28, § 2 (§ 118a).]

Took effect July 25, 1919.

**Explanatory.**—This article, and arts. 5107—119, 5107—120, 5107—121, were added to Acts 1917, 35th Leg., ch. 87, as §§ 118a, 119, 120, and 121 thereof, by Acts 1919, 36th Leg. 2d C. S., ch. 28, § 2.

**Art. 5107—119. Maintenance charges, how fixed; measuring devices.**—The maintenance charges may be fixed as provided in Section 95 of this Act [Art. 5107—95], or same may be determined upon the basis of the quantity of water used, and if based upon the use of water a fixed charge may be made on all lands or water connections entitled to receive and use water, and an additional charge may be made, or a graduated scale adopted, for the use of water in excess of that covered by the minimum charge. The district may install proper measuring devices. [Id. (§ 119).]

**Art. 5107—120. Contract with city or town to supply water.**—Where a district includes a city or town, or contracts with a city or town to supply it water, the charge for the use and delivery of such water, and the time and manner of payment therefor shall be determined by the board of directors and be specified in a standing order of said board. [Id. (§ 120).]

**Art. 5107—121. Consolidation of districts; election; procedure; taxes; debts; officers.**—Any two or more irrigation districts, or water improvement districts, governed by the provisions of this Act and amendments thereof, may be consolidated into one district in the following manner: The terms and conditions upon which such consolidation is to be effected shall be agreed upon by the board of directors of each district, and then the question shall be submitted to a vote in each district after giving notice thereof for at least twenty days in the manner provided by law for other elections. The election shall be held in such districts on the same day. The consolidation to be effected only in the event same is adopted by each and all such districts. When two or more districts are consolidated their obligations shall not be impaired but shall be protected and paid by taxes levied upon the property in the district creating said debt or by assessments in the same manner and extent as if said consolidation had not been effected. After consolidation such taxes shall be assessed and collected by the officers of the consolidated district and in the event they should fail or refuse to so assess and collect same, for such purpose, in due order and time, then same may be assessed and collected, and paid on such obligations, by a receiver appointed by and acting under the orders of a district court, in a proper suit which may be brought by a creditor or by five or more tax payers of such district. When two or more districts are consolidated into one district, same shall be governed as and be one district, except that the debts of each district created prior to such consolidation, shall be paid as herein provided; provided, however, such consolidated district may contribute to such payments upon the terms stated in the consolidated agreement. When two or more districts are consolidated the officers of said respective districts shall continue to act jointly as the officers of said district, and to wind up, the affairs of their respective districts as affected by said consolidation, for a period of ninety days after the date of the election, and they may continue to so act until the next general election if so provided by the consolidation agreement, or the consolidation agreement may provide who shall con-

stitute the first board of directors to serve until the next general election if the officers then serving agree to resign. Said new officers shall within the period of ninety days after the election qualify as such officers of the consolidated district and assume such offices at the expiration of said period. All bonds of such officers will be approved by the then existing boards of directors. [Id. (§ 121).]

**Art. 5107—122. Repeal.**—Any and all Acts of the Legislature in conflict with the provisions hereof are repealed insofar as they conflict with the provisions hereof; provided this Act shall not in any manner affect or repeal other laws providing other methods of forming similar districts. [Id., § 3.]

**Art. 5107—122a. Mode of taxation in case of extension or consolidation of districts.**—In the event land is admitted to an established district by petition provided for in Section 20 of Chapter 87, Acts of the Thirty-fifth Legislature [1918 Supp., Art. 5107—20], and such district to which same is added is or has been constituted a conservation and reclamation district, such land may be admitted upon the agreement that same will be taxed upon the assessment of benefit plan instead of upon the plan of the general ad valorem tax, and when two or more districts are consolidated by an agreement adopted by an election, and one of the districts has issued bonds, the property in the other districts, when so provided by agreement, shall be taxed for the payment thereof on the basis of taxation, the rate of taxation, and the period for which same are to be paid and other details prescribed in the consolidation agreement, and adopted at said election by a majority vote, and when said tax is levied on irrigated land or land to be irrigated, same may provide for a fixed acreage tax, if same is equitable. [Acts 1921, 37th Leg., ch. 13, § 8 (§ 122).]

**Explanatory.**—This act adds sections 122 to 137, inclusive, to Acts 1917, 35th Leg., ch. 87.

**Art. 5107—122b. Location of office of directors where towns are excluded from district.**—Whenever a district is formed in such manner that the towns within or adjoining the territory included in the district are left out of said district, then in that event the directors for said district may establish the office in said district, as provided by law, or may establish the office of said district within any town adjoining, or close to said district within the same county or counties, which may be best suited as a location for the transaction of the business of said district, provided, however, such office shall not be removed from the proximity of said district, but shall be so located as to be accessible to the residents of said district. [Id., § 8 (§ 123).]

**Art. 5107—122c. Mode of assessment for taxation in district constituted a conservation and reclamation district.**—In the event that any irrigation or water improvement district, other than those operating under contract with the United States, have been or shall be constituted a conservation and reclamation district, and shall adopt the assessment for benefit plan of taxation instead of the ad valorem system of taxation, as authorized by the provisions of Chapter 12 of the General Laws of the Second Called Session of the Thirty-sixth Legislature [Arts. 5107—50a, 5107—272, 5107—273], or under the provisions of this Act, then in that event the levy, assessment, equalization of property values, and collection of taxes shall be made in the manner provided by Sections 125 to 130 inclusive [Art. 5107—122d et seq.] of this Act. [Id., § 8 (§ 124).]

**Art. 5107—122d. Commissioners of appraisalment.**—As soon as practicable, after the approval of the report of the engineer, and the adoption of the plan of improvements to be constructed, the board of directors shall appoint three disinterested commissioners, who shall be known as commissioners of appraisalment, but who shall be freeholders, but not owners of land within the district for which they are to act. [Id., § 8 (§ 125).]

**Art. 5107—122e. Same; notice to and proceedings of Commissioners.**—The secretary of the board of directors immediately following the appointment of the commissioners of appraisalment shall in writing notify each of his appointment, and in the notice designate a time and place for the first meeting of such commissioners. It shall be the duty of the commissioners to meet at the time and place specified or as soon thereafter as possible when they shall each take and subscribe an oath that they will faithfully and impartially discharge their duty as such commissioner, and make true report of the work done by them, and at such meeting the commissioners shall organize by electing one of their number chairman and one vice-chairman, and the secretary of the board of directors, or in his absence such person as the board of directors may appoint, shall be secretary of said commissioners during their continuance in office and shall furnish to them such information and such assistance as may be within his power and necessary to the performance of their duties. [Id., § 8 (§ 126).]

**Art. 5107—122f. Same; assessment and report of commissioners; compensation.**—Within thirty days after qualifying and organizing as above directed, the commissioners of appraisalment shall begin their duties, and they may at an time call upon the attorney of the district for legal advice and information relative to such duties, and may, if necessary, require the presence of the district engineer, or one of his assistants, as such times and for so long as may be necessary to the proper performance of their duties. Such commissioners shall proceed to view the lands within such district as will be affected by the plan of reclamation for such district as carried out, and all public roads, railroads, rights of way and other property or improvements located within such district, and shall assess the amounts of benefits and all damages, if any, that will accrue to any tract of land or other property within such district or to any public highway, railroad and other rights of way, roadways or other property from carrying out and putting into effect the improvements to be constructed by such district. The board shall prepare a report of their findings which shall show the owner of each piece of property examined, and on or concerning which any assessment is made, together with such description of said property as may identify the same, with the amount of damages and all benefits assessed for and on account of, or against the same, which said report shall be signed by at least a majority of the said commissioners and filed with the secretary of the board of directors of the district, and which report shall also show the number of days each commissioner has been employed and the actual expenses incurred by each during his service as commissioner, and each shall be paid by the district not to exceed \$10.00 per day for his services, and all necessary expenses in addition thereto upon the approval of his account for such per diem and expenses by the board of directors. Said commissioners shall in their said report fix a time and place when and where they will hear objections thereto, and such date shall be not less than twenty days from the filing of such report. [Id., § 8 (§ 127).]

**Art. 5107—122g. Same; proceedings on report; objections; notice of hearing.**—When the report of the Commissioners shall have been filed with the secretary of the board of directors, he shall forthwith give notice by publication in a newspaper published in each county wherein any portion of the district is located, for at least once a week for two consecutive weeks prior to the date fixed for such hearing, of the time and place of such hearing, and he shall also mail a written notice to each person whose property will be in any wise affected by the carrying out of the plan of reclamation and improvement if his postoffice is known, stating the time and place of such meeting, which notice shall state in substance that the report of the commissioners to assess benefits and damages accruing to the land and other property by reason of the plan of reclamation and improvement for the district in question has been filed in his office, and that all persons interested may examine the same and make objections thereto in whole or in part, and that the commissioners will meet on the day and at the place named for the purpose of hearing and acting on objections to such report, and the secretary upon the day of the hearing shall file in his office the original notice with his affidavit thereto, showing the manner of publication and the names of all persons to whom notices have been mailed, and that postoffices of those to be affected to whom notices were not mailed were unknown to him, and could not be ascertained by reasonable diligence, and copies of such notice and affidavit shall be filed, one with the commissioners of appraisal and one with the clerk of the County Commissioners' Court. [Id., § 8 (§ 128).]

**Art. 5107—122h. Same; exceptions; decision; costs; record.**—At or before the hearing, upon the report of the commissioners of appraisal, any owner of land or other property affected by such report, or the plan of reclamation and improvements may file exceptions to any or all parts of such report, and said commissioners at the time and place specified in the notice shall proceed to hear and base opinion on such objections, and where such objections are sustained, in whole or in part, may make such changes and modifications from time to time as may be necessary to conform the report to their findings. When the commissioners shall have finally acted they shall make decrees confirming such report in so far as it is confirmed, and approving and confirming the same as modified or changed in so far as it may be modified or changed. The commissioners shall have power to adjudge and apportion costs incurred upon the hearing in such manner as may be deemed equitable. The findings of the commissioners as to benefits and damages to lands, railroads and other property within the district shall be final and conclusive. The final decree and judgment of the commissioners shall be entered of record in the minutes of the board of directors, and certified copies thereof shall be filed with the county clerk of each county in which any portion of the lands within such district are located, as a permanent record of such county, and such filings shall be notice to all persons of the contents and purpose of such decree. [Id., § 8 (§ 129).]

**Art. 5107—122i. Same; basis for levy of tax; process for witnesses.**—After the action of the commissioners of appraisal as aforesaid, their final findings, judgment and decree, until lawfully changed or modified, shall form the basis of taxation within and for the district for which they shall have acted, for all purposes for which taxes may be levied by, for or on behalf of such district and all taxes shall be apportioned and levied on each tract of land, railroad and other real property in the



district, in proportion to the net benefits to the property named in such final judgment or decree as shown thereby. In all matters before the commissioners of appraisal, parties interested may not only appear in person or by attorney, but they shall be entitled to process for witnesses to be issued by the chairman of the commissioners of appraisal on demand, and such commissioners shall have the same power as a court of record to enforce the attendance of witnesses. [Id., § 8 (§ 130).]

**Art. 5107—122j. Election to determine mode of assessment of tax.**—Any water improvement district organized under authority of Section 59 of Article 16 of the Constitution, and Chapter 25 General Laws, Fourth Called Session, Thirty-fifth Legislature, [Arts. 5107—267 to 5107—276], as well as any water improvement district which may have been created prior to the adoption of such Constitutional amendment, and which shall have availed itself or may hereafter avail itself of the benefits of Section 59 of Article 16 of the Constitution, may at the time of its creation, or at any time thereafter before such district shall have issued bonds, submit to the qualified electors of such district the question whether the taxes to be levied therein, or any part thereof, shall be levied, assessed and collected upon an “equitable” basis in proportion to benefits to be conferred by the organization, operation and maintenance of such district and the work and improvements to be created thereby, or whether such taxation or any portion thereof shall be levied upon an ad valorem basis. Such question shall be submitted to the qualified voters of such district at any time and in any manner that the governing body of such water improvement district may select, and the ballots to be used shall have printed thereon in substance the following: “For the levy of taxes upon a benefit basis instead of an ad valorem basis,” and “Against the levy of taxes on a benefit basis instead of on an ad valorem basis.” And such election shall be governed by the provisions of Chapter 87 of the General Laws of the Thirty-fifth Legislature, Regular Session, and amendments thereof [1918 Supp., Art. 5107—1 et seq.] so far as applicable. If a majority of the votes cast at such election shall be in favor of the levy and collection of the taxes, or any part thereof, upon an equitable basis in proportion to benefits instead of upon an ad valorem basis, then taxes shall be so levied and collected. [Id., § 8 (§ 131).]

**Art. 5107—122k. Apportionment and assessment of benefits in districts operating under contract with United States; notice and hearing.**—In the event an irrigation or water improvement district shall have heretofore been operated or shall hereafter be operated under contract with the United States and such district shall have adopted or may adopt the plan of the levy and collection of taxes on a benefit basis instead of an ad valorem basis, then the directors of such district shall at some convenient time thereafter, and from time to time as may be necessary, sit as a board to apportion and assess the benefits conferred upon any and all property situated within such water improvement district and shall cause a record to be made, showing the amount and value of the benefits computed to accrue to all of the property situated within such district and subject to taxation, and the amount of taxes upon such basis to be levied against and collected from such property; provided, that no taxes so assessed or adjudged against such property shall be in excess of the benefit accruing and to accrue to such property from the organization, operation and maintenance of such district and the improvements to be acquired or constructed thereby. After such record shall have been

made up, the board shall cause notice to be mailed to each property owner whose name appears upon such record, showing the amount of taxes to be levied against such property, and fixing a date and place at which such owner may appear and contest the correctness and equitableness of such tax. And after such hearing such board of directors or other governing body shall determine the inequitableness of the tax and sustain, reduce, or increase the same, as in their judgment shall be just and equitable; and the decision of such board shall be final. All of the provisions of Chapter 87, General Laws Thirty-fifth Legislature, Regular Session, and amendments thereto [1918 Supp., arts. 5107—1 to 5107—122], not inconsistent herewith, shall apply to the levy, assessment and collection of the taxes herein provided for. [Id., § 8 (§ 132).]

**Art. 5107—122l. Contracts for sale of water power privileges; reserving supply for irrigation and other purposes.**—Any irrigation or water improvement district may contract for the sale of water power privileges whenever it may be possible for power to be generated by the use of the water flowing from its reservoir, or in its canal system, provided, however, any such contract for the sale of water power privileges shall be subject to the obligation of the district to protect the lands embraced therein in an adequate supply of water for irrigation for which the district was organized, or for supplying water for municipal purposes in those districts supplying water for municipal purposes. [Id., § 8 (§ 133).]

**Art. 5107—122m. Districts operating under ad valorem basis of taxation may adopt assessment and equalization plan; mode of assessment; compensation of tax collector; remedies of security holders; appeal; districts embracing two or more counties.**—Irrigation and water improvement districts operating under the provisions of laws of this State, and assessing taxes on the ad valorem basis, may, if they find it to their advantage, adopt the assessment and equalization of values of the property authorized therein for taxation as made and equalized by the county officers and the County Commissioners' Court and base the levy and collection of taxes on such assessment and equalization, and they shall also have authority to secure from the County Tax Assessor a list of tax renditions as made to him covering the property within said district, and adopt same for the use and benefit of said district by causing the tax assessor and collector of the district to compile same as the tax roll of the district instead of making independent assessment thereof. In the event that the district tax assessor and collector and district directors should for any reason fail or refuse to properly assess, equalize tax values, and prepare a tax roll for said district, as provided by law, then in that event the taxes levied at the time of issuance of bonds or other valid obligations of said district shall be collected by the County Tax Collector by entering on his rolls the said tax as against all property situated within such district for the year or years which the said district officers may have so failed to perform their said duties. If the tax levy is not sufficient because of decreased valuations same shall be increased by order of the Commissioners Court.

The fund so collected by such County Tax Collector shall be deposited in the county depository as a special fund to be devoted to the payment of interest and sinking fund on such bonds or other obligations, and such fund shall be paid thereon upon order of the County Commissioners' Court. In the event any such County Tax Collector should fail or refuse to perform such duties then the holders of such

securities, bonds or obligations, or any one or more of them, may compel him to do so by mandamus proceeding in the court of proper jurisdiction. The County Tax Collector shall be allowed, in addition to all other compensation now provided by law, reasonable fees for the performance of such duty, to be fixed by the County Commissioners' Court, not to exceed, however, the rate of compensation fixed by law for the performance of like duties in the collection of county funds. Whenever such district officers shall fail to perform and discharge their duty, in the assessment and valuation of the property and collection of taxes; as hereinabove provided, then any bond holder or other person interested in said district and the payment of their obligations may request the County Commissioners' Court to enter an order authorizing the County Tax Collector to perform the duties herein provided, and the County Commissioners' Court shall investigate said matter, and if they find said conditions to exist shall enter an order directing the County Tax Collector to proceed as herein provided, and no County Tax Collector shall undertake the collection of such taxes until so ordered by the County Commissioners' Court. The provisions of this Section are not intended to allow anyone to interfere with the duties of the district officers so long as they are in the active discharge of their duties, but such powers shall be exercised in the event such district officers shall not perform their duties, or in the event of a vacancy in said offices.

In the event of any dispute arising as to whether or not said officers are so performing their duties, said matter may be determined by an action against said officers in the District Court in the nature of a mandamus suit or in injunction proceedings restraining such officers from interfering with the collection of such taxes and the payment of said obligations by said County Tax Collector, and said County Commissioners' Court. Any such action of the District Court may be appealed to the Court of Civil Appeals and a judgment of the Court of Civil Appeals shall be final. In the event any such district embraces territory in two or more counties, the duties herein provided for the County Tax Collector and County Commissioners' Court shall be performed by such officers as to all such property lying within the county. [Id., § 8 (§ 134).]

**Art. 5107—122n. Sale of surplus water.**—Any irrigation or water improvement district may sell a surplus water they may have or have conserved to lands in the same vicinity for the purpose of irrigation, domestic or commercial uses. [Id., § 8 (§ 135).]

**Explanatory.**—Sec. 136 repeals all laws in conflict, and sec. 5a, ch. 12, Gen. Laws, 2d Called Sess. 35th Leg. Sec. 137 is the emergency clause. Act took effect March 2, 1921.

**Art. 5107—122o. Water improvement district which is also a conservation and reclamation district may hold election to impose limitation on debt or bond issue; completion of works.**—The Board of Directors of any Water Improvement District which has been or shall be constituted a Conservation and Reclamation District under the provisions of Section 59, of Article XVI, of the Constitution, may, for the benefit of the purchasers or holders of bonds to be issued, limit the power of the District to incur debt and issue bonds in the manner and to the extent hereinafter mentioned. Said Board may adopt a resolution declaring that during a period not exceeding ten years, the District shall not issue bonds in excess of twenty-five per cent of the assessed value of the taxable real property of the District according to the last assessment for District purposes, and shall give notices of the adoption of

such resolution by publication once a week for two successive weeks in a newspaper published in the District, stating that such resolution shall take effect unless a petition signed by ten per cent. of the qualified property tax paying electors of the District shall be presented against the proposed limitation within thirty days after the date of the first publication of such notice. If such petition or remonstrance be filed within said period, said limitation shall not take effect unless it be approved at a general or special election held in the District in the same manner as other general or special elections are held. The ballot on the question at such election shall be in substantially the following form: "For limiting during the term of . . . . . years, the maximum debt of the District to twenty-five per cent. of the assessed valuation of the real property," and "Against limiting during the term of . . . . . years, the maximum debt of the District to twenty-five per cent of the assessed valuation of the real property." If such limitation shall be approved or if during said period no petition or remonstrance shall be filed, the District shall not issue bonds under any statute or constitutional provision during said term in excess of the amount so limited, except to complete works for constructing which bonds may be issued within said limitation, and shall only issue bonds exceeding said limitation for completing such works after the State Board of Water Engineers shall have approved the plans and specifications of the original and uncompleted works, together with the estimates of the cost thereof. If such plans and specifications and estimate be approved by said State Board of Water Engineers, notice of intention to issue said bonds to complete said works shall be given by publication once a week for three weeks, stating the amount of the proposed issue of bonds and the time when a hearing will be had, which shall be not less than thirty days from the date of the first publication. Any property taxpayer, bond holder or other creditor or person interested may appear and shall be heard. If the determination be in favor of the issuance of additional bonds to the amount stated in the notice, the question of issuing such bonds shall be submitted to the property taxpaying voters at an election held in the form and manner prescribed by law. [Acts 1921, 37th Leg. 1st C. S., ch. 6, § 1 (§ 138).]

**Explanatory.**—Took effect Aug. 13, 1921. The act adds sections 138 and 139 to Acts 1917, 35th Leg., ch. 87.

**Art. 5107—122p. Former proceedings validated.**—All proceedings heretofore had and taken to organize a water improvement district under the Act to which this is an amendment, or to determine the manner in which taxes or assessments shall be levied and collected, or to bring any district organized hereunder, under the provisions of Section 59 of Article XVI of the Constitution of Texas, or to authorize the issuance of bonds of any District organized under the Act to which this is an amendment, whether such District shall or shall not have come under said Section 59 of Article XVI of the Constitution, shall be and are hereby in all respects ratified, validated, approved and confirmed, and such bonds may be issued and sold in the form and manner and at the price and under the conditions prescribed by law. [Id., § 1 (§ 139).]

**Art. 5107—122pp. Districts may maintain suits.**—All water improvement districts and irrigation districts heretofore or hereafter organized under the laws of the State being dependent upon their water rights and water supply to perform their public duties and to protect their bonds and other indebtedness created under the provisions of the

law and to maintain their taxable values and assessable values shall have full authority to maintain any action or suit for such purposes. [Acts 1921, 37th Leg. 1st C. S., ch. 46, § 1 (§ 140).]

**Explanatory.**—Took effect Nov. 15, 1921. The act amends Acts 1917, 35th Leg. ch. 87, by adding thereto sections 140, 141, and 142.

**Art. 5107—122q. Districts may sue to protect water supply.**—The board of directors are hereby empowered to institute and maintain any suit or suits to protect the water supply of said district and to prevent any unlawful or unwarranted interference with or diversion of such water supply. All water improvement districts and irrigation districts shall have full power and right to protect its water supply and all other rights and property and by proper suit, to prevent any taking or interference with such water supply, of whatever nature or however acquired, necessary to the uses of such district or for the irrigation of the lands situated therein. [Id., § 1 (§ 141).]

**Art. 5107—122qq. State Board of Water Engineers constituted a commission to investigate feasibility of projects involving issuance of bonds.**—The State Board of Water Engineers shall be and is constituted a commission to investigate and report upon the organization and feasibility of all water improvement districts which shall issue bonds under the provisions of the law of this State. All such districts desiring to issue bonds for any purposes shall submit in writing to said board an application for investigation, together with a copy of the engineer's report, and a copy of all data, profiles, maps, plans and specifications prepared in connection therewith. Said Board of Water Engineers shall examine same and shall visit the project and carefully inspect the same and may call for and shall be applied with additional data and information requisite to a reasonable and careful investigation of the project and proposed improvements. They shall file in their office in writing their suggestions for changes and improvements, and furnish a copy thereof to the board of directors of the district. If said board shall finally approve or refuse to approve such project, or the issuance of bonds for any improvement, they shall make a full written report thereon, file same in their office, and furnish a copy of same to the board of directors of said district. [Id., § 1 (§ 142).]

## CHAPTER THREE

### WATER CONTROL AND PRESERVATION DISTRICTS

<p><b>Art.</b> 5107—123. Districts may be established; territory included; purposes of.</p> <p>5107—124. Petition for establishment; contents; hearing by commissioners' court thereon; notice of.</p> <p>5107—125. Duties and powers imposed on County Judges, Commissioners' Court, county clerk, etc., made part of regular duties.</p> <p>5107—126. Contest of establishment of district; hearing.</p> <p>5107—127. Order establishing or denying establishment of district; contents.</p> <p>5107—128. Appeal to District Court from order establishing, etc., district; notice of; bond of ap-</p>	<p><b>Art.</b> pellant; hearing and judgment.</p> <p>5107—129. Election to determine establishment; propositions to be submitted.</p> <p>5107—130. Notice of election.</p> <p>5107—131. Conduct of election; qualified voters; voting precincts; election officers; ballots.</p> <p>5107—132. Lists of property taxpayers for election judges; oath administered to voters.</p> <p>5107—133. Returns and declaration of result of election; form for.</p> <p>5107—134. District board of directors; number; appointment; qualifications; compensation; terms of office; vacancies in office of.</p>
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Art.		Art.	
5107—135.	Proposed district partly within two or more counties; petition, election, etc.	5107—159.	Interest and Sinking Fund; how constituted; payments from.
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**Article 5107—123. Districts may be established; territory included; purposes of.**—One or more Water Control and Preservation Districts may be established in the several counties, or a part of any county, of this State, or in two or more adjacent counties, or in parts of one or more adjacent counties, or in one county and part of an adjacent county or counties, in the manner herein after provided. Said districts may or may not include within their boundaries villages, towns and municipal corporations, or any part thereof but no land shall be at the same time included within more than one Water Control and Preservation District, created under this Act; the said districts, when so established, to be for the purpose of the control and preservation of the purity of the waters of any rivers, creeks, bayous, lakes, canals, streams or other waters of any kind and character situated or flowing, in whole or in part, through the said district, or any part thereof, by the prevention of the inflow of salt water or other deleterious substances, or by the chang-

ing of said waters from salt to fresh water, and the impounding of fresh water for the above mentioned purposes; such districts when so established being fully empowered to erect, construct, maintain, repair and reconstruct dams, bulkheads, jetties, locks, gates, or any other character of improvement, or construction necessary to the accomplishment of said purposes, or any of them, and such construction, or any part of same, may be without the boundaries of the district, where same may be deemed necessary to the preservation or the improvement of the purity and irrigable quality of the waters of any river, creek, bayou, lake, canal, stream or other waters, or any part thereof, situated or flowing, in whole or in part, through the said district, or any part thereof; and may issue bonds in payment thereof as hereinafter provided. [Acts 1918, 35th Leg. 4th C. S., ch. 43, § 1.]

Took effect April 2, 1918.

**Art. 5107—124. Petition for establishment; contents; hearing by commissioners' court thereon; notice of.**—Upon the presentation to the County Commissioners' Court of any county of this State of a petition, accompanied by the deposit as hereinafter provided, signed by twenty-five of the resident property taxpayers of any proposed Water Control and Preservation District, praying for the establishment of a Water Control and Preservation District within said county and setting forth the boundaries of the proposed district, accompanied by a map thereof, the general nature of the improvement, or improvements, proposed and an estimate of the probable cost thereof, and praying for the issuance of bonds and levy of a tax in payment thereof, and designing a name for such Water Control and Preservation District, which name shall include the name of the county; said petitioners shall make affidavit to accompany said petition of their said qualification; the said Commissioners' Court shall, at the same session when said petition is presented, enter an order setting same down for hearing at some regular term of said court or at some special session of said court called for the purpose, not less than thirty days nor more than sixty days from the presentation of said petition, and shall order the Clerk of said Court to give notice of the date and place of said hearing by posting, or causing to be posted, a copy of said petition and the order of the Court thereon in five public places in said county, one of which shall be at the Court House door of said county and the other four of which shall be within the limits of said proposed Water Control and Preservation District, which said notice shall be posted not less than twenty days prior to the time set for the hearing. The said Clerk shall receive as compensation for such services One Dollar for each such notice and five cents per mile for each mile necessarily traveled in posting such notices. [Id., § 2.]

**Art. 5107—125. Duties and powers imposed on County Judges, Commissioners' Court, county clerk, etc., made part of regular duties.**—The duties and powers herein conferred upon the County Judges and members of the Commissioners' Court, the County Clerk and other officers are made a part of the regular duties of said officials which they shall render and perform without additional compensation unless otherwise provided herein. [Id., § 3.]

**Art. 5107—126. Contest of establishment of district; hearing.**—Upon the day set for the hearing of said petition before the County Commissioner's Court, any person who has taxable property within the proposed district, or who may be affected thereby, may appear before the

said court and contest the creation of said district, or contend for the creation of said district, and may offer testimony in favor of or against the boundaries of said district to show that the proposed improvement or improvements would or would not be of any public utility and would or would not be feasible or practicable and the probable cost of such improvement or improvements, or as to any other matter pertaining to the proposed district. Said County Commissioners' Court shall have exclusive jurisdiction to hear and determine all contests and objections to the creation and establishment of the same, and shall have exclusive jurisdiction in all subsequent proceedings of any district when organized, except as herein otherwise provided, and may adjourn hearing on any matter connected therewith from day to day and all judgments, decrees or orders rendered or entered by said Court in relation thereto shall be final except as herein otherwise provided. [Id., § 4.]

**Art. 5107—127. Order establishing or denying establishment of district; contents.**—If at the hearing of said petition it shall appear to the Commissioners' Court that the organization of such district and the proposed improvement is feasible and practicable, that it would be a public benefit or public utility, then the Court shall so find and shall also find the amount of money necessary for said improvement or improvements, for all expenses incident thereto and the expenses necessarily incurred in connection with the creation and establishment of the district, and shall specify the amount of bonds to issue, the length of time the bonds shall run and the rate of interest said bonds shall bear, and cause its findings to be recorded in the records of the Commissioners' Court. If the Court shall find that the organization of such district and the proposed improvement is not feasible or practicable, or that it would not be a public benefit or public utility, then the Court shall enter such findings of record and dismiss the petition at the cost of petitioners; but the order dismissing said petition shall not prevent or conclude the presentation at any subsequent time of a similar petition with changed boundaries, but the presentation of a similar petition with identical boundaries shall not be permitted until the expiration of six months after such dismissal. [Id., § 5.]

**Art. 5107—128. Appeal to District Court from order establishing, etc., district; notice of; bond of appellant; hearing and judgment.**—If at the hearing of said petition, as herein provided for, the Commissioners' Court shall enter an order granting or dismissing the petition for the establishment of said district at the cost of petitioners, then and in that event the petitioners, or any one or more of them, or any taxpayer in such district, may appeal from said order to the District Court of said county which appeal shall be perfected in the following manner, to-wit: notice of appeal shall be given at the time of the entry of said order by announcement of same before said Court, which notice of appeal shall be entered on the minutes of said Court, or by giving written notice within two days after the entry of such order, said notice to be a simple statement in writing to the effect that the undersigned gives notice of appeal from the order entered on the date stated, which notice shall be filed with the Clerk of the County Court, and the appellant shall, within five days from the date of the entry of said order, file an appeal bond with two or more good and sufficient sureties in the sum of One Hundred Dollars, payable to the County Judge of the county, to be approved by the County Clerk; conditioned, upon the due prosecution of the appeal and payment of all costs incident thereto, and unless the



appeal be thus perfected within five days after the rendition of the order, such order shall be final and conclusive and there shall be no extension of time granted for the filing of the appeal bond; the County Clerk shall, within five days after the filing of said appeal bond, transfer to the Clerk of such District Court all records filed with the County Commissioners' Court, pertaining to the establishment of said district, and it shall be unnecessary to file any other or additional pleadings in said court. The Court shall set the matter down for hearing, giving it precedence over all other cases, and the matters shall be tried and determined by the court, the hearing being de novo. The judgment of the District Court shall be final and conclusive, and the same shall be certified to the Commissioners' Court for its further action. The provisions of Section 5, hereof [art. 5107—127], as to the presentation of a subsequent petition or petitions, as the case may be, shall be applied in case of such appeal. [Id., § 6.]

**Art. 5107—129. Election to determine establishment; propositions to be submitted.**—After the hearing upon the petition, as herein provided, if the Commissioners' Court shall find in favor of the petitioners for the establishment of a Water Control and Preservation District according to the boundaries as set out in said petition, then the Commissioners' Court shall order an election, in which order provision shall be made for submitting to the qualified property tax paying voters, resident in said district, whether or not such Water Control and Preservation District shall be created and whether or not a tax shall be levied sufficient to pay the interest and provide a sinking fund sufficient to redeem said bonds at maturity, said order specifying the amount of bonds to be issued together with the length of time said bonds shall run and the rate of interest said bonds shall bear, as said matters have been determined by the Commissioners' Court under the provisions thereof; said election to be held within such proposed Water Control and Preservation District at the earliest legal time, at which election there shall be submitted the following propositions and none other: "For the Water Control and Preservation District and issuance of bonds and levy of tax in payment thereof." "Against the Water Control and Preservation District and issuance of bonds and levy of tax in payment thereof." Provided that said bonds shall not exceed in amount one-fourth of the assessed valuation of the real property of such district as made by last annual assessment thereof for state and county taxation. [Id., § 7.]

**Art. 5107—130. Notice of election.**—Notice of such election stating the time and place of holding the same shall be given by the Clerk of the County Court by posting, or causing to be posted, notices thereof in four public places in such Water Control and Preservation District and one at the Court House door of the county in which such district is situated for thirty days prior to the date of said election; such notices shall contain the proposition to be voted upon as set forth in Section 7, of this Act [art. 5107—129], and shall also specify the purpose for which said bonds are to be issued and the amount of such bonds, and shall contain a copy of the order of the court ordering the election. [Id., § 8.]

**Art. 5107—131. Conduct of election; qualified voters; voting precincts; election officers; ballots.**—The manner of conducting said election shall be governed by the election laws of the State of Texas, ex-

cept as herein otherwise provided. None but resident property taxpayers, who are qualified voters of said proposed district shall be entitled to vote at any election on any question submitted to the voters thereof by the County Commissioner's Court at such election. The County Commissioner's Court shall create and define, by an order of the Court, the voting precincts in the proposed Water Control and Preservation District, and shall name a Polling place or places within said precincts, taking into consideration the convenience of the voters in the proposed district, and shall also select and appoint the judges and other necessary officers of the election, and shall provide one and one-half times as many ballots as there are qualified resident property tax paying voters within such Water Control and Preservation District; said ballots shall have printed thereon the words and none others: "For the Water Control and Preservation District, and issuance of bonds and levy of tax in payment thereof"; "Against the Water Control and Preservation District, and issuance of bonds and levy of tax in payment thereof." [Id., § 9.]

**Art. 5107—132. Lists of property taxpayers for election judges; oath administered to voters.**—It shall be the duty of the tax collectors of the county, wherein such proposed district is situated, prior to the day set for the election, to make a certified list of the property taxpayers of said district and to furnish to the presiding judge of each precinct a list of such voters in such precinct, and before any person is entitled to vote at any election under this Act his name must appear in said certified list of property taxpayers, unless such person acquired property in said district after the first day of January of the preceding year, and in such event before he shall be permitted to vote he must take the following oath to be administered by the presiding judge of the polling place where he offers to vote, and for such purpose the presiding judge is hereby authorized to administer the same; "I do solemnly swear (or affirm) that I am a qualified voter of . . . . . County and that I am a resident property taxpayer of the proposed district, that I was not subject to pay property tax in said district for the preceding year and have not voted before at this election"; or unless the person offering to vote is in fact a resident property taxpayer who has in fact paid his property tax for the preceding year but whose name was for some reason omitted from said list before being permitted to vote, such person shall take the same oath as hereinabove set out, except that in lieu of the Clause "That I was not subject to pay property tax in said district for the preceding year," there shall be substituted "that I was subject to and did pay property tax in said district for the preceding year," which oath shall be administered by the presiding judge. [Id., § 10.]

**Art. 5107—133. Returns and declaration of result of election; form for.**—Immediately after the election, the presiding judge at each polling place shall make return of the result in the same manner as provided for in elections for state and county officers, and return the ballot boxes to the County Clerk, who shall keep same in a safe place and deliver them, together with the returns from the several polling places, to the Commissioners' Court at its next regular session, or special session called for the purpose of canvassing the vote, and the County Commissioners shall, at such session, canvass the vote; and, if it be found that a two-thirds majority of those voting at such election shall have been cast in favor of the Water Control and Preservation District and the issuance of

bonds and levy of tax, then the Court shall declare the result of said election to be in favor of said Water Control and Preservation District, and shall enter same in the minutes of the Court as follows:

“Commissioners’ Court of \_\_\_\_\_ County, Texas, \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_ in the matter of petition of \_\_\_\_\_ and \_\_\_\_\_ others, praying for the establishment of a Water Control and Preservation District, and issuance of bonds and levy of taxes in said petition fully described and designated by the name of \_\_\_\_\_ Water Control and Preservation District \_\_\_\_\_. Be it known that at an election called for that purpose in said district, held on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_, a two-thirds majority of the resident property tax-payers voting thereon voted in favor of the creation of said Water Control and Preservation District, and the issuance of bonds and levy of a tax. Now, therefore, it is considered and ordered by the Court that said Water Control and Preservation District be and the same is hereby established by the name of \_\_\_\_\_ Water Control and Preservation District \_\_\_\_\_, and that the bonds of said District in an amount not exceeding \_\_\_\_\_ Dollars be issued by the Directors of said Water Control and Preservation District, and that said Board of Directors levy a tax of \_\_\_\_\_ cents on the hundred dollars of valuation, or so much thereof as may be necessary, upon all property within said Water Control and Preservation District, whether real, personal, mixed or otherwise, sufficient in amount to pay the interest on such bonds and provide a sinking fund sufficient to redeem them at maturity, and that if said tax shall at any time become insufficient for such purpose, same shall be increased by the Directors of said district until same is sufficient. The metes and bounds of said district being as follows, to-wit: (Giving the metes and bounds).” [Id., § 11.]

**Art. 5107—134. District board of directors; number; appointment; qualifications; compensation; terms of office; vacancies in office of.**—After the establishment of any Water Control and Preservation District, as herein provided, the Commissioners’ Court, at the same meeting at which the result of said election is determined and declared, or at a meeting called for the purpose not more than five days after such first mentioned meeting, shall appoint a Board of Directors consisting of three members, all of whom shall be residents of the Water Control and Preservation District, who shall be freehold property taxpayers and legal voters of the county embraced, in whole or in part, within the district, and at the time of said election more than twenty-one years of age, whose duties shall be as hereinafter provided; they shall each receive as compensation for their services the sum of Three (\$3.00) Dollars per day for each day necessarily taken in the discharge of their duties as such directors; said directors shall hold office for the term of two years and until their successors have qualified, unless sooner by a majority vote of the Commissioners Court. Upon the expiration of the term of office of said directors, the Commissioners’ Court shall appoint their successors by majority vote. Should any vacancy occur through death, resignation or otherwise, of any directors, the same shall be filled by the Commissioners’ Court. [Id., § 12.]

**Art. 5107—135. Proposed district partly within two or more counties; petition, election, etc.**—Where any such district proposed to be established lies partly within two or more counties, the petition provided for in this Act, shall be presented to the County Commissioners’ Court of each county in which a portion of said district shall lie, and all notices provided for in this Act, to be given in the formation of such district,

shall be given in each and every county in which any portion of said territory proposed to be included in such district shall lie. The elections herein provided for, for the establishment of such district, shall be ordered as herein provided by the County Commissioners' Court of each County, in which any portion of said district may lie, for the portion of said district lying in said county. The election returns in such county shall be made to the Commissioners' Court and the said Commissioners' Court shall appoint all necessary officers, furnish all necessary supplies and give all necessary notice as herein provided in the same manner as if the territory lying in said county was, in itself, to be incorporated in such district, but stating that same is a part of such entire district. The said election shall be held in each county in the portion of the district therein situated and the returns of such election shall be made to the County Commissioners' Court, and shall be by it duly canvassed and the result duly declared. After canvassing, determining and declaring the result of said election, the County Judge or presiding officer of the Commissioners' Court shall certify and report the result of said election to the County Judge of the county in which the largest portion of any such district is situated and said County Judge shall canvass said vote and declare the result thereof, and if it be determined that at least two-thirds of the property tax payers, voting thereon, in said entire district have voted in favor of the creation of said district, the said County Judge shall declare the result thereof in the manner herein provided. Said County Judge shall make the order provided for in this Act, relating to districts wholly within one county, and shall cause copies of such order to be filed with the County Clerk of each county in which any portion of said district may lie, which shall be held to be a proclamation of the result of said election. [Id., § 13.]

**Art. 5107—136. Same; hearing and determination by Commissioners Court; appeals.**—When a petition praying the establishment of such district is filed in two or more counties, the Commissioners' Court of each county shall proceed to hear and determine the matters therein set forth with reference to the territory within their said county in the same manner as herein provided for districts wholly within one county and appeals may be taken for the order entered upon such petition, in the manner as herein provided where the district lies wholly within one county, and the District Court of any county in which any portion of said district is situated, shall have jurisdiction to hear and determine said appeal, the procedure of such appeal, the effect of the judgment entered and the certification thereof, shall be the same as herein provided for districts wholly within one county. [Id., § 14.]

**Art. 5107—137. Same; board of directors.**—Where the proposed district lies partly within two or more counties, the Board of Directors, instead of consisting of three members shall consist of five and instead of being appointed, as herein provided for, when districts lie wholly within one county, shall be elected at the same time that the question of the establishment of the district is submitted to the voters, and the ballot in addition to the words printed thereon, as provided in Section 9 hereof [art. 5107—131], may have printed the names of the candidates for director, or the voter may write upon his ballot the names of the persons voted for as directors; the five persons receiving the highest number of votes so cast shall be the directors of said district, and the vote for directors shall be canvassed and the result declared at the same time and in the same manner as herein provided for the establishment of the district. [Id., § 15.]

**Art. 5107—138. Same; board of directors; election; terms of office; vacancies in office of.**—The directors so elected shall hold their office for two years and until their successors are elected and qualified, provided however, that the directors elected at the time of the establishment of the district, shall hold office only until the next regular election to be held in said district for the election of directors, as hereinafter provided and until their successors are elected and qualified. All vacancies in the office of directors shall be filled by the Board of Directors, by appointment, and the director so appointed shall hold office until, the next regular election and until his successor has been elected and qualified. Where the number of directors shall have been reduced by death, resignation or otherwise, to less than three, an election shall be held in the manner provided in Section 75 of Chapter 87, Acts of the Thirty-fifth Legislature, Regular Session [Art. 5107—76], and all the provisions of said section shall apply. There shall be held on the second Tuesday in January, after the establishment of such district, and every two years thereafter, an election within the district, where the land in the district lies in two or more counties, at which time there shall be elected five directors for such district, said elections to be held in accordance with the election laws of the State of Texas, and the provisions of this Act for elections for the establishment of districts, provided however, the Board of Directors shall give notice of the election, appoint all necessary officers, name the polling places in the district, receive and canvass the election returns and do and perform all other duties necessary to the holding of said elections, canvassing the returns and declaring the result thereof. None but resident property taxpayers, who are qualified voters of such district, shall be entitled to vote at such election. [Id., § 16.]

**Art. 5107—139. Board of directors; bonds and oath of office.**—Within ten days after their appointment or election, or as soon as thereafter as practicable, the directors so appointed or elected, shall make and enter into a good and sufficient bond, in the sum of Five Thousand (\$5,000.00) Dollars, each, payable to such district, conditioned upon the faithful performance of his duties, the said bond, when the district lies wholly within one county, to be approved by the Commissioners' Court and when said district includes lands within two or more counties the bonds of such directors shall be approved by the Commissioners' Court of the county in which they reside, a copy of the order approving the bond shall be filed with the County Clerk of the county in which the largest part of the district is situated, together with the bond, and such clerk shall record same in the deed records of the county and shall properly index the same in the manner provided for the recording and indexing of deeds; provided however, that after the organization of such district, all bonds required to be given by any director, officer or employé of such district, shall be approved by the directors of such district. The said directors shall take the oath of office prescribed by the Constitution for officers; the said oath of office, when the district is composed of land lying wholly within one county, to be taken before the County Clerk of such county; and where lands within the district lie partly within two or more counties, the oath of office shall be taken before the County Clerk of the County within the district in which such director resides, and the said bonds and oaths shall be delivered by said Clerks to the depository selected by such district under the provisions of this Act, and shall be by it safely kept and preserved for the said district. [Id., § 17.]

**Art. 5107—140. Organization of board of directors; quorum.**—The directors of such district shall, as soon as possible after their appointment or election and qualification, organize by electing one of their number as President and one as Secretary. When the board of directors consists of three members any two of said directors shall constitute a quorum, when the board of directors consists of five members any three of said directors shall constitute a quorum. [Id., § 18.]

**Art. 5107—141. Bonds of district; order for issue; amount; tax levy.**—The Board of Directors, as soon as practicable after their appointment, or election, qualification and organization, shall enter an order directing the issuance of water control and preservation bonds for such Water Control and Preservation District, in an amount sufficient to cover the cost of the proposed improvement or improvements, all of the expenses incident thereto and the expenses necessarily incurred in connection with the creation and establishment of the district, provided that the amount of the bonds shall not exceed the amount authorized by the election theretofore held; and the directors shall levy a tax upon all property, subject to taxation within such district, sufficient in amount to pay the interest on such bonds, together with an additional amount to be placed in the sinking fund sufficient to discharge and redeem said bonds at maturity; and said directors for such district shall annually levy and cause to be assessed taxes upon all property within said district sufficient in amount to pay for the expenses of assessing and collecting such taxes, and a tax sufficient for the expenses incident to the maintenance of the district; provided that the tax so levied in connection with any original issuance of bonds shall remain and shall be from year to year as a levy for that purpose until a new levy shall be made. The Board of Directors may from time to time increase or diminish such tax so as to adjust the same to the taxable value of the property subject to taxation by the district, and the directors shall certify to the Commissioners' Court or courts, as the case may be, the levy of such taxes. [Id., § 19.]

**Art. 5107—142. Tax levy; books for tax officers; assessment of property; lien of tax; duties of tax officers.**—When the lands embraced within such district shall be wholly within the boundaries of one county, the County Commissioners' Court shall provide all necessary additional books for the use of the assessor and collector of taxes for such water control and Preservation District and charge the cost of same to the said district. It shall be the duty of the Commissioners' Court, when the directors of the district certify any tax levy to order the county tax assessor to assess all property within such Water Control and Preservation District and list the same for taxation in the books or rolls furnished him by said Commissioners' Court for that purpose, and return said books or rolls at the same time when he returns the other books or rolls of the state and county taxes for correction and approval, and if the said Commissioners' Court shall find said books or rolls correct they shall approve the same, and all matters pertaining to the assessment of property for taxation in said district, the tax assessor and Board of Equalization of the County in which said district is located shall be authorized to act and shall be governed by the laws of Texas for assessing and equalizing property for state and county taxes, except as herein otherwise provided. In the event such district lies partly within two or more counties, the directors shall certify the tax levies to the Commissioners' Court of the respective counties, and it shall be the duty of such Com-

Commissioners' Courts to order the county tax assessor to assess all property in said county within said Water Control and Preservation District and list the same for taxation in the books or rolls furnished him by said Commissioners' Court for that purpose at the cost of said district, and return said books or rolls for approval of such Commissioners' Court, and said court shall examine and approve the same in the manner hereinabove provided; and in all matters pertaining to the assessment of property for taxation in the part of the county included within such district, the tax assessor and Board of Equalization of such county shall be authorized to act and shall be governed by the laws of Texas for assessing and equalizing property for state and county taxes, except as herein provided. All taxes authorized to be levied by this Act shall be a lien upon the property upon which said taxes are assessed, and said taxes shall mature and be paid at the time provided by the laws of this state for the payment of state and county taxes, and all penalties provided by the laws of this state for the non-payment of state and county taxes shall apply to all taxes authorized to be levied by this Act. The tax assessor, or assessors, as the case may be, shall receive for said service such compensation as the directors of the Water Control and Preservation District shall determine proper, provided that in no event shall they be allowed more than is now allowed by law for like services. Should any tax assessor fail or refuse to comply with the orders of the Commissioners' Court requiring him to assess and list for taxation all the property in the county within the boundaries of said district, as herein provided, he shall be suspended from the further discharge of his duties by the Commissioners' Court of his county, and he shall be removed from office in the mode prescribed by law for the removal of county officers. And any Commissioners' Court refusing or failing, upon being notified of the levy of such tax by the Board of Directors, to order the county tax assessor to make assessment as herein provided, shall be subject to mandamus by any court of competent jurisdiction on a petition in the name of the district, and the order of court upon such hearing may require the assessor to perform the duty without the intervention of an order of the Commissioners' Court. [Id., § 20.]

**Art. 5107—143. Same; collection of tax; duties of tax collector.**—The tax collector of the county in which said district is situated, and in each county wherein any part of the district may be situated, shall be charged by the Commissioners' Court of such county or counties with the assessment rolls of the Water Control and Preservation District, of that part of said district situated within the county, and it shall be his duty to collect the said taxes within his said county. He shall receive for his services such compensation as the directors of said district shall deem proper, but in no event shall he be allowed more than he is now allowed by law for like services. The county Commissioners' Court shall require the tax collector of the county or of their respective counties, as the case may be, to give an additional bond or security in such sum as they may deem proper and safe to secure the collection of said taxes, payable to the district, conditioned as provided by law for tax collectors' bonds, and in all matters pertaining to the collection of taxes levied under the provisions of this Act, the tax collector shall be authorized to act and shall be governed by the laws of Texas for the collection of state and county taxes, except as herein otherwise provided, and suits may be brought for the collection of said taxes and the enforcement of the tax liens created by this Act. Should any tax collector fail or refuse to give such additional bond or security as herein provided, when requested by the

Commissioners' Court, within the time prescribed by law for such purposes, or shall fail or refuse to collect the taxes so levied on the property of said district within his county, he shall be suspended from office by the Commissioners' Court of his county and immediately thereafter be removed from office in the mode prescribed by law. [Id., § 21.]

**Art. 5107—144. Same; delinquent property; sale; redemption from sale.**—It shall be the duty of the county tax collector to make a certified list of all delinquent property upon which the water control and preservation tax has not been paid within his county and return the same to the Commissioners' Court of said county which shall proceed to have the same collected the sale of such delinquent property in the same manner, both by suit and otherwise, as is now provided for the sale of property for the collection of state and county taxes, and all the provisions of law with reference to delinquent state and county taxes, the collection thereof by suit or otherwise and the redemption of same from such sale, shall apply except as herein otherwise provided, such proceedings and suits to be in the name of the said district and be brought and prosecuted by the same officers as provided for state and county taxes, who shall receive the same fees for such services as provided for like proceedings for state and county taxes; in the sale of any property for delinquent taxes, the directors may become the purchasers of same for the benefit of the district. [Id., § 22.]

**Art. 5107—145. Tax levy for maintenance, etc., of district; assessment, collection, etc.**—The Board of Directors shall have authority from time to time, as occasion may require and demand, in its discretion, to levy a tax on all property within such district in an amount sufficient to pay for the proper maintenance, operation and repair of any dams, bulkheads, jetties, locks, gates or any other improvement constructed by said district, the directors shall certify to the Commissioners' Court, or courts, as the case may be, the levy of such tax as provided in Section 19 hereof [art. 5107—141], whereupon it shall be the duty of such Commissioners' Court or Courts, as the case may be, to order the tax assessor to assess the property, and same shall be assessed, as provided in Section 20 hereof [art. 5107—142], such tax shall be collected in the manner as provided in Section 21 hereof [art. 5107—143], and all the provisions of Sections 19, 20, 21 and 22 hereof [art. 5107—141 to 144] shall be applied to the tax hereby authorized. [Id., § 23.]

**Art. 5107—146. District depository; selection; duties.**—The directors for such district shall select a depository for such district in the same manner as now provided for the selection of depositories for the counties in this State, and the duties of such depository shall be the same as now prescribed by law for county depositories, except as herein otherwise provided. In the selection of depositories the directors of such district shall act in the same capacity and perform the same duties as are incumbent upon the county Judge and members of the Commissioners' Court in the selection of county depositories, and all the laws now in force, or hereafter to be enacted, for county depositories, shall apply and become a part of this Act is so far as the same be applicable. [Id., § 24.]

**Art. 5107—147. Same; payment of money collected to.**—The tax collector of the county or counties, as the case may be, in which said district is situated, shall pay all moneys collected by him or them for said district to the district depository monthly and as often as they may be directed so to do by the Board of Directors of said district, as now pre-



scribed by law for payment by tax collectors to county and city treasurers. [Id., § 25.]

**Art. 5107—148. Same; reports and vouchers.**—The district depository shall make a report of all moneys received and of all moneys paid out at the end of each month, and shall file such reports with such vouchers among the records of said district in its own vault, and shall furnish a true copy thereof to the directors, and shall, when called upon, allow same to be inspected by any taxpayer or resident of such district; such records shall be preserved as the property of such district and shall be delivered to the successor of such depository. [Id., § 26.]

**Art. 5107—149. Funds of district; payments from; accounts; audit.**—All payments of any funds of the district shall be by voucher upon the district depository, and all vouchers issued for the payment of any funds of the district shall be signed by the President of the Board of Directors or any two of said directors; all vouchers shall be issued from a regular duplicate book containing a duplicate, which shall be preserved. The directors shall have kept complete books of accounts for such district, and shall on September 1st of each year select a permanent auditor who shall examine the accounts, books and reports of the depository, the assessors and collectors and the directors, and make a full report thereof, a copy of which shall be filed with the depository and a copy with the directors, and one with the County Clerk of the county in which the said district is situated; or if the district be composed of lands situated in two or more counties, then with the clerk of the county in which the largest portion of such district is situated; such report shall be filed by November 1st of each year. [Id., § 27.]

**Art. 5107—150. Bonds of district; issue; denominations; interest; payment.**—All bonds issued under the provisions of this Act shall be issued in the name of the Water Control and Preservation District, signed by the President and attested by the Secretary of the Board of Directors, with the seal of said District attached thereto, and such bonds shall be issued in denominations of not less than One Hundred Dollars nor more than One Thousand Dollars each, and such bonds shall bear interest at the rate of not to exceed six per cent per annum, payable annually or semi-annually; such bonds shall by their terms provide the term, place or places, manner and conditions of their payment and the interest thereon as may be determined and ordered by the directors for such district, and no bonds shall be made payable more than forty years after date thereof. [Id., § 28.]

**Art. 5107—151. Suit to test validity of district or bonds issued thereby.**—No suit shall be permitted to be brought in any court of this State, contesting or enjoining the validity of the formation of any district created under the provisions of this Act, or any bonds issued hereunder, or in anywise affecting the establishment of the district or issuance of bonds by such district, except in the name of the State of Texas by the Attorney General upon his own motion, or upon the motion of any party affected thereby, upon good cause shown, except as herein otherwise provided. [Id., § 29.]

**Art. 5107—152. Action to determine validity of bond issue prior to sale thereof.**—Any such district issuing bonds in accordance with this Act shall, before such bonds are offered for sale, bring an action in the District Court in any county of the judicial district in which said dis-

trict may be situated, in whole or part, or in the District Court of Travis County, to determine the validity of any such bonds; such action shall be in the nature of a proceeding in rem and jurisdiction of all parties interested may be had by publication of a notice thereof once each week for at least three consecutive weeks in some paper of general circulation published in the county where the action is pending and in the county in which said district is situated, where all of the lands embraced within the district lie in one county, and where lands of two or more counties are situated within said district, then in the county in which the largest portion of any such district is situated. Notice shall also be served upon the Attorney General of the State of Texas of the term of court to which said suit is made returnable, such notice to the Attorney General shall contain a copy of all of the proceedings had in the formation of such district and in connection with the issuance of said bonds. The Attorney General may waive service when furnished a full transcript of such proceedings. [Id., § 30.]

**Art. 5107—153. Same; duty of Attorney General.**—It shall be the duty of the attorney general to make a careful examination of all such proceedings and require such further evidence and make such further investigation as may seem to him advisable. He shall then file an answer tendering the issue as to the due organization and the validity of the district and whether such bonds are legal and binding obligations upon such district. The issues thus made shall be tried and determined by the court and judgment entered upon such finding upon the trial of such cause. The court may permit any person having an interest in the issue to be determined to intervene and participate in the trial of the issue made. All suits brought under the provisions of this Act shall have preference over all other actions in order that a speedy determination as to the matters involved may be reached. [Id., § 31.]

**Art. 5107—154. Same; judgment.**—Upon the trial of the issues made under the preceding section of this Act, if the judgment of the court shall be favorable to the district, such judgment shall be so rendered; if the judgment of the court shall be adverse to the district, then such judgment may be by said district accepted, and the error pointed out in such proceedings may be corrected in the manner designated or directed by said court, and when so corrected the judgment of the District Court shall be rendered showing that said corrections had been made and that the bonds issued thereunder are binding obligations upon said district, and such judgment shall be final; and thereafter the judgment, when so finally made out and entered, shall be received as *res adjudicata* in all cases arising in connection with the collection of said bonds or any interest due thereon, and as to all matters pertaining to the organization and validity of said district or pertaining to the validity of said bonds. After the making and entry of the judgment of the District Court, as hereinabove provided, the Clerk of said court shall make a certified copy of such decree, and said court decree shall be filed with the Comptroller of Public Accounts and be by him recorded in a book kept for that purpose, and said certified copy, or a duly certified copy of said record made by the Comptroller, shall be received in evidence in all litigations thereafter arising which may affect the validity of said bonds or any matter pertaining to the organization and validity of said district, and shall be conclusive evidence of such validity. [Id., § 32.]

**Art. 5107—155. Bonds of district; registration; record of.**—Upon the presentation of said bonds together with a certified copy of the decree

of the District Court as provided in the preceding section, the Comptroller shall register said bonds together with a certified copy of the judgment as herein provided for in a book to be provided for that purpose, and shall attach to each of said bonds a certificate of the fact that the decree of the District Court, as required by this Act, has been filed with him in his office, such certificate to be signed by him officially and the seal of his office attached thereto. The Board of Directors of the district shall provide a well bound book in which a record shall be kept by the County Clerk or Clerks of the county in which the largest portion of such district is situated, of all bonds issued with their numbers, amounts, rate of interest, date of issue, when due, where payable, and the annual rate per cent of tax levy made each year to pay the interest on said bonds and to provide a sinking fund for their payment. Said book shall be at all times open to the inspection of all parties interested in said district, either as taxpayers or bond holders, and upon the payment of any bond an entry shall be made in said books showing such payment, and the Secretary of such district shall furnish to the proper County Clerk a certified copy of all orders made in connection with the issuance and levy and assessment of taxes for the payment of interest and creating a sinking fund for the final payment of such bonds. The County Clerk or Clerks shall receive for their services in registering said bonds the sum of ten cents for each bond and a like sum for entering payment of each bond, and for recording any instruments of the district required to be recorded, the same fees as are provided by law for other like services. [Id., § 33.]

**Art. 5107—156. Same; sale.**—After the issuance of said bonds and after the registration by the Comptroller of Public Accounts for the State of Texas, as herein above provided, the Board of Directors for such district shall offer for sale and sell said bonds on the best terms and for the best price possible, but none of said bonds shall be sold for less than the face value thereof and the accrued interest thereon, and after said bonds are sold all moneys received therefrom shall be immediately paid over by the Board of Directors to the depository of said district; provided, however, that the Board of Directors may exchange bonds in payment of the contract price for work to be done for the use and benefit of said district. [Id., § 34.]

**Art. 5107—157. Modification or change in proposed improvement; procedure; additional bonds; election to determine issue.**—If after an election has been held for the issuance of bonds the Directors of said district shall consider it necessary to make any modifications or changes in any proposed improvements, they shall be authorized thereto, provided that any change or modification of any improvement or construction shall require the concurrence of four Directors.

In the event the Board of Directors shall determine to make additional improvements, works or constructions in order to carry out the purposes for which said district was organized, or to reconstruct any improvements theretofore made, and the amount derived from the bonds issued or authorized shall not be sufficient, a resolution to that effect shall be duly entered upon the minutes of the board, which said resolution shall set forth the modification or changes proposed, or the new improvements proposed, or the proposed reconstruction, as the case may be, the amount of bonds to be issued to pay for same, together with the length of time said bonds shall run and the rate of interest said bonds shall bear, and shall embody therein a request to the Commissioner's

Court of the County, if all the land of the district be embraced in one county, or to the Commissioners' Court of several counties in which any part of the lands embraced in the district is situated, to order an election to submit to the qualified property tax paying voters, resident in said district, at a day specified in said resolution, whether or not such Water Control and Preservation District shall issue additional bonds in the amount named and whether or not a tax shall be levied sufficient to pay the interest and provide a sinking fund to redeem said bonds at maturity; that a certified copy of said resolution shall be presented to the Commissioners' Court or the several Commissioners' Courts, as the case may be, and thereupon it shall be and become the duty of the Commissioners' Court of said county, if all of the lands within the district lies within one county, or of the Commissioners' Courts of the several counties in which any part of the lands of the district are situated, to order an election on the day specified in said resolution to be held in the county or such part of such respective counties embraced within the district, and notice of such election shall be given, returns made, result declared orders entered, tax levied, certified, assessed and collected in the same manner as herein provided in case of elections for original bonds, and all provisions as to the issuance, approval, validation, registration, recordation and sale of original bonds shall be applicable to such additional bonds, the calling of the election at the date specified in the resolution of said Board of Directors as certified to the Commissioners' Court or Commissioners' Courts, as the case may be, shall not be discretionary with such Commissioners' Court or Courts, but the same shall be and is hereby made mandatory, and all the provisions with reference to the election for the original bond issue, in so far as applicable, shall apply to any election for such additional bonds. The ballots shall have printed thereon the words and none other: "For the issuance of additional Water Control and Preservation bonds and levy of tax in payment thereof;" "Against the issuance of additional Water Control and Preservation bonds and levy of tax in payment thereof." [Id., § 35.]

**Art. 5107—158. Construction and Maintenance Fund; how constituted; expenses of elections; how paid.**—There is hereby created what shall be termed the "Construction and Maintenance Fund" of such district, which fund shall consist of all moneys received from the sale of bonds and all other amounts received by said district from whatever source, except the tax collections applied to the sinking fund and payment of interest on bonds. All expenses of any kind prior to and after the filing of the original petition, necessarily incurred in connection with the creation, establishment and maintenance of any district organized under the provisions of this Act and improvement or improvements, repairs, cost of maintenance, the salaries of all officers and of all employés of every kind whatsoever, and all expenditures for any purposes of the district, other than the payment of bonds or interest thereon shall be paid out of such "Construction and Maintenance Fund" of said district. Provided, that should the proposition of the creation of such district and issuance of bonds be defeated at the election called to vote upon same, then all expenses up to and including said election shall be paid in the following manner; when the original petition praying for the establishment of a Water Control and Preservation District is filed, as herein provided, it shall be accompanied by Five Hundred Dollars in cash, which shall be deposited with the Clerk of the County Commissioners' Court, if all the lands in the boundaries of the district are situated in one county, or, where the lands embraced in the district lie

partly in two or more counties, then with the Clerk of the County Court of the county in which the largest portion of the proposed district is situated, and shall be held by such Clerk until after the result of the election for the creation of said district has been declared and entered of record as hereinbefore provided. Should the results of said election be in favor of the establishment of said district, then the said Five Hundred Dollars shall be by the said Clerk returned to the signers of said original petition, or their agent or attorney. But should the result of said election be against the establishment of said district, then the said Clerk shall pay out of said Five-Hundred Dollars, upon vouchers signed by the County Judge of the county wherein the district is situated, if all the lands are embraced in one county, or, if the lands embraced in the district lie in two or more counties, then by the County Judge of the county in which the largest portion of such proposed district is situated, all expenses and costs pertaining to the said proposed district up to and including the said election and shall return the balance, if any, of said Five Hundred dollars, to the signers of said original petition, or their agent or attorney. [Id., § 36.]

**Art. 5107—159. Interest and Sinking Fund; how constituted; payments from.**—There is hereby created what shall be termed the “Interest and Sinking Fund” for such district, and all taxes collected under the provisions of this Act for the payment of bonds and interest thereon, shall be credited to such fund and shall never be paid out except for the purpose of satisfying and discharging the interest on said bonds, or for the payment, cancellation and surrender of said bonds, and such fund shall be paid out upon vouchers drawn as hereinbefore provided, and at the time of such payment the depository for such district shall receive and cancel any interest coupon so paid or any bond so satisfied or discharged, and when such interest coupon or bond shall be turned over to the directors the account of such depository shall be credited with the amount thereof and such bond or interest coupon shall be canceled and destroyed. [Id., § 37.]

**Art. 5107—160. Right of eminent domain conferred; procedure.**—The right of eminent domain is hereby conferred upon all Water Control and Preservation Districts established under the provisions of this Act, for the purpose of condemning and acquiring the right of way over, and through all lands, private and public, except property used for cemetery purposes, necessary for making and maintaining dams, bulkheads, jetties, locks, gates and all other improvements necessary and proper for such construction, and to effectuate the purposes of such district, and the authority hereby conferred shall authorize and empower such district to condemn all lands, private and public, for the purposes herein designated, beyond the boundaries of such district and in any county within the State of Texas. All such condemnation proceedings shall be under the direction of the directors and in the name of the district. The assessment of all damages and all procedure with reference to condemnation, appeal and payment shall be in conformity with the statutes of the State for condemning and acquiring right of way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings shall be paid out of the “Construction and Maintenance Fund. [Id., § 38.]

**Art. 5107—161. Engineer; employment; duties; directors to cooperate with United States.**—The directors of any such district shall have authority to employ a competent engineer whose term of office shall

be at the will of said directors. It shall be the duty of the engineer to make all necessary surveys, examinations, investigations, maps, plans and drawings with reference to the proposed improvements. He shall make an estimate, or estimates, of the cost of same, shall supervise the work of improvements, and shall do and perform all such duties as may be required of him by the directors. If it be necessary to erect and maintain dams, bulkheads, jetties, locks, gates or any other character of improvement or construction, in order to the preservation of the purity and irrigable qualities of the waters of any rivers, creeks, bayous, lakes, canals or streams, or other waters of any kind or character, and the improvement proposed to be of such nature as requires the permission or consent of the Government of the United States, or any department or officer of the United States, the said directors shall have authority to obtain the required permission or consent, provided that in lieu of the employment of an engineer, as herein provided, or in addition thereto, the said directors shall have power to adopt any survey of any river, creek, canal, stream, bay, lake or other waters, theretofore made by the United States, or any department thereof, and to arrange for surveys, examination and investigation of the proposed improvement, and supervision of the work of improvement by the United States, or the proper department or officer thereof. And said directors shall have full power and authority to co-operate and act with the United States, or any officer or department thereof, in any and all matters pertaining or relating to the construction and maintenance of any improvement whether by survey, work or expenditure of money made, or to be made, either by said directors or by the United States, or any proper officer or department thereof, or by both; and to the end that the United States may aid in all such matters, the said directors shall have authority to agree and consent to the United States entering upon and taking management and control of said work of construction, repair or reconstruction and maintenance, in so far as it may be necessary or permissible under the laws of the United States and the regulations and orders of any department thereof. [Id., § 39.]

**Art. 5107—162. Joinder of districts in construction of improvement; contracts; general manager.**—Two or more districts may, in the discretion of the directors of the respective districts, join in the construction of any improvement or improvements and enter upon any work authorized under this Act as a joint project where in the judgment of the majority of the directors of each of said districts such improvements, works or constructions will be advantageous to the respective district. To this end a contract may be entered into between such districts by the respective directors, stipulating the pro rata amount to be paid by such district for such joint project and to provide for its maintenance, repair and reconstruction, and such joint projects may be undertaken whether the improvement or improvements, works or constructions are wholly within one district or partly in each of said districts, or partly in either said district and without the bounds of either district, or wholly without the bounds of either district, and such contracts may be enforced and specific performance compelled by any court of competent jurisdiction. When improvements are constructed by two or more districts, bids may be jointly called for and may be opened and considered at the designated office of either of said districts, and the directors of such districts shall approve the letting of the contract and contractor's bond, and may meet for that purpose and for all purposes concerning the joint project at a place outside the district, or at any office established for

such joint project, and at which office all business of such joint project may be transacted. All bids, bonds, contracts, etc., of said project shall be in the name of said joint project districts, such districts being empowered and authorized to do all acts by joint action that one district may do, the action of each district being determined by its Board of Directors. A General Manager may be employed for such project, whose duties may be set forth in the joint ownership contract; such manager may be a director of either of such districts. [Id., § 40.]

**Art. 5107—163. Contracts for improvements; letting; advertisement; several improvements.**—If the improvement or improvements, works or constructions be not carried out and performed by the United States as herein provided, the contract or contracts for such improvement or improvements shall be let by the directors and the same shall be awarded to the lowest and best responsible bidder after giving notice by advertising the same in one or more newspapers of general circulation in the State of Texas once a week for four consecutive weeks, and by posting notices for at least thirty days at the Court House door of the county or counties in which the lands of the district may be situated. Nothing herein contained shall prevent the making of more than one improvement and where more than one improvement is to be made, the contract may be let separately for each or one contract for all such improvements. [Id., § 41.]

**Art. 5107—164. Same; surveys, plans, etc., for bidders; acceptance or rejection of bids; contracts; requisites of.**—Any person, firm or corporation desiring to bid on the construction of any work advertised for as provided in the preceding section of this Act, shall upon application to the Secretary of the district be furnished the surveys, plans for the said work, and all bids or offers for any such work shall be in the writing and sealed and delivered to the President or Secretary of the Board of Directors, together with a certified check for at least two per cent of the total amount bid, which shall be forfeited to the district in case the bidder refuses to enter into a proper contract and make the necessary bond, if his bid is accepted, or returned to the bidder if his bid is rejected. Any and all bids may be rejected at the discretion of the directors, all contracts made by the directors shall be reduced to writing and signed by the contractors and President of the Board of Directors and attested by the Secretary of the Board of Directors and a copy of same shall be filed with the County Clerk of said county, if the lands embraced in the district lie wholly within one county, or if in two or more counties, with the clerk of the county in which the largest portion of such district is situated. [Id., § 42.]

**Art. 5107—165. Same; bond of contractor.**—The person, firm or corporation to whom any such contract is let shall give bond, payable to the district, in such amount as may be determined by the directors not to exceed the contract price and not less than fifty per cent thereof, conditioned that he, they or it will faithfully perform the obligations, agreements and covenants of their contract and that in default thereof will pay to said district all damages sustained by reason thereof; and such other conditions as may be required by law of contractors for public work; said bond to be approved by the Board of Directors. [Id., § 43.]

**Art. 5107—166. Supervision of work by district engineer.**—All work contracted for by the Board of Directors, unless done under the supervision of the United States, or the proper department of officer thereof,

as hereinbefore provided, shall be done under the supervision of the engineer of the district; and when the work is completed according to the contract, the engineer shall make a detailed report of the same to the Board of Directors showing whether the contract has been fully complied with according to its terms; and if not, in what particular it has not been so complied with. The directors, however, shall not be bound by such report, but may in addition thereto fully investigate such work and determine whether or not such contract has been complied with. [Id., § 44.]

**Art. 5107—167. Inspection of work by directors; payments to contractors.**—The directors shall have the right, and it is hereby made their duty, during the progress of work being done under contract, to inspect the same, and upon the completion of any contract they shall draw a voucher on the district depository for the amount of the contract price in favor of the contractor or his assignee, which voucher shall be drawn in the manner as hereinabove provided; said voucher to be paid out of the “Construction and Maintenance Fund” of such district; provided that if the directors shall deem it advisable they may contract for the work to be paid for in partial payments as the work progresses, but such partial payments shall not exceed in amount in the aggregate eighty per cent of the total amount to be paid under the contract the amount of work completed shall be shown by a certificate of the engineer; and provided further that nothing in this section shall effect the provision of this Act providing for the carrying out and performing of the improvement of improvements by the United States. [Id., § 45.]

**Art. 5107—168. Report of work done by directors.**—The directors shall make an annual report on the first day of January of each year showing in detail the kind, character and amount of work done in the district, the cost of same, the amount of each voucher drawn and to whom paid, and for what purpose paid, and other data necessary to show the condition of improvements made under the provisions of this Act, a copy of which report shall be filed in the office of the County Clerk of the county, where the lands embraced lie wholly within one county or where the district is composed of land lying in two or more counties, then with the clerk of the county in which the largest part of the lands of the district are situated, which report shall be opened to public inspection. [Id., § 46.]

**Art. 5107—169. General powers and duties of directors; director may be general manager.**—The Board of Directors shall have control over the management of all of the affairs of such district, shall make all contracts pertaining thereto and shall employ all necessary employés for the proper conduct and operation of such district; including engineers, bookkeepers and such other assistants and such other laborers as may be required, paying such compensation as the Directors may determine; and the directors are authorized to employ an attorney or attorneys to represent such district in the preparation of any contract or the conduct of any proceedings in or out of court, and to be the legal advisor or advisors of the directors on such terms and for such fees as may be agreed upon by them, provided that where the district lies wholly within one county the directors shall not, after the completion of the improvements, employ any attorneys as legal advisers of the district or an engineer as engineer of such district, or any other employés except with the concurrence and consent of the Commissioners' Court of such county and the compensation to be paid such attorney, engineer or



employé, so employed after the completion of the improvements, shall be fixed by the directors subject to the approval of said Commissioners' Court. They may require bonds of any employés in any amount within their discretion. The directors may also employ a general manager to have general charge of the work, paying such compensation as may be agreed by the directors. A director may be appointed as general manager and at such compensation as may be fixed by the other directors, and when so employed he shall also perform the duties of a director but he shall not receive the compensation to be paid to the directors. The directors may also buy all necessary work animals, machinery and supplies and material of all description as may be required in the construction, operation or repairing of the improvements of the district, and may do and perform all things necessary and proper in carrying out the purposes of said district. [Id., § 47.]

**Art. 5107—170. Director, etc., not to have pecuniary interest in contract, etc.; punishment for violation.**—No director of any such district, engineer or other employé thereof, shall be directly or indirectly interested either for themselves or as agents for any one else, in any contract for the construction of any work or improvement, or repair or reconstruction of such improvements by said district, and if any such person shall directly or indirectly be or become interested in any such contract, he shall be guilty of a felony, and upon conviction thereof be punished by confinement in the penitentiary for a term not less than one year nor more than five. [Id., § 48.]

**Art. 5107—171. Suits by or against district; judicial notice of district; contracts with district; seal of district.**—All districts established under the provisions of this Act are hereby declared to be defined districts within the meaning of Section 52, Article 3 of the Constitution, and may by and through its directors sue and be sued in the name of such district, and all courts of this State shall take judicial notice of the establishment of such districts; and said district shall contract and be contracted with in the name of such districts. Such districts shall have a seal, which shall be circular in form containing a five pointed star in the center and around the margin thereof the name of the district. [Id., § 49.]

**Art. 5107—172. Acquisition by directors of rights of way, etc.; condemnation; conveyance of property to United States.**—The directors of any district are hereby empowered to acquire the necessary right of way and property of any kind or character whatsoever for all necessary improvements contemplated by this Act, by gift, grant, purchase or condemnation proceedings, whether the same be within or without the boundaries of the district; and any property acquired may be conveyed to the United States in so far as the same shall be necessary for the construction, operation and maintenance of works by the United States under any contract that may be entered into between the district and the United States. [Id., § 50.]

**Art. 5107—173. Right of entry by directors upon lands for examination thereof; interference with; punishment.**—The directors of any district and the engineers and employés thereof are hereby authorized to go upon any land lying within said district for the purpose of examining same for locating dams, bulkheads, jetties, locks, gates or any other character of improvement or construction necessary to the accomplishment of the purposes of the district, to make maps and profiles thereof, and are hereby authorized to go upon lands beyond the boundaries

of such districts for the purposes stated and for any other purposes necessarily connected therewith whether herein enumerated or not; and any person who shall wilfully prevent or prohibit any such officer or employé from entering upon such land for such purpose shall be guilty of a misdemeanor and upon conviction shall be fined One Hundred Dollars for each day he shall prevent or prohibit such officer or employé from entering upon any lands. [Id., § 51.]

**Art. 5107—174. Investment of sinking fund.**—The Board of Directors are authorized and empowered whenever they may deem it advisable to invest from time to time any sinking fund of the district, acquired for the redemption and payment of any of its outstanding bonds and interest thereon, in bonds of the United States or of the State of Texas, of any county of the State of Texas, any irrigation or water improvement or navigation bonds, or bonds or any other school district in the State of Texas authorized to issue bonds, provided that no bonds shall be so purchased that according to their terms mature at a date subsequent to the time of the maturity of the bonds for the payment of which such sinking fund was created. [Id., § 52.]

**Art. 5107—175. Directors to keep accounts, and preserve contracts, records, etc.**—The Board of Directors of such district, through the Secretary, shall keep a true account of all matters and proceedings of the board and shall preserve all contracts, records and notices, duplicate vouchers, duplicate receipts, and all accounts and records of whatsoever kind, and the same shall be the property of the district and shall be delivered to their successors in office. [Id., § 53.]

**Art. 5107—176. Office to be maintained by directors; meetings.**—The directors of each district shall, during the progress of the construction of any improvement under contract, have and maintain a regular office within such district and may in their discretion when deemed necessary have and maintain a regular office in the district during any other time or times. The directors shall hold an annual meeting on the first day of December of each year at ten o'clock A. M. and may provide for meetings at stated intervals by resolution duly passed, and the President or any two directors may call special meetings at any time that may be deemed proper or necessary. [Id., § 54.]

**Art. 5107—177. Bonds of officers and employés of district.**—All officers and employés of any district who may be required to give bond or security may furnish bonds of surety companies subject to the approval of the directors; all such bonds shall be preserved by directors as the property of said district. [Id., § 55.]

**Art. 5107—178. Disposition of remainder of Construction and Maintenance Fund.**—After the full and final completion of all of the improvements of such district, as herein provided for, and after payment of all expenses incurred under the provisions of this Act, the directors are authorized to use the funds remaining in the "Construction and Maintenance Fund" for the best interest of such district in the preservation, upkeep, repair and reconstruction of the works of such district. [Id., § 56.]

**Art. 5107—179. Repeal.**—All laws and parts of laws in conflict with this Act are hereby repealed. Provided however, the provisions of this Act shall not repeal or affect any of the provisions of the law contained

in Chapter 87 Acts of the Thirty-fifth Legislature, at its regular session 1917, or any amendment thereto, but are independent thereof. [Id., § 57.]

See chapter 2 of this title.

## CHAPTER FOUR

### FRESH WATER SUPPLY DISTRICTS

Art. 5107—180.	Purposes for which districts may be created.	Art. 5107—210.	Same; issue; denominations; interest; maturity.
5107—181.	Petition for establishment; contents; hearing; notice thereof.	5107—211.	Same; record of.
5107—182.	Posting copies of notice of hearing on petition.	5107—212.	Same; determination of validity by Attorney General.
5107—183.	Deposit to accompany petition.	5107—213.	Same; registration by Comptroller.
5107—184.	Determination of sufficiency of petition.	5107—214.	Same; sale.
5107—185.	Election to determine establishment of district; order for; proposition to be submitted; election of supervisors, and assessor and collector.	5107—215.	Taxes; assessment; mode of.
5107—186.	Same; notice; posting.	5107—216.	Same; levy, assessment and collection; sinking funds.
5107—187.	Same; conduct of; polling places and voting precincts; election officers; ballots.	5107—217.	Maintenance tax; election to determine; levy, assessment and collection.
5107—188.	Same; oath of voters.	5107—218.	Collection of taxes by assessor and collector of district.
5107—189.	Same; returns; canvass; certificate of result.	5107—219.	Board of equalization; number; appointment; meetings; secretary; record; compensation.
5107—190.	Same; order establishing district; form and contents.	5107—220.	Same; oath of members.
5107—191.	Certified copy of order establishing district; filing and recording.	5107—221.	Same; general powers.
5107—192.	Supervisors; bonds and oaths of office.	5107—222.	Equalization of taxes; complaints; witnesses.
5107—193.	Same; organization; quorum; secretary.	5107—223.	Same; list of tax payers refusing to make returns.
5107—194.	Same; qualifications.	5107—224.	Same; raising valuation.
5107—195.	Same; powers and duties enumerated.	5107—225.	Same; meetings of board; hearings; approval of lists and rolls.
5107—196.	Districts declared bodies corporate; general powers.	5107—226.	Compensation of members of board of equalization.
5107—197.	Construction, etc., of works and improvements; taking over existing plants and systems; power to issue bonds and incur indebtedness; election to determine issue of bonds, etc.	5107—227.	Taxes; assessment rolls.
5107—198.	Power of eminent domain conferred; procedure, etc.	5107—228.	Same; collection; payments to depository.
5107—199.	Rights of way; power to acquire.	5107—229.	Same; charges against and credits to assessor and collector.
5107—200.	Power to enter upon lands for examination, etc.	5107—230.	Term of office of assessor and collector.
5107—201.	Levees, bridges, etc., across or under railroad tracks or public or private roads.	5107—231.	Taxes; assessment; time of making.
5107—202.	Rights of way across public or county roads.	5107—232.	Same; meetings of board of equalization; completion of assessment rolls.
5107—203.	Joint action with other political subdivisions.	5107—233.	Same; when due and payable.
5107—204.	Assessor and collector; bond; qualifications; compensation.	5107—234.	Delinquent taxes; lien; sale of land.
5107—205.	Election to determine bond issue; proposition submitted.	5107—235.	Same; delinquent tax roll; making and delivery to secretary of district.
5107—206.	Same; notice; conduct of; qualified voters; voting places; ballots.	5107—236.	Same; book record of delinquent tax roll.
5107—207.	Same; oath of voters.	5107—237.	Same; publication of delinquent tax record.
5107—208.	Same; returns; canvass; declaration of result.	5107—238.	Same; suit to collect; petition.
5107—209.	Bonds; order for issue of.	5107—239.	Same; suit to collect; parties; process; order of sale.
		5107—240.	Same; tax deed on sale.
		5107—241.	Same; suit to collect; compensation of attorney, etc.
		5107—242.	Same; penalty; collection.
		5107—243.	Same; redemption from sale.
		5107—244.	Accounts and records of supervisors.

Art. 5107—245.	District depository; selection; laws applicable to.	Art. 5107—256.	Contracts for work; letting; notice of; making of contract.
5107—246.	Same; reports and vouchers.	5107—257.	Bond of contractor.
5107—247.	Office and meetings of supervisors.	5107—258.	Work under contracts; how done; supervision.
5107—248.	Meetings of supervisors; vouchers; books of accounts.	5107—259.	Inspection, etc., of work; partial payments on contracts.
5107—249.	Bonds of officers and employés of district.	5107—260.	Seal of districts.
5107—250.	Vacancies in office of assessor and collector.	5107—261.	Engineer; powers and duties.
5107—251.	Vacancies in office of supervisor; how filled.	5107—262.	Interest and sinking fund; how constituted; payments from.
5107—252.	Terms of office of district officers.	5107—263.	Maintenance and operating fund; how constituted; payments from.
5107—253.	Election of supervisors and assessor and collector.	5107—264.	Depository to act as treasurer, when.
5107—254.	Compensation of supervisors.	5107—265.	Costs of creation of district.
5107—255.	Compensation of other officers, etc.	5107—266.	Acts not affected.

**Article 5107—180. Purposes for which districts may be created.**—There may be created within this state conservation districts to be known as Fresh Water Supply Districts, for the purpose of conserving, transporting and distributing Fresh Water from lakes, pools, reservoirs, wells, springs, creeks, and rivers for domestic and commercial purposes, as contemplated by Section 59, Article 16 of the Constitution of this State, which said districts shall have and may exercise all the rights, privileges and powers given by this Act and in accordance with its directions, limitations and provisions. Such districts may or may not include cities and towns. [Acts 1919, 36th Leg., 2d C. S., ch. 48, § 1.]

Took effect July 28, 1919.

**Art. 5107—181. Petition for establishment; contents; hearing; notice thereof.**—When it is proposed to create a Fresh Water Supply District, there shall be presented to the Commissioners' Court in which the lands to be included in such district are located, or to the County Judge of the County, if the Commissioners' Court is not in session, a petition signed by fifty or by a majority of the qualified voters of such proposed district who shall own land within the District proposes, setting forth the proposed boundaries thereof, the general nature of the work proposed to be done, the necessity therefor, and the feasibility thereof and designating a name therefor, which shall include the name of the county in which it is situated and upon presentation of such petition it shall be the duty of the Commissioners' Court or the County Judge of such county if the court be not in session to forthwith fix a time and place at which said petition shall be heard before the Commissioners' Court of the County herein it is filed, which date shall be not less than fifteen nor more than thirty days from the date of the order, and to order and direct the County Clerk of such County, as ex-officio clerk of the Commissioners' Court thereof, to issue notice of such time and place of hearing, which notice shall inform all persons concerned of the time and place of hearing and their right to appear and contest the genuineness of such petition and the signature thereto and whether said petitioners are qualified voters of such proposed district, and owners of land therein and to deliver such notice to any adult who is willing to execute the same by posting as herein directed. [Id., § 2.]

**Art. 5107—182. Posting copies of notice of hearing on petition.**—Upon receipt of the notice above provided for by any adult person willing to receive and execute the same it shall be the duty of such person, or persons if more than one shall act, to post a copy of such notice at the

door of the Court House of said County, and a copy at four different places within such proposed district. Such posting shall be for not less than ten days prior to the date fixed for the hearing and the person or persons so posting shall make affidavit, before some officer authorized by law to administer oaths of his or their action in respect to such posting, and such affidavit when so made shall be conclusive of the facts sworn to. [Id., § 3.]

**Art. 5107—183. Deposit to accompany petition.**—A petition for the formation of such a district shall be accompanied by a deposit of One Hundred Dollars, which deposit shall be paid to the clerk of the County Court, who shall therefrom upon vouchers approved by the County Judge, pay all expenses incident to the hearing and the election for the creation of the District herein provided for, returning any excess to the petitioners or their attorney. [Id., § 4.]

**Art. 5107—184. Determination of sufficiency of petition.**—At the time and place set for the hearing of the petition or such subsequent date as may then be fixed the court shall proceed to examine such petition for the purpose of ascertaining the sufficiency thereof, and any person interested may appear before the court in person or by attorney and offer testimony touching the sufficiency of such petition. Such court shall have jurisdiction to determine all issues raised touching the sufficiency of such petition. Such hearing may be adjourned from day to day and from time to time as the facts may require. The court shall have power to make all incidental orders necessary in respect to the matters before it. [Id., § 5.]

**Art. 5107—185. Election to determine establishment of district; order for; proposition to be submitted; election of supervisors, and assessor and collector.**—If upon the hearing of such petition it be found that the same is signed by the requisite number of qualified voters of such proposed district, who own land therein and that such petition conforms to the provisions of Section 2 of this act [Art. 5107—181], then the court shall so find in favor of the petitioners for the establishment of a district according to the boundaries as set forth in said petition and the County Commissioners' Court hearing said petition shall order an election to be held within said proposed Fresh Water Supply District at a time not less than twenty nor more than thirty days from the date of such order. At which election there shall be submitted the following propositions: "For the Fresh Water Supply District," "Against the Fresh Water Supply District," and the election of five supervisors and an assessor and collector as hereinafter provided. [Id., § 6.]

**Art. 5107—186. Same; notice; posting.**—After the ordering of an election as provided in the preceding section, notice of such election shall be given stating the time and place or places of holding the election and showing the boundaries of said proposed district, and such notice shall also show the presiding officer or officers appointed for the holding of said election. Such notice shall be posted at the Court House door of the County in which said proposed district is situated, and shall be posted for twenty days previous to the day of the election and shall contain the proposition to be voted upon and names of officers to be filled at such election. [Id., § 7.]

**Art. 5107—187. Same; conduct of; polling places and voting precincts; election officers; ballots.**—The manner of conducting such elec-

tion shall be governed by the election laws of the State of Texas, except as herein provided, and at such election none but resident property tax payers who are qualified voters of such proposed district shall be entitled to vote on any question submitted to the voters thereof at such election. The County Commissioners' Court shall name a polling place or polling places for such election. Each and every Fresh Water Supply District is hereby constituted an election precinct for the purposes of the election above specified, and all other elections which may be ordered or held under any provisions of this Act. The Commissioners' Court ordering said election shall select and appoint two judges, one of whom shall be presiding judge, and two clerks at each polling place name, and shall provide the necessary ballots for such election. Said ballot shall have printed thereon the following: "For the Fresh Water Supply District," "Against the Fresh Water Supply District," and the names of the persons recommended for supervisors and officers in the petition presented to the Commissioners' Court. Said ballot shall also have five blank places after the name of those printed on which each voter may write the names of other persons supervisors and assessor and collector, and there shall be no other matter placed on said ballot. [Id., § 8.]

**Art. 5107—188. Same; oath of voters.**—Every person who offers to vote in any election held under the provisions of this Act shall take the following oath before the presiding judge of the polling place where he offers to vote and for such purpose the presiding judge is hereby authorized to administer the same:

"I do solemnly swear (or affirm) that I am a qualified voter of \_\_\_\_\_ County and that I am a resident property tax payer of the proposed Fresh Water Supply District voted on at this election, and have not voted before in this election." [Id., § 9.]

**Art. 5107—189. Same; returns; canvass; certificate of result.**—Immediately after the election the presiding Judge at each polling place shall make returns of the result in the same manner as provided for in general elections for State and County Officers, and the Commissioners' Court shall forthwith at a regular Session, if said court be in regular session, or a special session called for that purpose if said Commissioners' Court be not in regular session, canvass such vote and if it be found that the votes of a majority of the resident property tax payers voting thereon shall have been cast in favor of the Fresh Water Supply District, then the court shall declare the result of said election in favor of the establishment of said district, and shall enter the same in the minutes of said court, and shall also canvass the vote for supervisors and assessor and collector and issue or cause to be issued to the five supervisors receiving the highest number of votes certificates of their election and to the person receiving the highest number of votes for assessor and collector a certificate of his election as provided under the general election law. Provided however, that should it be found that two or more persons had received the same number of votes for the position of fifth supervisor the said Commissioners' Court shall select one of said persons to fill said position. [Id., § 10.]

**Art. 5107—190. Same; order establishing district; form and contents.**—If the Commissioners' Court shall declare the result of said election to be in favor of the establishment of the Fresh Water Supply District, then said court shall cause to be made and entered in the minutes of said court an order setting forth substantially as follows: "In the

matter of the petition of \_\_\_\_\_ and \_\_\_\_\_ others praying for the establishment of a Fresh Water Supply District as in said petition described and designated, as \_\_\_\_\_ County Fresh Water Supply District No. \_\_\_\_\_; be it known that an election was called for that purpose in said district and held on the \_\_\_\_\_ day of \_\_\_\_\_ Month, A. D. 19— and a majority of the resident tax payers voting thereat voted in favor of the creation of the said Fresh Water Supply District. Now, therefore, it is ordered by the Court that a Fresh Water Supply District be and the same is hereby established under the name of \_\_\_\_\_ County Fresh Water Supply District No. \_\_\_\_\_ with the following metes and bounds.” (Which field notes shall be copied in the record). The first district created under this Act in any county shall assume the number “ONE”, the second district created shall assume the number “TWO”, and so on consecutively. [Id., § 11.]

**Art. 5107—191. Certified copy of order establishing district; filing and recording.**—After the making and entering by the Commissioners Court of the order establishing a Fresh Water Supply District as herein provided, the court shall cause to be made a certified copy of such order, which shall be filed with the County Clerk of the county in which such district is situated, and the same shall be duly recorded in the deed records of said County, and such recordation shall have the same effect in so far as notice is concerned, as is provided for the record of deeds and all costs in connection with the making and recording of such copy shall be paid by the District. [Id., § 12.]

**Art. 5107—192. Supervisors; bonds and oaths of office.**—Within ten days after the making and entry of the order of the Commissioners' Court declaring the result of the election and the establishment of the Fresh Water Supply District as herein provided, or as soon thereafter as practicable, the supervisors elected at such election shall give and enter into a good and sufficient bond in the sum of \$5,000.00 each payable to the Fresh Water Supply District, conditioned upon the faithful performance of their duties to be approved by the Commissioners' Court provided, however, that after the organization of such district all bonds required to be given by any supervisor, officer, or employé of such supply district shall be approved by the supervisors of such districts instead of the Commissioners' Court. The supervisors shall take the oath of office prescribed by the Statute for Commissioners' Court except that the name of the Supply District shall be substituted for the name of the county in said oath of office, and the bond and oath herein provided for shall be filed with the County Clerk of the County wherein the order was entered creating said district, and by him recorded in the official bond records of said County, and after it is recorded said bond shall be delivered by the County Clerk to the depository selected by such district under the provisions of this Act, and shall be by it safely kept as part of the records of said district. [Id., § 13.]

**Art. 5107—193. Same; organization; quorum; secretary.**—The supervisors of such Fresh Water Supply District shall organize by electing one of their number as President, and any three of whom shall constitute a quorum, and a concurrence of three shall be sufficient in all matters pertaining to the business of their district. They shall have power to appoint a secretary who shall receive such compensation as the Board of Supervisors may fix, not to exceed One Hundred Fifty (\$150.00) Dollars per month. [Id., § 14.]

**Art. 5107—194. Same; qualifications.**—No person shall be elected as supervisor for any Fresh Water Supply District created under this Act unless he is a resident of said district and owns land subject to taxation within such district, and who at the time of such election shall be more than twenty-one years of age. [Id., § 15.]

**Art. 5107—195. Same; powers and duties enumerated.**—The Board of Supervisors herein provided for shall have control over and management of all the affairs of such Fresh Water Supply District, shall make all contracts pertaining thereto and such supervisors shall have control of the construction of all improvements and works within and without the boundaries of such district and the transportation and distribution of the water of such district, and shall prescribe the manner and terms upon which water shall be furnished, and shall be authorized to fix the rate to be charged users of water from such supply district, and shall promulgate rules and regulations governing the distribution and use of water and the revenue from the sale of such water shall be applied to operating expenses and the upkeep of the system of improvements installed in said district, and any surplus that may be left after paying such expenses shall be from year to year applied to the payment of interest on the bonds or other indebtedness that may be incurred by the district, and if there be more than enough to pay operating and upkeep expenses, and the interest on the indebtedness of the district, then such surplus shall be passed by the supervisors to the sinking fund provided in this act, and the board of supervisors shall employ all necessary employés for the proper handling and operation of such district, and especially may employ a general manager, attorneys, a bookkeeper and an engineer and such assistants and laborers as may be required, and they may also buy all necessary implements, machinery, work animals, equipment and supplies, as may be required for the construction, operation, and maintenance of the system of works and improvement of such Fresh Water Supply District. [Id., § 16.]

**Art. 5107—196. Districts declared bodies corporate; general powers.**—All Fresh Water Supply Districts created as herein specified shall be governmental agencies and bodies politic and corporate with such powers of government, and with authority to exercise such rights, privileges and functions concerning the purposes for which they are created, as may be conferred by this act, or any other law in this State, to the benefit of which they may become entitled, and such districts are hereby declared to be defined districts within the meaning of Section 59, Article 16 of the Constitution and may by and through their supervisors, sue and be sued in any and all courts of this state in the name of such fresh water supply districts, and all courts of this state shall take judicial notice of the establishment of such districts, and said districts shall contract and be contracted with in the name of such districts. And all such Fresh Water Supply Districts shall have full authority and right to acquire water rights and privileges in any way that any individual or corporation may acquire same, and to hold the same either by gift, purchase, device, appropriation or otherwise. [Id., § 17.]

**Art. 5107—197. Construction, etc., of works and improvements; taking over existing plants and systems; power to issue bonds and incur indebtedness; election to determine issue of bonds, etc.**—Fresh Water Supply Districts created under this Act are entitled to the ben-



efits of this provision, and subject to the limitations of this act contained, shall have full power and authority to build, construct, complete, carry out, maintain and in case of necessity add to and re-build all works and improvements within and without such districts necessary to accomplish any plan of conservation, transportation and distribution of fresh water adopted for or on behalf of such districts and may make all necessary and proper contracts, and employ all persons and means necessary to that end, and such districts are authorized, if the governing bodies thereof shall deem it necessary, to take over in whole or in part by purchase or otherwise, any water plants or systems within such districts; and in the accomplishment of such purposes they may or may not issue bonds, and may or may not incur indebtedness, provided that no bonds by or on behalf of such district shall be issued nor shall any indebtedness against the same be incurred unless the proposition to issue such bonds or to incur such indebtedness, shall be first submitted to the qualified property tax paying voters of such district, and the proposition adopted by a majority vote of the property tax paying voters of the district voting at an election held to determine such question, and no enumeration of specific powers in this Act shall be held a limitation upon the general powers hereby conferred except as may be distinctly expressed. [Id., § 18.]

**Art. 5107—198. Power of eminent domain conferred; procedure, etc.**—The right of eminent domain is hereby expressly conferred on all Fresh Water Supply Districts established under the provisions of this act for the purpose of enabling such district to acquire the fee simple title, easement, or right-of-way over and through any and all lands, water, or lands under water, private or public (except lands and property used for parks, manufacturing industries and established and developed water powers existing at the time of the creation of such district, and cemetery purposes) within and without such districts necessary for making, constructing and maintaining all canals, conduits, aqueducts, pipe lines, pumping plants and other improvements necessary for the conservation, transportation and distribution of fresh water for the purpose herein named. In the event of the condemnation or taking, damaging or destroying of any property for such purposes, the Supply Districts shall pay to the owner thereof adequate compensation for the property taken, damaged or destroyed. All condemnation proceedings or suits in the exercise of eminent domain under this Act shall be instituted under the direction of the district supervisors, and in the name of the Fresh Water Supply District, and all suits or other proceedings for such purposes and for the assessing of damages, and all procedure with reference to condemnation, the assessment of and estimating of damages, payment, appeal, the entering upon the property pending the appeal, etc., shall be in conformity with the statutes of this state, for the condemning and acquiring of right of way by railroad company, and all such compensation and damages adjudicated in such condemnation proceedings and all damage which may be done to the property of any person or corporation in the construction and maintenance of canals, conduits, pipe lines, pumping plants and other improvements under the provisions of this Act shall be paid out of any funds or properties of the said Fresh Water Supply District, except taxes necessarily applied to the sinking fund and interest on the district bonds. [Id., § 19.]

**Art. 5107—199. Rights of way; power to acquire.**—The District Supervisors of any District are hereby empowered to acquire the necessary right of way for canals, conduits, pipe lines, pumping plants and other necessary improvements contemplated by this act, by gift, grant, purchase or condemnation proceedings as hereinbefore provided. [Id., § 20.]

**Art. 5107—200. Power to enter upon lands for examination, etc.**—The supervisors of any district, and the engineers and employes thereof are hereby authorized to go upon any lands lying within or without said district, for the purpose of examining the same with reference to the location of canals, conduits, pipe lines, pumping plants and all other kinds of improvements to be constructed for such district, and for any other lawful purpose connected with their plan of conservation, transportation and distribution of water, whether herein enumerated or not, and such necessary improvements may be constructed and maintained within and without such proposed districts upon lands acquired as herein authorized. [Id., § 21.]

**Art. 5107—201. Levees, bridges, etc., across or under railroad tracks or public or private roads.**—The said Fresh Water Supply Districts are hereby authorized and empowered to make all necessary levees, bridges and other improvements across or under any railroad embankments, tracks, or rights of way, or public or private roads or the rights of way thereof, or rivers or other public improvements of other districts, or other such improvements and the rights of way thereof, for the purpose of enabling the Fresh Water Supply necessary for said district; provided, however, that notice shall first be given by said Fresh Water Supply District to the proper railroad authorities or other authorities or persons relative to the additions or changes to result from the improvements contemplated by the said Fresh Water Supply District; and the said railroad authorities or other authorities, or persons shall be given thirty (30) days in which to agree to said work to be done in the manner proposed by said District, or to refuse to agree thereto, in case of refusal, they shall at their own expense, construct the said improvements in their own manner: provided such design or manner of construction shall be satisfactory to said Fresh Water Supply District. [Id., § 22.]

**Art. 5107—202. Rights of way across public or county roads.**—Fresh Water Supply Districts are hereby given the right of way across all public or county roads, but they shall restore such roads where crossed to their previous condition for use, as near as may be. [Id., § 23.]

**Art. 5107—203. Joint action with other political subdivisions.**—Fresh Water Supply Districts shall have authority to act jointly with each other with political subdivisions of the state, with other states, with cities and towns, and with the government of the United States, in performance of any of the things permitted by this act; such joint acts to be done upon such terms as may be agreed upon by their supervisors. [Id., § 24.]

**Art. 5107—204. Assessor and collector; bond; qualifications; compensation.**—The office of assessor and collector herein provided for shall be filled by the same person, and before entering upon his duties as such assessor and collector he shall qualify by making and entering into a good and sufficient bond in the sum of Five Thousand (\$5,000)

Dollars conditioned upon the faithful performance of his duties as assessor, and collector and upon the paying over to the district depository of all sums of money coming into his hands as such collector; provided, however, that the supervisor shall require additional security in the event, in their judgment, the same may become necessary; and such assessor and collector shall be a resident of the district and a qualified voter in the district and shall receive such compensation for his services as may be provided by the board of supervisors, not to exceed \$2,400.00 per annum, which salary shall be paid by the district upon vouchers issued by the Board of Supervisors. [Id., § 25.]

**Art. 5107—205. Election to determine bond issue; proposition submitted.**—After the establishment of any such Fresh Water Supply District, and the qualification of the Supervisors thereof, the Board of Supervisors may order an election to be held within such organized districts at a time not less than twenty nor more than thirty days from the date of said order, at which election, there shall be submitted this proposition and none other; “For the issuance of bonds and levy of taxes in payment thereof,” “Against the issuance of bonds and levy of taxes in payment thereof.” [Id., § 26.]

**Art. 5107—206. Same; notice; conduct of; qualified voters; voting places; ballots.**—Notice of such election, stating the amount of bonds as determined by the Board of Supervisors to be necessary to be issued, shall be given by the Board of Supervisors, by posting a copy of said notice in four public places in said Fresh Water Supply District, one at the court house door of the county in which said District is situated; copies of which notice shall be posted for twenty days previous to the date of the election, and shall contain the proposition to be voted upon as set forth in the preceding section, together with an estimate of the probable cost of construction of the proposed improvement, and incidental expenses connected therewith, and an estimate of the cost of the purchase of the improvements already existing, if the same is contemplated, or the purchase of said necessary improvements, and the construction of additions thereto as the case may be. The manner of conducting such election shall be governed by the election laws of the State of Texas, except as hereinbefore otherwise provided. None but resident property tax payers who are qualified voters of such proposed district shall be entitled to vote on any question submitted to the voters thereof by the board of supervisors for said Fresh Water Supply District. The Board of Supervisors for such district shall name a polling place, or places, in such district and shall also select and appoint two judges, one of whom shall be presiding judge, and two clerks for each voting place designated by them and shall provide the necessary ballots for said election. Said ballot shall have written or printed thereon the words and none other: “For the issuance of bonds and levy of taxes in payment thereof,” “Against the issuance of bonds and levy of taxes in payment thereof.” All expense incident to the calling and holding of such election or any other election authorized by this Act shall be paid out of any funds of said Fresh Water Supply District except interest and sinking fund provided for in this act upon vouchers drawn by the Board of Supervisors. [Id., § 27.]

**Art. 5107—207. Same; oath of voters.**—Every person who offers to vote in any such election shall first take the oath hereinbefore set forth in section No. 9 of this Act [art. 5107—188] before the presiding judge

or any one of the judges of the polling place where he offers to vote, and the presiding judges are hereby authorized to administer said oath. [Id., § 28.]

**Art. 5107—208. Same; returns; canvass; declaration of result.**—Immediately after the election, the presiding judge of each polling place shall make return of the result in the same manner as provided for in general election for State and County officers, such return shall be made to the Board of Supervisors who shall at a regular or special session called for the purpose of canvassing said vote, canvass said vote and if it be found that the votes of a majority of the resident property tax paying voters voting therein shall have been cast in favor of the issuance of the bonds and levy of taxes, then said supervisors shall declare the result of said election to be in favor of the issuance of bonds and levy of taxes, then said supervisors shall declare the result of said election to be in favor of the issuance of bonds and levy taxes and in payment thereof and shall cause same to be entered in their minutes. [Id., § 29.]

**Art. 5107—209. Bonds; order for issue of.**—After the canvass of the vote and declaring the result as provided for in the preceding section, the supervisors for said Fresh Water Supply District shall make and enter an order in their minutes directing the issuance of bonds for such district sufficient in amount to pay for such purposed improvements together with all necessary actual and incidental expenses connected therewith, and not to exceed the amount specified in said order and notice of election. [Id., § 30.]

**Art. 5107—210. Same; issue; denominations; interest; maturity.**—The bonds issued under the provisions of this Act shall be issued in the name of the Fresh Water Supply District, signed by the president of the board of supervisors and attested by the secretary with the seal of said district affixed thereto and such bonds shall be issued in denominations of not less than one hundred (100.00) Dollars nor more than One Thousand (1000.00) Dollars each, and such bonds shall bear interest at the rate of not to exceed six (6) per cent., payable annually or semi-annually. Such bonds shall by their terms provide the time, place or places, manner and conditions of their payment and the purpose for which they are issued and the interest thereon as may be determined and ordered by the board of supervisors for such Supply District and none of such bonds shall be made payable more forty years after the date thereof. [Id., § 31.]

**Art. 5107—211. Same; record of.**—When bonds shall be [have] been issued by and on behalf of any Fresh Water Supply District, the supervisors of such district shall procure and deliver to the treasurer of the county in which such district is located, a well bound book in which a list shall be kept of all such bonds with their manner, amount, rate of interest, date of issuance, when due, where payable, amount received for same and the tax levy to pay interest on and to provide a sinking fund for their payment which book shall at all times be opened to the inspection of the parties interested, either as tax payers or bondholders; and upon the payment of any bond, an entry thereof shall be made on such book. The County Treasurer shall receive for his services in recording all these matters the same fees as may be allowed by law to the County Clerk for recording deeds. [Id., § 32.]

**Art. 5107—212. Same; determination of validity by Attorney General.**—Before any bonds issued by or on behalf of any Fresh Water Supply District are offered for sale there shall be forwarded to the Attorney General a certified copy of all proceedings had in the organization of the district and with reference to the issuance of such bonds in connection with the bonds themselves and such other information with respect thereto as may be required by the Attorney General shall be furnished; and it shall be the duty of the Attorney General to carefully examine said bonds in connection with the record and Constitution and laws of this State governing the issuance of such bonds, and, if, as a result of his examination, the Attorney General shall find that such bonds are issued in conformity with the Constitution and laws of the State and that they are valid and binding obligations upon the district by or on behalf of which they are issued, he shall so officially certify, and until he shall so officially certify, and until registered by the Comptroller as hereinafter required, the said bonds shall be without validity. [Id., § 33.]

**Art. 5107—213. Same; registration by Comptroller.**—When the bonds of any Fresh Water Supply District have been examined and approved by the Attorney General and his certificate thereto has been issued, they shall be registered by the State Comptroller in a book kept for that purpose and the certificate of the Attorney General as to the validity of such bonds shall be preserved of record. Such bonds after receiving the certificate of the Attorney General, and after having been registered in the Comptroller's Office, as herein provided, shall be held, in every action suit or proceeding in which their validity may be brought into question, prima facie valid; and in every action brought to enforce collection of such bonds and interest thereon, the only available defense against the validity of such bonds shall be forgery or fraud. [Id., § 34.]

**Art. 5107—214. Same; sale.**—When bonds shall have been issued, approved and registered as provided in this Act, the board of supervisors shall sell said bonds on the best terms and for the best price possible. The supervisors selling said bonds shall promptly pay over to the depository of said district the proceeds of said bonds to be placed to the credit of such district; but none of said bonds shall be sold for less than face value thereof and accrued interest. [Id., § 35.]

**Art. 5107—215. Taxes; assessment; mode of.**—Immediately after the voting of bonds in any Fresh Water Supply District as provided by this Act, the assessor and collector as hereinbefore provided, shall at once proceed to make an assessment of all of the taxable property, both real, personal and mixed in his district; and such assessment shall be made annually thereafter. Said assessment shall be made upon blanks to be provided by the supervisors for such district. Said assessment shall consist of a full statement of all property owned by the party rendering same in said district and subject to taxation therein and shall state the full value thereof. There shall be attached to each such assessment an affidavit made by the owner or his agent rendering said property for taxation to the effect that said assessment or rendition contains a true and complete statement of all property owned by the party for whom said rendition is made in said district and subject to state and county taxation therein; and in addition to all such assessments or rendition made by the owner or agents of such property, the tax assessor shall make out similar lists of all poerty [property] not rendered for

taxation in such district that is subject to State and County taxation. Each and every person, partnership or corporation owning taxable property in such district shall render same for taxation to the assessor when called upon to do so, and if not called upon by the assessor, the owner shall on or before June first of each year, nevertheless, render for taxation all property owned by him in the district subject to taxation.

And all penal laws and penal statutes of this State providing for securing the rendition of property for state and county taxes, and providing penalties for the failure to render such properties shall apply to all persons, partnerships or corporations owning or holding property in any Fresh Water Supply District. The tax assessor shall have authority to administer oaths to fully carry out the provisions of this Section. [Id., § 36.]

**Art. 5107—216. Same; levy, assessment and collection; sinking funds.**—When the bonds shall have been issued by any Fresh Water Supply District, the board of supervisors of such district shall levy and cause to be assessed and collected taxes upon all property, real and personal and mixed, within such district based upon the full value of each piece of property, which taxes shall be sufficient in amount to pay the interest on such bonds as it shall fall due, and to raise an additional fund which shall create a sinking fund sufficient to redeem and discharge such bonds at maturity; and such taxes shall thereafter be levied annually so long as such bonds, or any of them, are outstanding, sufficient in amount to accomplish the purposes indicated. Sinking funds shall from time to time be invested in such county, municipal, district or other bonds as other sinking funds may by law be invested in, or in bonds of the series to which such funds apply if offered for redemption before maturity upon terms deemed advantageous to the district by its Supervisors. [Id., § 37.]

**Art. 5107—217. Maintenance tax; election to determine; levy, assessment and collection.**—If at any time it should be deemed necessary by the board of supervisors to vote a maintenance tax in such district, they shall call an election in such district, at which election shall be submitted the question “For a maintenance tax”, “Against a maintenance tax”; the supervisors calling said election shall state the amount of said maintenance tax proposed to be voted and such election shall be called and held and the votes returned and canvassed in the same manner as provided for the issuance of bonds in this act. And when a maintenance tax shall have been voted as herein provided, the supervisors of said district shall thereafter levy and cause to be assessed and collected upon all property, real, personal and mixed of such district based upon the full valuation of same, to an amount not exceeding the specific sum voted, and the vote in such cases may be for a specific sum, or not to exceed a specific sum. The proceeds of such taxes shall be used for the maintenance, upkeep, repairs and additions to the improvements, and the district, or other lawful expense incurred by and on behalf of such district and for no other purposes. The right to levy such taxes shall remain in force until abrogated in whole or in part by another election to be called and held in the same manner as the election for the voting of maintenance taxes; but elections upon the question of repeal or reduction of maintenance taxes shall not be held oftener than every five years; provided, however, that the supervisors of such district may, or may not, levy from time to time the maintenance tax voted if such taxes are not necessary. [Id., § 38.]

**Art. 5107—218. Collection of taxes by assessor and collector of district.**—All taxes provided for herein including the maintenance and operating taxes shall be collected under the direction of the supervisor by the assessor and collector for such district. He shall keep a true account of all moneys collected and deposit the same as collected in the district depository, and shall file with the secretary of the board of supervisors a true statement of all money collected once a week. He shall use a duplicate receipt book and shall give a true receipt for each collections made, retaining in such book a true copy thereof which shall be preserved as a record of the district. [Id., § 39.]

**Art. 5107—219. Board of equalization; number; appointment; meetings; secretary; record; compensation.**—The supervisors for each fresh water supply district created under the provisions of this act shall at their first meeting or as soon thereafter as practicable and annually thereafter, appoint three commissioners, each being a qualified voter and resident property owner of said district who shall be styled the "Board of Equalization" and at the same meeting the said Board of Supervisors shall fix the time for the meeting of such Board of Equalization for the first year; and said Board of Equalization shall convene at the time fixed by the Supervisors to receive all assessments, lists or books of the assessor for said District for examination, correction, equalization, appraisalment and approval and at all meetings of said board, the secretary shall keep a permanent record of all proceedings of said board of equalization, and such commissioners shall each receive as compensation for such service not to exceed Five (5) Dollars per day. [Id., § 40.]

**Art. 5107—220. Same; oath of members.**—Before entering upon the duties as such Board of Equalization, each of the members thereof shall take and subscribe to the following oath:

"I, —— do solemnly swear (or affirm) that I will to the best of my ability make a full and complete examination, correction equalization and appraisalment of all property contained within said district, as shown by the assessment list or books of the assessor for said district." and said oath shall be spread upon the minutes to be kept by the secretary of said board. [Id., § 41.]

**Art. 5107—221. Same; general powers.**—The Board of equalization herein provided for shall cause the assessor to bring before them, at the time fixed for the convening of said board all the assessment lists or books of the assessor of said district for their examination, that they may see that each and every person has rendered his property at its full value; and said board shall have power to send for persons and papers, to swear and qualify persons who testify, to ascertain the value of such property and if they are satisfied it is too high, they shall lower it to its proper value, and if too low, they shall raise the value of such property to the proper figure. Said board shall have power to correct any and all errors that may appear on the assessors list or books and shall have further authority to add any and all property to said list or inventories that may have been omitted therefrom. [Id., § 42.]

**Art. 5107—222. Equalization of taxes; complaints; witnesses.**—The Board of Equalization shall equalize as near as possible the value of all the property situated within said district having reference to the location of said property and the improvements thereon situated, and

any person may file with said board at any time before the final action of said board a complaint as to the assessment of his, or any other persons, property, and said board shall bear said complaint and said complaint shall have the right to have witnesses examined to sustain said complaint as to the assessment of said property, or as to failure to render any property owned by any person, partnership or corporation, situated within said district, subject to taxation which has not been properly assessed. [Id., § 43.]

**Art. 5107—223. Same; list of tax payers refusing to make returns.**—The assessor for such district, at the same time that he delivers to said board his lists and books shall also furnish to said board a certified list of the names of all persons who either refuse to swear to or to sign the oath or affirmation as required by this law, together with a list of the property of such persons situated within said district as made by him through other information, and said board shall examine the list and appraise the property so listed by the assessor. [Id., § 44.]

**Art. 5107—224. Same; raising valuation.**—In all cases where the Board of Equalization shall find it their duty to raise the value of any property appearing on the lists or books of the assessor, they shall, after having fully examined such lists or books and corrected all errors appearing thereon adjourn to a day not less than ten nor more than fifteen days from the date of adjournment, such day to be fixed in the order of adjournment, and shall cause the secretary of the board to give written notice to the owner of such property, or to the persons rendering same, of the time to which said board may have adjourned, and that such owner or person may at any time appear and show why the value of such property should not be raised, which notice may be served by depositing the same, properly addressed, and with necessary postage in any post office within the county. [Id., § 45.]

**Art. 5107—225. Same; meetings of board; hearings; approval of lists and rolls.**—The Board of Equalization shall meet at the time specified in said order of adjournment, and shall hear all persons the value of whose property has been raised, and if said board is satisfied they have raised the value of such property too high, they shall lower the same to its proper value; and said Board of Equalization, after they have finally examined and equalized the value of all the property on the assessor's lists or books, or that they may have been placed thereon by said board of equalization shall approve said lists or books and return them, together with the lists of unrendered property to the assessor, that he may make up therefrom his general rolls as required by this act; and when said general rolls are so made up, the board shall immediately reconvene to examine said rolls, and to approve the same if found correct, and the action of the board at the meeting last provided for in this article shall be final, and shall not be subject to revision by said board or by any other tribunal thereafter. [Id., § 46.]

**Art. 5107—226. Compensation of members of board of equalization.**—The members of the board of equalization and the secretary of said board, shall each receive such compensation for their services to be allowed by the supervisors of said district, as they may deem just and reasonable, not to exceed however the sum of Five (5) Dollars per day for the time actually engaged in the discharge of such duties. [Id., § 47.]



**Art. 5107—227. Taxes; assessment rolls.**—After the return to the assessor and collector of the assessment lists or books duly approved by the Board of Equalization, as hereinbefore provided for, the said assessor and collector shall make up the assessment of all taxable property situated in said district upon duplicate rolls, and after the approval of said rolls by the Board of Equalization, one of the same shall be delivered to the Supervisors of said Fresh Water Supply District, to be by them kept as a permanent record in their office, and all lists and books of said assessor shall be caused to be substantially bound and by him kept as a permanent record of his office and be delivered, together with all other records of his office, to his successor, upon his election and qualification or in case of a vacancy in such office to the supervisors of said Fresh Water Supply District. [Id., § 48.]

**Art. 5107—228. Same; collection; payments to depository.**—The assessor and collector shall collect all taxes due to said Fresh Water Supply District, and shall, at the expiration of each week, pay over to the depository selected by said district, all moneys by him collected, and shall report to the supervisors of such district on the fourth Saturday of every month all moneys so collected by him and paid over to the depository, as hereinbefore provided, and shall perform all such duties and in such manner and according to such rules and regulations as the board of supervisors may prescribe, and for the convenience of the persons, firms or corporations owing such tax, shall keep and maintain an office with the Board of Supervisors for such Fresh Water Supply District where all such taxes may be paid. [Id., § 49.]

**Art. 5107—229. Same; charges against and credits to assessor and collector.**—The assessor and collector shall be charged by the Supervisor for such Fresh Water Supply District, upon a permanent finance ledger, to be kept for said purpose by said District, with the total assessment as shown by the assessment rolls; and proper credit shall be given to the assessor and collector for all sums of money paid over to the depository as shown by his monthly reports as hereinbefore provided for, and upon the final annual settlement, the said assessor and collector shall make up a full complete report of all taxes that have not been collected, which said report shall be audited by said board of supervisors and proper credits given therefor, and such annual settlements shall be made on the first Monday in May of each year. [Id., § 50.]

**Art. 5107—230. Term of office of assessor and collector.**—The assessor and collector for said district shall hold office for the term of two years, and until his successor has been elected and qualified; provided, that the assessor and collector first elected to said office shall hold office only until the next general election to be held in said district for the election of officers as provided by this act. [Id., § 51.]

**Art. 5107—231. Taxes; assessment; time of making.**—The assessment provided for in this Act shall be made upon all property subject to taxation in said district on the first day of January of each year, and such assessment shall be completed and the lists and books ready to deliver on or before the first day of June of each year. [Id., § 52.]

**Art. 5107—232. Same; meetings of board of equalization; completion of assessment rolls.**—The Board of Equalization after the first year, shall convene annually on the first Monday in June in each year to re-

ceive all of the assessment lists or books of the assessor of said district for examination, correction, equalization, appraisal and approval, and for the addition thereto of any property found to be unrendered in said district, and shall complete the examination and equalization of said lists and rolls by the second Monday in June of said year, and shall complete and deliver said rolls to the assessor and collector by the second Monday in July of said year and the said assessment rolls shall be completed by the assessor and approved by the Board of Equalization, and returned to said assessor and collected by the first Monday in September of each year after the first assessment as hereinbefore provided. [Id., § 53.]

**Art. 5107—233. Same; when due and payable.**—All taxes provided for by this Act shall become due and payable on the first day of October of each year, and shall be paid on or before the 31st day of January thereafter. [Id., § 54.]

**Art. 5107—234. Delinquent taxes; lien; sale of land.**—All lands or other property which have been returned delinquent or which may hereafter be returned delinquent shall be subject to the provisions of this act, and said taxes shall remain a lien upon said land, although the owner be unknown, or though it be listed in the name of a person not the actual owner, and though the ownership be changed; the land may be sold under the judgment of the Court for all taxes, interest, penalty and costs shown to be due by such assessment for any preceding year. [Id., § 55.]

**Art. 5107—235. Same; delinquent tax roll; making and delivery to secretary of district.**—It shall be the duty of the Supervisors for such Fresh Water Supply District to cause to be prepared by the tax collector, at the expense of such district, a list of all lands upon which the taxes remain unpaid on the 31st day of January of each year, and such list of lands shall be known as the delinquent tax roll, and such tax roll shall be delivered to the secretary of such district to be by him safely kept as a part of the record to his office. Such delinquent record shall carry a sufficient description to properly identify the land shown to be delinquent therein. Such description may be made by reference to lot or block number. [Id., § 56.]

**Art. 5107—236. Same; book record of delinquent tax roll.**—Upon receipt of such delinquent tax roll by the Supervisors of said Fresh Water Supply District, the said Supervisors shall cause same to be recorded in a book which shall be labeled "The Delinquent Tax Record of \_\_\_\_\_ County. Fresh Water Supply District, No. \_\_\_\_\_" and shall be accompanied by an index showing the name of delinquents in alphabetical order. [Id., § 57.]

**Art. 5107—237. Same; publication of delinquent tax record.**—Upon the completion of said delinquent tax record by any Fresh Water Supply District, it shall be the duty of the Supervisors thereof to cause the same to be published in some newspaper published in the county in which said district is situated for three consecutive weeks, but if no newspaper is published in the county, such list may be published in a newspaper outside of the county to be designated by such Supervisor, by a contract duly entered into, and a publisher's fee of not to exceed twenty-five cents for each tract of land so advertised; and said publication and any other publication in a newspaper provided for in this

Act may be proven by the affidavit of the proprietor of the newspaper in which the publication was made, his foreman or principal clerk, annexed to a copy of the publication, specifying the time when and the paper in which the publication was made. [Id., § 58.]

**Art. 5107—238. Same; suit to collect; petition.**—Twenty days after the publication of such notice, or as soon thereafter as practicable, the supervisors for such Fresh Water Supply District shall employ an attorney to bring suit in the name of the Fresh Water Supply District in the district court of said county for the purpose of collecting all taxes, interest, penalty and costs due upon said land. Said petition shall describe all lands upon which taxes and penalties shall remain unpaid and the total amount of taxes and penalties due thereon with interest computed thereon to the time fixed for the sale of said land at the rate of six per cent. per annum, and shall pray for a judgment for said amount, and for the fixing, establishing and foreclosing of the lien existing against said land; that said lands be sold to satisfy said judgment for all taxes, interest, penalty and costs, and for such other relief to which such district may be entitled under the law and facts. [Id., § 59.]

**Art. 5107—239. Same; suit to collect; parties; process; order of sale.**—The proper persons shall be made parties defendants in all such suits, and shall be served with process and other proceedings due therein as provided by law for suits of like character in the district court of this State, and in case of foreclosure, order of sale shall issue to the lands sold thereunder as in other cases for foreclosures; but if the defendant or his attorneys at any time before the sale, file with the sheriff or other officer in whose hands any such order of sale shall be placed, a written request that the property described therein shall be divided and sold in less tracts than whole, together with a description of such subdivision, then such officer shall sell the lands in said subdivision as the defendant may request, provided same are reasonable, and in such case, shall sell only as many subdivisions as may be necessary to satisfy the judgment, interest, and penalties and cost, and after the payment of the taxes, interest and penalties and costs adjudged against it, the remainder of the purchase price, if any, shall be paid by the sheriff, or other officer executing said order of sale, to the defendant, or his attorney of record. [Id., § 60.]

**Art. 5107—240. Same; tax deed on sale.**—In all cases in which lands may be sold for default, in the payment of taxes under the preceding section, it shall be lawful for the sheriff, or other officer, selling the same, or any of his successors in office, to make a deed or deeds to the purchaser, or to any other person to whom the purchaser may direct the deed to be made, and any such deed shall be held in any court of law or equity in this state to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud. [Id., § 61.]

**Art. 5107—241. Same; suit to collect; compensation of attorney, etc.**—The attorney representing such district in all suits against delinquent tax payers that are provided for in this act shall receive for such service such compensation as may be allowed by the supervisors for such Fresh Water Supply District; provided, however, that in no event shall said fees exceed fifteen per cent. of the amount of the taxes so collected. The sheriffs, district clerks, and other officers executing any writ or performing any service in the foreclosure of delinquent taxes on any land situated in such Fresh Water Supply District, shall

receive the same fees for such service as is provided by statute as fees for like services performed in connection with the discharge of the duty of their respective offices. [Id., § 62.]

**Art. 5107—242. Same; penalty; collection.**—If any person shall fail or refuse to pay the taxes imposed upon him or his property by this act until after the 31st day of January next succeeding the return of the assessment roll for said Fresh Water Supply District, a penalty of ten per cent. on the entire amount of such tax shall accrue, which penalty, when collected, shall be paid over to such District. And the collector of taxes shall by virtue of his tax roll seize and levy upon and sell so much personal property as shall be sufficient to make the amount of such taxes, together with the penalty above provided, interest thereon at the rate of six per cent. per annum, and all costs accruing thereon. If no personal property be found for seizure and sale as above provided, the collector shall make up and file with the Secretary of the District the delinquent tax list hereinbefore provided for, charging against same all taxes, penalties and interest assessed against the owner thereof. [Id., § 63.]

**Art. 5107—243. Same; redemption from sale.**—Any delinquent tax payer whose lands have been returned delinquent, or any one having an interest therein, may redeem the same at any time before his lands are sold, under the provisions of this act, by paying to the collector the taxes due thereon, with interest at the rate of six per cent, and all costs and the penalty of ten per cent. as provided for in this Act. [Id., § 64.]

**Art. 5107—244. Accounts and records of supervisors.**—The Supervisors of Fresh Water Supply Districts shall keep a true account of all their meetings and proceedings, and shall preserve all contracts, records of notices, duplicate vouchers, duplicate receipts, and all accounts and records of whatever kind, in a fire proof vault or safe, and same shall be the property of the district, and shall be delivered to their successors in office. [Id., § 65.]

**Art. 5107—245. District depository; selection; laws applicable to.**—The Supervisors of such Supply District shall select a depository for such district under the same provisions as now provided for the selection of the depositories for the counties within this State; and the duties of such depositories shall be the same as now prescribed by law for county depositories. In the selection of depositories, the Supervisors of such Supply District shall act in the same capacity and perform the same duties as are incumbent upon the county judge and members of the commissioners' court in the selection of the county depositories; and all laws now in force or hereinafter to be enacted for the government of county depositories, shall apply to and become a part of this Act. [Id., § 66.]

**Art. 5107—246. Same; reports and vouchers.**—The Fresh Water Supply District depository shall make a report of all moneys received and of all moneys paid out at the end of each month and file such reports with such vouchers among the records of such district in its own vault, and shall furnish a true copy thereof to the district supervisors and shall when called upon, allow same to be inspected by any tax payer, or resident of such district; such record shall be preserved as the property of such district and shall be delivered to the successor of such depository. [Id., § 67.]

**Art. 5107—247. Office and meetings of supervisors.**—The supervisors of each Fresh Water Supply District shall have and maintain a regular office suitable for conducting the affairs of such district within such Supply District and such supervisors shall hold regular meetings at said office, on the first Monday in February, May, August and November of each year, at ten o'clock A. M., and shall hold such regular and special meetings as they may see fit, any tax payer or resident or interested party may attend any such meeting, but shall not participate in same without the consent of the supervisors and may present to said supervisors such matters as they desire in an orderly manner. [Id., § 68.]

**Art. 5107—248. Meetings of supervisors; vouchers; books of accounts.**—All meetings of the supervisors shall be held at the regular office of the district. All vouchers issued for the payment of any funds of the district shall be signed by at least three supervisors and shall refer to the book and page of the minutes allowing such act. All vouchers shall be issued from a regular duplicate book, retaining a duplicate which shall be preserved. The supervisor shall have kept a complete book of accounts for such district, and shall on June 1st of each year select a competent auditor who shall examine the accounts, books and reports of the depository, the assessor and collector and supervisors, and make full report thereon, copy of which shall be filed with the depository, and a copy with the supervisors, and one with the county clerk of the county in which such district is situated. Such reports shall be filed by September 1st of each year, and such reports shall show in detail for what purposes the money from each fund has been expended. [Id., § 69.]

**Art. 5107—249. Bonds of officers and employés of district.**—The officers and employés of any Fresh Water Supply District who may be required to give bond or security, may furnish bonds of surety companies to be approved by the District Supervisors, provided, however, that when such a surety company bond is furnished by any such officer or employé, the surety company furnishing the same shall file for record in the office of the county clerk in the county wherein such district was created, a duly executed power of attorney showing the authority of the person signing such bond for such company to sign same, and said power of attorney shall be duly executed by the officers of said company and have attached the company's seal; and such power of attorney shall remain on file in said office. All such official bonds shall be deposited with the district depository and be preserved by it as the property of said district. [Id., § 70.]

**Art. 5107—250. Vacancies in office of assessor and collector.**—The supervisors for any district created under this act shall have authority to fill all vacancies in the office of assessor by appointment, and the person so appointed shall hold his office until the next regular election held under this act, and until his successor shall have been elected and qualified. [Id., § 71.]

**Art. 5107—251. Vacancies in office of supervisor; how filled.**—All vacancies in the office of supervisors shall be filled by the Board of Supervisors by appointment, and the supervisor so appointed shall hold office until the next regular election, and until his successor shall have been elected and qualified; provided, however, that where the number of supervisors shall have been reduced by death or resignation, or other

cause, to less than two, then such vacancies shall be filled by special election to be ordered by the remaining member of said board of supervisors, said election to be ordered and held after the giving of notice for the election of said officers as provided for the holding of general elections; and further provided that if said remaining member shall fail or refuse to order such election, or if there be no remaining member on said board, then said election shall be ordered by the county judge of the county within which such district is situated, upon a petition signed by five persons interested in the election of said supervisors, whether said interested persons be tax-payers or bond-holders and when so ordered, notice shall be given of said election, and such election held in the manner provided for the holding of general elections, and the supervisors elected at such election shall hold their office until the next general election, and until their successors shall have been elected and qualified. In the event that less than a quorum exists to approve the bonds of such elected supervisors, then such bonds shall be approved by the County Commissioners' Court of such county. [Id., § 72.]

**Art. 5107—252. Terms of office of district officers.**—The term of office of all officers elected for such district shall be for two years and until their successors are elected and qualified; provided, however, that all officers elected at the first election held under the provisions of this Act shall hold office only until the next regular election to be held in said district for the election of officers. [Id., § 73.]

**Art. 5107—253. Election of supervisors and assessor and collector.**—There shall be held on the first Tuesday in January, 1921, and every two years thereafter, a general election, at which time there shall be elected five supervisors for such districts and one assessor and collector who shall be the elective officers for such districts. [Id., § 74.]

**Art. 5107—254. Compensation of supervisors.**—The Supervisors provided for by this Act shall each receive as compensation for their services a sum not to exceed Ten (\$10.00) Dollars for each and every day necessarily taken in the discharge of their duties as such supervisors, and said supervisors shall file with the secretary of such district a statement verified by their affidavit of the number of days actually taken by them in the service of said district, said statement to be filed on the last Saturday of each month, or as nearly thereafter as practicable, and before a warrant shall be issued for the payment of such service. [Id. § 75.]

**Art. 5107—255. Compensation of other officers, etc.**—For all service performed by any officer or individual under this act, the compensation for which is not expressly provided for, such officer or individual shall receive the same compensation as he would for like service if rendered as an officer for the county. Clerks recording orders hereunder shall receive the same compensation as would a county clerk for recording deeds, and persons posting notices hereunder shall receive the same compensation as would a sheriff for posting notices as would by law be required by him for posting notices officially. [Id., § 76.]

**Art. 5107—256. Contracts for work; letting; notice of; making of contract.**—Contracts for the making and construction of all improvements contemplated in this Act and all necessary work in connection with such improvement district, when the cost price exceeds \$10,000.00 shall be let to the lowest responsible bidder furnishing satisfactory evi-

dence of possessing equipment and facilities essential to the proper performance of such contract; after giving notice by advertising the same in one or more newspapers in general circulation in the State of Texas, which notice shall be published once a week for ten (10) days, and also by posting a notice for at least ten (10) days at the courthouse door of the county within which the district lies.

Such contract shall be reduced to writing and signed by the contractors and supervisors, and a copy of same so executed shall be filed with the District Depository subject to the inspection of all parties interested. [Id., § 77.]

**Art. 5107—257. Bond of contractor.**—The person, firm or corporation or association to whom such contract is let shall give bond to the district in such amount as the board of supervisors may determine, not to exceed the contract price conditioned that he, they, or it will faithfully perform the obligations, agreements and covenants of such contract, and that in default thereof they will pay the said District all damages sustained by reason thereof; such bond shall be approved by the supervisors and shall be deposited with the depository of the district, a true copy thereof being retained in the office of the secretary of the board of supervisors. [Id., § 78.]

**Art. 5107—258. Work under contracts; how done; supervision.**—All work included in the contract shall be done in accordance with the specifications under the supervision of the supervisors and district engineer. As the work progresses the engineer of such district shall make report to the supervisors showing in detail whether the contract is being complied with, and when the work is completed, he shall make a detailed report of same to the supervisors showing whether or not the contract has been fully complied with according to its terms, and if not in what particular it has not been complied with. [Id., § 79.]

**Art. 5107—259. Inspection, etc., of work; partial payments on contracts.**—The supervisors shall during the progress of the work under any contract, inspect the same, and upon the completion of any work in accordance with the contract, they shall draw a warrant on the depository of the district for the unpaid amount of the contract price, in favor of the contractor, and if the Supervisors shall deem it advisable, they may enter into a contract to be paid in partial payments as the work progresses; but such partial payments shall not exceed in the aggregate, eighty per cent of the amount of work done, the said amount of work completed to be shown by certified report of the engineer of the district. [Id., § 80.]

**Art. 5107—260. Seal of districts.**—Fresh Water Supply Districts created under this Act shall have a common seal which shall be circular in form, with the name of the District within the circle and a star of five points in the center. [Id., § 81.]

**Art. 5107—261. Engineer; powers and duties.**—After the establishment of any such Fresh Water Supply District, and after the qualification of the Board of Supervisors, the Board of Supervisors for such district may appoint an engineer whose duty shall be to make maps and profile of the several canals, reservoirs, aqueducts, conduits, pipe lines, pumping plants and all other works in such district and connected therewith, and shall also show any part of said canals, reservoirs, aqueducts, conduits, pipe lines, pumping plants or other works extending

beyond the limits of such district. And to do such other and further work connected with such district as may be directed by the Board of Supervisors. Such engineer to receive a salary not to exceed Thirty-six Hundred (\$3600.00) Dollars per year as may be fixed by the Board of Supervisors for such District; provided said engineer may adopt other maps, plats and surveys of the correctness of which he may be satisfied. [Id., § 82.]

**Art. 5107—262. Interest and sinking fund; how constituted; payments from.**—There is hereby created what shall be termed the “interest and Sinking Fund” for such district, and all taxes collected under the provisions of this Act shall be credited to such fund, and shall never be paid out, except for the purpose of satisfying and discharging the interest on said bonds or for the cancellation and surrender of such bonds and to defray the expenses of assessing and collecting such tax and such funds shall be paid out upon orders of the supervisors for such district upon warrants drawn therefor, as hereinbefore provided, and at the time of such payment the depository for said district shall receive and cancel any interest coupons so paid or any bonds so satisfied or discharged, and when such interest coupon or bond shall be turned over to the Supervisors, the account of such depository shall be credited with the amount thereof, and such bond or interest coupon shall be canceled and destroyed. [Id., § 83.]

**Art. 5107—263. Maintenance and operating fund; how constituted; payments from.**—There shall also be created a fund known as the “Maintenance and Operating Fund”, and such fund shall consist of all moneys collected by assessment or otherwise for the maintenance and operation of the properties purchased or constructed or otherwise acquired by such district and out of this fund shall be paid the salaries of all officers other than the assessor and collector and of all employés of every kind whatsoever, and all expenses of operation of every kind, such debts to be paid upon a warrant executed as otherwise provided herein. [Id., § 84.]

For section 85 of this act, see Penal Code, art. 122b.

**Art. 5107—264. Depository to act as treasurer, when.**—The Depository of each Fresh Water Supply District when designated as provided in this act, shall perform the services as treasurer of the district, and shall execute a bond as such treasurer as may be required by the supervisors. [Id., § 86.]

**Art. 5107—265. Costs of creation of district.**—The Board of Supervisors are hereby authorized to pay all necessary costs and expenses necessarily incurred in the creation and organization of any Fresh Water Supply District, and reimburse any person, corporation, or association for money advanced for such purposes, such payment to be made for money obtained from the sale of bonds. [Id., § 87.]

**Art. 5107—266. Acts not affected.**—Provided, however, this Act shall in no manner repeal or affect the several Acts of the Legislature, providing other or different methods of organization and operating, conservation districts; and provided further that nothing in this Act shall be construed as repealing or in any manner affecting any laws providing for the reclamation of the overflow and swamp lands of this state, and the duties and powers of the State Reclamation Engineer as heretofore provided by law. [Id., § 88.]



CHAPTER FIVE

CONSERVATION AND RECLAMATION DISTRICTS

<p>Art. 5107—267. Purposes of; manner of establishment.</p> <p>5107—268. Water Improvement Districts, Drainage Districts, or Levee Improvement Districts may become.</p> <p>5107—269. Incurring indebtedness and levy of taxes.</p> <p>5107—270. Same; limitations removed.</p> <p>5107—271. Establishment of Water Improvement District or Irrigation District as; election; bal-</p>	<p>Art. lots; canvass and declaration of result.</p> <p>5107—272. Laws governing districts.</p> <p>5107—273. Drainage District may become Conservation and Reclamation District.</p> <p>5107—274. Laws governing districts.</p> <p>5107—275. Improvement District or Levee Improvement District may become Conservation and Reclamation District.</p> <p>5107—276. Laws governing districts.</p>
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**Article 5107—267. Purposes of; manner of establishment.**—Conservation and Reclamation Districts may be created and organized in any manner that Water Improvement districts, Drainage Districts, or Levee Improvement Districts are now authorized by the laws of this State to be created, and for the several purposes therein provided. [Acts 1918, 35th Leg. 4th C. S., ch. 25, § 1.]

Took effect March 21, 1918.

**Constitutionality.**—This act is not unconstitutional because permitting taxation of other than real property within levee district to pay cost of improvement, and is not violative of article 16, § 59, conservation amendment, requiring that taxes for district indebtedness authorized shall be equally distributed. Dallas County Levee Dist. No. 2 v. Looney, 109 Tex. 326, 207 S. W. 310.

This act is not unconstitutional as an attempt to amend Acts 34th Leg. c. 146 (Supp. 1918, art. 5530 et seq.), the levee improvement district act, by reference to its title. Id.

**Repeal.**—The Laney Act (Art. 5584½ et seq.) providing for creation of conservation districts under Const. art. 16, § 59, did not, by implication, repeal this act. Dallas County Levee Dist. No. 2 v. Looney, 109 Tex. 326, 207 S. W. 310.

**Art. 5107—268. Water Improvement Districts, Drainage Districts, or Levee Improvement Districts may become.**—Any Water Improvement District, Drainage District, or Levee Improvement District heretofore organized or hereafter organized or hereafter to be organized under the laws of this State, as Defined Districts, under Section 52 of article 3 of the Constitution, may avail itself of the benefits of Section 59 of Article 16 of the Constitution, and thereby become a Conservation and Reclamation District without change of name. [Id., § 2.]

**Art. 5107—269. Incurring indebtedness and levy of taxes.**—Any Conservation and Reclamation District hereafter organized under this Act, and any Water Improvement District, Drainage District or Levee Improvement District which may be constituted a Conservation and Reclamation District under this Act, may incur indebtedness and levy taxes to fully carry out each and all of the purposes of its organization, and for the payment of its obligations and the maintenance and operation of said district. [Id., § 3.]

**Art. 5107—270. Same; limitations removed.**—All limitations of indebtedness authorized to be incurred and taxes to be levied, imposed by Section 52 of Article 3 of the Constitution, and any and all laws under which any such district has been or may be organized, are removed as to all districts which may become Conservation and Reclamation Districts under the terms of this Act. [Id., § 4.]

**Art. 5107—271. Establishment of Water Improvement District or Irrigation District as; election; ballots; canvass and declaration of re-**

**sult.**—Any Water Improvement District, or Irrigation District heretofore or hereafter organized under the laws of this State may become and be made a Conservation and Reclamation District, as herein provided, in the following manner: When a petition signed by twenty per cent of the owners of land in such district, praying therefor, is presented to the Directors, they shall order an election to be held to determine such issue, such election to be conducted as provided for general elections in such districts. The ballots shall have printed thereon the following: "For Conservation and Reclamation." The Directors shall canvass the returns and declare the result of such election, and have recorded in the deed records of the county or counties in which such district is situated a full copy of the order declaring the result of such election; and when such order is in favor of so making such district a Conservation and Reclamation District, it shall become such district without change of name or impairment of its obligations, upon the result of such election being declared and recorded as herein provided. [Id., § 5.]

**Explanatory.**—Sec. 5a of this act, added by Acts 1919, 36th Leg. 2d C. S., ch. 12, § 3, relating solely to Water Improvement Districts, was repealed by Acts 1921, 37th Leg. ch. 13, § 136. See ante, art. 5107—50a.

**Art. 5107—272. Laws governing districts.**—Any Conservation and Reclamation District organized for the purpose for which Water Improvement Districts and Irrigation Districts have heretofore been organized, or any Water Improvement District or Irrigation District becoming a Conservation and Reclamation District under the terms hereof, shall be governed and controlled by the provisions of Chapter 87, Acts of the Thirty-fifth Legislature, Regular Session, and amendments thereof, except as herein otherwise provided. [Acts 1918, 35th Leg. 4th C. S., ch. 25, § 6; Acts 1919, 36th Leg. 2d C. S., ch. 12, § 1.]

**Art. 5107—273. Drainage District may become Conservation and Reclamation District.**—Any drainage district heretofore organized or hereafter to be organized under the laws of this State, may, by a petition in writing to the Commissioners' Court, on hearing before such Court, as provided for in Sections 2, 3, and 4, Chapter 118, Acts of the Thirty-second Legislature, passed at its regular session in 1911, and prior laws and amendments thereof, upon the order of said Court to that effect entered of record, become such conservation and reclamation district without change of name or impairment of its obligations. [Acts 1918, 35th Leg. 4th C. S., ch. 25, § 7; Acts 1919, 36th Leg. 2d C. S., ch. 12, § 2.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5107—274. Laws governing districts.**—Any Conservation and Reclamation District organized for the purpose for which Drainage Districts have heretofore been organized under Chapter 4, Title 47, of the Revised Civil Statutes of 1911, and amendments thereof, and prior laws relating to the same subject, and any such Drainage Districts becoming a Conservation and Reclamation District under the terms of this law shall be governed and controlled by the provisions of Chapter 4 of Title 47 of the Revised Civil Statutes of 1911 and amendments thereof, except as herein otherwise provided. [Acts 1918, 35th Leg. 4th C. S., ch. 25, § 8.]

**Art. 5107—275. Improvement District or Levee Improvement District may become Conservation and Reclamation District.**—Any Improvement District or Levee Improvement District heretofore organized or hereafter to be organized under the laws of this State, may, by a peti-

tion in writing to the Commissioners' Court, on hearing before such Court, as provided in Sections 2, 3, 5, and 6, of Chapter 146, Acts of the Thirty-fourth Legislature, upon order of said Court to that effect, entered of record, become such Conservation and Reclamation District without change of name or impairment of its obligation. [Id., § 9.]

**Art. 5107—276. Laws governing districts.**—Any Conservation and Reclamation District organized for the purposes for which levee improvement districts have heretofore been organized under Chapter 146, Acts of the Thirty-fourth Legislature, Regular Session, 1915, and prior laws relating to the same subject, or amendments thereof, or any levee improvement district becoming a Conservation and Reclamation District under the terms of this Act, shall be governed and controlled by the provisions of Chapter 146, Acts of the Thirty-fourth Legislature, Regular Session, and amendments thereof, except as herein otherwise provided. [Id., § 10.]

## CHAPTER SIX

### POWER PLANTS

Art.

5107—277. Districts operating under contract with United States may acquire, construct, lease or control power plants; issue of bonds.

Art.

5107—278. Co-operation with other districts obtaining water under laws of another state election; contract; construction of works; joint manager.

5107—279. Application of law.

**Article 5107—277. Districts operating under contract with United States may acquire, construct, lease or control power plants; issue of bonds.**—Any water improvement district or conservation and reclamation district operating under contract with the United States, may provide for the purchase, acquisition, construction, operation, lease or control of plants for the generation, distribution, sale and lease of electrical energy, including the sale to municipalities, corporations, firms or individuals of electrical power, generated within or without said district, or the sale or lease of power privileges incident to or forming a part of the reservoirs, canals or other works owned, constructed or operated by or for such district, and for the purpose of obtaining funds with which to construct or acquire the power plants, transmission lines and other works necessary or useful for the development, transmission, distribution, sale or lease of such power, may borrow money in the name of such district, and issue bonds therefor, which bonds shall be secured by a lien upon the water power or energy and power privileges incident to such irrigation and drainage project, and also by a lien upon the power plant, transmission lines, and all of the physical properties necessary for, or used in the creation, transmission, distribution and market of such power or energy, but such bonds shall not be a lien upon the lands or other property owned by individual irrigators or water users under such project. Such bonds may be issued in the manner and subject to all of the regulations, terms, conditions and provisions of other bonds authorized to be issued under the terms of Chapter 87 of the General Laws of the Regular Session of the Thirty-fifth Legislature [Art. 5107—1 et seq.], and of the acts amendatory thereof and supplementary thereto, except as in this section otherwise provided. The board of directors of any such district shall estimate and determine the amount of money

necessary to be raised, or the amount of indebtedness necessary to be assumed for such purpose or purposes, and may include in such amount a sum sufficient to pay the first four years' interest on such indebtedness. [Acts 1921, 37th Leg., ch. 94, § 1.]

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

**Art. 5107—278. Co-operation with other districts obtaining water under laws of another state; election; contract; construction of works; joint manager.**—Whenever any water improvement or conservation and reclamation district in this State, operating under contract with the United States, shall obtain water from the same source from which water is obtained by any such district or similar district or districts, organized for irrigation or drainage purposes, under the laws of any other State, the water improvement district or conservation and reclamation district organized under the laws of this State shall be, and it is hereby authorized to jointly own, acquire, construct and operate irrigation works, reservoirs and drainage works, in cooperation with such district or districts obtaining water from the same source of supply, which may be located within another State, under the terms and conditions to be set out in a written contract, and the provisions of the preceding Section, relating to the development, transmission, distribution, sale and lease of electrical power and energy, in the manner in said Section provided, shall be applicable to any such district in this Section referred to. Any such contract shall not be binding until the same shall have been ratified by a majority vote of the legally qualified voters of such district, situated within this State. Such contract shall be printed or in writing, and a true copy thereof shall be filed in the office of such district in Texas fifteen (15) days prior to such election, and shall be subject to public inspection.

Whenever works or improvements are to be constructed or acquired, bids may be jointly called for and may be opened and considered at the designated office of either of such districts, and the officers of such district in Texas may execute such contract, and may hold meetings to consider the execution thereof, and the approval of the contractor's bond, and all matters pertaining to or incident to such contract, at any office established for such joint project, and at which office all business of such joint project may be transacted.

The action of each district being determined by its board of directors, a general manager may be employed for such joint enterprise, whose duties may be set forth in the joint ownership contract. The terms and conditions of such joint ownership or construction contracts shall not conflict with the provisions of the law providing for the organization and conduct of districts, except as herein provided, but may include provisions for joint construction and operation, and such contracts may be amended from time to time, in the same manner. [Id., § 2.]

**Art. 5107—279. Application of law.**—The provisions of this Act shall apply only to districts operating under contract with the United States. [Id., § 3.]

## TITLE 75

## JURIES IN CIVIL CASES

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| <p>Chap.</p> <ol style="list-style-type: none"> <li>1. Jurors—Their qualifications and exemptions.</li> <li>2. Jury commissioners for the district court, appointment, qualification, etc.</li> <li>3. Jury commissioners for the county court, appointment, qualifications, etc.</li> <li>4. Proceedings of the jury commissioners in the selection of jurors.</li> <li>5a. Interchangeable juries.</li> <li>6. Selected jurors—How summoned, etc.</li> </ol> | <p>Chap.</p> <ol style="list-style-type: none"> <li>7. Juries for the week—How made up.</li> <li>8. Jury trials—Authorized, when and how.</li> <li>9. Challenges.</li> <li>10. Formation of the jury for the trial of a cause.</li> <li>11. Oath of jurors in civil cases.</li> <li>12. Juries—How constituted and their verdicts.</li> <li>13. Compensation of jurors of the district and county court in civil cases.</li> </ol> |
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## CHAPTER ONE

## JURORS—THEIR QUALIFICATIONS AND EXEMPTIONS

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|---|---|
| <p>Art.</p> <ol style="list-style-type: none"> <li>5114. Who are competent jurors.</li> <li>5115. Who are disqualified, in general.</li> <li>5117. Jurors disqualified in certain cases.</li> </ol> | <p>Art.</p> <ol style="list-style-type: none"> <li>5118. Who are liable to jury service; who are exempt from jury service.</li> </ol> |
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**Article 5114. [3138] [3009] Who are competent jurors.**

Cited, *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463.

**Art. 5115. [3139] [3010] Who are disqualified, in general.**

See notes under arts. 692-695, Code Cr. Proc.

Cited, *Hunter v. State*, 30 Tex. App. 314, 17 S. W. 414.

**Foreign birth.**—Under this article, Code Crim. Proc. art. 687, and Const. art. 6, § 1, persons who have legally declared their intention of becoming citizens are not, by reason of their foreign birth, disqualified to act as jurors. *Abrigo v. State*, 29 Tex. App. 143, 15 S. W. 408.

**Prior service.**—Under Rev. St. 1879, art. 3010, disqualifying a juror who has served for six days within a certain time, one who has served five days is not disqualified, and it was prejudicial error to dismiss him on a challenge by the state for incompetency, though the defendant did not exhaust his peremptory challenges. *Monk v. State*, 27 Tex. App. 450, 11 S. W. 460.

**Art. 5117. [3141] [3012] Jurors disqualified to try a particular case.**

See notes under art. 692, Code Cr. Proc.

Cited, *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40; *Hunter v. State*, 30 Tex. App. 314, 17 S. W. 414.

**Discretion of court.**—Rev. St. 1879, art. 3080, which authorizes the court to sustain a challenge to a juror when, in its opinion, he is unfit to sit in the case, clothes the trial judge with a discretion which will not be reviewed on appeal unless it is shown that the party complaining has been deprived of an impartial jury; and hence, where neither party exhausted its peremptory challenges the trial court's ruling excusing a juror because he is in defendant's employ will not be disturbed on appeal, though the relation of master and servant is not one of the grounds of disqualification specified in art. 3012. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.) 17 S. W. 521.

The question whether jurors were prejudiced against the defendant and concealed that fact is primarily within the sound discretion of the trial court, and its action in denying new trial for misconduct of jury will not be revised where it does not clearly appear that the rights of the parties have been disregarded. *El Paso Electric Ry. Co. v. Gonzales* (Civ. App.) 207 S. W. 162.

Complaint of action of trial court in compelling plaintiffs, after they had exhausted their peremptory challenges, to accept a juror, shown to be a customer of defendant bank for many years, will not be sustained; it not appearing that trial judge abused his discretion. *Washington v. Austin Nat. Bank* (Civ. App.) 207 S. W. 332.

Though the trial court has discretion to determine whether a juror is disqualified for a cause which the statute does not declare a disqualification, it has no discretion where the juror has a bias which under the statute disqualifies him. *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

**Interest in litigation.**—Juror who was one of sureties on garnishment bond executed by plaintiff had no such interest in litigation as to preclude him from serving, suit involving plaintiff, defendant, garnishee, and several interveners. *Wise v. Johnson* (Civ. App.) 198 S. W. 977.

**In action against city that veniremen are taxpayers of the city does not disqualify them;** their interest being too remote. *Moore v. City of Dallas* (Civ. App.) 200 S. W. 870.

**In a personal injury suit that juror was engaged in preparing for injured persons their suits against railroads was not ground for challenge for cause when he stated that he had no interest in instant case and could decide case impartially, record not showing that he was interested in any suit against defendant.** *St. Louis, S. F. & T. Ry. Co. v. Whatley* (Civ. App.) 212 S. W. 968.

**Bias or prejudice.**—The law exacts that a fair and impartial jury shall pass upon the merits of cases. *El Paso Electric Ry. Co. v. Gonzales* (Civ. App.) 207 S. W. 162.

**Where a juror was an employé of a railroad which was a constituent of defendant railroad, and stated on his voir dire examination that a large verdict against defendant might affect his employment but that he could rise above such influence and render a fair verdict, held, that overruling of challenge for cause was not error; the juror not sitting in the case.** *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397.

**A juror who stated on his examination that he had a bias for defendant is absolutely disqualified as a juror by this article, notwithstanding his further statement that he could disregard his feeling; "bias" being defined as a particular influential power which sways the judgment.** *Kansas City Life Ins. Co. v. Elmore* (Civ. App.) 226 S. W. 709.

**Formation and expression of opinion as to cause.**—Where a juror stated he had an opinion which it would take evidence to remove, but record does not show whom the opinion favored, and juror said he would disregard the opinion, and appellant did not take advantage of a peremptory challenge, there was no error in refusing a challenge for cause. *Horn v. Price* (Civ. App.) 200 S. W. 590.

**Personal opinions and scruples.**—See notes under art. 692, Code Cr. Proc.

**Other disqualifications.**—Act of juror in inspecting diamond, identity of which was in question, showing him to be possessed of superior knowledge of facts helpful in disclosing truth, cannot be held disqualification. *Hall v. Collier* (Civ. App.) 200 S. W. 880.

**Evidence.**—Testimony of a juror who had been accepted and sat as a juror held to show that he was qualified. *St. Louis, B. & M. Ry. Co. v. Broughton* (Civ. App.) 212 S. W. 664.

**Art. 5118. [3142] [3013] Who are liable to jury service; who are exempt from jury service.**

See *Owens v. State*, 25 Tex. App. 552, 8 S. W. 658.

## CHAPTER TWO

### JURY COMMISSIONERS FOR THE DISTRICT COURT, APPOINTMENT, QUALIFICATION, ETC.

Art.  
5127. Failure of commissioners, etc.

Art.  
5131a. Compensation.

**Article 5127. [3150] [3022] Failure of commissioners, etc.**

See *Daniel v. Bridges*, 73 Tex. 149, 11 S. W. 121.

**Appointment of commissioners on deficiency of jurors.**—Under Rev. St. 1879, art. 3022, if in term of a district court there should be a deficiency of jurors, it is discretionary with the court to appoint jury commissioners to make selection of jurymen, and for this purpose it may utilize the services of the jury commissioners already appointed to select jurors for the next term. *Williams v. State*, 24 Tex. App. 32, 5 S. W. 658.

**Ordering sheriff to summon jurors.**—Under Rev. St. 1879, arts. 3027, 3029, and art. 3022, defendant cannot demand that jury commissioners be appointed to select the jury by which he is to be tried, merely because he believes the sheriff is prejudiced against him. *Johnson v. State*, 31 Cr. R. 456, 20 S. W. 985.

**Art. 5131a. Compensation.**—Each jury commissioner of either the district court or the county court shall receive as compensation for his services the sum of Three Dollars for each day and each fraction of a day that he may serve as a jury commissioner in said court. [Acts 1919, 36th Leg., ch. 26, § 2.]

## CHAPTER THREE

## JURY COMMISSIONERS FOR THE COUNTY COURT, APPOINTMENT, QUALIFICATIONS, ETC.

Art. 5132. Jury commissioners for the county court, etc.	Art. 5134. To select jurors for six months.
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**Article 5132. [3155] [3027] Jury commissioners for the county court, etc.**

Cited, *Johnson v. State*, 31 Cr. R. 456, 20 S. W. 985.

**Same persons as jury commissioners for both county and district courts.**—If they see fit for reasons of convenience or otherwise, the county and district judges may appoint the same persons to act as jury commissioners for both of those tribunals. *Donegan v. State* (Cr. App.) 230 S. W. 166.

Where for motives of convenience the county court, which did not ordinarily try cases at the April term, requested that jury commissioners appointed by the district judge draw a panel for the county court, but such commissioners were not sworn to act as jury commissioners for the county court, though they took a similar oath in the district court, the panel for the county court was illegal, and a conviction had on trial before such jury will not stand, although the defendant was not injured, for trial by jury stands on a higher plane than expediency, and a defendant is entitled to have the jury selected in the manner prescribed by law. *Id.*

**Art. 5134. [3157] [3029] To select jurors for six months.**

Cited, *Johnson v. State*, 31 Cr. R. 456, 20 S. W. 985.

## CHAPTER FOUR

## PROCEEDINGS OF THE JURY COMMISSIONERS IN THE SELECTION OF JURORS

Art. 5135. Selection of jurors, etc.	Art. 5137. Special venire list.
5136. Drawing of jurors, how conducted.	5138. Lists to be certified, etc.

**Article 5135. [3158] [3030] Selection of jurors, etc.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**In general.**—That the jury in a prosecution in the county court heard in April was not drawn at the January term, as provided by statute, will not make the jury illegal. *Donegan v. State* (Cr. App.) 230 S. W. 166.

**Art. 5136. [3159] [3031] Drawing of jurors, how conducted.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Art. 5137. [3159a] Special venire list.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611; notes under arts. 655-672, Code Cr. Proc.

**Art. 5138. [3160] [3032] Lists to be certified, etc.**

**Heading list incorrectly does not show envelope incorrectly indorsed.**—Defendant's motion to quash the special venire was based upon the fact that the several lists were headed "Lists of Jurors for the April Term," instead of properly, the May term. The bill of exceptions did not show, nor did it otherwise appear, that the envelopes inclosing said lists were not properly indorsed. Held that, this article does not require the "headings of the lists" to be indorsed in like manner as the envelopes, the presumption obtained in favor of the proper return of the lists. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591.

## CHAPTER FIVE A

## INTERCHANGEABLE JURIES

Art.  
5158 $\frac{1}{2}$ d. Use of jurors impaneled; additional jurors.

Art.  
5158 $\frac{1}{2}$ f. Placing names on the general panel.

**Article 5158 $\frac{1}{2}$ d. Use of jurors impaneled; additional jurors.**—Said jurors, when impaneled, shall constitute a general panel for the week, for service as jurors in all the county and district courts in said county, and shall be used interchangeably in all of the said courts. In the event of a deficiency of said jurors at any given time to meet the requirement of all said courts, the judge having control of said general panel for the week shall order such additional jurors to be drawn from the wheel as may be sufficient to meet such emergency, but such jurors shall act only as special jurors and shall be discharged as soon as their services are no further needed. Resort to the wheel shall be had in all cases to fill out the general panel, except where waived by the parties or their attorneys; provided that by written agreement entered into by all parties to any cause or suit, or the attorneys of record in such suit or cause filed therein, the sheriff or other officer in attendance upon said court, may summon the jury needed, or any part of same, in such cause or suit by talesmen, without resorting to the jury wheel, and in such cause or suit said jurors so selected shall be paid as if regularly drawn from the jury wheel. [Acts 1917, 35th Leg., ch. 78, § 5; Acts 1918, 35th Leg. 4th C. S., ch. 59, § 1.]

**Explanatory.**—The title of the act is as follows: "An act to amend section 5, chapter 78, page 147-148 and 149, passed at the regular session of the Thirty-fifth Legislature, known as the interchangeable jury law, so as to hereafter read as follows; and declaring an emergency." Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 5158 $\frac{1}{2}$ f. Placing names on the general panel.**—The names of the Jurors shall be placed upon the general panel in the order in which they are drawn from the wheel, and jurors shall be assigned for service from the top thereof in the order in which they shall be needed, and jurors returned to the general panel after service in any one of the Courts, shall be enrolled at the bottom of the list in the order of their respective return, provided however, that the trial judge, upon the demand of any party to any case reached for trial by jury, or of the attorney for any such party, shall cause the names of all the members of the general panel available for service as jurors in such case, to be placed in a hat or other receptacle and well shaken and said trial Judge shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be transcribed in the order drawn on the jury list from which the jury is to be selected to try such case. [Acts 1917, 35th Leg., ch. 78, § 7; Acts 1919, 36th Leg., ch. 6, § 1.]

Took effect Feb. 7, 1919.



CHAPTER SIX

SELECTED JURORS—HOW SUMMONED, ETC.

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| Art.<br>5161. Special venire; how summoned. | Art.<br>5164. Sheriff's return. |
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**Article 5161. Special venire, how summoned.**

Cited, Taylor v. State, 87 Cr. R. 330, 221 S. W. 611.

**Art. 5164. [3178] [3050] Sheriff's return.**

**Time for objecting to return.**—Objections to sheriff's return of service of jurors selected by jury commissioners, as not stating facts showing diligence, or reasons why certain jurors were not summoned, should be made in time to invoke the court's action, when it would not require discharge of a portion of a panel from which cases have been tried. Leahy v. Timon (Civ. App.) 204 S. W. 1029.

CHAPTER SEVEN

JURIES FOR THE WEEK—HOW MADE UP

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| Art.<br>5167. If practicable, to be of jurors selected by jury commissioners. | Art.<br>5170. Oath to be administered to the sheriff, etc. |
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5168. May be filled up, how.

**Article 5167. [3181] [3053] If practicable, to be of jurors selected by jury commissioners.**

**In general.**—Where sheriff's return shows that, although he served some jurors selected by jury commissioners for certain week of court, he did not serve the remainder, because "not found after due diligence and search," the court, at the beginning of such week, on finding that sufficient number of jurors are not in attendance, is not required to try question of diligence of sheriff before causing sufficient jurors to be summoned to make up suitable panel for week, but may complete his panel as provided by this and the following article. Leahy v. Timon (Civ. App.) 204 S. W. 1029.

**Art. 5168. [3182] [3054] May be filled up, how.**

Cited, Leahy v. Timon (Civ. App.) 204 S. W. 1029.

**Art. 5170. [3184] [3056] Oath to be administered to the sheriff, etc.**

**Oath once taken during term is sufficient.**—Under Rev. St. 1879, art. 3056, an oath once taken during the term is sufficient, and need not be repeated at each time it becomes his duty to so summon talesmen. Blanton v. Mayes, 72 Tex. 417, 10 S. W. 452.

**Swearing deputy sheriff.**—In a prosecution for aggravated assault, that a deputy sheriff was sent out after talesmen when the list of regular jurors was exhausted without then being sworn presented no error, when the only objection raised was that the officer was not sworn at the time he was sent out; it not appearing that he had not been sworn during the term and anterior to the trial. Knight v. State, 87 Cr. R. 134, 220 S. W. 333.

CHAPTER EIGHT

JURY TRIALS—AUTHORIZED WHEN AND HOW

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| Art.<br>5173. Right of trial by jury to remain inviolate, subject, etc. | Art.<br>5178. Call of docket for demands for jury trials. |
| 5174. Must be demanded and jury fee paid.                               | 5180. Jury fee.   |
| 5175. Time of demand.   | 5181. Oath of inability to make deposit.                  |
| 5176. Same.   | 5183. Order of court.                                     |
|   | 5184. Clerk to keep jury docket.                          |
|   | 5185. Jury trial day to be fixed.                         |

**Article 5173. [3187] [3059] Right of trial by jury to remain inviolate, subject, etc.**

**Right to jury trial.**—San Antonio ordinance of August 27, 1917, regulating automobiles used for hire, is not invalid as depriving any person of the right of trial by jury. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

Intervening landowners in receivership proceedings against an irrigation plant have no right to have their water rights determined by jury trial, the court which appointed receiver having right to fix rates, and landowners' remedy being appeal. *McHenry v. Bankers' Trust Co.* (Civ. App.) 206 S. W. 560.

In a suit where relief by way of injunction is sought, the parties are entitled to jury trial on disputed fact issues, on regular assignment of the case, if demanded. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

In an action by a husband to set aside part of a judgment of divorce granted his wife, which required him to pay money to the wife, on the ground that he had never been served with notice of the suit or process, court was not authorized by article 1951, or otherwise, to hear testimony and require the plaintiff to introduce testimony for the purpose of ascertaining whether or not there was sufficient testimony contesting the service in the complaint to authorize the submission of such an issue to the jury; it being the duty of the court to pass on all matters of pleading without hearing evidence, and, if a good cause of action is pleaded, to empanel a jury and let plaintiff introduce his evidence. *Becker v. Becker* (Civ. App.) 218 S. W. 542.

Where an injunction against keeping of a disorderly house by relator had been issued after trial by jury, imprisonment ordered in contempt proceedings without jury trial for violation of the injunction is not illegal, though the act complained of was also a crime. *Ex parte Houston*, 87 Cr. R. 8, 219 S. W. 826.

Farm laborer seeking to enforce lien was entitled to jury trial on issue of value of property, raised on plea to jurisdiction of county court, but where evidence was undisputed it would have been proper to direct verdict. *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

The Delinquent Child Law does not violate the right of trial by jury, in view of Code Cr. Proc. arts. 1198, 1200. *Gordon v. State* (Cr. App.) 228 S. W. 1095.

In habeas corpus hearings to determine the matter of custody of children subsequent to divorce proceedings, there is no constitutional right to a trial by jury. *Foster v. Foster* (Civ. App.) 230 S. W. 1064.

**Action of trial court infringing right of trial by jury.**—Action of a court, in peremptorily instructing a jury, held equivalent to a denial of the right of trial by jury and in violation of Const. art. 1, § 15. *Buckholts State Bank v. Graf* (Civ. App.) 200 S. W. 858.

In view of Const. art. 1, § 15, preserving the right to jury trial, and Civ. St. art. 2024, limiting the number of new trials, it is the province of the jury to determine the credibility of witnesses and the weight of testimony, and the court may not assume its functions by deciding that testimony is entitled to no credit because overborne by contradictory testimony, or that it is so contradictory to circumstances and proof as to be improbable. *Drew v. American Automobile Ins. Co.* (Civ. App.) 207 S. W. 547.

**Waiver of right.**—See notes under arts. 22, 582, 644, Code Cr. Proc.

Where judgment, reciting that upon hearing the court decided that there was no question to be submitted to the jury, is the only evidence before the court on appeal of what the actual proceedings were, the conclusive presumption arises that defendants waived any right to a jury trial; no exception having been taken to court's action. *Andrie v. Fajkus* (Civ. App.) 209 S. W. 752.

Where defendants answered plea of intervention, at the same time demanding a jury and paying lawful fee therefor, though the jury for the week had been discharged, and only six days of the term remained after defendants' answer was filed, filing did not amount in law to announcement of ready for trial, nor waiver of right to trial by jury. *Finkelstein v. Roberts* (Civ. App.) 220 S. W. 401.

**Art. 5174. [3188] [3060] Must be demanded and jury fee be paid.**

See *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

**Art. 5175. [3189] [3061] Time of demand.**

**Appearance cases.**—This article is merely directory and not mandatory as to appearance cases. *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

**Failure to demand in time.**—Substituted judge who presided after first day of term had power to grant application to have case placed on jury docket, so that, where parties failed to present such application, subsequent demand for jury trial came too late under this article, and art. 5180. *Magee v. Snell* (Civ. App.) 197 S. W. 364.

In view of this article, requiring party desiring jury to apply therefor, in open court on first day of term, it was not error to refuse jury trial after jury had been discharged for week, where there was no demand as required and no excuse given for failure to call for a jury. *Rusk County v. Hightower* (Civ. App.) 202 S. W. 802.

Where at the time the case had been called for trial the jury docket had been disposed of and the jury for the term discharged, a demand for jury then made will be denied. *Blair v. Paggi* (Civ. App.) 219 S. W. 287.

Plaintiffs were not represented when their case was called for trial, and after two postponements the case, shortly after entering on the trial, was postponed until the

following term; after commencement of that term, plaintiffs paid the jury fee and demanded jury trial, although such trial had been denied when the court commenced the trial of the case before the last postponement; held that, as plaintiffs did not object to discharge of jury for term, and failed to demand jury trial on first day of term, in accordance with this article, their negligence in allowing jury to be discharged, etc., was sufficient ground for denial of their demand for jury trial at second term. *Id.*

Art. 5178 et seq. relative to application for jury trials, are not mandatory, and failure of a party to make application at the time prescribed does not forfeit his constitutional right to have trial by jury when such failure does not operate unreasonably to delay trial or prejudice the adverse party. *Watson v. Cloud* (Civ. App.) 225 S. W. 807.

In suit to cancel an oil lease, where, if plaintiffs' application for jury trial had been granted, the trial would not have been delayed, as a jury then in attendance on the court could have been used, and the rights of defendants would not have been prejudiced, the action of the trial court in denying plaintiffs trial by jury was erroneous, though the application was not made on the appearance day of the term as required by art. 5178. *Id.*

**Art. 5176. [3190] [3062] Same.**

Cited, *Gilbert v. State*, 32 Cr. R. 596, 25 S. W. 632.

**Art. 5178. [3192] [3064] Call of docket, etc.**

Cited, *Allen v. Plummer*, 71 Tex. 546, 9 S. W. 672; *Arispe v. Clark* (Civ. App.) 204 S. W. 373.

**Art. 5180. [3194] [3066] Jury fee.**

See *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

Cited, *Magee v. Snell* (Civ. App.) 197 S. W. 364.

**Time for depositing jury fee.**—Rev. St. 1879, arts. 3064, 3066, directing that a demand for a jury shall be made and the jury fee paid upon the first day of the term, are not strictly mandatory; and where a plaintiff demands a jury on the first day of the term, it is error to try the case without a jury, although the jury fee is not paid until the next day, the jury docket not having at that time been disposed of; and it is immaterial that granting a jury trial will cause the case to be postponed until the next term. *Allen v. Plummer*, 71 Tex. 546, 9 S. W. 672.

Where defendants at a prior term demanded a jury, but failed to pay the fee, and the cause was continued on the nonjury docket, and plaintiffs did not ask jury until the day of trial, when they announced they would take advantage of defendants' demand, they had no right to a jury trial, in view of art. 5178 and this article. *Arispe v. Clark* (Civ. App.) 204 S. W. 373.

**Case transferred from county to district court.**—Rev. St. 1879, art. 3066, does not require a defendant who pays the jury fee of three dollars in the county court to pay an additional fee when the case is removed to the district court because the county judge is related to one of the parties. *Warner v. Crosby*, 75 Tex. 295, 12 S. W. 745.

**Art. 5181. [3195] [3067] Oath of inability to make jury fee deposit.**

See *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

**Art. 5183. [3197] [3069] Order of court.**

See *Pate v. Woodville Mercantile Co.* (Civ. App.) 229 S. W. 916.

Cited, *Cabell v. Hamilton-Brown Shoe Co.*, 81 Tex. 104, 16 S. W. 811.

**Art. 5184. [3198] [3070] Clerk to keep jury docket.**

Cited, *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408; *Cabell v. Hamilton-Brown Shoe Co.*, 81 Tex. 104, 16 S. W. 811.

**Art. 5185. [3199] [3071] Jury trial day to be fixed.**

Cited, *Cabell v. Hamilton-Brown Shoe Co.*, 81 Tex. 104, 16 S. W. 811.

CHAPTER NINE

CHALLENGES

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| <p>Art.<br/>5194. Challenge for cause.<br/>5195. On trial of challenge for cause, evi-<br/>dence to be heard.</p> | <p>Art.<br/>5198. Number of peremptory challenges in<br/>district court.</p> |
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**Article 5194. [3208] [3080] Challenge for cause.**

**Discretion of court.**—Rev. St. 1879, art. 3080, which authorizes the court to sustain a challenge to a juror when, in its opinion, he is unfit to sit in the case, clothes the trial judge with a discretion which will not be reviewed on appeal unless it is shown that the party complaining has been deprived of an impartial jury; and hence, where neither party exhausted its peremptory challenges, the trial court's ruling excusing a juror because he is in defendant's employ will not be disturbed on appeal, though the relation of master and servant is not one of the grounds of disqualification specified in art. 3012. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Sup.) 17 S. W. 521.

**Art. 5195. [3209] [3081] On trial of challenge for cause, evidence to be heard.**

**Examination of juror.**—The general rule that the utmost freedom on examination on voir dire should be permitted to discover any interest, bias, opinion, or other fact tending to disqualify or affect the impartiality of prospective jurors, is limited by the rule forbidding any examination the purpose of which is to have the juror indicate his views on certain facts, and thereby commit him to certain views or conclusions; so that in a will case, want of testamentary capacity being urged, it was proper to exclude a question whether jurors would be influenced by the fact that testator disinherited some members of his family. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

**Art. 5198. [3212] [3084] Number of peremptory challenges in district court.**

**More than one plaintiff or defendant.**—This article does not entitle each defendant, where there are number of defendants against whom there is a general cause of action, but who have secondary and collateral issues among themselves, to six peremptory challenges; the word "party" not meaning a "person," and there being but two parties, notwithstanding the number of defendants, where the liability of each of the defendants depends on the same facts. *Nueces County v. Gussett* (Civ. App.) 213 S. W. 125.

CHAPTER TEN

FORMATION OF THE JURY FOR THE TRIAL OF A CAUSE

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| <p>Art.<br/>5203. Shall place names of jurors in the<br/>box.<br/>5206. Challenge for cause to be made,<br/>when.</p> | <p>Art.<br/>5207. When number of jurors reduced, etc.<br/>5208. Peremptory challenge to be made.</p> |
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**Article 5203. [3217] [3089] Shall place names of jurors in the box.**

See *Houston & T. C. Ry. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

**Art. 5206. [3220] [3092] Challenge for cause to be made, when.**

**Time for objection.**—Under Rev. St. 1879, arts. 3091-3094, when 12 jurors are present, and their names have been drawn and entered on the slips, the parties may be required to exercise their peremptory challenges, and cannot require the entire panel to be placed in the box, and their names drawn by the clerk, nor that talesmen be summoned until the number is reduced by challenge. *Gulf, C. & S. F. Ry. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129.

Disqualification of a juror, discovered after commencement of trial, but before its close, is waived by not being complained of till after verdict. *Haynes v. Sosa* (Civ. App.) 198 S. W. 976.

An objection to a juror on the ground of disqualification cannot be heard when made for the first time after verdict. *St. Louis, B. & M. Ry. Co. v. Broughton* (Civ. App.) 212 S. W. 664.

**Art. 5207. [3221] [3093] When number reduced, etc.**

Cited, Gulf, C. & S. F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S. W. 129.

**Art. 5208. [3222] [3094] Peremptory challenge to be made, when.**

See Houston & T. C. Ry. Co. v. Terrell, 69 Tex. 650, 7 S. W. 670.  
Cited, Gulf, C. & S. F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S. W. 129.

**CHAPTER ELEVEN****OATH OF JURORS IN CIVIL CASES**

Art.  
5212. Jury shall be sworn.

Art.  
5213. Form of oath.

**Article 5212. [3226] [3098] Jury shall be sworn.**

See Stephens v. State, 33 Cr. R. 101, 25 S. W. 286.

**Art. 5213. [3227] [3099] Form of oath.**

See Chicago, R. I. & G. Ry. Co. v. Trout (Civ. App.) 224 S. W. 472.

**CHAPTER TWELVE****JURIES—HOW CONSTITUTED, AND THEIR VERDICTS**

Art.  
5214. Jury in district court.

Art.  
5217. The entire jury must concur in the verdict.

**Article 5214. [3228] [3100] Jury in district court.**

**In general.**—Under Rev. St. 1879, arts. 3100, 3101, where a juror was excused by consent on account of sickness in his family, a verdict rendered by the remaining eleven, and signed by but one, as foreman, is valid. *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S. W. 724.

**Art. 5217. [3231] [3103] Entire jury must concur in verdict.**

**Method of arriving at verdict.**—When there was no agreement beforehand to adopt a quotient as the verdict, and it was to be used and was used merely as a working basis to reach the amount of verdict, no reversible error is shown. *El Paso Electric Ry. Co. v. Lee* (Civ. App.) 223 S. W. 497.

**CHAPTER THIRTEEN****COMPENSATION OF JURORS OF THE DISTRICT AND COUNTY COURTS IN CIVIL CASES**

**Article 5218a. Pay of jurors.**—Each juror in the district or county court, except special veniremen, whose compensation is now fixed by law, shall receive Three Dollars for each day and for each fraction of a day that he may attend as such juror to be paid out of the jury fund of the county in which he may serve as a juror. [Acts 1919, 36th Leg., ch. 26, § 1.]

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

## TITLE 76

## JUVENILES

Chap.

1. State juvenile training school.
2. Girls' training school.

Chap.

4. State home for dependent and neglect-ed children.

## CHAPTER ONE

## THE STATE JUVENILE TRAINING SCHOOL

Art.

5221. Name of institution; board of trustees; tenure; qualifications; compensation; approval of accounts.

Art.

5229. Who to be confined; separation of races.

5231. Indeterminate sentence, etc.

**Article 5221. [2941] Name of institution; board of trustees; tenure; qualifications; compensation; approval of accounts.**

**Name.**—This article designates state institution for training of juveniles located at Gatesville as "the State Juvenile Training School," to be designated as "the Training School," and a judgment punishing a delinquent by designating such place of confinement and the term as an indeterminate period not to exceed five years or beyond the time when he shall have reached the age of 21, complies with the law requiring that the time and place of confinement be stated in the judgment. *Guinn v. State* (Cr. App.) 228 S. W. 233.

**Art. 5229. [2949] Who to be confined; separation of races.**

**Validity.**—This article is not in conflict with mandatory provisions of Code Cr. Proc. 1916, art. 1195, and requiring judge on a showing that a male person indicted for felony is under 17 to dismiss prosecution and try him as a juvenile delinquent. *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.

**Infants.**—This article declares that boys under 17 years of age charged with felonies who do not claim the privilege of trial as juveniles, may be sent to the penitentiary where the conviction condemned them for a period greater than 5 years, but if for less penalty the confinement shall be in the juvenile school, but the statutes make no such exemption for girls and the discrimination between the two classes, boys and girls, if wrong, is for the Legislature, and not for the courts to remedy. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

In prosecution for homicide, defendant, a boy of 14½ years, under this article, and art. 5231, if convicted for a term of less than 5 years, was entitled to be sent to the reformatory instead of the penitentiary. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

**Art. 5231. [2951] Indeterminate sentence, etc.**

Cited. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

**Infants.**—In view of Code Cr. Proc. 1911, art. 1203, and this article, a judgment committing a juvenile should state the length of time he is to be detained, and that he is not to be detained beyond the time he reaches the age of 21. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

In view of Code Cr. Proc. 1911, art. 1203, and this article, limiting term of commitment to five years, a judgment committing a juvenile until he became 21 years of age was absolutely void, where infant was only 13 years of age. *Id.*

This article, fixing a five-year limit for indeterminate sentence, refers only to male juveniles, and does not apply to a female juvenile. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

## CHAPTER TWO

## GIRLS' TRAINING SCHOOL

**Article 5234e. Superintendent, officials and teachers; salaries; removal of superintendent.**

See art. 7085h, fixing salary of superintendent.

## CHAPTER FOUR

## STATE HOME FOR DEPENDENT AND NEGLECTED CHILDREN

Art. 5234¾. Establishment; board for selection of site, etc.	Art. 5234¾e. Same; transcript of proceedings.
5234¾a. Purpose of home.	5234¾f. Dismissal from home; adoption of inmates.
5234¾b. Board of control; members; appointment; terms of office.	5234¾g. Rules and regulations for home.
5234¾c. Superintendent; employment; qualifications; compensation; other officers.	5234¾h. Diplomas to inmates.
5234¾d. Commitment of children.	5234¾i. Persons who must and who may not be committed to home.
	5234¾j. Expenses of board of control.

**Article 5234¾. Establishment; board for selection of site, etc.—**

That there be established and maintained at some place in the State of Texas to be selected by the Lieutenant Governor, Comptroller and Superintendent of Public Instruction, where suitable farm lands may be secured, a home or homes upon the cottage plan for the proper care, education and training of dependent and neglected white children, to be known as the State Home for Dependent and Neglected Children. And the Lieutenant Governor, together with the Comptroller and State Superintendent of Public Instruction, shall constitute a Board for the purpose of selecting a site and having said buildings erected, and shall have full power and authority to do and perform the things necessary to carry out the purposes of this Act. [Acts 1919, 36th Leg., ch. 159, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 33, § 1.] -

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5234¾a. Purpose of home.**—It shall be the purpose of this Home and School to provide an institution of care, education and training for the dependent and neglected white children of this State, who by their unfavorably surroundings have become dependent or children who have become neglected from the want of care or attention of their parents or guardian and need the care and attention not heretofore provided and in the accomplishment of this Act the Board of Control shall provide wholesome and proper quarters, exercise and diversion and shall make provisions for training in all the useful arts and sciences to which such children are adapted and to prepare them for manhood and womanhood and independence. [Acts 1919, 36th Leg., ch. 159, § 2.]

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

**Art. 5234¾b. Board of control; members; appointment; terms of office.**—The State Home for Dependent and Neglected White Children shall be under the control and management of a board of control composed of five persons, one of whom shall be the State Superintendent of Public Instruction of the State of Texas; another shall be the State Health Officer; the remaining three to be appointed by the Governor of Texas, at least one of whom shall be a woman. One of the three members to be selected by the Governor shall be appointed for a term to end January 1st, 1921, one of them for a term to end January 1, 1925. At the expiration of each term a successor shall be appointed by the Governor then in office for a term of six years. [Id., § 3.]

See art. 7150¾h, transferring the management and control of the state eleemosynary institutions to the State Board of Control.

**Art. 5234¾c. Superintendent; employment; qualifications; compensation; other officers.**—The Board of Control shall employ as super-

intendent of this Home a person of previous experience and training in a similar institution who shall have power to appoint and discharge all subordinate officials and teachers for said Home which may be necessary to employ, and said board shall fix the salary of Superintendent and all employes, and said board shall also, have full authority to remove the Superintendent on account of inefficiency, incompetency, inattention to the duties of a Superintendent, misconduct or malfeasance in office, and the decision of said board as to such inefficiency, inattention to the duties of a superintendent, misconduct or malfeasance in office shall be final. [Id., § 4.]

See art. 7085g, fixing salary of superintendent.

**Art. 5234<sup>3</sup>/<sub>4</sub>d. Commitment of children.**—Whenever any child, male or female, under the age of sixteen years shall be brought before any juvenile court within this State, upon petition of any person within this State, or the Humane Society, or any institution of a similar purpose or character, charged with being a dependent or neglected child as these terms are defined in the Statutes of this State the Court may, if in the opinion of the Judge, the Home for Dependent and Neglected Children is the proper place for said children, commit such child to said Home during its minority; provided that no child who is feeble-minded, epileptic or insane and that any child who is afflicted with a venereal, tubercular or other communicable disease shall not be assigned to this institution until cured of such disease or diseases. No child shall be admitted to the Home until he has been examined by the physician of the Home to be appointed by the Board of Control of same and such physician issuing certificate showing the exact state or condition in reference to said qualifications herein above enumerated. [Id., § 5.]

**Art. 5234<sup>3</sup>/<sub>4</sub>e. Same; transcript of proceedings.**—It shall be the duty of the Court committing any child to the State Home for Dependent and Neglected Children to prepare a transcript of all proceedings had and done in same and attach thereto a certificate of the County Health Officer of such County to said transcript. If it be a girl or baby or infant committed to said Home, the Judge of the Court shall designate some reputable woman to convey said girl, baby or infant to said Institution. The cost of conveying any child to said Institution shall be paid out of the general fund of the county from which they are committed and provided that no compensation shall be allowed beyond actual and necessary expenses of the party conveying and the child conveyed. [Id., § 6.]

**Art. 5234<sup>3</sup>/<sub>4</sub>f. Dismissal from home; adoption of inmates.**—No child shall be dismissed until some suitable home has been found for it or it has become able to be self-supporting and only then upon the written recommendation of the Superintendent to the Board of Control or when any ward committed to said Institution has become married with the consent of the Board of Control and Superintendent. Children shall be placed for adoption only in homes where proper support and training can and will be given. Any child above the age of ten years and not adopted, but who goes out from this Home, either under the custody of some adult or as self-supporting shall continue under the supervision and guidance of the Board of Control of said Institution who shall require that the person or persons under whose care the child is placed or the child himself or herself shall write bi-weekly letters to the Board of Control for first six months and then monthly thereafter. The Board of Control, the Superintendent of said Home or some other employe of said Home



may visit the place where said child is adopted, living or employed and it shall be the duty of the person having said child in adoption or custody to answer all questions asked by said visiting committee concerning the conduct, employment, treatment or conditions of said child. If in the judgment of the Board of Control it should be to the best interests of said child that it be returned to said Home, the Board is hereby empowered to have it returned. [Id., § 7.]

**Art. 5234<sup>3</sup>/<sub>4</sub>g. Rules and regulations for Home.**—The Board of Control shall make all necessary rules and regulations for the proper government of said Home, and shall see to it that the time of children is properly distributed between the school of letters and the industrial and domestic pursuits according to what is deemed for their best interests and the facilities at hand, and the Superintendent shall from time to time make such recommendation to said Board as may to him or her seem to the best interests of all the children committed to said Home. [Id., § 8.]

**Art. 5234<sup>3</sup>/<sub>4</sub>h. Diplomas to inmates.**—It shall be the duty of the Board of Control to give diplomas or certificates of proficiency for grades of literary or any industrial school that may be established by the Board. [Id., § 9.]

**Art. 5234<sup>3</sup>/<sub>4</sub>i. Persons who must and who may not be committed to Home.**—It shall be the duty of all Juvenile Courts in this State to give preference to this Home to those children of tender years, and said courts shall not commit to said Home children under the age of sixteen years who are known to be habitual violators of the laws of this State or who have therefor been committed to any other institution of this State or to the State School for the Training of Juveniles at Gatesville and Gainesville, Texas, and the Board of Control is hereby authorized and empowered to refuse admittance to such juveniles or if, after they are committed to the State Home for Dependent and Neglected Children, their conduct should be of such nature and character as to contaminate the interests of other children in said Home, the Board of Control, upon proper application, shall have the authority and it shall be the duty of the Superintendent of the State School for the training of juveniles to accept said child in said institution. [Id., § 10.]

For sec. 11 of this act see Penal Code, art. 334b.

**Art. 5234<sup>3</sup>/<sub>4</sub>j. Expenses of board of control.**—If at the time this Act becomes effective there shall be no Board of Control and it becomes necessary for the Board herein authorized to be created to act they shall be paid such amounts as will be necessary to cover actual expenses incurred in the discharge of the duties of such Board. [Id., § 12.]

Sec. 13 makes an appropriation.

## TITLE 77

## LABOR

## Chap.

1. Bureau of labor statistics.
- 1a. Industrial commission.
- 1b. Protection of employes in factories, mills, etc.
2. Labor organizations.

## Chap.

3. Hours of labor of females.
4. Hours of labor upon public works.
5. Workmen's compensation law.
8. Emigrant agents.
9. Protection of laborers on buildings.

## CHAPTER ONE

## BUREAU OF LABOR STATISTICS

**Article 5243. Salary and compensation of commissioner and employes.**—The Commissioner of the Bureau of Labor Statistics shall receive a salary of \$3,000.00 per annum, payable monthly, and he shall be allowed a secretary at a salary of \$1800.00 per annum; an assistant secretary and stenographer at a salary of \$1500. per annum, a chief deputy at a salary of \$2,000.00 per annum; six deputies at a salary of \$1800.00 each per annum; a chief of the Woman's Division at a salary of \$2000.00 per annum, and two women inspectors at a salary of \$1800.00 each per annum—each to be appointed by him—and such assistants and employes as the Legislature may at any time in the future authorize, within the limits of the appropriations made therefor. The Commissioner shall also be allowed necessary postage, stationery, printing, and other expenses to transact the business of the Bureau, within the limits of the appropriations made therefor, and the salary shall be paid as in the case of other State officers and employes. In addition to his salary, the Commissioner and any employe of the Bureau shall be allowed his actual necessary traveling expenses while in the performance of duties required by this Act, and within the limits of the appropriations made therefor. [Acts 1909, p. 59, § 12; Acts 1911, p. 17; Acts 1913, p. 237, amending art. 5243, Rev. St. 1911; Acts 1919, 36th Leg., ch. 106, § 1.]

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

## CHAPTER ONE A

## INDUSTRIAL COMMISSION

## Art.

- 5243 $\frac{1}{2}$ -5243 $\frac{1}{2}$ *o*. [Repealed.]  
 5243 $\frac{3}{4}$ . Industrial commission created; appointment; tenure; compensation.  
 5243 $\frac{3}{4}$ a. Chairman; stenographer and secretary, salary.  
 5243 $\frac{3}{4}$ b. Labor controversies submitted to commission.

## Art.

- 5253 $\frac{3}{4}$ c. Investigation and recommendation to Governor.  
 5243 $\frac{3}{4}$ d. Hearings to be public.  
 5243 $\frac{3}{4}$ e. Report to legislature.  
 5243 $\frac{3}{4}$ f. Summoning and attendance of witnesses.

**Articles 5243 $\frac{1}{2}$ -5243 $\frac{1}{2}$ *o*.** [Repealed.]

**Explanatory.**—Acts 1919, 36th Leg., ch. 160, approved April 3, 1919, is repealed by Acts 1921, 37th Leg., ch. 118, § 1.

**Art. 5243<sup>3</sup>/<sub>4</sub>.** **Industrial Commission created; appointment; tenure; compensation.**—That there is hereby created an Industrial Commission, composed of five members, one of said members to represent employers of labor, one to represent the employés or laborers, and three to represent the general public. The members of this commission shall be appointed by the Governor, to hold office for a term of two years, or until their successors shall be appointed and qualified. The members of this commission shall serve without pay or salary, but the actual expenses incurred during hearings had by or before the commission and railway fare and hotel bills incurred by them shall be paid out of appropriations made to the executive office for the payment of rewards and the enforcement of the law, until such time as the Legislature may make appropriations to cover such items. [Acts 1920, 36th Leg., 4th C. S., ch. 9, § 1.]

Took effect 90 days after Oct. 2, 1920, date of adjournment.

**Art. 5243<sup>3</sup>/<sub>4</sub>a.** **Chairman; stenographer and secretary, salary.**—By a majority vote the members of this commission shall elect one of their members as chairman of the commission, to preside at all hearings had under the provisions of this Act, with power and authority usually exercised by chairmen in such capacity; and said commission shall have authority to employ a competent stenographer to act as secretary of such commission, and to pay said secretary and stenographer a reasonable salary. The salary shall be paid out of the fund or funds described in Section 1 [Art. 5243<sup>3</sup>/<sub>4</sub>] of this Act. [Id., § 2.]

**Art. 5243<sup>3</sup>/<sub>4</sub>b.** **Labor controversies submitted to commission.**—When the Governor of Texas becomes convinced or has reason to believe that controversies between employers and employés are of such nature and character as to be of public concern or interest he shall refer, by proclamation, such controversy or controversies to the commission here created for hearing and report. [Id., § 3.]

**Art. 5243<sup>3</sup>/<sub>4</sub>c.** **Investigation and recommendation to Governor.**—The commission, and the members thereof, shall forthwith proceed to the place where the employés in the controversy may be located, or to such other place as may appear best to said commission for the purpose of making investigation and report; and said commission shall make investigation and hear testimony concerning the controversy between the employers and employés; and after said investigation shall have been completed a full report shall be made to the Governor, covering the facts established by the investigations made and hearings had. Said commission shall make recommendations to the Governor as to what action should be taken in reference to the controversy or the settlement thereof. [Id., § 4.]

**Art. 5243<sup>3</sup>/<sub>4</sub>d.** **Hearings to be public.**—All hearings had by this commission shall be open to the public; and the findings and recommendations of the commission shall be furnished to the news agencies and newspapers of the State, to be published by the several papers of this State as news items. [Id., § 5.]

**Art. 5243<sup>3</sup>/<sub>4</sub>e.** **Report to Legislature.**—The commission shall also make full report to the Legislature, if in session, and if not in session, then to the succeeding session of the Legislature, setting forth the findings and recommendations, accompanied by a transcript of the testimony taken at the hearings provided for herein. [Id., § 6.]

**Art. 5243<sup>3</sup>/<sub>4</sub>f. Summoning and attendance of witnesses.**—The commission shall have power to summon witnesses, to issue subpoenas, to compel attendance of witnesses, to compel production of books and records by witnesses, to punish for contempt, to hold sessions and to take testimony in or out of the State of Texas, and to pay witnesses as paid in felony cases, to administer oaths; and to have all powers now given by statutes of Texas to Legislative investigation committees. [Id., § 7.]

## CHAPTER ONE B

### PROTECTION OF EMPLOYÉS IN FACTORIES, MILLS, ETC.

Art.

5243<sup>7</sup>/<sub>8</sub>. Temperature of factories, etc.

5243<sup>7</sup>/<sub>8</sub>a. Sewer gas.

5243<sup>7</sup>/<sub>8</sub>b. Removal of waste, etc.

5243<sup>7</sup>/<sub>8</sub>c. Doors, stairways, and elevator shafts.

Art.

5243<sup>7</sup>/<sub>8</sub>d. Water closets.

5243<sup>7</sup>/<sub>8</sub>e. Practices affecting morals of employés.

5243<sup>7</sup>/<sub>8</sub>f. Inspections; orders.

5243<sup>7</sup>/<sub>8</sub>g. Precedence of trials.

**Article 5243<sup>7</sup>/<sub>8</sub>. Temperature of factories, etc.**—In every factory, mill, workshop, mercantile establishment, laundry, or other establishment, adequate measures shall be taken for securing and maintaining a reasonable, and as far as possible, an equable temperature consistent with a reasonable requirement of the manufacturing process. No unnecessary humidity which would jeopardize the health of the employees shall be permitted. In every room, apartment, or building used as a factory, mill, workshop, mercantile establishment, laundry or other place of employment, sufficient air space shall be provided for every person employed therein, and which in the judgment of the Commissioner of Labor Statistics, or of his deputies and inspectors is sufficient for their health and welfare. [Acts 1918, 35th Leg., 4th C. S., ch. 58, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Explanatory.**—The act bears the heading "protection of female employés in factories, mills, etc." The title of the act reads as follows: "An act for the protection of the health, safety and comfort of employés in factories, mills, workshops, mercantile establishments, laundries, or other establishments where females are employed," etc. It would seem, therefore, that the operation of the act is somewhat restricted by its title.

**Art. 5243<sup>7</sup>/<sub>8</sub>a. Sewer gas.**—All factories, mills, workshops, mercantile establishments, laundries and other establishments shall be kept free from gas or effluvia arising from any sewer, drain, privy or other nuisance on the premises; all poisonous or noxious gases arising from any process; all dust of a character injurious to the health of persons employed, which is created in the process of manufacturing within the above named establishment, shall be removed as far as practicable by ventilators or exhaust fans or other adequate devices. [Id., § 2.]

**Art. 5243<sup>7</sup>/<sub>8</sub>b. Removal of waste, etc.**—All decomposed, fetid or putrescent matter, and all refuse, waste and sweepings of any factory, mill, workshop, mercantile establishment, laundry or other establishment, shall be removed at least once each day and be disposed of in such manner as not to cause a nuisance. All cleaning, sweeping and dusting shall be done as far as possible outside of working hours, but if done during working hours, shall be done in such manner as to avoid so far as possible the raising of dust and noxious odors. In all establishments where any process is carried on which makes the floors wet, the floors shall be constructed and maintained with due regard for the health of the employés, and gratings or dry standing room shall be provided wherever prac-

ticable, at points wherever employés are regularly stationed, and adequate means shall be provided for drainage and for preventing leakage or seepage to lower floors. [Id., § 3.]

**Art. 52437/8c. Doors, stairways, and elevator shafts.**—All doors used by employés as entrances to, or exits from factories, mills, workshops, mercantile establishments, laundries or other establishments of a height of two stories or over, shall open outward, and shall be so constructed as to be easily and immediately opened from within in case of fire or other emergencies. Proper and substantial hand rails shall be provided on all stairways, and lights shall be kept burning at all main stairs, stair landings and elevator shafts in the absence of sufficient natural light; provided that the provisions of this section shall not apply to any mercantile establishment having seven female employés or less. [Id., § 4.]

**Art. 52437/8d. Water closets.**—Every factory, mill, workshop, mercantile establishment, laundry or other establishment, shall be provided with a sufficient number of water closets, earth closets or privies, and such water closets, earth closets or privies shall be supplied in the proportion of one (1) to every twenty-five (25) male persons, and one (1) to every twenty (20) female persons, and whenever both male and female persons are employed, said water closets, earth closets or privies shall be provided separate and apart for the use of each sex, and such water closets, earth closets, or privies shall be constructed in an approved manner and properly enclosed, and at all times kept in a clean and sanitary condition, and effectively disinfected and ventilated, and shall at all times during operation of such establishment be kept properly lighted. In case there be more than one shift of not more than eight hours each of employés the average number of persons in the establishment at any one time should be used in determining the number of toilets required. [Id., § 5.]

**Art. 52437/8e. Practices affecting morals of employés.**—It shall be unlawful for the owner, manager, superintendent or other person in control or management of any factory, mill, workshop, mercantile establishment, laundry or other establishment where five or more persons are employed, all or part of whom are females, to permit in such place of employment any influence, practices or conditions calculated to injuriously affect the morals of such female employés. [Id., § 6.]

**Art. 52437/8f. Inspections; orders.**—The Commissioner of Labor Statistics, or any of his deputies or inspectors, shall have the right to enter any factory, mill, workshop, mercantile establishment, laundry, or other establishment where five or more persons are employed, for the purpose of making inspections and enforcing the provisions of this Act; and they are hereby empowered, upon finding any violations of this Act by reason of unsanitary conditions such as to endanger the health of the employees therein employed, or of neglect to remove and prevent fumes and gases or odors injurious to employees, or by reason of the failure or refusal to comply with any requirement of this Act, or by reason of the inadequacy or insufficiency of any plan, method, practice or device employed in assumed compliance with any of the requirements of this Act, to pass upon and to make a written finding as to the failure or refusal to comply with any requirement of this Act, or as to the adequacy or sufficiency of any practice, plan or method used in or about any place

mentioned in this Act in supposed compliance with any of the requirements of this Act, and, thereupon they may issue a written order to the owner, manager, superintendent, or other person in control or management of such place or establishment for the correction of any condition caused or permitted in or about such place or establishment in violation of any of the requirements of this Act, or of any condition, practice, plan, or method used therein or thereabouts in supposed compliance with any of the requirements of this Act, but which are found to be inadequate or insufficient, in any respect, to comply therewith, and shall state in such order how such conditions, practices, plans or methods, in any case, shall be corrected and the time within which the same shall be corrected, a reasonable time being given in such order therefor. One copy of such order shall be delivered to the owner, manager, superintendent, or other person in control or management of such place or establishment, and one copy thereof shall be filed in the office of the Bureau of Labor Statistics. Such findings and orders shall be prima facie valid, reasonable and just, and shall be conclusive unless attacked and set aside in the manner provided therefor in Section 8 of this Act [Art. 52437/8g]. Upon the failure or refusal of the owner, manager, superintendent, or other person in control or management of such place or establishment, to comply with such order within the time therein specified, unless the same shall have been attacked and suspended or set aside as provided for in Section 8 of this Act, the Commissioner of Labor Statistics, or his deputy or inspectors shall have full authority and power to close such place or establishment, or any part of it that may be in such unsanitary or dangerous condition or immoral influences in violation of any requirement of this Act or of such order, until such time as such condition, practice or method shall have been corrected in accordance with such order. And the further operation or use of such place, or part thereof, ordered closed, without the correction thereof as ordered, shall subject the owner, manager, superintendent, or other person in control or management of such place or establishment to the penalties provided for in Section 9 [Penal Code, art. 1451n] of this Act. [Id., § 7.]

**Art. 52437/8g. Precedence of trials.**—The owner or owners, manager, superintendent, or other person in control or management, of any place or establishment covered by this Act, and directly affected by any finding or order provided for in Section 7 of this Act [Art. 52437/8f], may, within fifteen days from the date of the delivery to him or them of a copy of any such order as provided for in Section 7 of this Act, file a petition setting forth the particular cause or causes of objection to such order and findings in a court of competent jurisdiction against the Commissioner of Labor Statistics. Said action shall have precedence over all other causes of a different nature, except such causes as are provided for in Article 6657, R. S., 1911, and shall be tried and determined as other civil causes in said court, provided, that if the court be in session at the time such cause of action arises, the suit may be filed during such term and stand ready for trial after ten days' notice. Either party may appeal, but shall not have the right to sue out a writ of error from the trial court, and said appeal shall at once be returnable to the proper appellate court at either of its terms, and said appeal shall have precedence in such appellate court over other causes of a different nature, except the causes provided for in Article 6657, Revised Statutes 1911. In all trials under this section the burden of proof shall be upon the Plaintiff,

to show that the findings and order complained of are illegal, unreasonable, or unjust to it or them. [Id., § 8.]

**Explanatory.**—Sec. 9 of the act imposes a criminal penalty and is set forth, post, as art. 1451n, Penal Code.

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## CHAPTER TWO

### LABOR ORGANIZATIONS

**Art.**  
5244. Right to organize.  
5245. Other rights and privileges.

**Art.**  
5246. Not to apply to what organizations.

#### Article 5244. Right to organize.

**Picketing ordinance.**—Ordinance prohibiting walking back and forth or loitering in front of business places, to persuade persons by sign or otherwise from entering to transact business, does not conflict with this article, or art. 5245, or Pen. Code 1911, art. 1473, allowing formation of labor unions and persuasion of employes. *Ex parte Stout*, 82 Cr. R. 183, 198 S. W. 967, L. R. A. 1918C, 277.

**Union of municipal employes.**—It cannot be said, as a matter of law, that a municipal corporation has no right or authority to determine that membership in a certain labor organization renders its appointees inefficient or untrustworthy, so as to transfer trial of the question to the courts. *San Antonio Fire Fighters' Local Union No. 34 v. Bell* (Civ. App.) 223 S. W. 506.

**Firemen's union.**—This article merely announces that there is no prohibition of law against trade unions, and does not seek to regulate the attitude of the employer toward the organization of unions among his employes, and has no controlling effect in an action for reinstatement by discharged city firemen who violated rules and regulations of the fire department in becoming members of a labor union, in view of art. 5246. *McNatt v. Lawther* (Civ. App.) 223 S. W. 503.

#### Art. 5245. Other rights and privileges.

Cited, *Ex parte Stout*, 82 Cr. R. 183, 198 S. W. 967, L. R. A. 1918C, 277.

**In general.**—A master plumber has no ground for injunctive relief against a labor union of journeymen plumbers which withdraws its members from his employ under a rule adopted in the interest of economical conduct of its affairs, of which he has notice, that they shall not work for one not a member of the master plumbers' association; there being no boycott, and such action being in the nature of a strike, lawful under and independently of this article. *Sheehan v. Levy* (Civ. App.) 215 S. W. 229.

**Picketing and boycott.**—This article, providing that it shall not be unlawful for a member of a union to induce by lawful means any person to accept or relinquish employment, is not, in view of art. 5246, at variance with the anti-trust laws, and does not permit the picketing and boycott of an employer, whose employes are in harmony with him, with the view of compelling the unionizing of the business. *Webb v. Cooks', Waiters' and Waitresses' Union, No. 748* (Civ. App.) 205 S. W. 465.

This article, declaring that it shall not be unlawful for members of trade unions or other organizations to induce by peaceable means any person to accept or relinquish any employment, does not apply to the case of a labor union of cooks, waiters, and waitresses, and its members, who, on account of restaurant proprietors refusing to renew their contract with union for another year, called a strike in the place, picketed, and attempted to dissuade customers from entering. *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (Civ. App.) 230 S. W. 1036.

#### Art. 5246. Not to apply to what organizations.

Cited, *Webb v. Cooks', Waiters' and Waitresses' Union, No. 748* (Civ. App.) 205 S. W. 465; *McNatt v. Lawther* (Civ. App.) 223 S. W. 503.

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## CHAPTER THREE

### HOURS OF LABOR OF FEMALES

**Article 5246a. Hours of labor in certain employments; emergencies; stenographers and pharmacists excepted.**

Cited, *Debenham v. Short* (Civ. App.) 199 S. W. 1147.

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## CHAPTER FOUR

## HOURS OF LABOR UPON PUBLIC WORKS

**Article 5246f. Contracts deemed on basis of eight hour day; laborers employed by contractors; emergencies, etc.**—All contracts hereafter made by or on behalf of the State of Texas, or by or on behalf of any county, municipality or other legal or political sub-division of the State, with any corporation, persons or association of persons for performance of any work, shall be deemed and considered as made upon the basis of eight hours constituting a day's work. It shall be unlawful for any corporation, person or association of persons having a contract with the State or any political sub-division thereof, to require any such laborers, workmen, mechanics or other persons to work more than eight hours per calendar day in doing such work, except in case of emergency, which may arise in times of war, or in cases where it may become necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements. In such emergencies the laborers, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work; provided that not less than the current rate of per hour wages for like work in the locality where the work is being performed shall be paid to the laborers, workmen, mechanics or other persons so employed by or on behalf of the State of Texas, or for any county, municipality or other legal or political sub-division of the State, county, or municipality, and every contract hereafter made for the performance of work for the State of Texas, or for any county, municipality, or other legal or political sub-division of the State, county or municipality, must comply with the requirements of this Section; provided, that nothing in this Act shall affect contracts in existence at the time of the taking effect of this Act; provided further, that nothing in this Act shall be construed to affect the present law governing State and county convict labor while serving their sentences as such; and provided further, that nothing in the foregoing Section shall prevent any person, or any officer, agent, or employee of a person or corporation, or association of persons from making mutually satisfactory contracts as to the hours of labor, at the rates of pay as herein provided; provided further that the time consumed by the laborer in going to and returning from the place of work shall not be considered as part of the hours of work. [Acts 1913, p. 127, § 2; Acts 1921, 37th Leg., ch. 121, § 1 (§ 2).]

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



## CHAPTER FIVE

## WORKMEN'S COMPENSATION LAW

## PART I

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| <p>Art.<br/>5246—1. Actions for personal injuries or resulting death; defenses excluded.</p> <p>5246—2. Inapplicable to certain classes of employés.</p> <p>5246—3. No right of action against subscribing employer; compensation from Texas Employers' Insurance Association.</p> <p>5246—4. Notice by employé of election to assert common law liability; subsequent waiver; common law action preserved.</p> <p>5246—5. Employés waiving common law rights to recover compensation.</p> <p>5246—6. Employés, etc., of nonsubscribing employer may sue at common law; may not participate in benefits of association.</p> <p>5246—7. Recovery of exemplary damages in certain cases not excluded; award not to be pleaded or introduced in evidence.</p> <p>5246—8. No compensation for incapacity not extending beyond one week; medical aid.</p> <p>5246—9. Medical and hospital aid during first two weeks; notice of injury; additional hospital services.</p> <p>5246—11. Board may regulate medical and hospital fees and charges; payment.</p> <p>5246—14. Compensation where death results.</p> | <p>Art.<br/>5246—15. Beneficiaries in case of death; exempt from execution; mode of distribution; to whom paid; how paid.</p> <p>5246—17. Where there are no beneficiaries association shall pay expenses of last sickness and funeral expenses.</p> <p>5246—18. Compensation for total incapacity.</p> <p>5246—19. Compensation for partial incapacity.</p> <p>5246—20. What constitutes total incapacity; burden of proof.</p> <p>5246—21. Compensation for specified injuries.</p> <p>5246—23. Claims for hernia, etc.</p> <p>5246—24. Compensation for subsequent injury.</p> <p>5246—25. Change in compensation awarded during incapacity; review.</p> <p>5246—28. Contributions from employés prohibited; effect of violation.</p> <p>5246—30. Mode of estimating weekly wage of minors; hazardous employments.</p> <p>5246—32. No waiver of rights.</p> <p>5246—33. Lump sum for death or total permanent incapacity.</p> <p>5246—34. Increasing amount of weekly installments.</p> <p>5246—36. Aliens entitled to compensation, etc.</p> <p>5256—37. Failure of association to make payments; forfeiture of right to do business.</p> <p>5246—38. Injury to employé outside the state.</p> |
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**Article 5246—1. [5246h] Actions for personal injuries or resulting death; defenses excluded.**

**1. DUTIES AND LIABILITIES OF MASTER IN GENERAL.**

**2. Nature of master's duty in general.**—A master is not an insurer of the servant's safety. *Ebersole v. Sapp* (Com. App.) 208 S. W. 156.

A religious corporation organized to operate a hospital is liable for injuries to a servant through its negligence, though money received by it was expended in maintaining institution for poor, to pay off a mortgage, and to support its mother institution in another state. *Hotel Dieu v. Armendarez* (Com. App.) 210 S. W. 518.

Master is not an insurer of servant's safety, but is required to exercise that degree of care which an ordinarily prudent person engaged in like business would have exercised under similar circumstances. *Taylor v. White* (Com. App.) 212 S. W. 656.

A servant injured by negligence of master may elect to sue either on contract or for tort. *State v. Elliott* (Civ. App.) 212 S. W. 695.

**3. Relation of parties.**—Trustees of a trust estate operating as a business company are individually masters of servants engaged therein, and may not absolve themselves of personal liability for breach of masters' duty toward such servants. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

Where contract provided that buyer of timber should reimburse seller for wages paid scalers, not to exceed \$50 per month each, a scaler employed by, and who worked under direction of, seller, at a salary of \$70 a month, was not an employé of buyer, within Workmen's Compensation Act. *Kirby Lumber Co. v. McGilberry* (Civ. App.) 205 S. W. 835.

The relationship of master and servant arises upon a contract, express or implied, between the master, on the one hand, and the servant, on the other. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

4. — **Independent contractors.**—See *Crow v. McAdoo* (Civ. App.) 219 S. W. 241. Mere use by one doing piece of work of material or employés primarily employed by company having work done will not, of itself, make company liable for such employés' acts, unless it had immediate control and management of work done. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

On issue whether a company is liable to one as employé when he is injured, in doing work for it, by a company employé assisting him, true test is to ascertain who directs movements of person committing the injury, fact that company is primary employer of the persons assisting not necessarily making them its servants. *Id.*

Question as to whether relation of independent contractor exists as to piece of work is usually determined on issue as to who is in charge and control of work, and who determines method of doing it. *Id.*

That a machinist, or the machine shop sending him to do piece of work for corporation was to receive pay for work at so much an hour, or that it was to be paid for by the job, is not conclusive on issue whether machinist was employé of the corporation. *Id.*

Where paper bag company, under agreement to furnish space and machines therefor with which independent contractor was to do printing, furnished defective saw machine permitting hot metal to fly about, and a totally inadequate space requiring press to be placed so near saw that press feeder was in constant danger, a danger the company had knowledge of and could have anticipated, the company was guilty of actionable negligence and was liable for injury to press feeder from metal from saw, though she was employé of independent contractor, and though such contractor had control of both machines. *Continental Paper Bag Co. v. Bosworth* (Civ. App.) 215 S. W. 126.

Where a lessee, by terms of lease, was to operate mining properties at his own expense, purchase and install new machinery that might be necessary, pay taxes, etc., and the lessor, during the existence of the lease, did not exercise or attempt to exercise any control over the details of operating, or in controlling employés, lessee was an independent contractor, responsible to employés for injuries, though his compensation was practically a salary, and lessor furnished the money required to pay employés and operating expenses. *Higrade Lignite Co. v. Courson* (Civ. App.) 219 S. W. 230.

Plaintiff who, with another, employed and paid by defendant, would one day load defendant's push trucks with lumber brought by others on a mule truck from its sawmill, each with a specified number of tiers, and the next day push them to, and place their contents in, defendant's dry kiln, he being under the supervision and control of defendant's foreman, and required to so handle the lumber as to keep it out of the way of the saw, and have it at regular intervals in the dry kiln, was, as regards liability for his injury from defect in the kiln, an "employé," and not an "independent contractor," though paid by the truck load. *West Lumber Co. v. Powell* (Civ. App.) 221 S. W. 339.

A sawyer employed by a lumber company, though paid according to the timber sawed, being under control of the lumber company's foreman, is not an independent contractor, particularly where the employer deducted a portion of his wages with those of other employés for sick benefit fund, etc. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625.

5. — **Acts done under employment or by invitation of master's servants.**—A person, by merely volunteering his services to another, or by assisting the servants of another without authority to employ such assistance, cannot establish the relation of master and servant, and so establish liability for injuries under the principles of law governing master and servant. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

6. **Scope of employment.**—Employment of a servant under 15 years of age to work around dangerous machinery in violation of Acts 32d Leg. c. 46 (Vernon's Ann. Pen. Code 1916, art. 1050), is negligence per se, and a servant may recover although not engaged at the very place of work he was primarily employed to do. *Waterman Lumber Co. v. Beatty* (Civ. App.) 204 S. W. 448.

The scope of a servant's duties is determined by what he was employed to perform and what, with the knowledge and approval of his employer, he actually did perform, rather than by the mere verbal designation of his position. *Galveston, H. & S. A. Ry. Co. v. Bremer* (Civ. App.) 217 S. W. 253.

6½. **Care as to youthful or inexperienced employé.**—Employer was not negligent in permitting boy almost 16 years of age, who had never before worked about machinery, to work as off-bearer at sander machine with duty of taking boards out of machine after they had passed between unguarded rollers, where he was not required to put his hand closer than 12 inches to rollers and where he realized the danger of getting hand between rollers. *Bering Mfg. Co. v. Sedita* (Civ. App.) 216 S. W. 639.

7. **Medical attendance on injured employé.**—Corporation was not liable for medical services rendered an employé in absence of special authority from board of directors, where corporation had provided method of caring for injuries to employés by means of insurance it had taken out for their benefit under the Workmen's Compensation Act. *Producers' Oil Co. v. Green* (Civ. App.) 212 S. W. 68.

Employer, who monthly deducts a portion of employé's wages for purposes of accumulating a fund with which to care for employés who become sick, holds the fund in trust for the contributing employés, and assumes no personal responsibility to employé who becomes sick, other than a proper and faithful administration of the trust fund, requiring him, in absence of his own hospital or a custom of furnishing hospital service, to furnish such services only if there is an unexpended portion of the trust fund. *Courchesne v. Brown* (Civ. App.) 216 S. W. 674.

8. **Cause of injury.**—Where soldiers, not under the control of defendant, were placed on guard around his power plant in the interest of the general public by the United States

military authorities during a warlike situation, to suppress a hostile invasion, which was imminent, and not at defendant's request, defendant was not liable to a servant, shot through the negligence of a soldier. *Sweetman v. Laredo Electric & Ry. Co.* (Civ. App.) 204 S. W. 701.

In an action by a servant against a master for injuries caused by an explosion, evidence held sufficient to support the jury's finding that the explosion caused plaintiff's injury. *Abilene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

Plaintiff, in an action for injuries to a servant, is required to convince the jury by fair preponderance of the evidence that the accident resulted from defendant's negligence. *Bock v. Fellman Dry Goods Co.* (Com. App.) 212 S. W. 635.

9. **Accidental or improbable injury—Duty to anticipate consequences.**—See note 98, post.

Defendant's mine foreman, even if he negligently directed a coal miner to work on right side of his room, could not have reasonably contemplated that minor would mine coal almost across the face of his room, leaving a projection, and thereafter undertake to mine under it, causing it to fall. *Haney v. Texas & Pacific Coal Co.* (Civ. App.) 207 S. W. 375.

A master is not an insurer of the servant's safety, but is bound only to the exercise of ordinary care, and is not bound to provide against, or liable for, the results of a mere accident, and whether an act is negligent or accidental is to be determined by the standard of the conduct of an ordinarily prudent person in the exercise of reasonable care. *Ebersole v. Sapp* (Com. App.) 208 S. W. 156.

If an injury resulting from an act could have been reasonably anticipated, or foreseen by an ordinarily prudent person in the exercise of ordinary care, the occurrence is not accidental. *Id.*

To render the master's acts in furnishing a servant with a certain instrumentality for his work negligent, it must be found that an ordinarily prudent man in the exercise of reasonable care would have anticipated some injury as the result of its use in such work. *Id.*

To entitle an employé to recover for the employer's negligence, it must appear that the injury, not necessarily the precise actual injury, but some like injury, was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Dawson v. King* (Com. App.) 222 S. W. 164, affirming judgment (Civ. App.) *King v. Dawson*, 192 S. W. 271.

10½. **Persons liable.**—Employer, against whom recovery was had for injury to employé operator of elevator through structural defect therein, may, notwithstanding his negligence in not inspecting, enforce indemnity against elevator manufacturer and seller; it being the original active perpetrator of the wrong, and the negligence of the employer being only passive. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

11. **Contracts limiting or releasing liability.**—Managing shareholders of an unincorporated association are masters of servants engaged therein, and may not absolve themselves of personal liability for breach of masters' duty to reward such servants. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

As members and trustees of unincorporated business, trust, or partnership cannot change their legal status so as to make themselves masters of employés in representative capacity only, they cannot make valid contract exempting themselves from individual liability for injuries to employés of association. *Id.*

A contract by which a city employé released the city for personal injuries is unenforceable, and may be set aside where entered into through mistake of law on the part of the ignorant employé, who relied on the representations of the city attorney, who erroneously stated that the city could not be held for such injuries. *Leslie v. City of Galveston* (Civ. App.) 226 S. W. 433.

11½. **Amount of recovery.**—See art. 2022, and notes.

Where servant was a healthy man of 29 years, earning \$90 a month, and had his right hand and arm to elbow crushed and rendered worthless, was confined to the hospital four months, undergoing three operations at cost of \$1,000, a verdict of \$15,000, is not excessive. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 104.

11¾. **Circumstantial evidence.**—A master's negligence may be established by circumstantial evidence. *Bock v. Fellman Dry Goods Co.* (Com. App.) 212 S. W. 635.

## II. APPLIANCES AND PLACES FOR WORK

12. **Nature of master's duty and liability and care required in general.**—A master is not negligent in furnishing an instrumentality for use by a servant if it would have been considered by an ordinarily prudent person in the exercise of ordinary care a proper instrumentality for use in the manner and place and for the work for which it was furnished. *Ebersole v. Sapp* (Com. App.) 208 S. W. 156.

Where a servant alleged negligence on the part of the master in furnishing a defective pipe wrench, a charge that it is the duty of an employer to furnish reasonably safe tools, and that a failure to do so is negligence, was erroneous as making such duty absolute. *Texas & Pacific Coal Co. v. Ervin* (Civ. App.) 212 S. W. 234.

Before master can be held liable for failure to perform a promise to remove a specific danger, it is necessary to show that the existing conditions were of such a nature that their maintenance implied culpability. *Taylor v. White* (Com. App.) 212 S. W. 656.

Master is required to exercise ordinary care to provide servant with safe place to work and with reasonably safe and suitable machinery and appliances. *Id.*

The master is bound to exercise that degree of care for the protection of his serv-

ant which an ordinarily prudent person would exercise under similar circumstances, and whether he has discharged such duty depends upon the facts of the particular case and the dangers to be apprehended or avoided. *Rio Grande, E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

**13. Delegation of duty.**—The exercise of ordinary care to furnish servant with reasonably safe place in which to work is a positive duty on part of master, which cannot be so delegated as to relieve him from liability for its negligent performance. *Coca-Cola Co. v. Williams* (Com. App.) 209 S. W. 396.

If under the terms of the employment the employé was charged with the duty of seeing that the walls of an excavation are safe for himself and those working under him, recovery cannot be had by him for injuries based on his dereliction in performance of that duty. *Texas City Transp. Co. v. Winters* (Com. App.) 222 S. W. 541, reversing judgment (Civ. App.) 193 S. W. 366, and rehearing denied (Com. App.) 224 S. W. 1087.

**15. Custom and usage.**—That defendant employers were operating their glass factory in same manner as other well-regulated concerns would not relieve them from liability if they failed to exercise ordinary care. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

The custom of others engaged in like business is not the absolute test of negligence in failing to provide safe working place appliances, but where master was conducting his business in accordance with the uniform custom of others, it devolves upon servant to show that custom is negligent; the presumption being that persons in like business are reasonably prudent. *Taylor v. White* (Com. App.) 212 S. W. 656.

An employer operating an electric power plant is not negligent in failing to fence an exciter, which is covered with shield leaving no exposure except openings for adjusting and cleaning machine, where other employers in same line of business did not fence in exciters by guard rails, and employé who came in contact with machine was experienced and familiar with the surroundings. *Id.*

A sawmill owner was not guilty of negligence in failing to house or box in a wheel gearing under a gang table, where it was the universal usage and custom among sawmill men not to box in or house such gearing. *Van Landers v. West Lumber Co.* (Civ. App.) 227 S. W. 692.

**17. Defects in tools, appliances and places for work in general.**—Evidence held to show master's negligence in furnishing a defective tool, in using which plaintiff servant was injured. *Palermo Bros. v. Capps* (Civ. App.) 196 S. W. 275.

Evidence held to sustain verdict for servant, injured when motorcar on which he was riding was derailed, owing to defective condition of frame. *Mackay Telegraph & Cable Co. v. Kelly* (Civ. App.) 200 S. W. 225.

Evidence held to sustain verdict for servant, injured when motorcar on which he was riding was derailed, owing to defective condition of frame. *Id.*

Evidence held insufficient to sustain allegation that gun used by servant killed by breaking of electric wire in defendant's glass factory was in unsafe condition. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

In an action for injuries to a railroad bridge painter knocked from the scaffold by a vehicle passing on the street below, evidence held to warrant a finding that defendant was negligent in failing to furnish a reasonably safe place for work by failure to keep a lookout for vehicles, and that such negligence was the proximate cause of plaintiff's injuries. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

In an action against a master, evidence held to sustain a finding that an explosion causing injury was caused, as alleged, by the negligence of defendant in permitting the accumulation of coal dust and other combustible substances in the room where plaintiff was at work. *Southwestern Portland Cement Co. v. Moreno* (Com. App.) 215 S. W. 444.

Where a lumber company's employé, pushing an empty truck over a narrow dolly-way, was struck by a loaded truck propelled by another employé, and precipitated to the ground, the lumber company is liable. *Bartlett Lumber Co. v. Chaney* (Civ. App.) 219 S. W. 837.

An employer owed to employé generally the duty of blocking a rolling door, to prevent its falling while being used by them for its intended purpose, or to prevent its falling upon any employé working near it; and a like duty would arise toward an employé, if the employer should have anticipated that he would probably use it for other than its primary purposes in the performance of his work. *Dawson v. King* (Com. App.) 222 S. W. 164, affirming judgment (Civ. App.) *King v. Dawson*, 192 S. W. 271.

The employer's duty in respect to a safe place extends only to such parts of premises as he had prepared for the employé's occupancy or use in the performance of his work, and such other parts as he knows or ought to know such employé is accustomed or likely to use in performing his work. *Id.*

It is the duty of an employer to exercise ordinary care to furnish an employé a reasonably safe place in which to work, including a reasonably safe way or method of ascent and descent to and from a second floor, where it was necessary for him to go. *Id.*

**19. Defective or dangerous machinery.**—In action by servant for injury from planing machine, evidence held to show defendant's negligence. *West Lumber Co. v. Tomme* (Civ. App.) 203 S. W. 784.

In action by operator of emery wheel for injuries due to piece of metal striking his eye, the negligence alleged being failure to provide a guard on emery wheel to prevent particles of iron from flying therefrom when iron pipes were being ground, evidence held to support verdict for plaintiff. *Lancaster v. Keebler* (Civ. App.) 217 S. W. 1117.

20. **Buildings.**—In a suit by a planing mill employé, who slipped and fell into a moving belt, evidence held to warrant the jury's finding that, though there were both grease and shavings on the floor near the belt, that the master was not negligent. *Fults v. Waterman Lumber Co.* (Civ. App.) 217 S. W. 1105.

23. **Mines and other excavations.**—In action by a servant injured by an explosion of accumulated gas alleged to have resulted when the iron bucket furnished him struck a hard substance, brought on the theory of the master's negligence in permitting the accumulation of gas, evidence held not to show the alleged negligence. *Ebersole v. Sapp* (Com. App.) 208 S. W. 156.

24. **Electrical apparatus and structures.**—In action by telephone lineman for injuries caused by high-voltage wires, evidence held to show that employer was negligent. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

An electric light company owes a duty to employés to place high-voltage wires on outer ends of crossbeams in accordance with usual practice. *Id.*

25. **Shipping.**—Evidence as to whether employé's injury was caused by falling from insecurely fastened ladder in steamship hold held sufficient to support a verdict for plaintiff. *Southern Pac. Co. v. Eckenfels* (Civ. App.) 197 S. W. 1003.

28. **Inspection and test.**—Sledge hammer made by employer's head smith, its handle being placed for servant to use in striking, who never had used a sledge before equipped with a defective handle, was not a simple tool which an employer need not inspect. *Sante Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

Facts, finding of which was warranted by the evidence, held to authorize finding of negligence of master, in respect to seeing that a coil was safe for cleaning by employé by connection with a solution tank. *Liquid Carbonic Co. v. Dilley*, 109 Tex. 140, 202 S. W. 316.

Duty of employer to furnish employé reasonably safe work place and appliances, as applied to operator of freight elevator, includes the making of tests and inspection for defects. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

It is the duty of the master to make such inspections of machinery, and use such precautions in keeping it oiled and in good running condition, as its nature requires. *Gammage v. Gamer Co.* (Com. App.) 209 S. W. 389.

Evidence in a servant's action for injury from the unexpected automatic starting of a machine held sufficient to show the master's negligent failure to inspect, oil, and repair the machine. *Id.*

In an action by an employé of an oil company who was hurt by a falling pulley, evidence held to warrant a finding that the master was negligent in failing to examine the pulley, etc. *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837.

29. **Knowledge by master of defect or danger.**—Knowledge of danger from high-tension wires in close proximity to telephone wires will be imputed to the telephone company where such condition had long continued. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

In an action for injuries from the explosion of a tumbler while being used to dry clothes cleaned with gasoline, evidence held to sustain a finding that the manager of the defendant's laundry who was present daily knew of such use of the tumbler that exploded, notwithstanding the contrary testimony of two of defendant's servants. *Ablene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

Actual knowledge by the master as an element of liability for personal injury is not essential, but knowledge of an abnormal danger which a master might and should have acquired by the exercise of ordinary care, as an element of liability, stands upon precisely the same footing as actual knowledge. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

30. **Repairs.**—Evidence in a servant's action for injury from the unexpected automatic starting of a machine held sufficient to show the master's negligent failure to inspect, oil, and repair the machine. *Gammage v. Gamer Co.* (Com. App.) 209 S. W. 389.

31. **Improper or unusual use or test.**—The fact that a barrel of liquid would explode if fire was applied to it did not render place of work unsafe, and the safe-place rule did not apply where a vice principal lit a match to look into barrel to ascertain amount of liquid therein, causing an explosion; there being no evidence that such was only and customary method of ascertaining amount of liquid in barrel. *Coca-Cola Co. v. Williams* (Com. App.) 209 S. W. 396.

A master is not liable for injury where servant makes an unusual or unnecessary use of tools and appliances which the master could not have reasonably foreseen. *Roberg v. Houston & T. C. R. Co.* (Civ. App.) 220 S. W. 790.

An employer owed an employé no duty to secure a rolling door, so that he could safely use it to brace or balance himself in climbing through an opening leading to an upper floor, unless the employer knew or should have known that he did so use it; it not being intended for that use. *Dawson v. King* (Com. App.) 222 S. W. 164, affirming judgment (Civ. App.) *King v. Dawson*, 192 S. W. 271.

32. **Proximate cause of injury.**—If absence of appliance did not contribute to injury, it cannot be said that it rendered equipment unsafe for particular use made of it by servant. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

Evidence held to sustain findings of jury that negligence of the vice principal in handling a rope and pipe was the proximate cause of servant's injury. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194.

As between operator of elevator, injured by defect therein, and his employer, employer's failure to make inspection was proximate cause of the injury, though the de-

fect was structural and existed when the employer bought the elevator of the manufacturer. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

In coal miner's suit for injury from negligence in failing to remove débris after fall of earth and coal in mine chamber, evidence held to sustain trial court's finding that negligence was not proximate cause of injury. *Haney v. Texas & Pacific Coal Co.* (Civ. App.) 207 S. W. 375.

In action for death of a locomotive engineer from a boiler explosion, evidence held to sustain finding that the explosion was due to defect in the bolts and stays designed to sustain the crown sheet of the boiler, not to lack of water. *Lancaster v. Carroll* (Civ. App.) 211 S. W. 797.

In an action by a servant for damages for injuries caused by a sawing machine, evidence held sufficient to show that a rough table top on which the machine was being operated caused, or contributed to cause, the injury. *Worden v. Kroeger* (Com. App.) 219 S. W. 1094.

Where no stairway or method of ascent to an upper floor of a building was provided, and an employé attempted to reach the upper floor through a hole in the floor, by climbing a post on which were cleats, and in doing so placed his hand against a rolling door to brace or balance himself, and the door fell on him, the employer's negligence did not consist in providing an unsafe way, but in failing to provide any way, and was not the proximate cause of the injury, which was due to the unsafe way provided by the employé. *Dawson v. King* (Com. App.) 222 S. W. 164, affirming judgment (Civ. App.) *King v. Dawson*, 192 S. W. 271.

### III. METHODS OF WORK, RULES AND ORDERS

**33. Methods of work and duty to protect servant in general.**—Testimony in action for death of employé held to warrant jury in finding negligent starting of machinery by another employé. *Southwestern Portland Cement Co. v. Graves* (Civ. App.) 203 S. W. 979.

In an action by the servant of a cattle company for injuries due to exposure and frostbite while lost in a blizzard, evidence that plaintiff was sent on an errand to a ranch 32 miles away, and became lost, but was subsequently overtaken by defendant's president and general manager, directed anew, and instructed to meet them at a designated camp, which, however, the latter left without sending out a search party after plaintiff was 1½ hours overdue and not in sight, when darkness and a blizzard were approaching, held to show negligence. *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

**35. Knowledge of danger.**—If by ordinary care a master who has sent a servant to do a perilous thing should have known of the danger, or by the exercise of ordinary care might have known, though actual knowledge was absent, he would be guilty of negligence if the situation was such that he might have known the danger to the servant by ordinary care. *Baker v. Bell* (Civ. App.) 219 S. W. 245.

**38. Negligence in giving orders.**—Employer knowing that duty of turning on electric switch was dangerous, and that employé was ignorant of such danger, was negligent in ordering employé to turn on switch. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

### IV. WARNING AND INSTRUCTING SERVANTS

**39. Duty to warn and instruct in general.**—One employed by a city to remove rubbish, etc., from street gutters cannot recover from the city for injury received when in such work he sprained his ankle by stepping on a three-cornered brick in the gutter, which turned over the city owing him no duty of warning. *Dawson v. City of Houston* (Civ. App.) 201 S. W. 1056.

In action by servant injured by an explosion of accumulated gas alleged to have resulted when bucket struck a hard substance, brought on theory of negligence in failing to warn servant of the danger of ignition when the bucket struck a hard substance, evidence held not to show the negligence alleged. *Ebersole v. Sapp* (Com. App.) 208 S. W. 156.

As a general rule, it is not the duty of the employer to warn the employé of a danger incident to the service; but, where there are hazards which the master knows of or ought to know that are unknown to the servant, it is his duty to warn. *Southern Pac. Co. v. Stevenson* (Civ. App.) 218 S. W. 151.

**40. Delegation of duty.**—Religious hospital corporation operating a laundry was liable for injury to minor servant resulting from failure of forewoman on request to instruct her as to way to stop mangle before extricating clothes clogging it, and thus to avoid danger; hospital's duty to instruct and warn being nondelegable. *Hotel Dieu v. Armendarez* (Com. App.) 210 S. W. 518.

**41. Inexperienced or youthful employé.**—A minor servant, of capacity to appreciate the danger, or who has acquired the knowledge otherwise than by instruction from master, need not be warned or instructed, but mere fact servant knows that employment is dangerous does not relieve master of further instruction as to extent of danger and means of avoiding it. *Hotel Dieu v. Armendarez* (Com. App.) 210 S. W. 518.

It is duty of master to warn and instruct minor servant as to dangers incident to service which are known to master, or could be known by reasonable care, and which the servant, because of immature judgment and want of experience, cannot reasonably be expected to know and appreciate. *Id.*

42. **Dangers known to employé.**—Where grab setter was aware of danger attendant upon his attempt to chuck a wheel in obedience to order of foreman, held, that there was no necessity for warning by foreman. *Kirby Lumber Co. v. Hardy* (Civ. App.) 196 S. W. 211.

Where danger of employment is not understood or appreciated by adult employé, the master is only required to warn him, but is not required to explain details of danger or how to avoid it, where danger should be readily understood by employé, and in neither instance will master be held liable, where danger is known and appreciated. *Id.*

Sawmill owner was not guilty of negligence in failing to warn and instruct a boy 15 years of age of the dangers inherent in his work, where the boy had been working at the mill five or six months and was very intelligent, and testified with great clearness as to the arrangement and operation of the machinery and the handling of the lumber and how the wheel gearings which caused his injury were operated, and that he knew that injury would result to him if he crawled under a table where the gearings were placed. *Van Landers v. West Lumber Co.* (Civ. App.) 227 S. W. 692.

#### V. NUMBER AND COMPETENCY OF FELLOW EMPLOYEES

48. **Competency.**—In an action by a servant for personal injuries, it was error to admit evidence of incompetency of another who caused the injury, in the absence of an allegation that the employer knew of such incompetency. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

#### VI. NEGLIGENCE OF FELLOW SERVANTS

51. **Negligence as ground of liability in general.**—In order that an employer may take advantage of the exemption contained in Employers' Liability Act, § 2 (art. 5246—2), so as to permit him to interpose the defense of negligence of fellow servant, he must allege and prove his exemption thereunder. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

53. **Nature of act of fellow servant and performance of duties of master.**—In an action by a servant for injury from explosion, evidence held sufficient to show that the employé whose negligence caused the explosion was acting within the scope of his employment. *Abilene Steam Laundry Co. v. Carter* (Civ. App.) 210 S. W. 571.

54. **Vice principals.**—Foreman who had control over men working under him, and whose recommendations for employment and discharge of employés in his department were invariably made effective by the company, was a vice principal. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

55. — **Nature of act or omission, and performance of duties of master.**—Head blacksmith's neglect to see that sledge he was furnishing helper was safe will be imputed to common employer, head blacksmith being latter's personal representative with nondelegable duty to see tools are safe. *Sante Fé Tie & Lumber Preserving Co. v. Collins* (Civ. App.) 198 S. W. 164.

In servant's action for injuries when sledge hammer he was using flew off handle, evidence held to support finding that the head blacksmith was personal representative of employer, charged with nondelegable duty to see tools were safe. *Id.*

Where employer knew that certain duty was dangerous, and that employé was ignorant of such danger, it was liable for death of employé incurred in the discharge of the duty, after being ordered to discharge duty by foreman, the negligence being that of the employer. *San Antonio Portland Cement Co. v. Gschwender* (Civ. App.) 207 S. W. 967.

58. **Concurrent negligence of master and fellow servant.**—If, through a fellow servant's negligence, bricks fell on plaintiff working in manhole, employers would be liable if the danger of piling the brick around the edge of the manhole was discovered by their foreman in time to have it remedied. *Atterbury v. Horton & Horton* (Civ. App.) 196 S. W. 235.

A master is liable to his employé for injury resulting from master's negligence concurring with that of fellow servant. *Florence v. Belt* (Civ. App.) 204 S. W. 351.

#### VII. ASSUMPTION OF RISK

61. **Nature and extent in general.**—Defense of assumed risk rests upon implied contract on the part of the servant to assume risk of all dangers ordinarily incident to the service in which he is engaged. *City of Weatherford Water, Light & Ice Co. v. Veit* (Civ. App.) 196 S. W. 986.

Where defendants did not contend that they were subscribers to Employers' Insurance Association, or had been precluded from becoming such by art. 5246—2, court properly denied defense of assumed risk. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

Where there is no negligence on the part of the master, assumption of risk has no place in the case. *Southern Pac. Co. v. Stevenson* (Civ. App.) 218 S. W. 151.

62. **Reliance on care of master.**—An instruction on assumption of risk that conveys the idea that the injured servant was bound to inspect and search for negligent acts and omissions of the master is improper. *Southwestern Portland Cement Co. v. Challen* (Civ. App.) 200 S. W. 213.

65. **Dangerous operations and methods of work.**—In employé's action for injuries while working as grab setter, when log was thrown against him by bunching team

which had been attached to it to pull it up a hill, under the evidence, held, that he assumed the risk. Kirby Lumber Co. v. Hardy (Civ. App.) 196 S. W. 211.

**67. Incompetency or negligence of fellow servants.**—Servant assumes risks caused by negligence of fellow servant. Taylor v. White (Civ. App.) 212 S. W. 656.

**68. Knowledge by servant of defect or danger.**—Before Workmen's Compensation Act, if employé's injury resulted from risks incident to his employment, of which he knew or in exercise of ordinary care must have known or had been apprised, or which were obvious or grew out of operation of simplest laws of nature, or which were equally as open to him as to employer, held, that employé assumed the risks and is not entitled to recover. Kirby Lumber Co. v. Hardy (Civ. App.) 196 S. W. 211.

An experienced employé familiar with an unfenced exciter in an electric power plant and fully appreciating danger of injury from contact with it while in operation assumes the risk. Taylor v. White (Com. App.) 212 S. W. 656.

**69. Inexperienced or youthful employé.**—An electric merry-go-round operator, having no experience with electricity, and no knowledge that the switch is defective and likely to close the circuit by its own weight so as to start the machine while he is making repairs, is not chargeable with knowledge of the danger. Hutcherson v. Amarillo St. Ry. Co. (Com. App.) 213 S. W. 931.

**72. Promise to remedy defect or remove danger.**—A servant is not relieved of the assumption of risks of a known defect by reason of a promise to remedy unless he continues in the service in reliance on such promise and has reasonable grounds to expect its fulfillment. Taylor v. White (Com. App.) 212 S. W. 656.

**75. Concurrent negligence of master or vice principal.**—Where grab setter was aware of danger attendant upon his attempt to chock a wheel in obedience to order of foreman, held, that presence of latter acting as vice principal did not deprive employer of defense of assumption of risk. Kirby Lumber Co. v. Hardy (Civ. App.) 196 S. W. 211.

### VIII. CONTRIBUTORY NEGLIGENCE

**76. Application of the doctrine in general.**—That employé injured through structural defect in elevator, which he was operating, was guilty of contributory negligence, is immaterial, since judgment for the injury was recovered on question whether employer can enforce indemnity against manufacturer and seller of elevator. Otis Elevator Co. v. Cameron (Civ. App.) 205 S. W. 852.

**78. Care required of servant.**—Evidence held not to show contributory negligence on the part of a servant using a defective tool. Palermo Bros. v. Capps (Civ. App.) 196 S. W. 275.

**80. Reliance on care of master.**—A telephone lineman could assume that his master had provided him with a safe place to work. City of Weatherford Water, Light & Ice Co. v. Veit (Civ. App.) 196 S. W. 986.

**84. Knowledge of defects or dangers.**—In action for death of employé incurred in turning on electric switch, in compliance with order, evidence held insufficient to sustain finding that employé realized the danger. San Antonio Portland Cement Co. v. Gschwender (Civ. App.) 207 S. W. 967.

An employé could not be negligent in performance of dangerous duty where he had no knowledge of the danger. *Id.*

**86. Dangerous methods of work.**—In action by servant for injury from planing machine, evidence held not to show plaintiff was negligent. West Lumber Co. v. Tomme (Civ. App.) 203 S. W. 784.

**87. Disobedience of rules or orders.**—Evidence regarding warnings and protests by employer's superintendent against employé descending into vat to rescue fellow employé held to sustain trial court's finding that they did not constitute commands not to undertake rescue. General Accident, Fire & Life Assur. Corp. v. Evans (Civ. App.) 201 S. W. 705.

### IX. WORKMENS' COMPENSATION ACT

**Cited.**—Georgia Casualty Co. v. Ward (Civ. App.) 221 S. W. 298; United States Fidelity & Guaranty Co. v. Ross (Civ. App.) 221 S. W. 639; United States Fidelity & Guaranty Co. v. Nelson (Civ. App.) 228 S. W. 616; Board of Water Engineers v. McKnight (Sup.) 229 S. W. 301; Millers' Indemnity Underwriters v. Cook (Civ. App.) 229 S. W. 598; Dool v. City of Waco (Civ. App.) 231 S. W. 176.

**92. Constitutionality.**—This act does not deprive employé of liberty and property without due process of law, in that he may be required to accept act, if employer does, or withdraw from employment. It does not deny the equal protection of the laws, in that discrimination results from operation of act as between employés of different employers engaged in the same work, where one employer becomes a subscriber and another does not, or because option to become a subscriber rests with employer, and dissenting employé has no other remedy than withdrawing from the employment, or because it excludes from operation of the act domestic servants, farm laborers, employés of railroad carrier, laborers working cotton gin, and employés of persons, etc., employing no more than five; there being sufficient reasons as to each class for their exclusion. Middleton v. Texas Power & Light Co., 249 U. S. 153, 39 Sup. Ct. 227, 63 L. Ed. 527.

One not an employé in an excepted class in this act may not assert any grievance that excepted class might have to the validity of the act. *Id.*



**92a. Scope and application of act.**—Employers' Liability Act, applying to all corporations having more than five employes, applies to a city. *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157.

Action on policy issued under Workmen's Compensation Act for accidental drowning on dredge upon navigable water is not one within exclusive admiralty jurisdiction of federal court. *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343.

**92b. Conflict of ordinance with act.**—San Antonio ordinance of August 27, 1917, regulating automobiles used for hire, is not in conflict with the Texas employers' liability act. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

**92c. General rules of construction.**—To effectuate the purpose of the Workmen's Compensation Act, to provide means for speedy adjustment of industrial accidents, and to insure compensation, its provisions should be liberally construed in favor of those claiming compensation. *Western Indemnity Co. v. Leonard* (Civ. App.) 231 S. W. 1101; *American Indemnity Co. v. Dinkins* (Civ. App.) 211 S. W. 949; *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154; *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

Since the Workmen's Compensation Act is largely copied from the Massachusetts Act, it should receive the same construction as that given the latter act by the courts of that state. *Home Life & Accident Co. v. Corsey* (Civ. App.) 216 S. W. 464.

**94. Assumption of risk.**—In an action against an employer amenable to the provisions of this act, but not having qualified, assumption of risk is not a defense. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

Defense of assumed risk is not available to employer who was not a subscriber under this act. *Bering Mfg. Co. v. Sedita* (Civ. App.) 216 S. W. 639.

The Workmen's Compensation, Act abolished the defense of assumed risk. *West Lumber Co. v. Keen* (Civ. App.) 221 S. W. 625.

**95. Contributory negligence.**—In a personal injury case, after instruction as to contributory negligence, and that verdict for plaintiff should be diminished in proportion to the amount of his negligence, under this article before its amendment, a verdict for the plaintiff finds defendant's negligence was the proximate cause of plaintiff's injury. *McBride v. Hodges* (Civ. App.) 200 S. W. 877.

Where employe loses his life in rescuing fellow employe while both are working in course of their employment, relatives may recover workmen's compensation, at least where deceased was not positively prohibited by his employer from undertaking rescue. *General Accident, Fire & Life Assur. Corp. v. Evans* (Civ. App.) 201 S. W. 705.

**96. Remedies of employe in general.**—In an action by a servant for personal injuries against an employer amenable to the provisions of Employers' Liability Act, but not having qualified, recovery could be had, under this article, subd. 4, for negligence of the employer in hiring an inexperienced and incompetent employe. *Texas & Pacific Coal Co. v. Sherbley* (Civ. App.) 212 S. W. 758.

In such case it is necessary, in order to recover on the ground of negligence of the employer in hiring inexperienced and incompetent servants, to allege and prove that the employer knew of the inexperience and incompetency of the servant, or should have known it. *Id.*

**98. Cause of injury and injuries in course of employment.**—In a suit under the Workmen's Compensation Act, evidence held to show that the lifting of a can of paint caused the bursting of a blood vessel and the death of an employe. *Southwestern Surety Ins. Co. v. Owens* (Civ. App.) 198 S. W. 662.

Where lifting of a can of paint caused a blood vessel in a servant's lungs to burst, there was an "accidental injury" within the meaning of the emergency clause of the Workmen's Compensation Act. *Id.*

Where assistant engineer on dredge was accidentally drowned while off duty in attempting to save dredge from shipwreck, accident arose out of his employment within the Workmen's Compensation Act. *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343.

Assistant engineer on dredge, accidentally drowned in storm while off duty and while attempting to save dredge from shipwreck, was killed in "course of his employment" within Workmen's Compensation Act. *Id.*

Where assistant engineer was accidentally drowned while on board dredge because of violent storm, recovery could not be defeated under Workmen's Compensation Act because the accident was act of God. *Id.*

Where intestate was injured while working on employer's barn under its orders and control and for its benefit, he was injured in course of his employment. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

Under Workmen's Compensation Act, compensation may be awarded, although employer's negligence did not proximately cause injury. *General Accident, Fire & Life Assur. Corporation v. Evans* (Civ. App.) 201 S. W. 705.

Although an employe's employment may continue for an interval after he has ceased working, there must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is to be determined by the facts themselves. *American Indemnity Co. v. Dinkins* (Civ. App.) 211 S. W. 949.

Petition alleging that deceased, employed as an electric engineer, registered out for the day at the entrance gate, and started for home to secure rest, and had gotten a short distance, when he was struck by an automobile, was demurrable because it showed that injury was not sustained in the "course of employment," within Workmen's Compensation Law. *Id.*

Injuries sustained by deceased, three-quarters of a mile from refinery, where he was employed as electric engineer, after he had registered out for the day and started for home to secure rest, did not occur while he was engaged in the furtherance of the affairs of his employer, within Workmen's Compensation Law. *Id.*

In suit under Workmen's Compensation Law, held, under the undisputed evidence, that court erred in refusing to find that the injury occurred on one of the main public roads, which was not the only road leading to and from the plant of the employer. *Id.*

To come within the term "injury received in the course of employment," it must be shown that the injury originated in the work, and, further, that it was received by the employé while engaged in the furtherance of the affairs of the employer. *Id.*

In suit under Workmen's Compensation Law, held, under the undisputed evidence, that court erred in refusing to find as a fact that employé was injured after he had punched the time clock and after he had been relieved for the working day. *Id.*

One employed by a laundry to collect and deliver, and to collect the charges on delivery, who, though he had turned in his wagon at night, was on his way to a customer's residence to collect a laundry bill when he was killed by an automobile, was at the time engaged in the performance of his duties, within the Workmen's Compensation Act. *Employers' Indemnity Corporation v. Kirkpatrick* (Civ. App.) 214 S. W. 956.

Helper on truck, under the control of driver deviating from route, and who was killed on return trip, held to have sustained injury in the course of his employment. *Hartford Accident & Indemnity Co. v. Durham* (Civ. App.) 222 S. W. 275.

Where an employé was accidentally drowned while on a dredge on account of a violent storm, recovery on the employer's insurance policies could not be defeated under the Workmen's Compensation Act on the ground the accident was an act of God. *South-ern Surety Co. v. Nelson* (Civ. App.) 223 S. W. 298.

No direct causal connection between the employment and the injury is required; it being sufficient that it had to do with and originated in the employer's business and that the employé at the time was engaged in or about the furtherance of the employer's affairs. *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

The expression "in the course of the employment" refers to the time, place, and circumstances of the accident. *Id.*

Where an entire town, probably, including a railroad track running through it, was on the employer's land, and the only well-defined crossing over the railroad track was a more or less private way leading to the employer's various buildings, and an employé who had gone home for dinner, as was customary, was returning to his work by such private way in the usual routine of his service when struck by a train, the injury was sustained in the course of the employment, though the employer had nothing to do with such train. *Id.*

Where a lumber company owned all the property around its sawmill and an employé riding homeward from his work on his velocipede on the company's tramroad was killed by a train at a point 1½ miles from the mill, held, that the remedy of his widow was not limited to proceeding under the Workmen's Compensation Act. *Kirby Lumber Co. v. Scurlock* (Civ. App.) 229 S. W. 975.

Where a shipbuilding company operated under a contract with the federal government, on a cost plus profits basis, and the company's expenses in furnishing railroad transportation to its employés were part of the cost, and an employé, after leaving the train at the place of work and while he was on the railroad right of way, started to return to the train on seeing a signal that there would be no work that day, and was injured in jumping across a ditch between him and the train, the injury occurred in the course of the employment, within Workmen's Compensation Act, so as to be compensable, though he occupied the relation of passenger to the federal administration of railroads as carrier; there being an election of remedies under part 2, § 6a (art. 5246—47), of the act, if the circumstances created a liability against the carrier. *Western Indemnity Co. v. Leonard* (Civ. App.) 231 S. W. 1101.

99. — **Intoxication.**—Intoxication, to be available as a defense under this article, must have contributed to the happening of the accident or the disability resulting therefrom. That employé killed when truck in which he was riding overturned as result of driver's negligence was intoxicated would be no defense where no act of employé contributed to injury, causing death; such intoxication not being the proximate cause. *Hartford Accident & Indemnity Co. v. Durham* (Civ. App.) 222 S. W. 275.

**Art. 5246—2. [5246hh] Inapplicable to certain classes of employés.**—The provisions of this Act shall not apply to actions to recover damages for the personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employés of any firm, person or corporation having in his or their employ less than three (3) employés, nor to the employés of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier, Provided, that any employer of three or more employés at the time of becoming a subscriber shall remain a subscriber subject to all the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employés may at times be less than three. [Acts 1913, p. 429, pt. 1, § 2;

Acts 1917, 35th Leg., ch. 103, pt. 1, § 2; Acts 1921, 37th Leg., ch. 115, § 1 (§ 2).]

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

**Farm or ranch laborers.**—Although a corporation is mainly engaged in cattle raising, with farming as a side issue, an employé injured while performing labor for the corporation in its farming operations, or in furtherance thereof, would be a "farm laborer." *C. C. Slaughter Cattle Co. v. Pastrana* (Civ. App.) 217 S. W. 749.

A servant employed to poison prairie dogs for his employer, who was engaged in cattle raising and incidentally conducting farm operations, held not a farm laborer. *Id.*

**Railroad companies.**—Electric company operating a street railway in a city and an interurban railway, and engaged in furnishing electric light to the public and electric power for commercial purposes, held subject to the Workmen's Compensation Act, in so far as it applied to its employés engaged in operating the electric power department of its business. *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

The Workmen's Compensation Act and the act increasing the powers of street and interurban railway corporations, having been passed at the same session of the Legislature, the Thirty-Fifth, and within a few days of each other, it is to be presumed that they are imbued with the same spirit, and actuated by the same policy, and they should be construed each in the light of the other in determining employments within Compensation Act. *Id.*

**Number of employés.**—Where it appears that a company sued for personal injuries by its servant employés more than five servants, it is subject to the Workmen's Compensation Act, whether a subscriber or not, and consequently cannot plead assumption of risk. *Wichita Falls Motor Co. v. Meade* (Civ. App.) 203 S. W. 71.

**Assumption of risk.**—Where defendants did not contend that they were subscribers or had been precluded from becoming such by this article, court properly denied defense of assumed risk. *Skelton & Wear v. Wolfe* (Civ. App.) 200 S. W. 901.

**Evidence.**—If city did not employ five men so as not to come within the Employers' Liability Act, such matter should be alleged and proved by the city. *Dunaway v. Austin St. Ry. Co.* (Civ. App.) 195 S. W. 1157.

In order that an employer may take advantage of the exemption contained in Employers' Liability Act, § 2, so as to permit him to interpose the defense of negligence of fellow servant, he must allege and prove his exemption thereunder. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

### Art. 5246—3. [5246i] No right of action against subscribing employer; compensation from Texas Employers Insurance Association.

See *Southern Surety Co. v. Houston Lighting & Power Co.* (Civ. App.) 203 S. W. 1115; *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837.

Cited, *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647; *Cole v. Mallory S. S. Co.* (Civ. App.) 197 S. W. 326.

**Subscribing under act in general.**—Election of one to take under Employers' Liability Act is sufficiently shown by his making claim thereunder and prosecuting it to final adjudication, so that if he is an employé within part 1, § 2, of the act, he has no right of action against his employer, if the latter is a subscriber under the act, irrespective of whether the employer gave him notice of being a subscriber. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

The notice to employé prescribed by arts. 5246—1, 5246—77, 5246—78, creates the relation of subscriber employer and employé, such act being mandatory, and requiring the actual giving of written or printed notice by employer to employé. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194.

Where a servant waived the want of notice required by the Employers' Liability Act and sought compensation for injuries before the Industrial Accident Board, he could not thereafter recover from the employer by action in court, in view of this article *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

Compensation for death of employé under the Workmen's Compensation Act, as amended by Laws 1917, c. 103, arises out of the contractual relation between the employer and the deceased employé, and is in substitution for damages ordinarily recovered by statute because of the death of the employé due to the negligence of the employer. *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

**Effect of denial of award under act.**—Denial by Industrial Accident Board of workman's claim for compensation on ground that, as casual employé, he was not employé within Employers' Liability Act had effect of remitting to their common-law rights both him and the company he claimed to be liable for his injury. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

### Art. 5246—4. Notice by employé of election to assert common law liability; subsequent waiver; common law action preserved.

See *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837.

**Failure to give notice.**—An employé of a subscriber under the Workmen's Compensation Law by failing to give the notice provided by this article, waives his right to claim damages for compensation except under art. 5246—5, and thus waives his right to assert common-law liability, and consents to the terms of the act, and may be compelled

to submit to a physical examination in his action to set aside an award and for compensation in a lump sum. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Art. 5246—5. Employés waiving common law rights to recover compensation.**

See *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; note under art. 5246—4.

**Art. 5246—6. [5246ii] Employés, etc., of nonsubscribing employer may sue at common law; may not participate in benefits of association.**

Cited, *Vaughan v. Southwestern Surety Ins. Co.* (Civ. App.) 195 S. W. 261.

**Action for benefit of heirs.**—Workmen's Compensation Act, art. 5246ii, held not to allow an action for benefit of heirs of a deceased employé, but to restrict such action to those persons enumerated in art. 4698. *Cole v. Mallory S. S. Co.* (Civ. App.) 197 S. W. 326.

**Art. 5246—7. [5246j] Recovery of exemplary damages in certain cases not excluded; award not to be pleaded or introduced in evidence.**

See *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

**Art. 5246—8. [5246jj] No compensation for incapacity not extending beyond one week; medical aid.**

**Operation in general.**—No compensation can be paid for an injury which does not incapacitate the employé for at least one week. *U. S. Fidelity & Guarantee Co. v. Nelson* (Civ. App.) 228 S. W. 616.

**Effect of insurance.**—Corporation was not liable for medical services rendered an employé in absence of special authority from board of directors, where corporation had provided method of caring for injuries to employés by means of insurance it had taken out for their benefit under the Workmen's Compensation Act. *Producers' Oil Co. v. Green* (Civ. App.) 212 S. W. 68.

**Affecting computation of payments.**—Under art. 5246—18, providing that the association will pay the injured employé a weekly compensation for not more than 400 weeks from date of injury, while art. 5246—8 provides that compensation shall begin to accrue on the eighth day after the injury, or after incapacity commences, if total and permanent incapacity continues for 400 weeks after the date of the injury, the servant is entitled to compensation for 400 weeks, not 401 weeks. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Art. 5246—9. [5246k] Medical and hospital aid during first two weeks; notice of injury; additional hospital services on certificate of attending physician.**

**First aid treatment.**—Under the Workmen's Compensation Law of 1917, an injured employé may, at the time of the injury or immediately thereafter, call in any available physician to render first-aid treatment as may be reasonably necessary at the expense of the association. *Home Life & Accident Co. v. Cobb* (Civ. App.) 220 S. W. 131.

**Notice of injury.**—Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 5246k, a servant cannot recover for medical aid where the insurer was not notified of the injury. *American Indemnity Co. v. Nelson* (Civ. App.) 201 S. W. 686.

**Liability of employer to physician.**—Under this article, a physician, furnishing medical aid to injured employé, may recover direct from the insurer. *Home Life & Accident Co. v. Cobb* (Civ. App.) 220 S. W. 131.

Although Workmen's Compensation Law allows a physician to recover for only two weeks' services, yet where the services rendered an injured employé were surgical in their nature, and treatment given after the expiration of two-week period was only incidental, the actual services having been fully rendered, the physician may recover, although the services covered a period in excess of two weeks. *Id.*

Under the Employers' Liability Act of 1917, an employer, though a member of the Texas Employers' Insurance Association, who engages a physician for an injured employé, may become liable for the physician's compensation. *Huddleston v. Texas Pipe Line Co.* (Civ. App.) 230 S. W. 250.

In an action to enjoin a judgment obtained by a physician against an employer, held, that the question whether the physician was informed that he must look to the Texas Employers' Insurance Association, and not to the employer, should have been submitted to the jury. *Id.*

**Payment of salary to physician and retention of fees.**—It was not against public policy, under this article, for an employer to agree to pay a doctor a salary, the employer to retain the medical fees allowed by the insurance association. *Sherrill v. Union Lumber Co.* (Civ. App.) 207 S. W. 149.

If it is against public policy for an employer to contract to pay a doctor a salary and retain the medical fees allowed by the insurance association under this article,

physician entering into such a contract is in *pari delicto* and cannot sue the employer for such fees, having received and retained his salary, since he cannot affirm in part and repudiate in part. *Id.*

**Recovery from insurer.**—Any one who pays for medical services for a servant may recover from the insurer, under this article. *American Indemnity Co. v. Nelson* (Civ. App.) 201 S. W. 686.

Where the court rendering judgment in favor of physician who treated an injured employé considered the reasonable value of the services of a necessary assistant, but did not make any separate award in favor of the assistant, the insurer cannot complain. *Home Life & Accident Co. v. Cobb* (Civ. App.) 220 S. W. 131.

An insurer is liable for medical aid rendered by a physician procured by the injured employé either where the physician was procured by the direction of the employer or where the employer had notified the insurer and it had failed to furnish medical aid. *Id.*

#### Art. 5246—11. Board may regulate medical and hospital fees and charges; payment.

**Reasonableness of charges.**—In an injured employé's action under the Workmen's Compensation Law, a petition which does not allege that there was a failure to furnish reasonable medical aid when needed, or within a reasonable time after notice of the injury, nor that the doctor's charges therefor are reasonable, does not state a cause of action for the recovery of such charges. *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

#### Art. 5246—14. [5246kk] Compensation where death results.

See *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343; *Georgia Casualty Co. v. Griesenbeck* (Civ. App.) 210 S. W. 273.

Cited, *Cole v. Mallory S. S. Co.* (Civ. App.) 197 S. W. 326.

**Who are beneficiaries.**—The brothers of a deceased servant were "beneficiaries" within the meaning of Workmen's Compensation Act 1913 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246kk). *American Indemnity Co. v. Zyloni* (Civ. App.) 212 S. W. 183.

**Application of death statute.**—Death Injury Statute, Vernon's Sayles' Ann. Civ. St. 1914, art. 4698, must be looked to as indicating whom Legislature intended as beneficiaries, under Workmen's Compensation Act, art. 5246kk, of employé, unmarried, without children, father, or mother, but with brothers and sisters, instead of Statute of Descent and Distribution, art. 2461, § 3, so that brothers and sisters were not "legal beneficiaries" within art. 5246kk. *Vaughan v. Southwestern Surety Ins. Co.* (Civ. App.) 195 S. W. 261.

Under Workmen's Compensation Act 1913, § 8 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246kk), declaring that compensation shall be paid to legal beneficiaries to be distributed according to the law of descent, the beneficiaries as well as the apportionment must be determined by that law, and not by art. 4698, governing recovery of damages for wrongful death. *Vaughan v. Southwestern Surety Ins. Co.*, 109 Tex. 298, 206 S. W. 920.

**Effect of previous payments to deceased.**—The heirs of a deceased employé previously awarded compensation for 100 weeks for injuries have no right to such compensation on the death of the employé not due to the injuries, before the term of compensation had expired. *U. S. Fidelity & Guaranty Co. v. Salsar* (Civ. App.) 224 S. W. 557.

**Computation of amount.**—Defendant cannot complain, on appeal, of court's failure to calculate the compensation due exactly as required by the statute, where amount allowed was less than it would have been if statute had been strictly followed. *Hartford Accident & Indemnity Co. v. Durham* (Civ. App.) 222 S. W. 275.

#### Art. 5246—15. Beneficiaries in case of death; exempt from execution; mode of distribution; to whom paid; how paid.

Cited, *Vaughan v. Southwestern Surety Ins. Co.* (Civ. App.) 206 S. W. 920.

**Validity.**—The courts are not concerned with the wisdom of the plan adopted by the Legislature in apportioning compensation under the Workmen's Compensation Act. *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

**Nature of right of beneficiaries.**—Under workmen's compensation statute, amount which relatives of employé who loses his life are entitled to receive does not come to them by inheritance from deceased, nor does it become part of his estate, and only cause of action which relatives have is given by statute, and vests originally in beneficiaries named. *Aetna Life Ins. Co. v. Otis Elevator Co.* (Civ. App.) 204 S. W. 376.

**As community property.**—Compensation awarded under the Workmen's Compensation Act, as amended by Laws 1917, for death of a servant is neither the community nor separate property of the deceased, and does not pass to the estate of the deceased to be administered upon, but is payable directly to those to whom it is awarded. *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

Where husband and father is killed in an accident, compensation under the Workmen's Compensation Act, as amended by Laws 1917, c. 103, partakes more nearly of community than of separate property, and should be distributed according to the statute of descent and distribution applicable in distributing community property, one-half going to the wife and one-half to the children, under Rev. St. 1911, art. 2469. *Id.*

**Who are beneficiaries.**—Under the Workmen's Compensation and Employers' Liability Act, only the dependent and widowed mother of deceased minor servant, and not his

minor brothers and sisters, held entitled to compensation. *Southern Surety Co. v. Moore* (Civ. App.) 196 S. W. 187.

Proof that deceased employé, a 19 year old farmer boy who was his parents' chief help on their rented farm where he worked, sought temporary employment to obtain money to buy clothing for himself with intent to return to the farm to assist his parents, who were poor and failing in health and strength, held to justify a finding that they were "dependent" upon him. *Southern Surety Co. v. Hibbs* (Civ. App.) 221 S. W. 303.

The test of dependency is, not whether the family could support life without the services or contributions of the deceased, but whether they depended upon them as part of their income or means of living. *Id.*

**Mode of apportionment.**—Compensation Act, pt. 1, § 8a, providing that beneficiaries in case of death of husband will take by law of descent, means descent relating to community property, and not per capita, as provided by law of descent relating to separate property, especially since the Industrial Board construed the law that way immediately after its passage, and many cases have been decided on that theory. *Texas Employers' Ins. Ass'n v. Boudreaux* (Civ. App.) 213 S. W. 674.

The statutes of descent and distribution (Rev. St. 1911, arts. 2469, 2462) must be looked to for a rule by which to apportion compensation among dependents for the death of a servant under the Workmen's Compensation Act, pt. 1, § 8a, as added by Laws 1917, c. 103 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—15). *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

**Art. 5246—17. [5246/l] Where there are no beneficiaries association shall pay expenses of last sickness and funeral expenses.**

See *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Davis* (Civ. App.) 223 S. W. 700.

Cited, *Vaughan v. Southwestern Surety Ins. Co.* (Civ. App.) 195 S. W. 261.

**Art. 5246—18. [5246//] Compensation for total incapacity.**

See *American Indemnity Co. v. Hubbard* (Civ. App.) 196 S. W. 1011; *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

**Duration of payments.**—Under Workmen's Compensation Law, providing that the association will pay the injured employé a weekly compensation for not more than 400 weeks from date of injury, while art. 5246—8 provides that compensation shall begin to accrue on the eighth day after the injury, or after incapacity commences, if total and permanent incapacity continues for 400 weeks after the date of the injury, the servant is entitled to compensation for 400 weeks, not 401 weeks. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Art. 5246—19. [5246m] Compensation for partial incapacity.**

See *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

**Art. 5246—20. What constitutes total incapacity; burden of proof.**

See *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

**What constitutes total incapacity.**—The phrase "total incapacity for work," in the Workmen's Compensation Act, does not imply an absolute disability to perform any kind of labor, and a person disqualified from performing the usual tasks of a workman in such a way as to render him unable to procure and retain employment is ordinarily regarded as being totally incapacitated. *Home Life & Accident Co. v. Corsey* (Civ. App.) 216 S. W. 464.

**Evidence.**—Evidence held sufficient to support a finding that injured servant, claiming compensation under Workmen's Compensation Act, suffered total incapacity for the period stated in the finding. *Home Life & Accident Co. v. Corsey* (Civ. App.) 216 S. W. 464.

**Art. 5246—21. [5246mm] Compensation for specified injuries.**

See *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

**Computation of compensation.**—In computing compensation for partial disability the proper method is to limit 60 per cent. of the average weekly wages to \$15 per week and fix the compensation by multiplying this 60 per cent. by the percentage of disability and not by multiplying 60 per cent. of the average weekly wages, by the percentage of disability, limiting the compensation to \$15 per week. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 825.

**Art. 5246—23. Claims for hernia, etc.**

**Evidence.**—In an action to set aside an award under the Workmen's Compensation Law, evidence held sufficient to support a jury finding that the hernia for which compensation was granted did not exist in any degree prior to the injury, though it was undisputed that the employé had another hernia prior to such injury. *U. S. Fidelity & Guaranty Co. v. Ross* (Civ. App.) 221 S. W. 639.

**Art. 5246—24. Compensation for subsequent injury.**

**Compensation from former employer.**—The fact that an injured employé may have obtained compensation for total incapacity from another master for a subsequent injury to which he was not entitled cannot defeat his right to recover compensation for total disability in an action against the insurer of the first master, the fraud, if any, being on the second, and not the first, master. *Home Life & Accident Co. v. Corsey* (Civ. App.) 216 S. W. 464.

**Art. 5246—25. Change in compensation awarded during incapacity; review.**

**In general.**—In view of Workmen's Compensation Act, pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44), a court trying a workmen's compensation case by implication has the power given the Industrial Accident Board by part 1, § 15 (art. 5246—33), to approve any agreed lump sum settlement, and the power given it by section 12d (art. 5246—25) to review, terminate, diminish, or increase an award for compensation made. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

In a workmen's compensation case, the form of judgment proposed by the servant, embodying the right and power of the court to review it and diminish, increase, or terminate the liability of the insurer in accordance with part 1, § 12d, with the right in the insurer at any time to redeem its entire liability by payment of a lump sum on agreement with the servant, with the approval of the Industrial Accident Board, in accordance with part 1, § 15 (art. 5246—33), held proper, with modification of provisions as to executions and the approval of the trial court of any lump sum settlement. *Id.*

The power rests with the Industrial Accident Board to terminate compensation for an injured employé at any time on a showing that his injury had healed. *Employers' Indemnity Corporation v. Woods* (Civ. App.) 230 S. W. 461.

Failure of losing party in a proceeding under pt. 1, § 12d, and part 2, § 5 (arts. 5246—25, 5246—44), to perfect his appeal after notice thereof by the filing of suit within the statutory period, is an abandonment of the appeal, and the administration of the claim rests with the Board as if no notice had been given. *Miller's Indemnity Underwriters v. Hayes* (Civ. App.) 230 S. W. 833.

**Grounds for change.**—The Industrial Accident Board, though not expressly authorized to correct its awards except for purpose of readjusting compensation, has inherent power to correct errors, inadvertences, and mistakes; but such authority must be exercised in harmony with provisions giving the courts jurisdiction to set aside awards. *Blair v. Millers' Indemnity Underwriters* (Civ. App.) 220 S. W. 787.

Under Workmen's Compensation Law as amended by Act March 28, 1917, pt. 1, § 12d, authorizing correction, during the compensation period, on application of any person interested showing a change of conditions, mistake, or fraud, of an award previously made, it is only a mistake of fact, and not one of law, as how much per week can be awarded for a permanent injury, which can be so corrected. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Davis* (Civ. App.) 223 S. W. 700.

**Art. 5246—28. Contributions from employés prohibited; effect of violation.**

See *Courchesne v. Brown* (Civ. App.) 216 S. W. 674.

**Art. 5246—30. Mode of estimating weekly wage of minors; hazardous employments.**

**Unlawful employment of minor.**—In view of this article, the Workmen's Compensation Act does not apply to infants employed around dangerous machinery in violation of Pen. Code, art. 1050. *Waterman Lumber Co. v. Beatty* (Civ. App.) 294 S. W. 448.

A minor under 15 years, whose employment by a lumber company at its sawmill was illegal and made punishable by Acts 1917, c. 59 (Vernon's Ann. Pen. Code Supp. 1918, art. 1050e), was not an "employé," within this article, to entitle his mother to compensation for his death. *Galloway v. Lumbermen's Indemnity Exchange* (Civ. App.) 227 S. W. 536.

**Art. 5246—32. [5246nn] No waiver of rights.**

**Application in general.**—Under the Employers' Liability Act of 1913, art. 5246q of which authorizes an award if not settled by agreement of the parties, a settlement, made without fraud after injury, is binding; this article referring only to agreements made prior to injury. *Jenkins v. Texas Employers' Ins. Ass'n* (Civ. App.) 211 S. W. 349.

**Art. 5246—33. [5246nnn] Lump sum for death or total permanent incapacity.**

See *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

Cited, *United States Fidelity & Guaranty Co. v. Parker* (Civ. App.) 217 S. W. 195.

**Right to and amount of lump sum payment.**—Under Acts 33d Leg. pt. 1, §§ 10, 15, and part 4, § 2 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246ll, 5246nnn, 5246yyyy) as to payment, an injured employé suing an indemnity company in which the employer was insured, in the absence of agreement, is entitled to judgment in lump sum for

the compensation already due and for weekly installments during the balance of the time in which he is entitled to compensation. *American Indemnity Co. v. Hubbard* (Civ. App.) 196 S. W. 1011.

A discount is required when the compensation is increased and the number of weeks is decreased. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 825.

**Grounds for allowance.**—In view of *Vernon's Ann. Civ. St. Supp.* 1918, art. 5246—33, providing that insurer's liability in case of servant's death or total permanent incapacity may be redeemed by payment of a lump sum by parties' agreement, but excluding any other lump sum settlement, except where in the judgment of the board manifest hardship or injustice would otherwise result, and art. 5246—34, contemplating that weekly compensation would sometimes work hardships, the facts that a lump sum settlement would enable the injured servant to live upon his unimproved farm, and that he could not support his family in town upon the weekly allowances, are to be considered. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

In action for death of employé under Employers' Liability Act, held, under the facts, that court properly awarded a lump sum rather than a weekly allowance. *Hartford Accident & Indemnity Co. v. Durham* (Civ. App.) 222 S. W. 275.

Where a deceased employé's widow was left without property of any kind and with seven small children not old enough to assist in earning a living, and four of whom were under five years of age, an award of a lump sum was not an abuse of discretion, especially where the oldest children would in a few years be able to increase the family earnings. *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

The association cannot be required to make a lump sum settlement, except in case of death or total permanent incapacity, notwithstanding that manifest hardship or injustice might result by denial of lump sum settlement, in view of arts. 5246—14, 5246—15, 5246—18, 5246—19, 5246—21, 5246—22, 5246—23, 5246—34, 5246—37. *Texas Employers' Ins. Ass'n v. Pierce* (Civ. App.) 230 S. W. 872.

**Power and jurisdiction to make award.**—In view of *Workmen's Compensation Act*, pt. 2, § 5 (*Vernon's Ann. Civ. St. Supp.* 1918, art. 5246—44), a court trying a workmen's compensation case by implication has the power given the Industrial Accident Board by this article, to approve any agreed lump sum settlement, and the power given it by section 12d (art. 5246—25) to review, terminate, diminish, or increase an award for compensation made. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

Under *Workmen's Compensation Act*, pt. 1, §§ 14, 15, 18, pt. 2, § 12, the justice court did not have jurisdiction to try the issue of a lump sum settlement by a compensation insurer with an injured employé; the amount involved exceeding the jurisdiction of the court. *Employers' Indemnity Corporation v. Woods* (Civ. App.) 230 S. W. 461.

Under the general jurisdiction of courts of the state they have no power to decree lump settlements in favor of injured employés under the *Workmen's Compensation Act*. *Id.*

**Agreement to accept lump sum in full settlement.**—No estoppel arose in favor of a workmen's compensation insurer against an injured employé who agreed to accept a lump sum settlement, the employé having been without power to contract in the premises, as the insurer knew, and the justice court which rendered judgment for such a lump sum settlement having been without jurisdiction to hear and determine the issue. *Employers' Indemnity Corporation v. Woods* (Civ. App.) 230 S. W. 461.

Under *Workmen's Compensation Act*, pt. 1, §§ 14, 15, 18, pt. 2, § 12, it was the intention of the Legislature to provide for compensation in weekly payments with certain definite exceptions to be approved by the Industrial Accident Board, and to make void a contract by a beneficiary to commute his compensation to a lump sum without the board's approval. *Id.*

**Evidence.**—In an action by an employé against the *Texas Employers' Insurance Association* to set aside an award of the Industrial Accident Board and to recover compensation in a lump sum for total and permanent disability, evidence held sufficient to sustain jury's findings in favor of plaintiff. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Review.**—Under *Compensation Act*, pt. 1, §§ 8a, 15, 18, providing that compensation shall be paid weekly, except that Industrial Board may redeem liability by payment in gross where manifest injustice would result from weekly payment, district court, on review of an award of weekly compensation, trying case de novo, as provided by *Vernon's Ann. Civ. St. Supp.* 1918, art. 5246—44, may give a gross award in case of death of employé having wife and two children of scholastic age, and no earning capacity, award for whom would amount to but \$7.44 a week. *Texas Employers' Ins. Ass'n v. Boudreaux* (Civ. App.) 213 S. W. 674.

What constitutes a special case justifying a lump sum award is left to the determination of the board or district court, and the exercise of such discretion will not be reviewed where no abuse appears. *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

### Art. 5246—34. Increasing amount of weekly installments.

See *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112; note under art. 5246—33.

**Discount of payments.**—Under *Workmen's Compensation Act* 1917, pt. 1, § 15a (*Vernon's Ann. Civ. St. Supp.* 1918, art. 5246—34), implying that the Industrial Ac-



cident Board may allow some discount in case of a lump sum settlement, it was not a misuse of authority or an abuse of discretion for the district court to discount the weekly payments of death benefits at the rate of 5 per cent., according to a standing rule of the board, instead of 6 per cent., the legal rate of interest. *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

#### Art. 5246—36. Aliens entitled to compensation, etc.

**Right to award.**—Nonresident aliens are entitled to recover benefits of Workmen's Compensation Act not expressly excluding them, in view of Acts 5th Leg. c. 70, Vernon's Sayles' Ann. Civ. St. 1914, art. 15, relating to aliens. *Southwestern Surety Ins. Co. v. Vickstrom* (Civ. App.) 203 S. W. 339.

#### Art. 5246—37. Failure of association to make payments; forfeiture of right to do business.

See *Texas Employers' Ins. Ass'n v. Boudreaux* (Civ. App.) 213 S. W. 674; *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

#### Art. 5246—38. Injury to employé outside the state.

**Insurance policy as affected by amendment of statute.**—Where a workmen's compensation insurer contracted to pay in the manner provided by the laws of such states as were in force at the time the policy took effect, or any subsequent amendments thereto, and while the policy was in force the Texas Workmen's Compensation Act was amended to provide that, if an employé hired in Texas, sustained an injury in the course of his employment, he should be entitled to compensation according to the law of Texas though the injury was received outside of the state, such amendment became part of the policy, and the insurer was liable for an award to an employé injured in Louisiana under Texas employment. *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 706.

### PART II

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| Art.<br>5246—39. Industrial accident board created; how constituted and appointed; term of members. | Art.<br>5246—45. Suit to enforce award; damages and attorney's fee, etc.                      |
| 5246—40. Qualifications of members; legal adviser and chairman.                                     | 5246—46. Compensation where sub-contractor is employed, etc.                                  |
| 5246—42. Duties and powers of board, etc.   | 5246—47. Where injury caused by third person employé shall elect; subrogation of association. |
| 5246—43. Employé shall give notice of injury.   | 5246—48. Employer to keep record of injuries; reports, etc.                                   |
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#### Article 5246—39. [524600] Industrial accident board created; how constituted and appointed; terms of members.

See *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

#### Art. 5246—40. [5246000] Qualifications of members; legal adviser and chairman.

See *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

#### Art. 5246—42. [5246pp] Duties and powers of board, etc.

See *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

**Constitutionality.**—The provision for physical examination of servant is not in violation of Const. art. 1, § 9, guaranteeing personal rights. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Powers and Jurisdiction of Industrial Accident Board.**—Jurisdiction of Industrial Accident Board to adjust claim against employers' liability insurer attaches as soon as claim for compensation for injuries to employé is filed. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

The Industrial Accident Board is not a court, but an administrative board, where interested parties may reach amicable adjustments quickly, by way of compromise. *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

**Examination of injured employé.**—An employé of a subscriber under the Workmen's Compensation Law by failing to give the notice provided by Vernon's Ann. Civ. St. Supp. 1918, art. 5246—4, waives his right to claim damages for compensation except under art. 5246—5, and thus waives his right to assert common-law liability, and consents to the terms of the act, and may be compelled to submit to a physical examination in his action to set aside an award and for compensation in a lump sum. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Facts developed on trial of motion for order for plaintiff to submit to physical examination, as well as on the merits of the case, held to show that the true extent

and effect of plaintiff's injuries was in doubt after the introduction of all available testimony, and that the X-ray examination sought would probably ascertain the truth and clear up the doubt, so that the motion should have been granted. *Id.*

The general provisions of the Workmen's Compensation Law relative to compelling servant suing for personal injuries to submit to examination by physicians are not limited by the specific provisions requiring its exercise in particular cases, but make its exercise in those particular cases mandatory instead of discretionary, although the defendant master or insurer, before it could complain of the court's refusal to order an examination under its general discretionary authority, would probably have to allege a request and a refusal. *Id.*

This article gives the master's insurer the privilege of having a physical examination of plaintiff's servant made by a physician of his own selection; and, in case of refusal, the insurer should apply to the Industrial Board or court having jurisdiction of the case for an order for the examination, and such tribunal should then provide therefor. *Id.*

Where there was no conflict in the evidence on the hearing of the motion to the effect that an X-ray examination would be helpful in clearing up the controversy as to spinal injury, the testimony of a physician on the subsequent trial would not justify the court's overruling such motion as a matter of discretion. *Id.*

Where injured servant, suing to set aside Industrial Board's award and for lump sum settlement, had been examined by order of the Industrial Board, but had made no claim before filing of suit for injuries to sight and hearing, and it subsequently became known that one of the physicians would testify that he had curvature of the spine, such facts afforded reasonable grounds for defendant's request to the court for a physical examination as to such matters. *Id.*

In a servant's action to set aside a weekly compensation award and for lump sum settlement, where the court had refused to order that plaintiff submit to a physical examination, it was not necessary that a motion should be made that plaintiff be refused compensation until he submit to examination, since, in view of this article, he could not be allowed compensation while his refusal continued. *Id.*

— **Jurisdiction of courts.**—In a servant's action against the Texas Employers' Insurance association the Workmen's Compensation Law is the sole authority by which the court may order a physical examination of plaintiff without his consent; for in the ordinary case the court is without such power. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

The provisions for physical examination of servant apply after the proceeding has been transferred to the courts, as well as while pending before the Industrial Accident Board. *Id.*

**Submission to medical or surgical treatment.**—Refusal of an injured servant to submit himself to a surgical operation was not a refusal "to accept or receive" medical treatment where in refusing to do so he was acting under the advice of skillful physicians who were treating him. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 325.

**Review.**—Where a motion for an order to compel the plaintiff to submit to a physical examination appealed to the general powers of the court conferred by this article, if the court's action thereon is largely discretionary, it may be reviewed in case of abuse of discretion. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

### Art. 5246—43. [5246ppp] Employé shall give notice of injury.

See *General Accident, Fire & Life Assur. Corporation v. Evans* (Civ. App.) 201 S. W. 705; *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837; *U. S. Fidelity & Guaranty Co. v. Parker* (Civ. App.) 217 S. W. 195.

Cited, *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

**Sufficiency of notice under Act of 1913.**—Verbal report of injury to servant, made a day or two before his death to his foreman, proper person to receive it, satisfied Employers' Liability Act of 1913, pt. 2, § 4a, requiring notice "as soon as practicable." *Texas Employers' Ins. Ass'n v. Mummey* (Civ. App.) 200 S. W. 251.

Brothers of deceased servant, his beneficiaries, through the attorney for the elder, held to have given the notice of injury and made the claim for compensation required by Workmen's Compensation Act 1913, though the first letter of the attorneys in relation to the matter was sent to the employer, and they were referred to the insurer, to which they wrote inclosing a copy of their first communication. *American Indemnity Co. v. Zyloni* (Civ. App.) 212 S. W. 183.

In an action for injuries to or death of employé, plaintiffs must allege that the claim for compensation was made within six months after the injury, or, in action for death, within six months after death, as required by Employers' Liability Act, § 4a (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246ppp). *Georgia Casualty Co. v. Ward* (Civ. App.) 220 S. W. 380, judgment modified on rehearing 221 S. W. 298.

The prosecution of a suit for an employé's death held not a "claim for compensation" within Employers' Liability Act, § 4a (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246ppp), requiring that "claim for compensation" be made within six months after injury or death, or removal of physical or mental incapacity, as a condition precedent to proceeding for compensation. *Id.*

**Sufficiency of notice under Act of 1917.**—Where the agents of an employer's workmen's compensation insurer of Texas employés assumed that a liability was under the employer's other policy with another company covering Louisiana employés, and without request from the injured Texas employé or the employer presented claim to the other insurer, the fact does not aid the Texas insurer to escape liability to the

injured Texas employé for the award, though subsequently the injured employé through his attorneys presented claim to the Louisiana insurer through local agents. *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 705.

Where a workmen's compensation insurer stipulated in its policy that as between employé or defendants and the insurer, notice to or knowledge of injury on the part of the employer should be notice to or knowledge on the part of the insurer, while the Workmen's Compensation Act was amended in 1917 to provide that notice, to the employer was notice to the insurer, the insurer had notice of an injury on account of the notice or knowledge of the employer. *Id.*

**Excuses for delay.**—Where an injured employé, on account of assurances given him by persons claiming to be agents of one or the other of the employer's insurers that no proceedings would be necessary, delayed presentation of his claim to the proper insurer, but the same was presented and filed with the Industrial Accident Board within a year, while the board made its award in favor of the employé, thereby holding the delay in the case came within this article, the circumstances were sufficient to excuse the employé's delay in filing claim until after six months. *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 705.

**Waiver of notice.**—Insurer's attorneys, by advising attorneys for plaintiffs, in action for compensation for employé's death, that the matter had been referred to them, that the attorneys for plaintiffs should have claim for compensation filled out, and that insurer was investigating plaintiffs' claim and would advise plaintiffs as to its decision as soon as investigation was completed, did not waive the making of a claim for compensation for the employé's death within six months thereafter, as required by Employers' Liability Act, § 4a (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp). *Georgia Casualty Co. v. Ward* (Civ. App.) 220 S. W. 380, judgment modified on rehearing, 221 S. W. 298.

**Evidence.**—Injured servant's report of injury to foreman having been verbal, in parents' action for death against the Employers' Insurance Association, it was proper to hear testimony of foreman and another to establish report was made, and contents. *Texas Employers' Ins. Ass'n v. Mummy* (Civ. App.) 200 S. W. 251.

**Review.**—Where demand for compensation was not made within the time limited and no allegation of incapacity was made, yet where there was evidence of incapacity the judgment should not be reversed and the cause dismissed on the employer's appeal, but the case should be remanded to the lower court for further proceedings. *Georgia Casualty Co. v. Ward* (Civ. App.) 221 S. W. 298, modifying judgment on rehearing 220 S. W. 380.

#### Art. 5246—44. [5246q] Questions to be determined by board; suit by person aggrieved, etc.

See *Western Indemnity Co. v. Prater* (Civ. App.) 213 S. W. 355; *Texas Employers' Ins. Ass'n v. Roach* (Com. App.) 222 S. W. 159.

**Validity.**—The provision for physical examination of servant is not in violation of Const. art. 1, § 9, guaranteeing personal rights. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Conclusiveness of award of accident board.**—Under Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246q), award of Industrial Accident Board, made on consent of parties, not withdrawn before final ruling and decision, held final between parties, constituting only remedy of father of deceased servant. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 328.

Where, with consent of all parties, Industrial Accident Board awarded compensation under Workmen's Compensation Act against Employers' Insurance Association, claimant had no cause of action against employer; award being final. *Id.*

Where employer expressed its consent by becoming subscriber to employers' insurance association, insurer, obtained its license and permit and issued policy, and claimant filed claim for compensation, there was consent of all parties interested, required to give Accident Board jurisdiction. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

Under Workmen's Compensation Act, art. 5246q, providing that party unwilling to abide by Industrial Board's findings may bring suit, and in such case board shall proceed no further, a party not exercising option to transfer case to court before board's final decision is bound thereby. *General Accident, Fire & Life Assur. Corporation v. Evans* (Civ. App.) 201 S. W. 705.

A workmen's compensation insurer which voluntarily contested the claim of the deceased servant's brothers before the Industrial Accident Board was not bound by the board's final award, and has an appeal therefrom where the board did not direct payment of the award to the brothers or find them in fact beneficiaries, but merely fixed the amount due, and ordered payment to the "legal beneficiaries," and where there was no express agreement the parties should be bound by action of the board. *American Indemnity Co. v. Zyloni* (Civ. App.) 212 S. W. 183.

An injured servant could not, under this article, repudiate and abrogate the ruling of the Industrial Accident Board awarding compensation, and at the same time treat it as effective and binding on the employer, and seek under section 5a to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with the mandates of the board. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

Decree of the Industrial Accident Board is final as to all issues and controversies, both as to law and fact, where no action has been taken by either party to set aside

the final ruling and decision of the board. *Southern Surety Co. v. Lucero* (Civ. App.) 218 S. W. 68.

**Settlement by parties.**—Under the Employers' Liability Act of 1913, art. 5246q of which authorizes an award if not settled by agreement of the parties, a settlement, made without fraud after injury, is binding; art. 5246nn, invalidating an agreement by employe to waive his rights, referring only to agreements made prior to injury. *Jenkins v. Texas Employers' Ins. Ass'n* (Civ. App.) 211 S. W. 349.

**Correction of award by accident board.**—The transfer of the controversy to the court, does not affect the Industrial Board's right to correct clerical errors manifest from the record. *Blair v. Millers' Indemnity Underwriters* (Civ. App.) 220 S. W. 787.

The Industrial Accident Board, though not expressly authorized to correct its awards except for purpose of readjusting compensation, has inherent power to correct errors, inadvertences, and mistakes; but such authority must be exercised in harmony with provisions giving the courts jurisdiction to set aside awards. *Id.*

**Notice of dissatisfaction with award.**—Final award of Industrial Accident Board would bind all parties before it, unless prior to such award insurer manifested its objection and refusal to abide by final decision. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

Where the Industrial Board's award, though erroneously entered against one who was not a party, was one that claimant did not wish to consent to, his only remedy was to give notice of dissatisfaction and bring suit to set it aside. *Blair v. Millers' Indemnity Underwriters* (Civ. App.) 220 S. W. 787.

Where compensation claimant gave notice of refusal to accept award and brought suit to set it aside, the notice was sufficient for the purpose of suit, though the Industrial Board thereafter changed the award so as to make it run against the insurer who was a party to the proceeding, instead of against a stranger, since the subsequent entry was merely to correct an error of commission and related back and became effective as of date on which the original award was entered. *Id.*

Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246q, right to sue, or to require suit to be brought on a claim for compensation, was not dependent on a party, before final determination by the Industrial Accident Board, giving notice that he does not consent to abide thereby; but the board's decision is not conclusive, though the parties agree to submit the matters pertaining to the injury to it, and the right to sue or require suit is by way of appeal. *Texas Employers' Ins. Ass'n v. Roach* (Com. App.) 223 S. W. 159, reversing judgment (Civ. App.) *Roach v. Texas Employers' Ins. Ass'n*, 195 S. W. 328.

Where beneficiaries of deceased servant filed claim with Industrial Accident Board before they filed suit against insurers, thus evidencing consent to adjudication by board, but no notice was issued by board to insurers to answer claim, and no action was taken by board in adjudicating it, it cannot be held jurisdiction of district court to adjudicate matter could not attach until formal notice had been given board by beneficiaries that they would not abide its decision; act not requiring such notice. *Southern Surety Co. v. Nelson* (Civ. App.) 223 S. W. 298.

Under Act of 1913, notice to the Industrial Accident Board of refusal to abide by its final decision was not a condition precedent to suit. *Southern Surety Co. v. Nelson* (Sup.) 229 S. W. 1113.

Failure of losing party to perfect his appeal after notice thereof by the filing of suit within the statutory period, is an abandonment of the appeal, and the administration of the claim rests with the Board. *Miller's Indemnity Underwriters v. Hayes* (Civ. App.) 230 S. W. 833.

**Jurisdiction of courts.**—Where an insurer brings a suit to set aside the findings and award of the Industrial Accident Board, the issue to be tried is, not the collection of the sum of weekly payments due under the award, but the determination of the full amount of insurer's liability that might be recovered under art. 5246—14, and, where such amount is in excess of \$500, the district court has jurisdiction. *Georgia Casualty Co. v. Griesenbeck* (Civ. App.) 210 S. W. 273.

Under Const. art. 5, § 8, giving the district courts jurisdiction over suits involving \$500 or more, and *Workmen's Compensation Act*, § 5 (*Vernon's Ann. Civ. St. Supp. 1913*, art. 5246—44), authorizing suits to set aside awards to be brought in a court of competent jurisdiction in county where injury occurred, the requirement that a suit to set aside an award be brought where the injury occurred is not jurisdictional, but relates only to the venue, and a suit brought in another county should not be dismissed, but, upon defendant's application, should be transferred to the county where the injury occurred. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222.

An action for compensation for death of employe which occurred after the amendment of the Employers' Liability Act by Gen. Laws 1917, c. 103, is not maintainable unless proceedings have been prosecuted to a decision in the first instance before the Industrial Accident Board. *Georgia Casualty Co. v. Ward* (Civ. App.) 220 S. W. 380, judgment modified on rehearing (Civ. App.) 221 S. W. 293.

District court, on appeal from a judgment of the Industrial Accident Board refusing to commute weekly payments into a lump sum, has jurisdiction to try the questions of totality and permanence of injury as well as the right to lump sum payment, presented as issues before the board. *Southern Surety Co. v. Hendley* (Civ. App.) 226 S. W. 454.

The Industrial Accident Board cannot, in refusing to commute weekly payments into a lump sum, deprive the district court of jurisdiction by making the judgment con-

tingent and providing that further applications for commutation into a lump sum may be made. *Id.*

**Physical examination.**—The provisions for physical examination of servant apply after the proceeding has been transferred to the courts, as well as while pending before the Industrial Accident Board. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Pleading and evidence.**—Parties who base their right of recovery on the Workmen's Compensation Law must show that they are entitled to compensation within the terms of the act, in view of part 2, § 5, providing that the rights and liabilities of parties shall be determined by the provisions of the act. *American Indemnity Co. v. Dinkins* (Civ. App.) 211 S. W. 949.

In a servant's action to set aside an award of weekly payments and to recover a lump sum, the statement of the injuries, the incapacity, and the weekly wage embraced all the essential elements of a good cause of action, and it was not necessary that the measure of damages be stated in the petition, and plaintiff's overestimating the extent of his injuries or incapacity or average weekly wage would not prevent awarding such compensation as he would be entitled to under facts proven, and his seeking commutation of damages to a lump sum would not prevent the court's applying the prescribed measure of damages applicable to all but exceptional cases, in event plaintiff did not bring himself within the exceptions. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

Where prayer of injured employé was for a lump sum or for general relief, the court was authorized to increase compensation by decreasing the number of weeks under the prayer for general relief. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 825.

Employé, suing to set aside award has the burden of proving that the employer was a subscriber under the act at the time of the injury. *Texas Employers' Ins. Ass'n v. Pierce* (Civ. App.) 230 S. W. 872.

In an injured employé's suit to set aside a decision of the Industrial Accident Board and to recover compensation, petition held to show jurisdiction in the district court, in that it stated a cause of action for compensation for total incapacity under section 10 (art. 5246—18), or for partial incapacity, or total and partial incapacity combined, under sections 11, 11a (arts. 5246—19, 5246—20), and not a cause of action for compensation for loss of index finger, or for ankylosis of such finger under section 12 (art. 5246—21), which would have confined recovery to less than \$500. *Home Life & Accident Co. v. Jordan* (Civ. App.) 231 S. W. 802.

In a suit to set aside an award under the Workmen's Compensation Act, it was not reversible error to admit in evidence a certified copy of the award made by the Industrial Accident Board, where it did not appear that the court considered the award in rendering a judgment for any improper purpose, and it was apparent that upon all the facts, which were practically undisputed, the court could properly have rendered no other judgment. *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 231 S. W. 818.

**Trial.**—A suit by insurer under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, to annul and cancel an award of the Industrial Accident Board made under art. 5246—14, is not, strictly speaking, an appeal, and the trial is *de novo*; the effect being similar to that of an appeal from the justice court judgment. *Georgia Casualty Co. v. Griesenbeck* (Civ. App.) 210 S. W. 273.

In a servant's suit against the Texas Employers' Insurance Association to set aside an award of weekly payments and for a lump sum settlement, the case is tried *de novo*, and the burden of proof is upon plaintiff; and, while the petition should refer to the proceeding before the Industrial Accident Board, in order to show the court's jurisdiction, and it would perhaps be necessary to file a certified copy of the award, yet the jurisdiction is for the court's determination, and the board's award is immaterial to any issue to be tried to the jury. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

**Judgment or award.**—Compensation under Workmen's Compensation Act should be allowed up to date of trial alone without prejudice to sue for unmaturred further installments. *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343.

In a workmen's compensation case, the judgment should have provided for the issuance of executions to collect the various installments of compensation awarded as they matured, since clerk cannot be made the judge to determine what character of process he shall issue. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

In view of this article, a court trying a workmen's compensation case by implication has the power given the Industrial Accident Board by part 1, § 15 (art. 5246—33), to approve any agreed lump sum settlement, and the power given it by section 12d (art. 5246—25) to review, terminate, diminish, or increase an award for compensation made. *Id.*

Under Compensation Act, pt. 1, §§ 8a, 15, 18, providing that compensation shall be paid weekly, except that Industrial Board may redeem liability by payment in gross where manifest injustice would result from weekly payment, district court, on review of an award of weekly compensation, trying case *de novo*, as provided by Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44 may give a gross award in case of death of employé having wife and two children of scholastic age, and no earning capacity, award for whom would amount to but \$7.44 a week. *Texas Employers' Ins. Ass'n v. Boudreaux* (Civ. App.) 213 S. W. 674.

Where injured servant's suit against the Texas Employers' Insurance Association was filed in the district court to set aside weekly payment award, and to recover lump sum, the entire case was then before such court, which could, if it decided that plaintiff

was totally and permanently disabled, but not entitled to receive compensation in bulk, award compensation for partial disability or total disability for a limited time, or until complete or partial recovery to the same extent as the Industrial Accident Board. *Texas Employers' Ins. Ass'n v. Downing* (Civ. App.) 218 S. W. 112.

The district court may award a lump sum, though no such settlement was sought before the Industrial Accident Board, as the board is not a court, but an administrative agency, and a resort to the district court is for a trial de novo. *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

In employé's action to set aside award, recital in the award was not competent to prove the employer a subscriber within the act. *Texas Employers' Ins. Ass'n v. Pierce*, (Civ. App.) 230 S. W. 872.

**Review.**—Discretion of district court in award of compensation in gross on trial of cause de novo, on review of an award of weekly compensation by Industrial Board, will not be disturbed on further appeal. *Texas Employers' Ins. Ass'n v. Boudreaux* (Civ. App.) 213 S. W. 674.

Where an insurer appealed from a judgment of the district court reversing a judgment of the Industrial Accident Board refusing to commute weekly payments into a lump sum, the costs of suit were properly adjudged against appellant. *Southern Surety Co. v. Hendley* (Civ. App.) 226 S. W. 454.

District court's findings upon question of whether judgment in a compensation proceeding should be rendered in a lump sum are findings of fact and subject to be reviewed on appeal to the Court of Civil Appeals the same as other fact issues are subject to review, under Workmen's Compensation Act, as amended by Laws 1917, c. 103, pt. 1, §§ 15, 18, and pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—33, 5246—37, 5246—44). *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

#### Art. 5246—45. Suit to enforce award; damages and attorney's fee, etc.

See *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 219 S. W. 222; *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.

**Maturity of installments.**—An injured servant could not, under Workmen's Compensation Act, pt. 2, § 5 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44), repudiate and abrogate the ruling of the Industrial Accident Board awarding compensation, and at the same time treat it as effective, and binding on the employer, and seek under section 5a to hold it liable for a lump sum settlement of his claim by reason of its failure to comply with the mandates of the board. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

For injured employé to authorize his attorney to file suit for the whole amount due under award of Industrial Accident Board is in effect a maturing on his part of the amount due. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parson* (Civ. App.) 226 S. W. 418.

Under this article, injured employé may mature his entire claim and bring suit thereon, as well where there has been no payment on the award of the Industrial Accident Board, as where, after a payment, there has been default. *Id.*

**Jurisdiction of court.**—In suit to enforce award, under Workmen's Compensation Act, of Industrial Accident Board, district court has jurisdiction if sufficient weekly installments are due at time of suit to amount to court's jurisdictional amount. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 328.

Chapter 103, Acts 35th Leg. p. 2, § 5a, amending Acts 33d Leg. c. 179, which former act became a law after an appeal was taken from an award under the first act, would not affect the question of the jurisdiction of the trial court at the time it tried the case. *Texas Employers' Ins. Ass'n v. Bryan* (Civ. App.) 198 S. W. 342.

That before suit can be brought the matter in controversy must be submitted to some board or referee, or must have some order or certificate or other matter of some department of state, does not give that place venue of a suit afterwards brought; hence in a suit under the Employers' Liability Act, the fact that plaintiff was obliged, under the act, to submit the claim to the accident board in a given county did not give such county venue of a suit on the liability. *Ozbolt v. Lumbermen's Indemnity Exchange* (Civ. App.) 205 S. W. 158.

**Evidence.**—Evidence in action for noncompliance with award of Industrial Accident Board held to warrant finding that the insurance carrier did not, prior to the action, in good faith attempt to comply with the award. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parson* (Civ. App.) 226 S. W. 418.

**Attorney fees.**—Where servant was accidentally drowned in course of employment in 1915 and liability for his death accrued under the Employers' Liability Act of 1913, before the adoption of the amendment of March 28, 1917, insurers against liability of the employer to its employés under the act were not liable for attorney's fees by reason of refusal to pay the claim until it was established in a court of competent jurisdiction, notwithstanding Vernon's Sayles' Ann. Civ. St. 1914, arts. 4746, 5246yyyy. *Southern Surety Co. v. Nelson* (Sup.) 229 S. W. 1113.

**Judgment and review.**—Under this article, on insurer's noncompliance with an award of the Industrial Accident Board, the injured employé is entitled to judgment in lump sum for compensation already due, and judgment for his weekly installments during the balance of the compensation period, but not to a lump sum judgment for the entire period. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parson* (Civ. App.) 226 S. W. 418; *U. S. Fidelity & Guaranty Co. v. Parker* (Civ. App.) 217 S. W. 195.

In suit on award under Workmen's Compensation Act by Industrial Accident Board, plaintiff must recover according to terms of award allowing weekly sums, and not in lump sum. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 328.

Compensation under Workmen's Compensation Act should be allowed up to date of trial alone, without prejudice to sue for unmatured further installments. *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343.

Where Industrial Accident Board under Employers' Liability Act awarded to plaintiff widow weekly allowance, and she sued insurer thereof, held, although court properly gave judgment establishing validity of award, judgment and execution for installments which had not accrued were improper. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

Workmen's compensation judgment for certain sum and over 200 future weekly installment items, for which execution should issue, if not paid when due, held not improper. *General Accident, Fire & Life Assur. Corp. v. Evans* (Civ. App.) 201 S. W. 705.

A judgment awarding plaintiff a lump sum for accrued weekly payment, and providing that he recover others as they accrue, though providing that as to payments subsequently to accrue the court may diminish, increase, or revoke so much of said judgment as pertains to future payments, is a "final judgment," from which an appeal may be taken. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parson* (Civ. App.) 226 S. W. 418.

**Execution.**—In suit to enforce award under Workmen's Compensation Act by Industrial Accident Board, remedy for enforcement of award, if proven, is by execution. *Roach v. Texas Employers' Ins. Ass'n* (Civ. App.) 195 S. W. 328.

**Interest.**—Though letter from Industrial Accident Board, or a member thereof, to insurance carrier, stated that the award would be complied with up to a certain time by payment thereof, tender thereof was not a full legal tender; it not including interest on deferred payments, to which the injured employé was entitled. *U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parson* (Civ. App.) 226 S. W. 418.

The trial court properly allowed interest to an injured employé against the employer's workmen's compensation insurer on the amount allowed the employé for medical and surgical attention and for the weekly payments from the due date of each item under the act, the insurer having had notice of the injury through the notice to or knowledge of the employer. *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 705.

#### Art. 5246—46. [5246qq] Compensation where sub-contractor is employed, etc.

See *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837.

**Who are employés.**—Under Employers' Liability Act, 1913, pt. 4, § 1, excepting casual employés from definition of employés, and pt. 2, § 6, excepting the employés of independent contractors on a contract "merely auxiliary and incidental to" the business, machinist sent by machine shop to do certain work on a machine was not employé of company owning machine. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

**Subrogation of insurer.**—Neither section 6, pt. 2, of the Workmen's Compensation Act, nor any other part of the act, in express terms or by implication, confers authority upon the insurer to reimburse himself for compensation paid to an injured employé as against a third person through whose negligence the injury occurred, or to be subrogated to the rights of the beneficiary as against such third person. *Southern Surety Co. v. Houston Lighting & Power Co.*, 1905 (Civ. App.) 203 S. W. 1115.

*Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246qq, held not to entitle workmen's compensation insurer to recover over on any theory of subrogation against elevator company which caused death of employé of subcontractor for which insurer of mercantile company and contractor repairing and remodeling its building paid award. *Ætna Life Ins. Co. v. Otis Elevator Co.* (Civ. App.) 204 S. W. 376.

*Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246qq, only gives right of subrogation when cause of action for injury to employé caused by third person has vested in injured employé. *Id.*

Elevator company which caused death of employé of subcontractor painting store building of merchandise company, which gave work of remodeling building to independent contractor, not having become liable to deceased employé for any sum under workmen's compensation statute, no right of subrogation against elevator company is given by *Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246qq, to insurer of merchandise company and independent contractor, which paid award for death. *Id.*

While right of equitable subrogation exists in favor of fire insurance company which has paid for loss occasioned by negligence of third persons, no such right exists in favor of workmen's compensation insurer, despite fact that premiums for such insurance are not paid directly by employés. *Id.*

Under Workmen's Compensation Act, pt. 2, § 6 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 5246qq), insurance association is not subrogated to rights of employé against third person, whose negligence alone caused injury, and is given no right to indemnify itself against such wrongdoer, save only where he is an independent or subcontractor. *City of Austin v. Johnson* (Civ. App.) 204 S. W. 1181.

#### Art. 5246—47. Where injury caused by third person employé shall elect; subrogation of association.

**Effect of acceptance or recovery of compensation, and election of remedies.**—See *Western Indemnity Co. v. Leonard* (Civ. App.) 231 S. W. 1101.

Where plaintiff had recovered against decedent's employer, and its indemnitor under Workmen's Compensation Act, her suit against a third person for the injury was barred. *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

A settlement by the Industrial Accident Board, as provided in Acts 33d Leg. c. 179, with an employé of a subscriber, does not preclude an action by the employé against a third party to recover damages occasioned by negligence of such third party. *City of Austin v. Johnson* (Civ. App.) 204 S. W. 1181.

In an employé's action against a third party instituted after the employé had received workmen's compensation, an instruction that the jury should deduct the compensation paid for whatever damages they may have found is proper, since a failure to make this deduction would result in double damages. *Wm. Cameron & Co. v. Gamble* (Civ. App.) 216 S. W. 459.

Under Workmen's Compensation Act, § 6a, authorizing an injured employé to either sue a third party injuring him or seek compensation, but not to do both, and providing that insurer paying compensation should be subrogated to the employé's rights and should pay any sum recovered in excess of the compensation to the injured employé, an employé after receiving compensation may sue a third party upon the insurer's failure or refusal to sue, and recover full damages minus the compensation previously received. *Id.*

Notwithstanding Workmen's Compensation Law 1917, pt. 2, § 6a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—47), declaring that an injured employé of a subscriber within the terms of the act may not proceed both against the association and a third party liable to him because of negligence, the receipt of compensation by plaintiff, an employé of a third party subscriber, from a surety company for injury by defendant railroad, and his assignment of so much of recovery as might be had, or would indemnify it, did not absolutely bar his action against railroad. *Lancaster v. Hunter* (Civ. App.) 217 S. W. 765.

**Where Compensation Act is inapplicable.**—A stevedore employed by a Texas company was injured while loading a vessel. Under the Texas Workmen's Compensation Act, the stevedore asserted a claim against his employer and received payment from an insurer, with whom the stevedore's employer as well as the agents of the vessel had taken out insurance. Held that, as the Texas act was inapplicable to the stevedore's claim against the vessel, and as he asserted no claim against the insurer as an insurer of the vessel or its agents, such payment did not bar his claim against the vessel, but amounted at most to a pro tanto satisfaction. *The Emilia S. De Perez*, 248 Fed. 480, 160 C. C. A. 490.

**Subrogation.**—Under Workmen's Compensation Act, a casualty company which has paid compensation to an employé cannot intervene and be subrogated to the rights of the employé to the extent of compensation paid, in an action by employé against a third person whose negligence caused the injury, regardless of the provisions of its policy. *Texas & P. Ry. Co. v. Archer* (Civ. App.) 203 S. W. 796.

Neither section 6, pt. 2, of the Workmen's Compensation Act, nor any other part of the act, in express terms or by implication, confers authority upon the insurer to reimburse himself for compensation paid to an injured employé as against a third person through whose negligence the injury occurred, or to be subrogated to the rights of the beneficiary as against such third person. *Southern Surety Co. v. Houston Lighting & Power Co.* 1905 (Civ. App.) 203 S. W. 1115.

That an employer whose servant was injured by structural defect in elevator had not taken out workmen's compensation insurance does not affect his right to indemnity against the elevator manufacturer and seller. *Otis Elevator Co. v. Cameron* (Civ. App.) 205 S. W. 852.

Under Workmen's Compensation Law 1917, pt. 2, § 6a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—47), the right of a surety corporation to be subrogated to rights of injured employé after its payment of compensation is given for the surety's benefit, and its suit against a negligent third party is for its benefit to extent of compensation paid by it, and for benefit of injured employé for any excess, so that the intervention of a surety company which had so paid compensation to an employé claiming damages from a third party should not be dismissed. *Lancaster v. Hunter* (Civ. App.) 217 S. W. 765.

#### **Art. 5246—48. [5246qqq] Employer to keep record of injuries; reports, etc.**

See *Texas Employers' Ins. Ass'n v. Roach* (Com. App.) 222 S. W. 159.

#### **Art. 5246—51. Sessions of board or members; inspectors and adjusters.**

See *Lumbermen's Reciprocal Ass'n v. Behnken* (Civ. App.) 226 S. W. 154.



## PART III

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| <p>Art.<br/>5246—64. Statement and certificate before issuance of policies; license to association.</p> <p>5246—74. Acts subject to approval of commissioner of insurance and banking.</p> <p>5246—76. Employer shall give notice to board on becoming a subscriber, etc.</p> | <p>Art.<br/>5246—77. Notice to employés of securing of policy.</p> <p>5246—78. Notice to incoming employés, etc.</p> <p>5246—79. Association shall pay subscriber amount of judgment, when.</p> |
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**Article 5246—64. [5246u] Statement and certificate before issuance of policies; license to association.**

Cited, *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647; *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

**Art. 5246—74. [5246ww] Acts subject to approval of Commissioner of Insurance and Banking.**

Cited, *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647; *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

**Art. 5246—76. Employer shall give notice to board on becoming a subscriber, etc.**

**Notice to Industrial Accident Board.**—Defendant's liability to pay compensation under its contract of employers' liability insurance did not depend upon notice of contract by defendant to Industrial Accident Board prior to injury. *Southwestern Surety Ins. Co. v. Curtis* (Civ. App.) 200 S. W. 1162.

It was immaterial when employer notified Industrial Accident Board of its insurance contract with defendant, only notice required being notice of employé's injury within reasonable time to defendant and board. *Id.*

**Art. 5246—77. [5246x] Notice to employés of securing of policy.**

**Construction and operation in general.**—Where insurer insured employer against losses under Workmen's Compensation Act, § 21 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246xxx), but employer failed to give notice as required by section 19 (art. 5246x), so as to bring his workmen within the act, and was held liable as at common law, he could not recover an additional sum of the insurer, who had paid the schedule amount, since his own negligence permitted the servant to recover more. *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

In view of the Amendment of 1917, held that where an employer, which became a subscriber under the Workmen's Compensation Act of 1913, failed to give the written notice to employés provided for by section 19, pt. 3, the statute was not binding on an injured employé who had no notice that the employer had adopted the act. *Batson-Milholme Co. v. Faulk* (Civ. App.) 209 S. W. 837.

Where an employer had failed to give servant notice of employer's compliance with the act, the servant could institute suit against employer for personal injuries, but was not limited thereto, and could waive the provision with reference to notice and claim benefit under the act. *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

Where an employer fails to give an employee notice that his industry is being operated under the Workmen's Compensation Act, the employee may sue for damages for personal injuries based upon common-law liability, in the absence of waiver of notice. *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

**Necessity of notice.**—The notice to employé creates the relation of subscriber employer and employé, such act being mandatory, and requiring the actual giving of written or printed notice by employer to employé. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194.

**Waiver of notice.**—An attempt of an injured employee to obtain an adjudication before the Industrial Accident Board, after the lapse of the time allowed within which to make application for compensation, is not a waiver of the employer's failure to give notice to the employee of his industry being operated under the act, want of notice being material only in event of an effort to enforce rights in the courts, and the employee not having intended to abandon his common-law remedy, but merely to get an equitable and prompt adjustment by way of compromise before the board. *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

Where an injured employee agreed upon dates for a hearing before the Industrial Accident Board of his claim for compensation, but reserved in writing a stipulation that the agreement was made without prejudice to any rights, claims, and defenses of any party, his attempt to obtain an adjudication before the Board, which allowed a plea of limitation, was insufficient to imply a waiver of his rights to sue at common law for want of notice. *Id.*

Where an injured employee, more than six months after his injury, attempted to obtain an adjudication before the Industrial Accident Board, under the Workmen's Compensation Act, he did not waive his right to sue at common law for want of the statutory notice, the doctrine of election of remedies being inapplicable, plaintiff, by reason of his failure to apply within the time prescribed by the act, having no valid or enforceable remedy before the Accident Board. *Id.*

**Evidence.**—In servant's action for personal injuries, plaintiff's testimony that notices were not posted at defendant's well eight months after defendant's injury was admissible, where question of their ever having been posted was made an issue. *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194.

Evidence held to support findings of the jury to the effect that the plaintiff had not received actual notice of defendant's acceptance of the provisions of Employers' Liability Law. *Id.*

Where an employer, sued for injuries, offers no proof to support the allegation that notice of provision for compensation had been given to servant by employer, it must be presumed that no such notice had been given. *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

**Art. 5246—78. [5246xx] Notice to incoming employés, etc.**

See *Farmers' Petroleum Co. v. Shelton* (Civ. App.) 202 S. W. 194; *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488; *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

**Art. 5246—79. [5246xxx] Association shall pay subscriber amount of judgment, when.**

Cited, *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647.

**Amount of recovery.**—Where insurer insured employer against losses under Workmen's Compensation Act, § 21 (*Vernon's Sayles' Ann. Civ. St. 1914, art. 5246xxx*), but employer failed to give notice as required by section 19 (*art. 5246x*), so as to bring his workmen within the act, and was held liable as at common law, he could not recover an additional sum of the insurer, who had paid the schedule amount, since his own negligence permitted the servant to recover more. *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

PART IV

<p>Art. 5246—82. Terms defined.</p> <p>5246—83. Officers and directors of subscriber corporation not deemed "employés."</p> <p>5246—84. Employer holding policy of insurance company deemed a subscriber, etc.</p>	<p>Art. 5246—87. Effect of amendment on rights acquired under previous law.</p> <p>5246—91. Reports of subscriber not evidence.</p>
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**Article 5246—82. [5246yyy] Terms defined.**

Cited, *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647; *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

**"Employés."**—Under Employers' Liability Act, pt. 4, § 1, excepting casual employés from definition of employés, and part 2, § 6, excepting the employés of independent contractors on a contract "merely auxillary and incident to" the business, machinist sent by machine shop to do certain work on a machine was not employé of company owning machine. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

Where contract provided that buyer of timber should reimburse seller for wages paid scalers, not to exceed \$50 per month each, a scaler employed by, and who worked under direction of, seller, at a salary of \$70 a month, was not an employé of buyer, within Workmen's Compensation Act, arts. 5246h, 5246yyy. *Kirby Lumber Co. v. McGilberry* (Civ. App.) 205 S. W. 835.

Evidence showing employer's control of mode of work of hauling clay for brick manufacturing held to support finding that deceased when killed was not an independent contractor, but an "employé"; it being assumed that the statutory definition does not distinguish an "employé" from a "servant" at common law, as distinguished from independent contractor. *Western Indemnity Co. v. Prater* (Civ. App.) 213 S. W. 355.

A traveling salesman, performing the usual and customary services for his employer, who could rightfully discontinue work or be discharged at any time, and was actually controlled by his employer in the performance of his work, held an employé, and not an independent contractor although he was not upon the pay roll of the employer, and was not paid wages, receiving his compensation by way of commission. *United States Fidelity & Guaranty Co. of Baltimore, Md., v. Lowry* (Civ. App.) 231 S. W. 818.

**"Average weekly wages."**—Where an injured servant had worked in the employment in which he was engaged when injured for several years before injury, his average weekly wages, and not the average weekly wages of other persons similarly engaged, were the proper basis for determining the amount of compensation. *U. S. Fidelity & Guaranty Co. v. Davis* (Civ. App.) 212 S. W. 239.

Evidence held to sustain a finding as to the amount of daily earnings of those of the same class as deceased employé doing the same work during the preceding year. *Southern Surety Co. v. Hibbs* (Civ. App.) 221 S. W. 303.

Defendant cannot complain, on appeal, of court's failure to calculate the compensation due exactly as required by the statute, where amount allowed was less than it would have been if statute had been strictly followed. *Hartford Accident & Indemnity Co. v. Durham* (Civ. App.) 222 S. W. 275.

"Injury sustained in the course of employment."—See note 98, under art. 5246—1.

### Art. 5246—83. Officers and directors of subscriber corporation not deemed "employés."

**Directors of corporation.**—One under contract of hire, who is injured in the performance of his duties as superintendent and head miller, is not excluded from the benefits of the act, though he is also a director of the corporation employing him. *Millers' Mut. Casualty Co. v. Hoover* (Civ. App.) 216 S. W. 475.

**Stockholders.**—A stockholder, who was the general manager, director, secretary, and treasurer of the employer corporation for a monthly "salary," is not entitled to compensation, though, as part of his duties as general manager, he occasionally performed the work of a laborer in the plant, and was injured while so doing, the language of the statute, which uses the word "wages," signifying compensation for mechanical or menial labor, and not the word "salary," which has reference to employment above the grade of such labor, showing an intention to exclude corporate officers even before the amendment of 1917. *Millers' Indemnity Underwriters v. Cook* (Civ. App.) 229 S. W. 598.

### Art. 5246—84. [5246yyyy] Employer holding policy of insurance deemed a subscriber, etc.

See *Southern Surety Co. v. Nelson* (Sup.) 229 S. W. 1113.

Cited, *Dallas Hotel Co. v. Fox* (Civ. App.) 196 S. W. 647; *Poe v. Continental Oil & Cotton Co.* (Civ. App.) 211 S. W. 488.

**Construction of policy.**—Policy insuring master for injuries to employés, together with binders and amendments attached after the enactment of Workmen's Compensation Act, held to contemplate indemnity against losses under the act only and according to its schedule of compensation. *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Civ. App.) 206 S. W. 531.

Where defendant had insured plaintiff against injuries to its employés, and the contract was changed subsequent to the enactment of Workmen's Compensation Act, charging a larger premium, it did not continue original liability as well as liability under the act. *Id.*

Construed with a liability policy issued to an employer before enactment of Workmen's Compensation Law, and binders thereafter attached, a subsequent policy, in which were merged all previous obligations, and which was made retroactive, held to cover master's liability at common law as well as under the Compensation Act. *Trinity County Lumber Co. v. Ocean Accident & Guarantee Corporation* (Com. App.) 228 S. W. 114.

**Forfeiture of policy.**—If under the laws of Texas an employé was protected by the policy issued by his employer's workmen's compensation insurer, such protection was not lost because the employer failed to pay the proper premium to the insurer. *Home Life & Accident Co. v. Orchard* (Civ. App.) 227 S. W. 705.

**Jurisdiction.**—Action on policy issued under Workmen's Compensation Act for accidental drowning on dredge upon navigable water is not one within exclusive admiralty jurisdiction of federal court. *Southern Surety Co. v. Stubbs* (Civ. App.) 199 S. W. 343.

**Judgment.**—An injured employé suing an indemnity company in which the employer was insured, in the absence of agreement, is entitled to judgment in lump sum for the compensation already due and for weekly installments during the balance of the time in which he is entitled to compensation. *American Indemnity Co. v. Hubbard* (Civ. App.) 196 S. W. 1011.

### Art. 5246—87. Effect of amendment on rights acquired under previous law.

**Operation and effect.**—Where insurance policy was issued to employé and accident occurred while Acts 33d Leg. (1913) c. 179, was in force, and prior to amendment thereof, by Acts 35th Leg. (1917) c. 103, the rights of the parties were governed by the provisions of the former statute in view of the latter statute, pt. 4, § 3b, employé having no right under the statute as amended to judgment for installments not due, or to recover a penalty or attorney's fee upon insurer's nonpayment of the matured installments. The rights of employé and insurer were fixed by the law as it existed prior to amendment, though employé presented his claim to the Industrial Accident Board after the amendment took effect. *Southern Surety Co. v. Lucero* (Civ. App.) 218 S. W. 68.

### Art. 5246—91. Reports of subscriber not evidence.

**Reports as evidence.**—In parents' action under Act of 1913, for death of son, reports of injury, made by employer to Industrial Accident Board, were prima facie evidence of statements in them. *Texas Employers' Ins. Ass'n v. Mummey* (Civ. App.) 200 S. W. 251.

## CHAPTER EIGHT

### EMIGRANT AGENTS

<b>Art.</b>	<b>Art.</b>
5246—101. Shall procure license.	missioner of labor; statistics; limitation of fees that may be collected from laborers; return of fees collected where employment not secured.
5246—102. Definition of "Emigrant Agent."	
5246—103. Application for license; fee; bond; action on bond; revocation of license.	5246—105. Duties of commissioner of labor statistics.
5246—103a. Notice to comptroller and tax collector of issuance of license.	5246—106. [Note.]
5246—104. Office and record to be kept by licensee; examination by com-	5246—107. Appropriations available.

**Article 5246—101. Shall procure license.**—That no person, firm or private employment agency shall engage in or carry on the business of an emigrant agent in this State without first having obtained a license therefor from the Commissioner of Labor Statistics of the State of Texas. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 1; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 1.]

Took effect 90 days after Oct. 2, 1920, date of adjournment.

**Operating under trade-name.**—Any person who does acts inhibited by this act, without license as required, may be prosecuted, although using a guise or trade-name. *Judge Lynch International Book & Publishing Co. v. State*, 84 Cr. R. 459, 208 S. W. 526.

**Art. 5246—102. Definition of "Emigrant Agent."**—The term "emigrant agent" as contemplated in this Act shall be construed to mean any person who engages in hiring laborers or soliciting emigrants or laborers in this State to be employed beyond the limit of this State. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 2; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 2.]

**Art. 5246—103. Application for license; fee; bond; action on bond; revocation of license.**—Any person, firm or private employment agency desiring to be licensed hereunder as an emigrant agent shall make application to the Commissioner of Labor Statistics on forms to be prescribed by said Commissioner, in which he shall state his name, age, place where his business is to be conducted, his previous occupation for the past five years, and the names of the counties of the State in which he expects to engage in hiring laborers or soliciting laborers or emigrants in this State to be employed beyond the limits of the State; such application shall, also, be accompanied by affidavits of at least three credible men that the applicant is of good moral character. The Commissioner of Labor Statistics may require other and additional evidence of the moral character of the applicant, if he deems it necessary; and no license shall be granted to any person except one of good moral character. Such application shall be examined by the Commissioner of Labor Statistics and if he finds that the same in all respects complies with the law and that the applicant is entitled to a license under this Act, then he shall issue a license to the applicant for each county for which application is made, and shall deliver such license to the applicant upon the payment of a license fee of one hundred dollars for each county in which said solicitation or employment shall be engaged in by said agent, and the execution of a good and sufficient bond in the penal sum of five thousand dollars for each such county, to be approved by said Commissioner of Labor Statistics and conditioned that the obligor will not violate any of the duties, terms, conditions and requirements of this Act, and will not make any false representation or statement to any person solicited or

employed. Said bond shall recite that any person injured by any false or fraudulent statement of such emigrant agent, or by any violation of the provisions hereof by such agent, shall be entitled to sue thereon, and, that service of process on the Commissioner of Labor Statistics as agent for such emigrant agent shall be sufficient to bind the principal on said bond. Said Commissioner is authorized to cause action to be brought on said bond by the Attorney General for any violation of any of its conditions; and any person aggrieved by any action or conduct or any false representation or statement of any such licensed party may bring action for damages against such party on said bond in the county in which same is filed, and recover thereon and against the bondsmen in any court of competent jurisdiction without the necessity of making the State a party thereto. On a full hearing the Commissioner may revoke any license for any violation of the provisions of this Act. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 3; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 3.]

**Art. 5246—103a. Notice to comptroller and tax collector of issuance of license.**—The Commissioner of Labor Statistics shall promptly upon the issuing of any license by him notify the Comptroller of Public Accounts of the issuance of such license and of the person to whom same is issued, and of the county or counties in which such emigrant agent will engage in business, and shall likewise notify the collector of taxes of each and every county in which such emigrant agent shall have been licensed of such facts. [Acts 1920, 36th Leg. 4th C. S., ch. 13, § 4.]

**Art. 5246—104. Office and record to be kept by licensee; examination by Commissioner of Labor; Statistics; Limitation of fees that may be collected from laborers; return of fees collected where employment not secured.**—It shall be the duty of every party licensed hereunder to keep and maintain an office, at which office a complete record of the business transacted shall be kept; there shall be kept a substantial book in the form prescribed by the Commissioner of Labor Statistics, in which shall be entered the age, sex, nativity, trade or occupation, name and address of every person or laborer hired or emigrant solicited to be employed beyond the limits of this State and where such person or emigrant was directed to go, and the address of such person or emigrant, if known. Such licensed party shall also enter in a register the name and address of every person who shall make application for laborers or emigrants to be employed beyond the limits of this State. All the books and registers, correspondence, memoranda, papers and records of every party licensed hereunder shall be subject to examination at any time by the Commissioner of Labor Statistics, his deputies and inspectors. The fees charged for hiring laborers or soliciting emigrants in this State for employment beyond the limits of this State shall not exceed two dollars for each such person or emigrant; and the fees charged any person who desires to find labor beyond the State or to emigrants beyond the boundaries of the State for the purpose of obtaining employment shall not exceed two dollars for each such person, and in no event shall more than two dollars be collected from any one for the same person who seeks employment beyond the State as a laborer or emigrant. Provided that all cases where the applicant who seeks employment beyond the State does not obtain such employment through the party licensed hereunder, then such party must return all fees collected from such applicant within thirty days after same has been collected. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 4; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 5.]

**Art. 5246—105. Duties of Commissioner of Labor Statistics.**—It shall be the duty of the Commissioner of Labor Statistics to enforce this Act, and when any violation thereof comes to his knowledge it shall be his duty to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 5; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 6.]

**Art. 5246—106.**

**Explanatory.**—Acts 1920, 37th Leg. 4th C. S., ch. 13, re-enacts the Emigrant Agent Act, Acts 1917, 35th Leg. 3d C. S., ch. 36 (Vernon's 1918 Supplement, arts. 5246—101 to 5246—107, inclusive), but omits sec. 7 of the latter act (art. 5246—106 of such Supplement). It is not clear that the Legislature intended to repeal that section. There is no repealing clause, general or special, in the later act.

**Art. 5246—107. Appropriations available.**—All appropriations heretofore made for the support and maintenance of the department of the Commissioner of Labor Statistics may be used in the enforcement and administration of this Act. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 8; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 8.]

## CHAPTER NINE

### PROTECTION OF LABORERS ON BUILDINGS

Art. 5246—108.	Certain buildings being constructed or repaired; temporary flooring; projecting scaffolding.	Art. 5246—111.	Duty of general contractors.
5246—109.	Same; removal of flooring.	5246—112.	Duty of owner or agent of building.
5246—110.	Same; elevators and hoisting apparatus; protection of shafts and openings.	5246—113.	Same; where contractor neglects duty.

**Article 5246—108. Certain buildings being constructed or repaired; temporary flooring; projecting scaffolding.**—Hereafter any building three or more stories in height, in the course of construction or repairs, shall have the joists, beams or girders of each and every floor below the floor level where any work is being done, or about to be done, covered with planking laid close together, said planking to be of not less than one and one-half inches in thickness, in buildings that have steel framework, and what is commonly known as one-inch plank in all others where joists are set on two feet centers or less, to protect the workmen engaged in the erections or construction of such buildings from falling through joists, girders, and from falling planks, bricks, rivets, tools or other substances, whereby life and limb are endangered. Where any scaffolding is placed on the outside of any of said buildings, over any public street or alley where persons are in the habit of passing, then said scaffolding shall be so constructed as to prevent any material, tools or other things from falling off and endangering the life of passersby. [Acts 1919, 36th Leg., ch. 152, § 1.]

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

**Art. 5246—109. Same; removal of flooring.**—Such flooring shall not be removed until the same is replaced by a permanent flooring in such building. [Id., § 2.]

**Art. 5246—110. Same; elevators and hoisting apparatus; protection of shafts and openings.**—If elevators, elevating machines or hod

hoisting apparatus are used within a building in the course of construction, for the purpose of lifting materials to be used in such construction the contractor or owners, or the agents of the owners, shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides, two sides of which must be at least six feet, and two sides where material is to be taken off or on, shall be protected by automatic safety gates. [Id., § 3.]

**Art. 5246—111. Duty of general contractor.**—It shall be the duty of the general contractor having charge of the erection and construction of such building to provide for the flooring as herein required, and to make such arrangements as may be necessary with the sub-contractor in order that the provisions of this Act may be carried out. [Id., § 4.]

**Art. 5246—112. Duty of owner or agent of building.**—It shall be the duty of the owner, or the agent of the owner, of such building, to see that the general contractor or sub-contractors carry out the provisions of this Act. [Id., § 5.]

**Art. 5246—113. Same; where contractor neglects duty.**—Should the general contractor or sub-contractors of such building fail to provide for the flooring of such buildings as herein provided, then it shall be the duty of the owner or the agent of the owner of such buildings to see that the provisions of this Act are carried out. [Id., § 6.]

For section 7 of this act see Penal Code, art. 1451zz.

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## TITLE 78

### LANDS—ACQUISITION FOR PUBLIC USE

Chap.

1. Authorizing Governor to purchase lands for state use.

Chap.

2. United States Government authorized to obtain title to lands in Texas.

#### CHAPTER ONE

##### AUTHORIZING GOVERNOR TO PURCHASE LANDS FOR STATE USE

Art.

5248. Land may be condemned.

Art.

5249. Land, how condemned.

**Article 5248. Land may be condemned.**

See *Stockwell v. State* (Civ. App.) 203 S. W. 109.

**Art. 5249. Land, how condemned.**

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

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#### CHAPTER TWO

##### UNITED STATES GOVERNMENT AUTHORIZED TO OBTAIN TITLE TO LANDS IN TEXAS

**Article 5275. [374] [333] Governor may cede jurisdiction.**

**Not delegation of legislative power.**—This article, authorizing the Governor, on application therefor, to cede exclusive jurisdiction to the United States over lands de-

scribed in the application and acquired by the United States for certain specified purposes, operates as a blanket consent by the Legislature to such cession, leaving to the Governor only the power to determine when the specified conditions exist, and is not a delegation to him of legislative power. *Brown v. United States*, 257 Fed. 46, 163 C. C. A. 258.

#### DECISIONS RELATING TO LAW OF EMINENT DOMAIN IN GENERAL

1. **Nature and source of power.**—Eminent domain is the sovereign power of taking private property for public use, providing first a just compensation, while taxes are burdens imposed to raise money for public purposes. *City of Dallas v. Atkins* (Civ. App.) 197 S. W. 593.

Individuals have no right of eminent domain. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

Where private property is taken, it is important that all the forms of law should be complied with, for these forms have been devised and certain restrictions adopted for the protection of private rights against public oppression. *Howard v. Rushing* (Civ. App.) 213 S. W. 953.

2. **Distinction from other powers.**—A prohibition against erection of wooden buildings within fire limits of an incorporated city, or removal of such buildings by proper authorities when found to be nuisances in the manner provided by law, is not an unreasonable taking of private property for public use, within purview of Const. U. S. or Texas Constitution. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

An ordinance excluding jitneys from a certain zone does not, in violation of Const. art. 1, §§ 17, 19, and Const. U. S. Amend. 14, take property and privileges, without due compensation or process of law, of jitney companies which, under former ordinances and statutes, made investments in the business; their use of the streets being the exercise of a mere license revocable at the will of the licensor. *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

4. **Delegation of power.**—Acts conferring the power of eminent domain will be strictly construed. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

The state has a right to part with its sovereign power of eminent domain to such agencies as it deems proper. *Id.*

Ordinarily it is essential for quasi public service corporations to have the power of eminent domain. *Id.*

6. **Necessity of compensation.**—Conceding that defendant had right superior to plaintiff to water in stream crossing plaintiff's land, it would have no right, in order to use water, to trespass upon plaintiff's land without compensating him therefor. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

Property may not be "taken" for a public use, nor can it be damaged, unless the citizen is compensated to the extent of the damage. *Brewster v. City of Forney* (Com. App.) 223 S. W. 175, reversing judgment (Civ. App.) 196 S. W. 636.

11. **Measure of compensation—In general.**—In a condemnation suit, damages resulting on account of improper and negligent construction cannot be recovered or considered for any purpose. *City of San Antonio v. Fike* (Civ. App.) 211 S. W. 639.

In proceedings to condemn a part of a lot for a sidewalk, it is not proper, in determining the measure of damages for the taker, to limit the inquiry as to the use to which the property may be put in the future, which opens too broad a field of conjecture. *City of San Antonio v. Fike* (Civ. App.) 224 S. W. 911.



## TITLE 79

## LANDS—PUBLIC

Chap.	Chap.
1. Public domain.	7. Land reservations.
2. General land office.	8. General provisions.
3. Land districts.	9. Sale and lease of public free school and asylum lands.
4. County and district surveyors.	10. Suits to recover public lands, rents and damages.
5. Surveys and field-notes.	
6. Patents.	

## CHAPTER ONE

## PUBLIC DOMAIN

**Article 5278. Vacant public lands belong to free school fund.**

See *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**"Appropriated lands."**—Where by virtue of a land certificate legally issued a survey was made and properly and promptly filed in county and general land office, land surveyed became "appropriated lands," which could not be covered by another certificate thereafter in view of Const. art. 14, § 2. *Allen v. Draper* (Civ. App.) 204 S. W. 792.

Surveys Nos. 207 and 208, location of which covered a portion of a prior school survey, were void to extent of the conflict because forbidden by Const. art. 14, § 2, and award of No. 208 and patent to 207 passed no right or title to land in prior survey. *Id.*

## DECISIONS RELATING TO SUBJECT IN GENERAL

**1. Public domain.**—The source of all title coming from the sovereign power, any one claiming title to lands in the state must show that a portion of the public domain has been segregated by some grant or purchase and no longer forms a part of the public lands. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

**1/2. Authority to grant lands.**—A nation cannot grant land to private individuals in territory to which it has no title, and a de facto possession could not supply title. *Kenedy Pasture Co. v. State* (Sup.) 231 S. W. 683.

Treaties take effect from the date signed, and where disputed territory is ceded as by the treaty of Guadalupe Hidalgo, the power of the ceding government to grant land within it ends with the signing of the treaty. *Id.*

**2. Spanish and Mexican grants.**—The grant of lands to plaintiffs' predecessor under the Mexican colonization laws cannot now be attacked by defendants sued in trespass to try title on the ground that such predecessor did not live in the colony where he was granted lands. *Allen v. West Lumber Co.* (Civ. App.) 223 S. W. 529.

The issue of abandonment of lands granted under the colonization laws of Mexico can be raised only by the state, and not by defendants in trespass to try title brought by the successors of the grantee of such lands from Mexico. *Id.*

In all cases except where the grantee of land under the colonization laws abandoned the realm, the laws of Mexico in 1835 required that the forfeiture of his land by him be ascertained by judicial inquiry. *Id.*

The act of December 14, 1837 (Laws of Republic 1836-37, p. 62), and the Constitution of the Republic recognized the validity of the transfer by a colonist of his right to land when the grant had not been perfected under the Mexican government. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 869.

An appropriation under a Mexican grant void upon its face cannot in its very nature give land the character of "titled land" or "land equitably owned" within the contemplation of Const. art. 14, § 2. *Kenedy Pasture Co. v. State* (Sup.) 231 S. W. 683, affirming judgment (Civ. App.) *Kenedy Pasture Co. v. State*, 196 S. W. 287.

The provisions of the treaty of Guadalupe Hidalgo, protecting Mexican land grants, cannot be construed to protect a grant made to one by a Mexican state in April, 1848, which was after the signing of such treaty. *Id.*

Where land between the Nueces and the Rio Grande rivers was surveyed for grantee who paid the Mexican authorities for it prior to 1836, when it was finally claimed by the Texas Republic, such grantee acquired an inchoate or equitable title having its origin prior to December 19, 1836, which would be protected by the treaty of Guadalupe Hidalgo. *Id.*

Where parties, claiming land against the state and holders of title from state, permitted the meager and fragmentary evidence of their right to slumber more than 70 years in the buried records of a foreign jurisdiction, with no possession on their part, with the land vacant and the state's claim openly asserted by appropriation at an early day, its resurrection now will not be suffered to defeat the title of innocent settlers, who purchased from the state in good faith. *Id.*

Where purchasers of land from the state had not paid the full money consideration when they first learned of defendant's claim under predecessor's inchoate right to title from a Mexican state, but had completed their settlement, improved the land, and paid the principal part of the consideration, and defendant claimant made no offer to reimburse them for consideration paid or improvements, or in any way to perform what equity would require, they are in no position to complain of a judgment protecting the rights of such purchasers. *Id.*

Plaintiff's contention that, if a grantee from a Mexican state acquired an inchoate right to the land, he thereafter abandoned it, is not well taken, where there was no unequivocal act on his part evidencing such intention, since his mere failure to assert such right could not operate as a forfeiture of it, besides such was a question of fact, concluded by the trial court's judgment. *Id.*

5. **Grant of lands under water.**—If the owners of land riparian to a navigable lake own the bed of the lake, it is because the land was specifically granted. *Welder v. State* (Civ. App.) 196 S. W. 868.

7. **Land certificates—Former law.**—Const. 1869, art. 10, § 3, declaring null and void certificates for land located after October 30, 1856, upon land previously titled, cannot be construed to affect any right vested in 1866 in view of Const. U. S. Amend. 14. *Fielder v. Houston Oil Co. of Texas* (Civ. App.) 208 S. W. 158.

8. — **Headright certificates.**—Where no certificate entitling to land as headright was issued to woman previous to 1862, and there was no transfer by her of any interest therein to her heir, heir had no right to pass title from woman through his deed dated 1854, 1862 being earliest possible date of woman's death. *Smelser v. Henry* (Civ. App.) 199 S. W. 1151.

13. — **Transfer of certificates.**—The legal effect of the conveyance of a donation certificate was to invest purchaser with title to land afterward located and to make the patent when issued inure to the purchaser's benefit, although the certificate was personalty when conveyed; "conveyance" denoting an instrument which carries from one person to another an interest in land. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

Actual possession of the land affected is not necessary to prove, by circumstantial evidence showing an ancient claim of ownership, the transfer of a lost certificate. *Magee v. Paul*, 110 Tex. 470, 221 S. W. 254, answering certified questions (Civ. App.) 159 S. W. 325, and answers conformed to (Civ. App.) 224 S. W. 1118.

A sale by an administrator of a certificate after it has been located by virtue of a duplicate of the certificate will not pass the title to the land. *Webb v. Goldsmith* (Civ. App.) 221 S. W. 690.

15. **Entries and locations under former law.**—The "close of the war," as used in 6 *Gammel, Laws*, 669, approved December 14, 1863, suspending all laws authorizing location and sale of public lands until such time, dates from closing of actual war in Texas May, 1865, and not from presidential proclamation thereof as of August 20, 1866. *Fielder v. Houston Oil Co. of Texas* (Com. App.) 208 S. W. 158.

16. — **Vacant public land.**—Const. 1876, art. 14, § 2, providing that land certificates shall not be located "upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which was on the county records or in the general land office," contemplates existence of legal evidence of such appropriation. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287, judgment affirmed (Sup.) 231 S. W. 683.

Where section of land had not been patented to one railroad when another section overlapping to extent was located for another railroad, on that date first section was not titled land, and was not equitably owned by first railroad, within the meaning of Const. art. 14, § 2. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

Under Const. 1869, art. 10, § 3, which declares null and void all certificates for land located after October 30, 1856, upon land titled before location of certificate, and Const. 1876, art. 14, § 2, "titled lands" are those within boundaries of patents from the state, and lands not patented, although erroneously indicated as within patent boundaries by a general land office map, were not "titled lands." *Fielder v. Houston Oil Co. of Texas* (Com. App.) 208 S. W. 158.

18. — **Surveys.**—Where vendor held scrip from the state which called for survey of a quantity of land, one-half to holder and the other to the state, and survey was made and the land partitioned by the General Land Office, held, that vendor owned only the part designated as his, and not an undivided half interest in the whole. *Browne v. Gorman* (Civ. App.) 208 S. W. 385.

Where certificate was located by a survey, errors in field notes as to distances on the ground between points identified by the calls did not affect validity of the location. *Webb v. Goldsmith* (Civ. App.) 221 S. W. 690.

A mere survey, without an order of survey, is not a legal appropriation of the land and does not sever it from the mass of the public domain. *Allen v. West Lumber Co.* (Civ. App.) 223 S. W. 529.

19. — **Location.**—A survey of land by virtue of a certificate is a location of the certificate within the rule that a sale by an administrator of a certificate after it has been located will not pass the title to the land, notwithstanding Act Aug. 30, 1856 (art. 4573, Pasch. Dig.), authorizing the location of public land by entry. *Webb v. Goldsmith* (Civ. App.) 221 S. W. 690.

22. — **Transfers and contracts.**—Under the Pre-emption Law, actual settlers acquired a valuable right to their claims of such a character as to be subject of contract and assignment. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

23. — **Priorities.**—Since a mere survey, without an order of survey, is not a legal appropriation of the land and does not sever it from the mass of the public domain, where A. and M. leagues conflicted, and the M. grant was issued by virtue of an application dated January 16, 1835, the A. by application dated May 28, 1835, the order of survey of the A. league was dated May 29, 1835, and of the M. league September 1, 1835, the field notes of both surveys were dated June 1, 1835, and the M. title issued October 8, 1835, and the A. title October 13, 1835, the A. title to the conflicting portion was superior to the M. title, because appropriated under valid surveys, based on proper applications and orders for survey, prior to, the time the order for the survey of the M. survey was made, notwithstanding formal title to the M. was issued prior to title to the A. league. *Allen v. West Lumber Co.* (Civ. App.) 223 S. W. 529.

24. **Homestead donations under former law.**—One who had settled upon the state's domain, held to have substantially complied with the statute then in force as to vest in him a fee-simple ownership in the land, segregating it from the mass of the public domain and rendering it the subject of private contract. *Riggs v. Baleman* (Com. App.) 228 S. W. 179.

#### VALIDATING ACTS

Acts 1919, 36th Leg., ch. 40, validates survey in Franklin county to William Lane on land certificate.

## CHAPTER TWO

### GENERAL LAND OFFICE

#### Article 5290. [4053] No transfers, etc., shall be withdrawn.

**Affidavit of alteration.**—Where a certified copy of a recorded deed has been filed in a suit by plaintiff for the purpose of offering the copy in evidence, an affidavit alleging alterations in the deed, and praying for the production of the original, is to be used to compel the production of the original only, and cannot be considered as attacking it when offered in evidence. *Stribling v. Atkinson*, 79 Tex. 162, 14 S. W. 1054.

## CHAPTER THREE

### LAND DISTRICTS

Art. 5297. County or district failing to organize as separate land district.	Art. 5299. Counties attached.
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#### Article 5297. [4067] County or district failing to organize as separate land district.

Cited, *Cox v. Houston & T. C. R. Co.*, 68 Tex. 226, 4 S. W. 455.

#### Art. 5299. [4067b] Counties attached.

Cited, *Warren v. Atlas Const. Co.* (Civ. App.) 197 S. W. 320.

## CHAPTER FOUR

### COUNTY AND DISTRICT SURVEYORS

Art. 5303. Duties of county surveyor.	Art. 5309. Chain carriers and markers.
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#### Article 5303. [4071] Duties of county surveyor.

See *Olcott v. Ferris* (Civ. App.) 24 S. W. 848.

#### Art. 5309. [4077] Chain carriers and markers.

See *Olcott v. Ferris* (Civ. App.) 24 S. W. 848.

## CHAPTER FIVE

## SURVEYS AND FIELD-NOTES

<p>Art. 5336. Field-notes shall describe what. 5338. Surveys on navigable streams. 5339. Surveys shall be in a square. 5344. Field-notes to be sent back for correction, when. 5347. Commissioners to have surveys made, when.</p>	<p>Art. 5348. Bonds, etc. 5349. May have lands surveyed, when. 5352. Persons owning private lands may co-operate. 5355. Field-notes to be returned; force and effect of.</p>
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**Article 5336. [4144] Field-notes shall describe what. .**

**Field notes.**—In trespass to try title, brought by the heirs of the owner of realty against the devisees of the owner's widow, field notes from records of the county surveyor were admissible to show the fact and date of the surveys by the original owner and the certificate or right under which they were made, although Pre-emption Act did not require the field notes to be recorded in the county, but merely returned to the land office. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

In order for the status of land, as surveyed or unsurveyed land to be affected by approved field notes on file in the General Land Office, the survey of the land and the filing and approval of the field notes by the land commissioner must not be void because violative of law. *Landry v. Robison*, 110 Tex. 295, 219 S. W. 819.

**Surveys.**—Legal survey of public domain is appropriation thereof. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

A location of a block of surveys is not rendered an office survey by the mere fact that the person who certified as deputy surveyor to the surveys being made according to law is not shown to have been present when the block was run out. *Standefer v. Vaughan* (Civ. App.) 219 S. W. 484.

That surveys are made by the same surveyor in the same month, and that most of them call for each other, do not place them in the category of a block or system of surveys, when made for different owners of certificates, and none of them are described as one of a block or system of surveys. *Hanman v. San Jacinto Rice Co.* (Civ. App.) 229 S. W. 1008.

**Return in twelve months—Former law.**—See *Hill v. Kerr*, 78 Tex. 205, 213, 14 S. W. 566.

**Art. 5338. [4147] Surveys on navigable streams.**

**Construction and operation in general.**—Where some sections of a purchase under the act have a greater water front than is allowed, such fact will not invalidate the title to other sections purchased at the same time. *Bacon v. State*, 2 Civ. App. 692, 21 S. W. 149.

In suit to restrain defendant from taking and appropriating water from a stream running through plaintiff's land, where plaintiff alleged ownership in land constituting bed of stream and of land on both sides of stream, burden was on defendant, although plaintiff alleged nonnavigability, to establish navigability. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

**Navigable waters.**—Lake averaging four feet in depth from which fish are taken and which is capable of use for floating logs or light draft boats is navigable; capacity, and not use, being determinative. *Welder v. State* (Civ. App.) 196 S. W. 868.

Where surveys on a lake were made to front one-half of the square thereon and run back at right angles, the lake was evidently regarded as a navigable lake, and its bed was not included in the surveys. *Id.*

By the terms of this article, and decisions thereunder a navigable stream must maintain an average width of 30 feet. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

**Title to bed of stream.**—The bed of a navigable stream, to which state has title, is that portion of its soil covered by the water under normal conditions and seasons. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

**Public rights.**—The common law as to nonnavigable streams is the rule of decision in Texas. *Welder v. State* (Civ. App.) 196 S. W. 868.

The bed of a navigable river was not open to prospecting for and development of petroleum prior to Laws 1917, c. 83, arts. 5904-5904w, notwithstanding Laws 1913, c. 173, opening to mineral prospecting "all public school, university, asylum and the other public lands, fresh water lakes, islands, bays, marshes, reefs, and salt water lakes, belonging to the state of Texas"; the bed of a navigable river not being other "public lands" within such statute. *Landry v. Robison*, 110 Tex. 295, 219 S. W. 819.

**Evidence.**—In suit to restrain defendant from taking and appropriating water from a stream running through plaintiff's land, evidence held insufficient to show that stream was navigable. *King v. Schaff* (Civ. App.) 204 S. W. 1039.

**Art. 5339. [4148] Surveys shall be in a square.**

**Construction and operation in general.**—Where there is no uniform variance from true course found in any of the lines of a survey actually run, but there is a difference in the course of the east line, and the angle at a corner is not a right angle, as required to make a proper square survey, in locating the surveys of the block the lines running southward and westward from certain corners should be run on true course. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

**Art. 5344. [4154] Field-notes to be sent back for correction, when.**

See *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

**Subsequent survey.**—If an original survey did not embrace lands in controversy, the act of the state surveyor in placing them within corrected field notes of such survey on his resurvey of the lands, and the subsequent approval of the field notes by the land commissioner, did not bind the state and those claiming under it. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

That a surveyor who had already surveyed a plot returned later to survey subsequent locations which he tied onto his previous work does not make his later survey a part of the same system so as to eliminate a vacancy, and the subsequent approval of the corrected field notes by the land commissioner will not bind the state or those claiming under the state. *Brooks v. Slaughter* (Civ. App.) 232 S. W. 856.

**Art. 5347. [4261] Commissioner to have surveys made, when.**

**Including other lands in patented survey.**—Land located by railroad and recovered by state and so belonging to permanent school fund under art. 5385, was appropriated land, and it was not lawful for Land Commissioner to correct field notes thereof to reduce its acreage and take from it land belonging to fund and give it to another survey owned by individual. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

**Art. 5348. [4262] Bonds, etc.**

See *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

**Art. 5349. [4263] May have lands surveyed, when.**

**Construction and operation in general.**—Land located by railroad and recovered by state, and so belonging to permanent school fund under art. 5385, was appropriated land, and it was not lawful for Land Commissioner to correct field notes thereof to reduce its acreage, and take from it land belonging to fund, and give it to another survey owned by individual. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

**Art. 5352. Persons owning private lands may co-operate.**

**Construction and operation in general.**—Where owner of Mexican grant has lands re-surveyed by county surveyor, such surveyor acts as agent of the owner and not of estate. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 237.

**Art. 5355. Field-notes to be returned, etc.**

**Conflicting surveys.**—In trespass to try title, where evidence suggests a conflict between surveys, the burden is upon the party claiming under a junior patent to show that his land does not conflict with that held under a senior grant; but it is not incumbent upon one holding under a junior grant well defined and located on the ground to locate surrounding grants of uncertain description. *Howell v. Ellis* (Civ. App.) 201 S. W. 1022.

**Evidence.**—In trespass to try title involving boundary, where a map was properly filed in the General Land Office, a copy thereof was admissible in evidence; and, it being contemplated that field notes of all surveys shall be made and recorded, a map should be made from such field notes, which should fully explain it, so that a letter, although accompanying the map and filed, was not admissible, except that part certifying to the map's correctness, in the absence of a law authorizing its filing. *Land v. Dunn* (Civ. App.) 226 S. W. 301.

A map, not filed in the surveyor's office or the General Land Office, does not become an archive in either office, and is not admissible to determine boundaries in trespass to try title. *Id.*

## BOUNDARIES IN GENERAL

**1/2. In general.**—The controlling issue in all boundary suits is the intention of the parties. *Welder v. State* (Civ. App.) 196 S. W. 868.

A description in a voluntary conveyance is covered by the same rules of construction which apply to an involuntary conveyance. *Mackechney v. Temple Lumber Co.* (Civ. App.) 197 S. W. 744.

In arriving at true location of block in a system of surveys, the conditions and circumstances surrounding its location, as well as the lines actually run by the surveyor, and the corners fixed on the ground, should be considered. *Standefer v. Vaughan* (Civ. App.) 219 S. W. 484.

**2. Relative importance of conflicting elements.**—A call made upon conjecture will not control a call for course and distance. *Kerr v. State* (Civ. App.) 205 S. W. 474.

A call in a survey for corners on the ground is superior to calls for course and distance. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

In determining the boundaries of surveyed lands a call for an established corner cannot be disregarded in favor of a call for an unmarked open line of an adjoiner. *Id.* In determining boundaries, when all the calls cannot be followed, as few should be disregarded as possible. *Wilson v. Giraud* (Sup.) 231 S. W. 1074.

**3. — Control of elements consistent with intention.**—In establishing boundaries, those calls will be adopted which are more certain, avoid conflicts in surveys, etc., and harmonize with the evident purpose of the state in making the grant, even though a natural object must be disregarded. *Matador Land & Cattle Co. v. Cassidy-Southwestern Commission Co.* (Civ. App.) 207 S. W. 430.

**4. — Control of natural objects and monuments over other elements in general.**—Call for well-known natural object controls call for point on line fixed by surveyor. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

Course and distance in survey of land yield to calls for natural and ascertained objects, such as a river, a spring, or even a marked line. *Rosetti v. Camille* (Civ. App.) 199 S. W. 526.

In determining boundaries, recourse should be had, first, to natural objects; second, to artificial objects; and, third, to courses and distances. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 104.

In boundary suit, instruction that, in locating land lines and corners, resort must first be had to natural and artificial objects called for, without variation for course, distance, quantity, or other facts, was proper. *Jackson v. Graham* (Civ. App.) 205 S. W. 755.

Where calls of survey were for objects specified as on the ground at distances indicated, the fact that survey may not have closed according to a calculation made of distances called for in the field notes would not render survey void, as distances called for would be extended to reach the objects. *Spearman v. Mims* (Civ. App.) 207 S. W. 573.

First importance is to be given to calls for objects on the ground, and if such objects can be identified, or if they have been destroyed or have disappeared, but their previous location can be shown, then the lines will be run accordingly, and the mere fact that the primitive land marks have disappeared does not authorize the limiting of the lines and confining of the boundaries by calls for distance in the field notes. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

While the intention of the surveyor in making an official survey will have an almost controlling effect in construing his work, such intention as evidenced by calls for courses and distances will not, where the survey was actually run, govern calls for natural monuments. *State v. Coleman-Fulton Pasture Co.* (Civ. App.) 230 S. W. 850.

**5. — Control of water courses, highways and fences over other elements.**—In the absence of showing that a call for a river bank was a mistake, it should control a call for distance. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

A requested instruction, making the course and distance controlling unless all trees called for by the field notes to locate the disputed corner were found, was properly refused, where there was evidence from which the jury could find the existence of one of the trees called for, but not the others. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

Calls for natural objects, such as a river, do not yield to calls for artificial stakes or movable rocks or stones, in absence of evidence that there was no river at the place called for, or that there was a mistake in the call for the river. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

It was improper for a surveyor to begin from a corner and then undertake to locate a survey by course and distance only, ignoring all calls for natural objects, and when he reached a river to fail to run it with its meanders, but to regard only course and distance, ignoring natural calls for the river. *Id.*

**6. — Control of metes and bounds or courses and distances over other elements.**—Distance being regarded as more unreliable than course, it follows that, the greater the distance, the greater the probability of error, and vice versa. *Matador Land & Cattle Co. v. Cassidy-Southwestern Commission Co.* (Civ. App.) 207 S. W. 430.

Calls for adjoining surveys should not be rejected because the distance gave out from this selected corner before reaching the adjoining survey called for, but such call should have its proper weight and according to evidence made at the time and found on the ground, and it is not an invariable rule that course and distance will prevail over a call for unmarked lines. *Brady v. McCuiston* (Civ. App.) 210 S. W. 815.

A call for a natural object will not control a call for course and distance, when it appears that the same was made by mistake, or upon an erroneous conjecture. *Benavides v. State* (Civ. App.) 214 S. W. 568.

While distance is often the most uncertain call in field notes, there are no set rules as to whether a call for natural or artificial objects or a call for distance should control, and, in the absence of elements showing that a call for distance was inserted by mistake, it will control the location of the survey. *Id.*

In an action involving a boundary of a survey, a call for "the lands of the Rio Grande," if held to refer to the black lines of adjacent porciones, will be rejected when to adopt it would be to disregard the calls for course, distance, quantity, and the express configuration of the survey. *Id.*

When the objects, natural or artificial, called for by the field notes, cannot be found on the ground, or their previous location accounted for, then course and distance will be followed. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

Calls for course and distance prevail over a call for the line of a senior survey, if that line itself is indefinite and uncertain. *Stein v. Roberts* (Civ. App.) 217 S. W. 166.

Though course and distance from an established corner prevail in the absence of located objects at the disputed corner, course and distance cannot conclusively determine the location of a disputed corner, where there is no point established on the ground by objects called for in the field notes from which to run the course and distance, in which case the jury must determine from all the evidence the true location of the disputed corner. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

The rule that an unmarked prairie line will not prevail over a call for course and distance is not inflexible, but its application depends on the facts and circumstances of each case. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

Where the northwest and southwest corners of a survey were identified, and the other two corners not, the east line calling for an uncertain corner, it was permissible to construct the boundary lines by course and distance; the evidence tending to show that no actual survey of the land was made by the original surveyor. *Prairie Oil & Gas Co. v. State* (Civ. App.) 229 S. W. 585.

The rule is that course and distance will prevail except where shown to be in conflict with a survey as actually made. *Braumiller v. Burke* (Sup.) 230 S. W. 400.

7. — **Control of lines marked or surveyed over other elements.**—Unmarked corner or line is sometimes accorded dignity of artificial object, and permitted to control course and distance call, but such controlling effect is not always given. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

The call for a marked line will ordinarily control the call for course and distance. *Kerr v. State* (Civ. App.) 205 S. W. 474.

An established original corner must control. *Chew v. De Ware* (Civ. App.) 207 S. W. 988.

The identification on the ground of the footsteps of the surveyor determines the true boundary. *Id.*

Contention that to trace the footsteps of the original or locating surveyor one must begin at the corner at which he began, or the point ascertained to be approximately near said corner, rather than at a well established and known corner of an adjoining survey called for by the locating surveyor in fixing the boundaries in question, is untenable. *Barrow v. Murray* (Civ. App.) 212 S. W. 178.

Where a corner or line is found marked, it influences all other surveys in the block, even though it operate to change calls for courses or distances. *Standefor v. Vaughan* (Civ. App.) 219 S. W. 484.

Ordinarily, where land is sold with reference to a survey made at the time, the survey determines the true boundary and marks the limits of the land to be conveyed. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

Where a deed conveying land with reference to an established line did not call for any objects, natural or artificial, conflicting with the true line, the grantee takes to the true line, though it did not correspond with a survey made at the time of the conveyance; for if the calls in a grant, when applied to land, correspond with each other, parol evidence is not admissible to vary them by showing that in point of fact they were not the calls of the survey as made. *Id.*

8. — **Control of calls for adjoiners over other elements.**—When unmarked lines of adjacent surveys are called for, and when, from the other calls of such adjacent surveys, the position of such unmarked lines can be ascertained with accuracy, the unmarked lines will prevail over course and distance. *Matador Land & Cattle Co. v. Cassidy-Southwestern Commission Co.* (Civ. App.) 207 S. W. 430.

The fact that in field notes of a survey there is a call for an unidentified corner of a survey ought not to be given controlling effect, if to do so is to entirely disregard calls for adjoining surveys and cause confusion and disagreement. *Id.*

While ordinarily a call for an adjoiner will control course and distance, not so where it is shown it was a mistake or made on conjecture. *Standefor v. Vaughan* (Civ. App.) 219 S. W. 484.

9. — **Control of maps, plats and field notes over other elements.**—Where footsteps of the surveyor are not found, it is the court's duty to ascertain intention by surveyor's field notes and circumstances and conditions surrounding the survey. *Howell v. Ellis* (Civ. App.) 201 S. W. 1022.

10. — **Control of quantity over other elements.**—While excess in quantity will be disregarded where the boundaries can be otherwise ascertained with reasonable certainty, yet, in the absence of such ascertainment, quantity may be looked to in determining the boundaries. *Welder v. State* (Civ. App.) 196 S. W. 868.

While quantity in a survey is immaterial when the lines and corners can be located with reasonable certainty by reference to calls for natural or artificial objects or for other surveys, when they cannot be thus located quantity becomes a material circumstance, there being no presumption of law that the surveyor made a mistake in his call for quantity. *Benavides v. State* (Civ. App.) 214 S. W. 568.

11. **Natural and permanent objects.**—The Spanish word "cañada," when used as a call in field notes, means valley. *Benavides v. State* (Civ. App.) 214 S. W. 568.

**12. Artificial monuments and marks.**—Objects denoting the footsteps of the surveyor cannot be given effect in the absence of calls therefor in the field notes. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

**13. Courses and distances.**—If surveyor in locating survey was under belief that the northwest corner and west line were 136 varas west from where they were in fact located upon the ground, and located section in question under such mistaken belief, resulting in a conflict in the calls, the calls for course and distance from the undisputed northwest corner and west line should be adopted. *Houston Oil Co. of Texas v. W. R. Pickering Lumber Co.* (Civ. App.) 212 S. W. 802.

In view of act of October 20, 1866 (Acts 11th Leg. c. 41), amending Act May, 1846 (Acts 1st Leg. p. 363), which was in force until adoption of Rev. St. of 1879, held with respect to surveys made during such period that courses and distances might be varied so as to connect with a line called for; it appearing that the surveyor intended to include all vacant land. *State v. Coleman-Fulton Pasture Co.* (Civ. App.) 230 S. W. 850.

**14. — Reversing calls.**—The only reason for reversing calls in field notes is to better follow the surveyor's footsteps, and mere running of lines according to course and distance does not locate the surveyor's footsteps in absence of any marked lines or established corners. *Howell v. Ellis* (Civ. App.) 201 S. W. 1022.

The presumption that a surveyor did not cross a navigable stream in violation of law will not justify reversing courses, where evidence shows that the river by changing its course had crossed the lines, and where by extending the line the original shape of the tract can be practically restored. *Id.*

Judgment held not void for lack of sufficient description of land involved, where it was apparent from the judgment, by reversing the calls, that the beginning call for Twenty-Third street was a mistake, and that Twentieth street was meant. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

Where no evidence can be found on the ground of the actual location of the beginning call, the calls may be reversed and run from marks found on the ground which are a part of the survey made. *Standefor v. Vaughan* (Civ. App.) 219 S. W. 484.

In a boundary controversy, where the beginning corner is not identified and certain, it is as lawful to reverse the calls as to follow the order given in the deed; but if the beginning corner can be identified, the footsteps of the surveyor must be followed, and if the beginning corner can be fixed with certainty, the called-for courses and distances as given in the deed must yield, if inconsistent. *Tomlinson v. Noel* (Civ. App.) 223 S. W. 1028.

If in running lands in one direction a difficulty is met with, and all the known calls in the survey can be met with by running in the reverse direction, this may properly be done. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

**15. Location of corners.**—Where southeast corner of survey is known corner, and there is nothing to identify southwest corner, if line be run south from true northwest corner to intersect line run west from its southeast corner, point of intersection will be the southwest corner. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

Where a surveyor ran a line and put up a monument at a corner, the monument belongs to the system of surveys made by the surveyor. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

Lost lines and corners should be located from the nearest known corners, especially when a corner called for is in conflict with all the other calls found and established and which are nearer in point of time and distance. *Standefor v. Vaughan* (Civ. App.) 219 S. W. 484.

**16. Location of lines.**—Surveyors often run preliminary lines that become of no locative value, but merely indicate the work on the ground unless written in and made part of the field notes, and in a boundary case no attention need be taken of the action of a surveyor in running a line which he abandoned as soon as he encountered difficulties. *Kempner v. Silver Lake Land & Cattle Co.* (Civ. App.) 213 S. W. 700.

The rule that the location of a tract of land must be determined by the lines of the survey as actually run and marked on the ground is only applicable where the actual survey can be found and identified as the same called for in the grant. *Hamman v. San Jacinto Rice Co.* (Civ. App.) 229 S. W. 1008.

**17. Designation, quantity and location of land.**—Grants conveying a given number of acres and stating the amount of arable and of pasture lands in each will not be extended to embrace the area of a lake bed. *Welder v. State* (Civ. App.) 196 S. W. 868.

Where a grant of public lands called for a given number of acres, the presumption is that the government did not intend to grant more, and the lines would not be extended to include approximately a 40 per cent. greater acreage. *Id.*

**18. Maps, plats and field notes.**—In an action of trespass to try title, where the court had before it the original and corrected field notes, and calls for a common corner had been erased from original field notes, it was the duty of the court in locating such corner to consider the original field notes; it appearing that the surveyor had made only one trip to the land. *McFaddin v. White* (Civ. App.) 214 S. W. 704.

All corners and field notes of a system of surveys may be looked to in locating any of the surveys in the system, and it is not necessary to constitute a block of surveys one system that the surveying be done on the same date, but it is only necessary the work be continuous from day to day and connected as part of the series of surveys. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

Field notes of blocks of surveys held not to create a vacancy between them, but to evidence intention to tie them together. *Standefor v. Vaughan* (Civ. App.) 219 S. W. 484.



**19. Adjoining or adjacent lands.**—Where two contiguous tracts are bounded by field notes radically different as to courses and distances, the trial court has no authority to change field notes of the older survey so as to include the younger when no evidence of the footsteps of the original survey can be found. *Howell v. Ellis* (Civ. App.) 201 S. W. 1022.

Where the unambiguous field notes of a survey definitely place it in a certain location, it cannot be moved merely because some of the surveys adjoining those which adjoin it conflict with older grants. *Hamman v. San Jacinto Rice Co.* (Civ. App.) 229 S. W. 1008.

**20. Waters and water courses.**—Though the grantee may hold an excess, it was never the intention of the state to grant an excess, and where a line falls for the shore of a lake it will not be extended a mile to reach the center. *Welder v. State* (Civ. App.) 196 S. W. 868.

A call for the margin, edge of water, high or low water mark, or shore or bank of a lake excludes the bed thereof. *Id.*

The common-law doctrine of extending the call for a nonnavigable stream to the center thereof does not apply to calls for a navigable lake. *Id.*

Where written designation of homestead gave call of description as on bank of river, designation called for river wherever it was at time, and homesteader's grantee of remainder of homesteader's land obtained title only as to what remained after designation. *Rosetti v. Camille* (Civ. App.) 199 S. W. 526.

The words "near the river bank," as used in field notes locating the corner of a survey, mean the same as "on the river bank." *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271.

A call for a river may be ignored only when it is shown to have been made by mistake. *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

**21. — Meandered waters.**—Where original boundary followed lake meander line and waters receded imperceptibly, the water's edge was the boundary. *Chew v. De Ware* (Civ. App.) 207 S. W. 988.

The expression, "thence down the river," as used in field notes of a surveyor of a patent, is construed to mean with the meanders of the river, unless there is positive evidence that the meander line as written was where the surveyor in fact ran it; for such lines are to show the general course of the stream and to be used in estimating acreage, and not necessarily boundary lines (citing *Words and Phrases, First and Second Series, Down*). *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271.

**22. — Accretion and avulsion.**—Where navigable river gradually left old bed and formed new one, abandoned bed was not state land, but became an accretion or reliction to the land on either side. *Siddall v. Hudson* (Civ. App.) 201 S. W. 1029.

Where changes in courses of rivers occur by sudden and violent avulsive method, property lines of abutting or riparian owners remained same as before. *Id.*

Where navigable river, during overflow, left its old bed and formed a new one, title to old bed remained in state, and boundary lines of abutting property remained the same; the change being the result of an avulsion, though only main body of river changed channel during overflow, and drying up of old bed was gradual process. *Siddall v. Hudson* (Civ. App.) 206 S. W. 381.

**24. Public ways.**—While a conveyance by an individual of land bordering on public highway, in absence of provisions to contrary, conveys title to center of highway if grantor owned such land, where state or municipality owns land and makes conveyance calling for highway, fee to highway is not conveyed. *Schutze v. Dabney* (Civ. App.) 204 S. W. 342.

The owner of a lot abutting on a street acquires the fee to the middle of the street. *Summit Place Co. v. Terrell* (Civ. App.) 207 S. W. 145.

**26. Priority of grants and deeds.**—Boundary given by course and distance in deed cannot be considered as of a different course merely because of conflict therewith in subsequent deed of tract by same grantor to another. *Keefer v. Jamison* (Civ. App.) 199 S. W. 490.

**27. Priority of surveys.**—Senior surveys control junior surveys. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102; *Erwin v. Morgan* (Civ. App.) 207 S. W. 556; *Kempner v. Silver Lake Land & Cattle Co.* (Civ. App.) 213 S. W. 700.

A subsequent patent must yield to the calls for boundaries in an older survey. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

Where junior survey located northwest corner at the southwest corner of a senior survey, and called for a marked tree at that point, instruction controlling findings by the call for the tree in the junior survey held proper. *Jackson v. Graham* (Civ. App.) 205 S. W. 755.

In an action of trespass to try title, where the older surveys on the north were definitely fixed and located, they control the location of the land in question as against uncertain locations of the southern tier of surveys. *McFaddin v. White* (Civ. App.) 214 S. W. 704.

When field notes of a survey were made out and filed the land was to be identified and located from them, and subsequent work in surveying could not change such location, since the field notes of junior surveys cannot control the location of senior surveys. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

A map of a subsequent survey filed in the general land office cannot be permitted to affect the location of lands as evidenced by field notes based on established corners on the ground and filed prior to filing of the map. *Id.*

**28. Remedies for establishment of boundaries.**—In trespass to try title, wherein the court undertook to fix the boundary line between two surveys, one owned by plaintiff, the other by defendant, the interests and rights of the owners of other surveys not being necessarily affected, they, not being precluded or bound by the judgment, were not necessary parties. *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726.

**31. — Weight and sufficiency of evidence.**—Evidence held to sustain finding of the jury of the location of plaintiff's boundaries as contended for by them in their action of trespass to try title. *Sullivan v. Masterson* (Civ. App.) 201 S. W. 194.

In trespass to try title, evidence held to support a jury finding that a certain tract was located as claimed by defendants and interveners. *Houston Oil Co. of Texas v. Lane* (Civ. App.) 203 S. W. 612.

In a boundary dispute involving conflict between surveys under the 50 cent act and a resurvey of leagues of land set apart by state for building state capitol, in which jury found state was entitled to land as made vacant by the correction of the original survey of state land by resurvey, whereby eastern line of such survey was moved west, evidence held insufficient to sustain the verdict. *Kerr v. State* (Civ. App.) 205 S. W. 474.

In an action to determine title to an overlap of two sections of school land, evidence held not sufficient to establish a boundary line by agreement. *Post v. Embry* (Civ. App.) 205 S. W. 514.

In suit to determine true boundary between adjoining surveys, held, that boundary was as claimed by plaintiff. *Matador Land & Cattle Co. v. Cassidy-Southwestern Commission Co.* (Civ. App.) 207 S. W. 430.

In an action to recover land, evidence held sufficient to support the finding of the jury as to the location of a monument from which surveys were run and by running courses and distances from corner so established that the strips of land in question belonged to three certain sections as contended by plaintiff. *Brady v. McCuiston* (Civ. App.) 210 S. W. 815.

In suit involving question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, evidence held to justify court's finding that the east boundary line of leagues was at the place contended for by appellees claiming adversely to plaintiffs. *Barrow v. Murray* (Civ. App.) 212 S. W. 178.

In trespass to try title, evidence held sufficient to support finding that the southwest corner of survey owned by defendant was on a river bank, so that land claimed by plaintiff as a survey of land lying between defendant's survey and the river was in fact in defendant's survey. *Burkett v. Chestnutt* (Civ. App.) 212 S. W. 271.

Evidence held to justify finding against defendant's contention that boundary claimed by him had been fixed by agreement between him and plaintiff's predecessor which was binding upon plaintiff. *Bigham v. Stamps* (Civ. App.) 212 S. W. 775.

Evidence held to support finding that there was no conflict between two surveys. *Houston Oil Co. of Texas v. W. R. Pickering Lumber Co.* (Civ. App.) 212 S. W. 802.

Finding that description of deed under which plaintiffs claimed embraced land claimed by defendant, adjoining owner, held against preponderance of the evidence. *Harrison v. Abercrombie* (Civ. App.) 213 S. W. 708.

In an action involving a boundary of a survey calling for the head of the drain of M., deceased, evidence held to show that such call was inserted by mistake, where the call for distance would cause a discrepancy of 2.7 miles. *Benavides v. State* (Civ. App.) 214 S. W. 568.

In an action of trespass to try title involving the question of surveys, facts of record held sufficient to sustain the judgment of the court that it was the intention of the surveyor and of the state in issuing patents and of the parties accepting the same to include in two certain surveys all of the land as shown on the official map, and sufficient to sustain an actual survey rather than a paper survey, had the trial court so found. *McFaddin v. White* (Civ. App.) 214 S. W. 704.

Evidence held to support finding that the location of a boundary line of a senior survey was uncertain and continued uncertain for a number of years. *Stein v. Roberts* (Civ. App.) 217 S. W. 166.

In a suit to locate a boundary which the parties agreed had been marked by a former picket fence, evidence of two witnesses, that they built the present fence with care not to encroach on plaintiff's lot as marked by the former fence, held sufficient to warrant a verdict for defendants, notwithstanding testimony of witnesses who had no particular reason to observe carefully that the new fence was on plaintiff's side of the former fence. *Neill v. Pryor* (Civ. App.) 222 S. W. 296.

In a suit involving the determination of a boundary, evidence showing a tree called for at the proper distance from the alleged corner, but with bearings reversed, and showing that a marked line led to that corner, and from that corner in the direction called for by the next call, while there was no such marked line extending beyond that corner for the distance stated in the first call, held to warrant a finding that the asserted corner was the corner located by the original surveyor. *West Lumber Co. v. Goodrich* (Com. App.) 223 S. W. 183, reversing judgment (Civ. App.) *Goodrich v. West Lumber Co.*, 182 S. W. 341.

In a suit by the successor of one to whom all of the survey, except 200 acres set off as a homestead, was conveyed by an administrator, evidence that the survey was wider than shown by the field notes, and that the homestead owners and their successors had claimed the entire width of the survey, held to show conclusively that the homestead as set off included the entire width, though that exceeded 200 acres, so that a directed verdict, giving the successors of the homestead owners the strips included in the additional width was proper. *Anderson v. Rich* (Civ. App.) 223 S. W. 540.

In a boundary dispute, evidence held not to fix the beginning corner in a deed with sufficient certainty to warrant overturning the verdict of a jury fixing such corner in accordance with defendants' claim. *Tomlinson v. Noel* (Civ. App.) 223 S. W. 1028.

Evidence held insufficient to show that the surveyor's decision as to the manner in which the survey should be made was the result of such gross and palpable mistake as to warrant the setting aside of the award under submission to a surveyor. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

In trespass to try title as to a strip of land claimed by limitations, evidence held not to raise issue of boundary, and court did not err in refusing to submit such issue to the jury. *Cass v. Green* (Civ. App.) 224 S. W. 938, opinion supplemented 227 S. W. 238.

Where testimony of defendant, who claimed to have inclosed his land by a fence on line claimed to have been definitely fixed as the boundary line by agreement between defendant and plaintiff's predecessor, showed as a whole that he claimed all the land within his inclosure, but that having been pointed out as that described in his deed, he believed it was actually conveyed by such deed, his testimony on cross-examination that he claimed title under his deed, and that he did not claim any more land than was described therein, considered with testimony of a surveyor that some of land inclosed was not so described, did not affect the correctness of findings in defendant's favor on sufficient evidence. *Walker v. Bowe* (Civ. App.) 225 S. W. 274.

In suit by the state and others to recover from an oil and gas company and others a strip of land, evidence held to justify the court's finding that no survey was made on the ground of a particular tract, but that it was merely constructed on the west line. The north and south ends of which were established by a call for natural objects. *Prairie Oil & Gas Co. v. State* (Civ. App.) 229 S. W. 585.

In a proceeding to determine boundaries where surveys, as indicated by the field notes, were conflicting, held that evidence conclusively showed that the land in controversy was part of certain surveys as they were actually located on the ground in 1874. *Wilson v. Giraud* (Sup.) 231 S. W. 1074.

**35. Agreements between parties.**—Boundary disputes may be settled so as to pass title by definite and unconditional parol agreements between owners of abutting tracts. *Decker v. Rucker* (Civ. App.) 202 S. W. 1001.

Where parol agreement between former owners of tracts to line surveyed as boundary was conditional, and defendant admits that plaintiff was entitled to recover, unless defeated by some special defense pleaded, line surveyed cannot be held to be true boundary. *Id.*

In an action involving a boundary dispute, evidence held insufficient to show that the parties had actually agreed to a boundary line, as alleged. *Campbell Banking Co. v. Hamilton* (Civ. App.) 210 S. W. 621.

In trespass to try title, an agreement as to the parties' ownership of different surveys held not to amount to an agreement by plaintiff that no part of the land sued on was embraced within the boundary of one of his surveys, which was senior to that of defendant. *Kempner v. Silver Lake Land & Cattle Co.* (Civ. App.) 213 S. W. 700.

Where plaintiff purchased 50 acres from the owner of a larger parcel, and the surveyor provided by the owner made an error so that plaintiff was put into possession of less than 50 acres, held that, though plaintiff and the son of the landowner carried the chains for the surveyor, plaintiff could not be denied recovery of his full 50 acres in an action against the one who purchased the remaining land on the theory that the lines as run by the surveyor were agreed lines. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

An agreement that, in view of doubt and uncertainty as to boundaries, a certain surveyor, after being appointed special surveyor by the commissioner of the general land office, should resurvey and mark on the ground the boundary lines, the parties to be bound by the lines run and surveyed and the corners erected by him, held to contemplate that all questions arising in reference to application of the field notes of the original survey to the facts as they existed on the ground should be determined and settled by the surveyor, acting under instructions from the commissioner of the general land office. *Robbs v. Woolfolk* (Civ. App.) 224 S. W. 232.

**36. Estoppel in general.**—Where plaintiff's ancestor in title owned two tracts, and conveyed one by deed, if such ancestor had the land surveyed or pointed out the lines, plaintiff would be bound thereby. *Massingill v. Moody* (Civ. App.) 201 S. W. 265.

Mere silence and failure of plaintiff to protest against improvement by defendant at great expense of strip on boundary held not to estop plaintiff from claiming strip as against defendant, where plaintiff did not know location of true boundary line at such time, but that defendant was ignorant of location of boundary line, that same was known to plaintiff, and that by silence of plaintiff defendant was induced to make improvements on strip in controversy, were necessary to show estoppel against plaintiff. *Decker v. Rucker* (Civ. App.) 202 S. W. 1001.

Statement by former owner that he would agree to a boundary between tracts now owned by plaintiff and defendant, and sale of tract now owned by defendant pursuant thereto, held not to estop plaintiff from claiming disputed strip between tracts. *Id.*

Where a landowner erected a fence and, in the presence of a prospective purchaser of adjoining land, stated that he would join such prospective purchaser in building a substantial fence, where there was an opening in the fence, he was estopped as against such purchaser from denying that such fence was on the boundary. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

In an action by a grantee of the state to recover possession of land bought by him as public land, which was vacant according to an erroneous survey, such survey, when not made on authority of the owners of the original Spanish grant of which the vacancy was

a part, did not estop them from claiming the land. *McLellan v. Brown* (Civ. App.) 209 S. W. 177.

Where a deed called for 640 acres, located by course and distance, but no marks were called for or identified, in a suit to recover an excess which plaintiff grantee supposed to be contained in the tract bought as shown by certain marked corners, with reference to which he purchased, evidence held not sufficient to show an estoppel upon grantor to deny the corners as claimed by plaintiff. *Buie v. Miller* (Civ. App.) 216 S. W. 630.

Where plaintiff purchased 50 acres from the owner of a larger parcel of land, and thereafter the remainder was sold to defendant, held that, in an action by plaintiff who had not been put in possession of his full 50 acres, etc., defendant could not defeat recovery on the theory that, having paid for all of the land possession of which he received, plaintiff was estopped from claiming his full 50 acres. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

**37. Recognition and acquiescence.**—Acquiescence in a boundary affords a strong presumption that the line acquiesced in is the true line. *Lopez v. Vela* (Civ. App.) 200 S. W. 1111.

Evidence held sufficient to establish a line by acquiescence. *Id.*

Plaintiff's failure to protest against improvement of disputed strip, and his apparent silent acquiescence in claims asserted by owners of defendant's tract, at most showed that true boundary line was where defendant claimed it to be. *Decker v. Rucker* (Civ. App.) 202 S. W. 1001.

Long acquiescence, while strongly tending to show the true location of a disputed boundary line, will not control if it is otherwise shown to have been actually located elsewhere, unless the acquiescence amounts either to an estoppel or an agreement as to boundary. *Campbell Banking Co. v. Hamilton* (Civ. App.) 210 S. W. 621.

Long acquiescence in a boundary will not alone constitute an estoppel. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

A boundary was not established by acquiescence, where plaintiff did not know that the fence was not on the true line and the means of ascertaining the correctness of the location of the line was equally open to the adjoining owners. *Id.*

**41. Apportionment of excess or deficiency.**—Where, on a line of the same survey between remote corners, the whole length is found to vary from the length called for, in re-establishing lost intermediate monuments as marking subdivisional tracts the court must conclude, in the absence of circumstances to the contrary, that the variance arose from imperfect measurement of the whole line, and distribute such variance between the various subdivisions of the line in proportion to their respective lengths. *Stahlman v. Riordan* (Civ. App.) 227 S. W. 726.

## CHAPTER SIX

### PATENTS

Art.	Art.
5361. Requisites of patent.	5376. Commissioners to deliver patents,
5362. When patent to be issued.	when; fee for.
5368. Shall issue patent to assignee.	5379. [Repealed.]

#### Article 5361. [4175] Requisites of patent.

**Conclusiveness.**—A subsequent patent inures to transferee of right to land grant or certificate, though transfer or assignment does not expressly show intention to convey land or contain covenant of warranty. *Cagle v. Sabine Valley Timber & Lumber Co.*, 109 Tex. 178, 202 S. W. 942, 6 A. L. R. 1426.

Where a section of school land was patented before the occupant of an overlapping section of school land had acquired any right and the field notes of the patented section embraced within its calls the overlap, the patentee's right was superior to that of a subsequent purchaser of the other section. *Post v. Embry* (Civ. App.) 205 S. W. 514.

**Patent as evidence of title.**—The patent carries with it the prima facie title to the land, and one attacking it must show a superior right. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

#### Art. 5362. [4176] When patent to be issued.

**Construction of field notes.**—A reasonable construction of field notes which harmonizes all the terms of the patent will be adopted, and such matters of description as clearly appear to have been inserted by mistake should be rejected. *Wilson v. Giraud* (Sup.) 231 S. W. 1074.

#### Art. 5368. [4182] Shall issue patent to assignee, when.

Cited, *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300.

**Art. 5376. [4191] Commissioner to deliver patent, when; fee for.**—The Commissioner of the General Land Office is hereby authorized and required to issue patents when it appears from the books of said office that full payment for the land has been made, where payment is required, and all legal fees due thereon have paid into said office and not withdrawn, including the legal fee or fees for the recording of said patent in the county or counties in which the land may be located. When one applies for a patent such person shall, in addition to other sums of money legally due as payment for the land and other sums due as legal fees, remit to the land Office the sum of one dollar for each and every county in which the land may be wholly or partly located and give the name and address of the owner or agent. When the patent is ready for delivery the Commissioner shall send it by registered mail to the county clerk of the county in which the land, or a part thereof is located, or to the clerk of the county in which such county may be attached for judicial purposes, together with the Receiver's check for one dollar for each and every county in which the land may be wholly or partly located, and accompany same with the name and address of the owner or his agent. Upon receipt of the patent and the fee, the clerk shall record the patent and deliver it to the owner or his agent either in person or by registered mail, if the land be wholly located in such county. If the land be located in two or more counties the patent, together with the required fee and the name and address of the owner or his agent, shall be forwarded by registered mail by each clerk to the clerk of another proper county until the patent shall have been recorded in each county and thereupon the patent shall be delivered to the owner or his agent either in person or by registered mail. All undelivered patents now in the Land Office on which fees have been paid shall be sent to the clerk of the county in which the land, or a part thereof is located, or to the clerk of the county to which such county may be attached for judicial purposes, and after being recorded in the last county as provided herein for other patents the clerk shall deliver the patent to the proper person upon payment of the recording fee. [Acts 1891, p. 182; Acts 1918, 35th Leg., 4th C. S., ch. 47, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 5379. [4193] [Repealed.]**

Explanatory.—Repealed by Acts 1918, 35th Leg., 4th C. S., ch. 47, § 2.

## CHAPTER SEVEN

### LAND RESERVATIONS

**Art. 5383. Locations validated.**

**Art. 5385. All unappropriated lands declared part of permanent school fund.**

**Article 5383. [4265] Locations validated.**

**Rights of state.**—Where the state reserves land for railroad purposes, and, upon the failure of the railroad, reopens the land to settlement, it is within the power of the state to say whether and what consideration shall be given those who have settled on the land during the period of reservation. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

**Art. 5385. All unappropriated lands declared part of permanent school fund.**

**Construction and application in general.**—Land located by railroad and recovered by state and so belonging to permanent school fund was appropriated land, and it was

not lawful for Land Commissioner to correct field notes thereof to reduce its acreage and take from it land belonging to fund and give it to another survey owned by individual. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

## CHAPTER EIGHT

### GENERAL PROVISIONS

Art.	Art.
5393a. Validation of grants and allotments by towns or villages under authority of Spain or Mexico.	5404a. Sale of lands and flats under waters of Matagorda Bay.
5393c. Validation of Baltazar de la Garza grant.	5404b. Same; persons entitled to purchase; price.
5393d. Same; relinquishment of state claims.	5404c. Same; application; fee; approval.
5393e. Same; junior patents.	5404d. Same; forfeiture of application.
5393f. Validation of certain Spanish grants.	5404e. Same; patent.
5396. Surplus segregated from public domain, when.	5404f. Same; disposal of purchase price.
5397. Belong to public free school fund.	5404g. Same; petroleum, etc., in land applied for.
5402. Lands—how sold and proceeds invested.	5404h. Same; use of channels dug.
	5404i. Lease of certain areas to Audubon society.
	5404j. Record of lease; rights under lease.

#### Article 5393a. Validation of grants and allotments by towns or villages under authority of Spain or Mexico.

**Title validated.**—Where plaintiff claimed title under a conveyance by the officers of the town of San Elizario, held that, even if an attempt to incorporate the town in 1879 under general statute was of no effect, the special charter not having been repealed, the title was validated by Acts 21st Leg. Special Laws (9 Gammel's Laws, p. 1371), and this article. *Perez v. Cook* (Civ. App.) 208 S. W. 668.

**Art. 5393c. Validation of Baltazar de la Garza grant.**—That the titles to all lands embraced within the boundaries of the Baltazar de la Garza grant of land in Nacogdoches County, Texas, as described in the petition and documents of said Baltazar de la Garza on file in the archives of the General Land Office of the State of Texas, the said lands so described being bounded on the west by the de la Cerda grant of land; on the north by the F. H. K. Day survey, Jose Ignacio Ybarbo grant, J. Fulcher and C. S. Engledow surveys, on the east by the M. C. Cherino grant, and on the south by the Juan Mora grant of land, be and the same are hereby in all respects validated, ratified and confirmed, and that hereafter the validity of said titles shall not be questioned in any court in the State of Texas; provided, this Act shall not apply to any defect title that may have occurred after the original grantee Baltazar de la Garza parted with the title thereto. [Acts 1921, 37th Leg., ch. 97, § 1.]  
Took effect 90 days after March 12, 1921, date of adjournment.

**Art. 5393d. Same; relinquishment of state claims.**—That all claim of the State of Texas in and to the said Baltazar de la Garza grant of land by reason of any failure of the said Baltazar de la Garza to perfect and complete and have recorded his muniments of title thereto, or any part thereof, or for any other reason, is hereby relinquished and abandoned. [Id., § 2.]

**Art. 5393e. Same; junior patents.**—Provided that this Act shall not be construed as in any way affecting any junior patents that may have been located on said Baltazar de la Garza grant prior to the passage of this Act. [Id., § 3.]

**Art. 5393f. Validation of certain Spanish grants.**—That the surveys of the following porciones of land in Webb County, Texas, granted

by the Crown of Spain in 1767, to the following settlers in the City of Laredo, at that time, viz :

Porcion No.		Original Grantees
29	to	Juan Baptista Villarreal
30	to	Jose Francisco Cordova Moreno
31	to	Jose Trevino
33	to	Jose Dionisio Trevino
34	to	Jose Antonio Diaz
36	to	Laureano Salinas
37	to	Jose Bartolo Chapa
38	to	Toledo Sanchez
39	to	Jose Antonio Nasario
47	to	City of Laredo
48	to	City of Laredo
53	to	Leonardo Sanchez
57	to	Jose Maria de la Garza
58	to	Manuel Garza

be and the same are hereby validated, and the Commissioner of the General Land Office, is hereby authorized and required to issue patents on each of the above named Porciones to the respective grantees, their heirs or assigns in accord with the field notes now on file in the General Land Office. [Acts 1921, 37th Leg., ch. 123, § 1.]

Took effect March 31, 1921.

**Art. 5396. [4274] Surplus segregated from public domain, when.**

**Construction and application in general.**—This act did not give controlling effect to any one method of locating surveys, or define the proper function of the various means that might be resorted to in locating boundaries, but merely referred to the different recognized means; the intent being that application of means should be governed by principles of boundary law and the use of maps under certain circumstances being recognized. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

In constructing blocks of surveys in which there is an excess, they must be constructed consecutively as placed therein by the original maps, sketches, or field notes. *Standefer v. Vaughan* (Civ. App.) 219 S. W. 484.

**Art. 5397. [4275] Belong to public free school fund.**

**Excess.**—Till excess in a block of surveys shall be set apart by the land commissioner, there is no right to purchase it. *Standefer v. Vaughan* (Civ. App.) 219 S. W. 484.

Where a section surveyed for the public school fund and described as containing 640 acres contained in fact 652 acres, and the different quarters were patented to different persons as containing 160 acres each, the purchasers had a prior right to their proportionate parts of the excess. *Anderson v. Robinson* (Sup.) 229 S. W. 459.

In case of excess, where a survey was actually run on the ground, the state cannot recover by seeking to tear surveys apart and declare a vacancy. *State v. Coleman-Fulton Pasture Co.* (Civ. App.) 230 S. W. 850.

Where a survey is actually made, it cannot be disregarded because of an excess. *Id.*

**Art. 5402. [4271] Land, how sold and proceeds invested.**

**Validity of contract.**—A contract for conveyance of minerals, in place, construed as an attempt to convey an interest in public school lands for a consideration, in part at least, other than money, thereby diverting a part of the fund from the purpose to which it was dedicated, so that the conveyance is void. *Thomason v. Upshur County* (Civ. App.) 211 S. W. 325.

That portion of a contract, by which a county conveyed minerals in certain school lands which required the county to make a dedication deed to streets and alleys and to convey odd-numbered blocks to grantees without consideration to be paid in money, is void. *Id.*

Where a county's contract for conveyance of an interest in school lands is entire as to consideration and incapable of severance, the consideration must be wholly good or wholly bad, and, where a part of it was bad as not being in money as required by law, the remainder, being in money, is insufficient to give the contract validity. *Id.*

Where county commissioners' court released one-half of a tract of land burdened with a \$21,000 school fund mortgage debt in favor of the county from all but \$10,500 of such debt, the transaction not being in the nature of a resale, but to prevent payment of the whole mortgage, such transaction falls within the inhibition of Const. art. 7, § 6, and art. 3, § 65, and is void. *Riggins v. Post* (Com. App.) 213 S. W. 600.

**Amount for which sold.**—If a contract for conveyance of school land be considered severable as to consideration, it is void, since the commissioners' court, occupying the relationship of a trustee, could not, for the nominal consideration of \$5, convey a valuable estate in land belonging to the school fund. *Thomason v. Upshur County* (Civ. App.) 211 S. W. 325.

**Power of court.**—Where a contract for conveyance of an interest in school lands provides that if it is invalid the county as grantor and grantee shall make a legal and binding agreement to carry out its terms, the court cannot enforce a transfer by prescribing the price and terms of payment, which is a matter for the commissioners' court. *Thomason v. Upshur County* (Civ. App.) 211 S. W. 325.

**Art. 5404a. Sale of lands and flats under waters of Matagorda Bay.**—That the Commissioner of the General Land Office be and he is hereby authorized to sell those certain lands and flats in and under the waters of Matagorda Bay, belonging to the State of Texas, upon the terms and conditions and within the limitations hereinafter provided. [Acts 1919, 36th Leg. 2d C. S., ch. 70, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5404b. Same; persons entitled to purchase; price.**—Any person, or any corporation heretofore organized, or which may hereafter be organized under the laws of the State of Texas, which has heretofore dredged a channel, or which may hereafter dredge a channel from the mainland through and across or partly across Matagorda Bay, and the lands and flats covered by the waters of said Bay to give access to the Intercoastal Canal and said proposed or constructed channel to have a depth of not less than six feet, and to be not less than one hundred feet wide at the bottom, shall have the right to purchase from the State of Texas, at the rate of Two Dollars per acre, a strip of land occupied by and adjacent to such proposed or constructed channel not to exceed eight hundred feet in width for the entire length of said channel, extending from the mainland into Matagorda Bay, for such a distance as is necessary to enable all water craft which navigate the intercoastal canal to reach said channel, which right to purchase shall include the right to drive such piling and to construct such jetties as are necessary in connection with the dredging, deepening, widening or maintaining of such channel, and the right to waste the spoil from such channel within or without the eight hundred feet so acquired. [Id., § 2.]

**Art. 5404c. Same; application; fee; approval.**—Any person or corporation desiring to purchase any of the lands hereinbefore referred to for such channel purposes under the provisions of this Act, shall file an application in writing for the survey thereof with the County Surveyor of the County in which the area is situated, and said County Surveyor shall, immediately upon the receipt thereof, make a survey and furnish such applicant with full field notes duly certified by him. Within ninety days after such applicant receives from said County Surveyor said certified full field notes, such applicant shall file an application and said certified field notes, together with One Dollar filing fee, in the General Land Office, together with Two Dollars per acre for each acre included in the application and field notes. Said application filed with the Commissioner of the General Land Office shall also contain a brief description of the improvements which such person or corporation may have made, or proposes to make, on the area sought to be purchased, together with an estimate of the cost of such improvements, including the dredging of the channel; and said application shall further state that it is made in good faith, and that the applicant intends to do the work and make the improvements described within the period of time therein stated, and shall also state when or about when, such person or



corporation intends to begin the work of making such improvements. The Commissioner of the General Land Office shall immediately upon receipt of such application, examine the same particularly as to the improvements made or contemplated to be made, and if upon such investigation as he desires to make, he is satisfied that such application is made in good faith, and is of the opinion that such improvements have been made, or will be made as stated in said applications, and if further of the opinion that such improvements are of a substantial nature and suitable for the purposes for which the area is desired, the Commissioner shall fix the time within which work shall begin on such improvements, if the beginning of work thereon has not already been commenced, which shall not be more than six months from the date of the approval of such application, and shall also fix the time within which such improvements shall be completed, which time shall be not more than two years from the date of the granting of such application; provided that for good cause shown, the Commissioner may extend the time for the completion of such work, for a term not to exceed two years.

If after the investigation herein provided for, the Commissioner of the General Land Office shall be of the opinion that said application is made in good faith and that person or corporation making such application intends to do the work and make the improvements therein described within the period stated in such application, and is of the further opinion that such improvements are of a substantial nature and suitable for the purposes for which the area is desired, then the said Commissioner having fixed the time within which work shall be begun on such improvements, and the time in which such improvements shall be completed, shall thereupon approve said application and grant the right therein applied for; provided, no patent shall issue to such applicant or to his or its successors or assigns, until the improvements provided for shall have been completed. [Id., § 3.]

**Art. 5404d. Same; forfeiture of application.**—Should such applicant fail or refuse to complete the improvements prescribed, within the time fixed for the completion thereof, or any extension of such time, then the said Commissioner of the General Land Office shall declare such application forfeited, and the person or corporation making such application shall forfeit to the State of Texas all rights acquired in and to the lands and flats in Matagorda Bay or the waters thereof, described in the application and field notes, together with all improvements made and all sums paid thereon. [Id., § 4.]

**Art. 5404e. Same; patent.**—Should the applicant complete the improvements provided for, within the time allowed, a patent to the lands described in the application shall then be issued by the State of Texas to such applicant, or to the successors or assigns of such applicant, upon the payment of the lawful patent fee. [Id., § 5.]

**Art. 5404f. Same; disposal of purchase price.**—All moneys received by the Commissioner of the General Land Office under the provisions of this Act, shall be transmitted by him to the State Treasurer and credited to the General Revenue. [Id., § 6.]

**Art. 5404g. Same; petroleum, etc., in land applied for.**—From and after the filing of an application with the County Surveyor under this Act, and Commissioner of the General Land Office shall not receive any applications for permit to prospect for petroleum, oil or natural gas in, on or under the area of waters that may be included in said ap-

plication, or any part thereof, and shall not grant or extend any right to prospect for said minerals in, on or under said area; provided that the State shall and does reserve all the minerals that may be within the area which may be acquired under this Act, which reservation shall be recited in the patents to said lands. [Id., § 7.]

**Art. 5404h. Same; use of channels dug.**—If a channel should be dug under the provisions of this Act it shall be open to the ingress and egress of every ship, boat, tug or barge and every other kind of commercial transport upon such terms, rates of charges and conditions as may be prescribed by the Railroad Commission, and said Commission shall have the same jurisdiction over such channel as is conferred upon it over railroads. [Id., § 8.]

**Art. 5404i. Lease of certain areas to Audubon society.**—For and in consideration of the undertaking by the National Association of Audubon Societies to propagate, protect and conserve birds and bird life on North Bird Island and on South Bird Island in Kleberg County; on Green Island in Cameron County and on the Group of Islands known as Three Islands in Cameron County, and on the flats and reefs and shallow waters in the vicinity of and adjacent to all of said Islands so far as such water, flats and reefs may be necessary for purposes of this Act, and as the same are situated in Laguna Madre between Padre Island and the main coast lines of said counties, the Commissioner of the General Land Office shall, upon application of said Association, lease said areas or so much thereof as said Association may desire for the purposes stated herein for a term not to exceed fifty years; provided, if said Association should at any time during the term of any lease issued under this Act dissolve its organization or consent to a termination of such lease the Commissioner of the General Land Office shall cancel same and thereupon all rights acquired by said Association shall terminate. [Acts 1921, 37th Leg. 1st C. S., ch. 20, § 1.]

Took effect Nov. 15, 1921.

**Art. 5404j. Record of lease; rights under lease.**—All leases shall be recorded in the county in which the leased area is situated and after the record thereof the lessee shall have the exclusive right to enter upon, have, hold and occupy exclusively the area included in such lease and shall have the exclusive right to adopt such rules and regulations as may be necessary for the execution of the purposes of this Act; provided, nothing herein shall be construed to prohibit or interfere with the authority of any peace officer of the State of Texas or of the United States to enter upon any such leased area for the purpose of discharging any duty imposed upon such officer by the laws of Texas or by the laws of the United States. [Id., § 2.]

**Explanatory.**—Sections 3 and 4 impose a criminal penalty, and are set forth, post, as arts. 923uu, 923v, Penal Code.

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## CHAPTER NINE

### SALE AND LEASE OF PUBLIC FREE SCHOOL AND ASYLUM LANDS

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| Art.<br>5405a. Sale of unsold lands.                | Art.<br>5409. Sales by commissioner, how made.                                     |
| 5407. Classification and valuation; sale of timber. | 5409b. Sale in whole tracts only; separate applications; lease of unsold portions. |
| 5408. Advertisement of land.                        |  |

<p>Art. 5410. Application for purchase; opening; rejection. 5416. Award and settlement. 5420. Limitations as to purchases. 5420a-5420g. [Repealed.] 5422. Sales without settlement. 5423. Forfeiture of purchase by non-payment of interest, etc. 5423a. Purchasers after January 1, 1907, and before January 1, 1913, who have forfeited for non-payment of interest, may repurchase, when. 5423b. Owner to advise commissioner of wish to repurchase, etc. 5423c. Board of appraisers, how constituted, etc. 5424. Permanent improvements to be erected by purchaser; forfeiture. 5425. Forfeiture for failure to settle on land, etc. 5428. Purchases prior to July 30, 1895, etc. 5430. Timber lands defined; regulation for sale of. 5432. Unsurveyed or scrap land. 5432a. Prior right to purchase privately surveyed land for which patent cannot issue.</p>	<p>Art. 5433. Minerals, gayule and lechuguilla reserved. 5435. Transfers. 5435a-5435d. [Repealed.] 5436, 5437. [Repealed.] 5444. Regulations as to occupancy. 5445. [Repealed.] 5449d. Certain other sales validated. 5449e. Same; affidavit of purchaser. 5449f. Same. 5449g. Same. 5449h. Same. 5449i. Same. 5449j. Same. 5449k. Same. 5449l. Same. 5449m. Same. 5449n. Same. 5449o. Same; postponing forfeiture.</p>
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**LEASES**

<p>5457. Lessees may remove improvements, when. 5458. One year to assert right to leased or sold land. 5459. Same.</p>
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**Article 5405a. Sale of unsold lands.**—On the first day of September 1919, and the first day of each January, May and September of each year thereafter, all the unsold lands set apart for the benefit of the public free school fund, the Lunatic Asylum fund, the Blind Asylum fund, the Deaf and Dumb Asylum fund, the Orphan Asylum fund, which have heretofore been surveyed or that may hereafter be surveyed and unsold portions of same shall be subject to sale by the Commissioner of the General Land Office under the regulations and upon the terms provided in this Act; provided, no land leased before the passage of this Act shall be subject to sale until the first sale date after the termination of the lease. No corporation shall purchase any land under this Act. [Acts 1919, 36th Leg., ch. 163, § 1.]

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

**Art. 5407. Classification and valuation; sale of timber.**—The Commissioner of the General Land Office shall from time to time, as the public interest may require, classify or reclassify, value or revalue, any of the lands included in this Act, designating the same as agricultural, grazing or timber, or a combination of said classifications, according to the facts in the particular case, and when entry of the classification and the appraisalment is made on the records of the General Land Office, no further action on the part of the Commissioner, nor notice to the County Clerk shall be required to give effect thereto. No land classed as agricultural shall be sold for less than one dollar and fifty cents per acre and no land classed as grazing shall be sold for less than one dollar per acre. The land included in this Act shall be sold with the reservation of the oil, gas, coal and all other minerals that may be therein to the fund to which the land belongs and all applications shall so state. Timber on land shall be sold for cash at its fair market value. The Commissioner shall notify the clerk of the proper county of the sale of each tract, giving the name and address of the purchaser together with the price of the land. When informed of the sale of any land the clerk shall enter on his books opposite the description of the land sold, the name of the purchaser and the date sold, and the notice of such sale and the books of record and entry shall be considered public records, and be open to public inspection, and it is hereby made the duty of the county clerk

to exhibit the said records to any person who shall apply therefor. [Acts 1905, p. 159, § 1. Art. 4218e, Act 1895, amended Acts 1897, p. 184. Art. 4218b, Act 1895. Art. 4218e, Act 1895, amended Acts 1897, p. 184. Act of 1905, p. 159, part of § 1. Art. 4218f, Act 1895. Acts 1919, 36th Leg., ch. 163, § 2.]

See *Ford v. Robison*, 109 Tex. 126, 201 S. W. 401.

**Classification.**—A purchaser from the state, under Act April 12, 1883 (Acts 18th Leg. c. 88), of school land, not known to contain minerals, but fairly and in good faith classified and sold without reservation as agricultural land by the duly authorized state authorities, acquired title to minerals which might be thereafter discovered, and relation is not, under Acts 33d Leg. c. 173, as amended by Acts 33d Leg. Ex. Sess. c. 18 (arts. 5904-5920j), entitled to a permit to prospect on the land for oil and gas, in view of art. 4041, validating title to minerals. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

**Reappraisal.**—The commissioner of public lands may, when a second forfeiture has been declared, reappraise land at less than the amount at which it was once appraised, under arts. 5223a-5423f, permitting repurchase by former purchasers whose purchase was declared forfeited. *Stockwell v. Robison*, 109 Tex. 137, 201 S. W. 1156.

**Evidence.**—The report of the board of appraisers as authorized by arts. 5423a-5423c, amending this article, that the proper classification of certain school land was grazing land, was not record evidence that the land was ever classified and sold as grazing land, so that it was not within the provisions of the act authorizing the issuance of permits to prospect for oil and gas. *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

In state's action to cancel sale of public land sold as dry agricultural land for \$1.50 an acre upon the ground that land was legally appraised at \$2 an acre at the time of the sale, and that the commissioner of the General Land Office had not notified the county clerk of county in which land was situated of classification of land and the appraisal thereof at \$1.50 an acre, under Act of 1897, c. 129 (10 Gammel's Laws, p. 1238) evidence held to prove that the land had been duly appraised at \$1.50 an acre, and that notice thereof had been sent to and received and recorded by the county clerk at the time of the sale. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

**Art. 5408. Advertisement of land.**—In cases where any land included in this Act may be leased and the same may come on the market by reason of the expiration or cancellation of such lease or in cases where land may be sold and revert to the fund to which it originally belonged by reason of the forfeiture or cancellation of the sale, it shall be the duty of the Commissioner to classify and value same before the next sale date thereafter and adopt such means as may be at his command that will give the widest publicity and general information as to when such land and other unsold land will be on the market for sale, together with the terms and conditions upon which the land may be purchased. No tract of land shall be subject to sale until it shall have been advertised. If there are no other satisfactory or sufficient means at the command of the Commissioner that will give the necessary publicity he shall have printed at the expense of the State, to be paid out of the appropriation for public printing, lists of the land for free distribution to the public. The lists shall contain a brief statement of how one shall proceed to buy the land. [Acts 1905, p. 159, § 2; Acts 1919, 36th Leg., ch. 163, § 3.]

**Purchase after cancellation or forfeiture.**—Purchaser's right to reinstatement under art. 5423, providing for reinstatement where no rights of third persons have intervened, following forfeiture for nonpayment of interest, was not affected by the fact that during interval between forfeiture and reinstatement third person made application to purchase the land, where such person did not complete his purchase by actually settling on the land, but voluntarily abandoned it. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

**Art. 5409. [4218g] Sale by commissioner, how made.**—One desiring to buy any portion of the land included in this Act shall transmit to the Commissioner of the General Land Office a separate application for each tract applied for together with the affidavit of the applicant to the effect that he desires to purchase the land for himself and that no other person or corporation is interested in the purchase thereof either directly or indirectly and one-fortieth of the aggregate price offered for the land

and the obligation of the applicant in a sum equal to the amount of the unpaid purchase price offered for the land, binding the purchaser to pay to the State at the General Land Office at Austin, Texas, on the first day of November thereafter and on the first day of November of each year thereafter until the whole purchase price is paid, one-fortieth of the aggregate price with interest on the unpaid purchase price at the rate of five per cent per annum. Upon receipt and filing of the application, affidavit, obligation and the one-fortieth part of the price offered, the sale shall be held effective from that date. If the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State and offered for sale on a subsequent sale date. [Acts 1895; Acts 1919, 36th Leg., ch. 163, § 4.]

**Art. 5409b. Sale in whole tracts only; separate applications; lease of unsold portions.**—The surveyed land and unsold portions of surveys included in this Act shall be sold in whole tracts only and without condition of settlement and residence and in quantities not to exceed eight sections to one purchaser. A separate application in writing shall be made for each tract applied for. Any unsold land may be leased at any time at not less than five cents per annum, payable in advance each year and for a term not to exceed five years, but all land so leased and unsold shall be subject to sale on each succeeding sale date. All tracts containing less than 80 acres shall be sold for cash. [Acts 1919, 36th Leg., ch. 163, § 5.]

**Art. 5410. Application for purchase; opening; rejection.**—All sales shall be made by the Commissioner of the General Land Office or under his direction. Any person desiring to purchase any of the surveyed land included in this Act shall make a separate application in writing for each tract as a whole and be addressed to the Commissioner of the General Land Office. It shall sufficiently designate the tract applied for and state the amount offered therefor which shall not be less than the appraised value fixed thereon by the Commissioner. The Application shall be delivered to the General Land Office in a sealed envelope addressed to the Commissioner of the General Land Office at Austin, Texas, and the envelope shall have endorsed thereon in effect: "Application to buy land," and date when the land will be on the market. Applications received at the Land Office in envelopes not so endorsed shall nevertheless be valid. When the envelopes so endorsed and applications without endorsement on envelopes are received in the General Land Office, the envelopes shall remain unopened and the applications shall remain unfiled and all shall be safely and securely kept by the Commissioner or his chief Clerk until the day following the day when the land comes on the market and at ten o'clock A. M. on said day one or both of them shall begin to open the envelopes and file all applications and take such action thereon as may be provided by law; provided, if the opening day should be Sunday or other legal holiday, the opening shall be postponed until the first work day thereafter. Those desiring to be present at such opening may do so. All sales shall be made to the applicant who offers the most for the land, not less than the price fixed by the Commissioner. Should two or more applicants offer the same price for any tract the same being the highest price offered therefor on any sale date, all shall be rejected and the land offered for sale on the next sale date. Payments on

all rejected applications shall be returned to the applicant by the State Treasurer. Land heretofore purchased by one shall be counted against him under this Act. [Acts 1905, p. 159, § 3; Acts 1919, 36th Leg., ch. 163, § 6.]

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

Decision under prior act, see *Richardson v. Westmoreland* (App.) 19 S. W. 432.

**Rights of applicants in general.**—Intending purchasers of public lands, having made application to purchase as required by art. 5410, held to have perfected rights to lands, though affidavit antedated official declaration that lands were for sale. *Stockwell v. Robison*, 109 Tex. 137, 201 S. W. 1156.

Art. 5423 was not affected by the fact that during interval between forfeiture and reinstatement third person made application to purchase the land, where such person did not complete his purchase by actually settling on the land, but voluntarily abandoned it. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

**When land is on the market in general.**—Land described in a patent cannot be subject to future location. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

#### Art. 5416. Award and settlement.

See *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

**Settlement and occupancy.**—In trespass to try title to recover land, originally public free school lands, from the purchaser thereof and his lessee, remarks of the trial court in overruling motion for new trial, and the ground on which he based his ruling, the ground being that the purchaser did not settle on the land for a home, but settled on it as employé of his subsequent lessee, held not reversible error. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

— **Evidence.**—Evidence in trespass to try title held sufficient to sustain findings that defendant purchaser did not actually settle free school land within 90 days after its award to him, as required, and did not reside thereon continuously for three years after actual settlement. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

#### Art. 5420. Limitations as to purchases.

**Explanatory.**—This article was in part superseded by Act April 5, 1915, which was repealed by Acts 1919, 36th Leg., ch. 163, § 10, set forth post as arts. 5420a-5420g.

**Limitations as to amount of land.**—Under this article, purchaser under art. 5420a, held chargeable with land previously purchased under prior statutes in same county, although such act does not specifically so charge him. *Ford v. Robison*, 109 Tex. 126, 201 S. W. 401.

#### Arts. 5420a-5420g. [Repealed by Acts 1919, 36th Leg., ch. 163, § 10.]

**Prior purchases.**—Under art. 5420, as to quantities in which school land may be purchased, purchaser under this act is chargeable with land previously purchased under prior statutes in same county, although such act does not specifically so charge him. *Ford v. Robison*, 109 Tex. 126, 201 S. W. 401.

**Quantity purchasable.**—The quantum of land which may be purchased by a single individual is determined by the number of sections regardless of acreage. *Ford v. Robison*, 109 Tex. 126, 201 S. W. 401.

#### Art. 5422. Sales without settlement.

See *Siddall v. Hudson* (Civ. App.) 201 S. W. 1029.

#### Art. 5423. [4218/] Forfeiture of purchase by non-payment of interest, etc.

**Forfeiture for nonpayment of interest—Reinstatement.**—Purchasers of public lands, against whom forfeiture has been declared for failure to pay interest, may be relieved of the forfeiture only in the absence of intervening rights of other persons. *Stockwell v. Robison*, 109 Tex. 137, 201 S. W. 1156.

Purchaser of public land classified at time of purchase as agricultural land, who defaulted in payment of interest, was entitled to reinstatement of sale with all rights received at time of original purchase, on payment of amount due, where no rights of third persons had intervened, notwithstanding reclassification of purchased land, during an interval between purchase and forfeiture, as mineral land under art. 5433, providing for sale of such land with reservation of minerals to the state. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

A quitclaim deed, executed by purchaser's successor in interest after forfeiture of sale for nonpayment of interest entitled grantee to reinstatement on payment of amount due, if rights of third parties have not intervened, under such statute; the grantor having enjoyed such a right and having conveyed by quitclaim deed the interest held by him at time of the execution of the deed. *Id.*

The right to reinstatement of successor in interest of purchaser of public land, after forfeiture for nonpayment of interest, was a vested right, where no rights of third par-

ties had intervened, which could not be affected by any false representations to Land Commissioner by successor in interest. *Id.*

Where third person, who had made an application to purchase land after forfeiture of previous sale for nonpayment of interest did not complete purchase, but voluntarily abandoned it without acquiring any substantial right, purchaser or his vendee, by payment of amount due, under such statute, were entitled to reinstatement, even though cancellation of sale to third person had not been formally entered on the Land Office books. *Id.*

**Art. 5423a.** Purchasers after January 1, 1907, and before January 1, 1913, who have forfeited for non-payment of interest, may repurchase, when.

See *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

**Repurchase or reinstatement.**—The right to repurchase does not constitute such title as to entitle him to compensation or damages from one who between the forfeiture and purchase obtains permit from the state to prospect for oil; art. 5920g, denying such recovery to a subsequent purchaser of the land. *Southwest Texas Oil & Gas Co. v. Boykin* (Civ. App.) 206 S. W. 216.

**Art. 5423b.** Owner to advise commissioner of wish to repurchase, etc.

See *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

**Art. 5423c.** Board of appraisers, how constituted, etc.

**Reappraisal.**—The commissioner of public lands may, under art. 5407, when a second forfeiture has been declared, reappraise land at less than the amount at which it was once appraised, under this act. *Stockwell v. Robison*, 109 Tex. 137, 201 S. W. 1156.

The report of the board of appraisers that the proper classification of certain school land was grazing land, was not record evidence that the land was ever classified and sold as grazing land, so that it was not within the provisions of the act authorizing the issuance of permits to prospect for oil and gas (art. 5904b, *Vernon's Ann. Civ. St. Supp.* 1918). *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

**Art. 5424.** Permanent improvements to be erected by purchaser; forfeiture.

**Construction and operation in general.**—In the provision providing that, if any purchaser shall fail "to reside upon and improve" in good faith school lands purchased by him, he shall forfeit the same to the state, the word "and" should be read "or." *State v. Elza*, 109 Tex. 256, 206 S. W. 342.

**Value of improvements.**—In suit to cancel defendant's purchase of school lands for failure to erect improvements as required, held, that defendant did not, by securing from lessee assignment of lease to land subsequently purchased, acquire title to fences erected by lessee, so that they could be counted as part of improvements. *State v. Elza*, 109 Tex. 256, 206 S. W. 342.

If fences were reserved by lessee of school lands when he assigned lease to defendant, they would not become defendant's, so that they could be counted as part of improvements required by this article, by virtue of his purchase of the land, prior to expiration of time for removal under art. 5457, and lessee's failure to remove within 60 days after expiration of lease as provided by said section; title not being in defendant but in the state thereafter. *Id.*

**Forfeiture for nonoccupancy or abandonment.**—A purchaser of public school lands having secured them on condition of settlement, and having failed to comply with the law's requirement as to residence through abandonment of the land himself without leaving thereon a qualified substitute, it became the duty of the commissioner of the general land office to forfeit the purchase. *Schauer v. Schauer*, 110 Tex. 257, 219 S. W. 195.

**Art. 5425.** Forfeiture for failure to settle on land, etc.

**Forfeiture—in general.**—Land commissioner has no authority to cancel a sale of public free school lands for collusion. *Schauer v. Schauer* (Civ. App.) 202 S. W. 1010.

Since state could recover from a substituted purchaser of public free school lands only by a direct suit, an attempted forfeiture of sale by land commissioner for collusion was void. *Id.*

**Art. 5428.** [4218f] Purchasers prior to July 30, 1895, etc.

See *Ford v. Robison*, 109 Tex. 126, 201 S. W. 401.

**Art. 5430.** Timber lands defined; regulations for sale of.

**Purchaser need not be actual settler.**—Under Acts 27th Leg. (1901) c. 125, an award of the timber on public lands carried with it the right of purchase of the land within five years if the timber was not sooner removed on condition of actual settlement. In

1907 the requirement as to actual settlement was abrogated. Held, that plaintiff, to whom the timber was awarded under said act, and who within the five-year period, but after 1907, was awarded the land without the condition of actual settlement, was entitled to the same as against a previous purchaser of other public lands whose conveyance, made in 1906, erroneously included the lands acquired by plaintiff. *Kirby v. Conn.*, 109 Tex. 540, 212 S. W. 469.

**Art. 5432. Unsurveyed or scrap lands.**—One desiring to purchase any portion of the unsurveyed land believed to belong to the school fund shall make a written application of inquiry to the Commissioner of the General Land Office. The inquiry shall give the applicant's post office address, state in effect that he desires to buy the land if it should be for sale and sufficiently designate it. If it should appear from the records of the Land Office the area belongs to the public free school fund or if there should be doubt as to the existence of the area as public free school land the applicant shall be advised and given the name and address of an authorized surveyor with whom he may contract for the survey of the land at the expense of the applicant. The applicant shall file an application with the surveyor accompanied by one dollar as a filing fee. The Application shall be filed and recorded and sufficiently describe the land. The survey shall be made and returned to the Land Office within ninety days after the date of the Commissioner's advice as to an available authorized surveyor. If the Commissioner should decline to recognize the existence of the area as public school land and refuse to authorize a survey to be made such person may file a suit against the county surveyor in the District Court of the county in which the land is located or in the county to which such county may be attached for judicial purposes to compel him to make the survey and thereupon the surveyor shall implead the claimant of the land and in such proceedings determine if the area be public land. In such proceedings the surveyor shall not be held for any cost incurred. If the final judgment of the Court should decree the area or part thereof to be school land the surveyor shall make the survey and the application, field notes and one dollar filing fee shall be filed in the Land Office within ninety days from date of the final decree. When the surveyor returns the field notes and a plat of the survey to the Land Office, together with one dollar filing fee to be paid by applicant, he shall report under oath the classification and reasonable market value of the land and also the timber thereon and its value which may be considered in connection with such other evidence as may be required by the Commissioner in determining the price to be given the land and timber. If upon inspection of the papers the Commissioner is satisfied from the report of the surveyor and the records of the Land Office the land belongs to the public free school fund and the survey has been made according to law, he shall approve same by classifying and valuing the land and mail notice of such action to the applicant, giving the classification price and terms. Such land shall be sold without condition of settlement and residence, and the timber, if any thereon, shall be sold for cash at its reasonable market value. No award shall be issued for the land until the timber shall have been fully paid for. The applicant shall file in the Land Office his application for the purchase of the land together with one-fortieth of the appraised value fixed thereon within sixty days from the date of the notice of the classification and valuation together with the applicant's obligation for the balance of the unpaid purchase price bearing interest at the rate of five per cent per annum and the obligation and other conditions of sale shall be the same as that for surveyed land. If such application should not be filed within the time prescribed herein, the



Commissioner shall place the land on the market for sale upon the same terms as are herein provided for other surveyed school land. The land shall be sold with the minerals therein reserved to the school fund. All tracts of less than 80 acres shall be sold as a whole for full cash payment which payment shall accompany the purchase application. If upon the inspection of any application, field notes and records of the Land Office, there should appear to be a greater area belonging to the school fund than that included in the application and field notes, the Commissioner may, in his discretion, require the applicant to include the whole area in his field notes. If it should appear that another than the applicant claims an unsurveyed area which belongs to the school fund, the Commissioner may, in his discretion, refer the removal of such claim to the Attorney General before making a sale to an applicant. If the Attorney General should refuse to institute proceedings for the removal of such claim, the Commissioner may, nevertheless, sell the area. [Acts 1907, p. 490, § 8; Acts 1919, 36th Leg., ch. 163, § 7.]

**In general.**—Where the state was not a party to actions against those to whom it has given permits under arts. 5904–5904w, to explore for oil on lands claimed to belong to the state, judgments rendered in suits against such licensees will not, under this article, be binding against the state; hence a suit by the state to enjoin defendants, who had sued the licensees from drilling on the land involved, will not be dismissed on the theory that the state was bound by the judgment in previous suit. *Prairie Oil & Gas Co. v. State* (Com. App.) 231 S. W. 1088, modifying judgment (Civ. App.) *Prairie Oil & Gas Co. v. State*, 214 S. W. 363.

**Unsurveyed land.**—In order for the status of land, as surveyed or unsurveyed land to be affected by approved field notes on file in the General Land Office, the survey of the land and the filing and approval of the field notes by the land commissioner must not be void because violative of law. *Landry v. Robison*, 110 Tex. 295, 219 S. W. 819.

**Vacancies between surveys.**—In suit to try title to land purchased by plaintiff as vacant land lying, as he claimed, between two surveys, one on the north and one on the south, instructions in connection with the issue as to whether the land was vacant held erroneous as calculated to mislead the jury, in that they were authorized to determine the location of the survey on the north on the ground with reference to surveys thereof made by other surveyors than the one who made the field notes on which it was patented. *Antone v. Hoffman* (Civ. App.) 219 S. W. 500.

In suit by the state and others to recover title to land on the theory that before its attempted appropriation the land was vacant and unappropriated land, evidence held to show that the land, prior to its attempted location, was appropriated public land, and that no vacancy existed, as claimed between other surveys and the river bank, where such location might be made. *Schnackenberg v. State* (Civ. App.) 229 S. W. 934.

In case of excess, where a survey was actually run on the ground, the state cannot recover by seeking to tear surveys apart and declare a vacancy. *State v. Coleman-Fulton Pasture Co.* (Civ. App.) 230 S. W. 850.

**Art. 5432a. Prior right to purchase privately surveyed land for which patent can not issue.**—If for any cause a patent cannot be lawfully issued upon a tract of land heretofore surveyed by virtue of any private right and such land shall be claimed in good faith by one by virtue of an original right or by a chain of title from the original holder of such right duly executed before the passage of this Act, and if such claimant has paid all taxes, he shall have the preference right to purchase the survey as surveyed school land at any time within sixty days after the date of the notice from the Land Office to the claimant that patent cannot be issued thereon, but if the said land should not be so purchased the Commissioner shall place the same on the market for sale as other surveyed public free school land. [Acts 1919, 36th Leg., ch. 163, § 8.]

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

**Art. 5433. Minerals, gayule and lechuguilla reserved.**

**Purchase prior to classification.**—A purchaser from the state, of school land, not known to contain minerals, but fairly and in good faith classified and sold without reservation as agricultural land by the duly authorized state authorities, acquired title to minerals which might be thereafter discovered, and relator is not, under arts. 5904–5920j, entitled to a permit to prospect on the land for oil and gas, in view of Rev. St. 1895, art. 4041, validating title to minerals. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

Purchaser of public land classified at time of purchase as agricultural land, who

defaulted in payment of interest, was entitled to reinstatement of sale with all rights received at time of original purchase, on payment of amount due, where no rights of third persons had intervened, under art. 5423, notwithstanding reclassification of purchased land, during an interval between purchase and forfeiture, as mineral land, where art. 5423, giving purchaser the right to reinstatement, was in existence at time of purchase, and was therefore a right which the Land Commissioner's subsequent reclassification of the land could not operate to destroy. *Gulf Production Co. v. State* (Civ. App.) 231 S. W. 124.

**Art. 5435. Transfers.**—Owners of public free school land and asylum land heretofore or hereafter purchased from the State may sell their land or a definite portion of same in any size tract. A vendee through personal transfer heretofore or hereafter executed for a whole survey and a vendee through personal transfer heretofore or hereafter executed for a whole portion of a survey that was purchased from the State as a whole, shall have the right to become a substitute purchaser direct from the State in the manner provided herein. With the approval of the Commissioner of the General Land Office a vendee through personal transfer heretofore or hereafter executed for a portion of a survey that was purchased from the State as a whole and a vendee through personal transfer heretofore or hereafter executed for a portion of a survey that was purchased from the State in a quantity less than the whole survey, may become a substitute purchaser direct from the State in the manner provided herein; also, one who claims title, heretofore or hereafter originating through a source other than by personal transfer to a definite portion of a survey less than the whole as it was purchased from the State may, with said approval, have such definite portion divided on the records of the General Land Office from the original purchase in the manner provided herein. Vendees who hold title through personal transfers and have the right to become purchasers direct from the State may be substituted on the records of said office for the original purchaser and thereby become a purchaser direct from the State by filing in said office a complete and valid chain of title through personal transfers which have been duly executed and recorded in the county or counties in which the land or a part thereof is situated or in the county to which such county or counties may be attached for judicial purposes, and pay the lawful fees. When said papers have been filed in said office the substituted purchaser shall have his portion of land separated from the other portion, if any, on the records of the General Land Office and thereby he shall assume and become liable to the State for all unpaid principal and interest due and to become due the State for the land conveyed in the deeds so filed, together with all obligations and penalties attaching to the original purchase the same as was the original purchaser. The obligation of the original purchaser and the obligation of all vendors of such substituted purchaser shall be enforceable against the substituted purchaser the same as if he were the original purchaser from the State and the obligation of the vendor or vendors of the substituted purchaser shall be deemed cancelled. One who claims title to a definite portion of a survey through a source other than by personal transfer may, with the approval above provided, have that portion of land so claimed separated from the other portion of the survey or portion of survey upon the records of the said office by filing therein such evidence of claims as may be required by the said Commissioner and pay the lawful fees for the papers filed as evidence of the claim or right to a separation of such area. When a separation of the land has been made upon the records of the General Land Office in either manner provided for herein, that portion so separated

shall be charged and credited with its pro-rata part of the principal and interest due and paid to the first day of the November preceding the date of the filing of the transfers or other papers. If in any of the preceding conditions the land that is desired to be separated from another portion should not be sufficiently designated by metes and bounds in the papers offered for filing for the purpose of certainty in identification the said Commissioner shall require that proper field notes accompany the papers before he shall be required to file them and separate the land. If any owner or claimant of any land included in this Act, which ownership or claim is shown on the records of said office should desire a patent upon a portion thereof less than the whole, such owner or claimant may, with the approval of said Commissioner, file field notes with lawful filing fee for that portion on which patent is desired and obtain a patent therefor when the land is fully paid for with all lawful fees. If the ownership should be evidenced by personal transfers the patent shall be issued to such owner and his assigns. If the claimant claims title through other evidence than by personal transfer, the patent shall be issued in the name of the person and his assigns that holds title by original purchase or in the name of the person and his assigns who appears on said records to hold title through the last personal transfer. If in any case a patent should be issued in the name of one other than the legal owner such patent and the rights granted therein shall inure to the benefit of the legal owner. If, in any case, land has been heretofore or hereafter purchased from the State on condition of residence no patent shall be issued until proper proof of such residence has been filed. In case the three years residence on the land should not have been completed before the date of the signing of the deed by the vendor, the vendee shall be in good faith an actual bona fide settler on the land on that date and shall continue to reside upon the land until his residence with that of the vendor or vendors shall aggregate the required three consecutive years continuous residence from the date of the original purchase. Every vendee before the completion of the required residence by his vendor shall file in the General Land Office an application, affidavit and obligation the same as is required of an original purchaser, together with the partial proof of his vendor's continuous residence to the date of the deed of transfer. When the required three years continuous residence has been heretofore or hereafter completed upon any land included in this Act and proof of that fact, satisfactory to the Commissioner, has been heretofore or may be hereafter filed in the General Land Office, the Commissioner shall issue a certificate of its sufficiency upon the payment of the lawful fees. The said certificate may be recorded in the deed records of the proper county and when so recorded it shall become a muniment of title. After a certificate heretofore or hereafter issued has been heretofore or may be hereafter recorded, neither the sale nor the occupancy of said land shall be questioned by the State nor any person whose rights did not accrue prior to the completion of said residence. The effect of the issuance of said certificate shall include and extend to all land purchased as additional to a home tract on which the said certificate may have been issued. No sale heretofore made or hereafter made without condition of settlement shall be questioned by the State nor any person after one year from the date of such sale. Nothing in this Act relating to the effect of a certificate of occupancy or limitation as to the time a sale may be questioned shall apply to any land that is now in litiga-

tion wherein the validity of the original sale is being questioned until such litigation shall be terminated. [Acts 1907, p. 490, § 6d; Acts 1919, 36th Leg. ch. 163, § 9; Acts 1921, 37th Leg., ch. 57, § 1.]

**Explanatory.**—Sec. 2 of the act repeals “chapter 25, an act approved March 1, 1911, and chapter 79, an act approved March 17, 1919, and articles 5436 and 5445 of the Revised Civil Statutes of 1911, and all laws and parts of laws in conflict with this act.” The act took effect 90 days after March 12, 1921, date of adjournment.

**Right to transfer in general.**—Where proper application has been made for public free school land of the state and the land has been surveyed, the applicant has a potential interest in the land which he can mortgage or sell; the subsequent award to him inuring to benefit of his mortgagee or purchaser. *Poole v. Cage* (Civ. App.) 214 S. W. 500.

A purchaser of school lands who has complied with the conditions as to occupancy and filed an affidavit thereof within proper time acquires an inchoate right to the land, which can be perfected by compliance with the further requirements of the statute, and this right is subject to sale or transfer. *De Shazo v. Eubank* (Com. App.) 222 S. W. 976, reversing judgment (Civ. App.) 191 S. W. 369.

**Title and rights acquired by transferee.**—Where sale of public free school lands to original purchaser was valid, a substituted qualified purchaser, who was an actual settler upon land at time of purchase from original purchaser, acquired title by original purchaser's conveyance, although transfer and substitute obligation was not filed in general land office. *Schauer v. Schauer* (Civ. App.) 202 S. W. 1010.

Where, while the law required interest payments by purchasers of public lands to be made by November 1st each year, a purchaser of such land, from one who had contracted for it from the state agreed with the seller, by notes and by an agreement extending the notes, to pay such interest October 1st of each year, the effect of subsequent legislative extension of time within which public land purchasers might pay interest to August, 1919, was to make the subpurchaser's payment of such interest within a reasonable time before August, 1919, a compliance with such term of the contract, for, the purpose of the provision being to prevent a forfeiture to the state for nonpayment of interest, the provision must be construed in connection with the law as amended. *Earhart v. Robinson* (Civ. App.) 215 S. W. 973.

While a purchaser, on complying with the requirements of the statute as to occupancy of school lands and the filing of an affidavit thereof, acquires an inchoate right subject to sale or transfer, the state is not completely divested of title until all conditions of the purchase are fully complied with, and the right of the purchaser is subject to forfeiture for failure to make payment as required, etc. *De Shazo v. Eubank* (Com. App.) 222 S. W. 976, reversing judgment (Civ. App.) 191 S. W. 369.

#### Arts. 5435a–5435d. [Repealed.]

**Explanatory.**—Repealed by Acts 1921, 37th Leg., ch. 57, § 2. See art. 5435, ante.

#### Art. 5436. [4218k] [Repealed.]

**Explanatory.**—Repealed by Acts 1921, 37th Leg., ch. 57, § 2. See art. 5435, ante.

**Title, rights, and liabilities of substitute purchaser.**—Where defendant acted in collusion with another to buy public school lands for such other from the occupant, the attempted transfer by the occupant to defendant was not authorized by this article, but was plainly forbidden, and defendant acquired no title to the lands; the only right acquired under a transfer authorized by the statute being that of substitution, expressly denied to defendant. *Schauer v. Schauer*, 110 Tex. 257, 219 S. W. 195.

#### Art. 5437. [Repealed.]

**Explanatory.**—Acts 1921, 37th Leg., ch. 57, § 2, repeals ch. 79, approved March 17, 1919. The latter act amended art. 5437, Rev. Civ. St. 1911.

#### Art. 5444. [4218j] Regulations as to occupancy.

**Certificate of occupancy—Conclusiveness.**—Where one owning lots in a county applied to purchase school lands as additional land, and after proof of occupancy the land commissioner issued a certificate, such certificate is not open to collateral attack on the ground that the lots were not private land, within the statute allowing the acquisition of additional land, for the commissioner is required to determine the sufficiency of the proof of occupancy, and as the statute relating to the acquisition of school land provides for payment over a long term of years, it is essential that on issuance of a certificate after proof of occupancy the title cannot be collaterally attacked. *De Shazo v. Eubank* (Com. App.) 222 S. W. 976, reversing judgment (Civ. App.) 191 S. W. 369.

#### Art. 5445. [Repealed.]

**Explanatory.**—Repealed by Acts 1921, 37th Leg., ch. 57, § 2. See art. 5435, ante.

**Art. 5449d. Certain other sales validated.**—In all cases where school land has been sold on condition of settlement and the purchaser has complied or may hereafter comply with the law relative to settlement

thereof and has been compelled to leave the same or may hereafter be compelled to leave the same for the purpose of earning a support for himself and family, and also in such cases where a purchaser is drafted into the Federal Service before he has time to settle on the land, or where he may be drafted into the Federal Service before the completion of three years residence on the land after settlement has been made, such sales are hereby validated and the Commissioner of the General Land Office shall not cancel such sales. [Acts 1918, 35th Leg., 4th C. S., ch. 57, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 5449e. Same; affidavit of purchaser.**—In all cases within the provisions of this Act the purchaser shall file in the General Land Office his affidavit stating the facts pertaining thereto, corroborated by the affidavit of three disinterested persons and when such affidavits shall have been filed the owner shall have a good and perfect title, subject only to the State's lien for the unpaid purchase price. [Id., § 2.]

**Art. 5449f. Same.**—In all cases of sales of public lands made by the State on February 21, 1907, requiring three years residence on said land, and the purchaser entered upon the land within the time required by law, and, in good faith, made the necessary improvements, but whose occupancy was broken within three years from the entry; and the purchaser has kept his interest payments up, and has completed a period of three years occupancy of the lands awarded, such purchases are hereby validated, and shall, upon proof of such facts, be entitled to receive a certificate of occupancy of said lands. [Acts 1918, 35th Leg. 4th C. S., ch. 64, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 5449g. Same.**—All sales of public free school land made on October 22, 1903, in quantities not exceeding forty acres, and the same have been fully paid for, be and the same are hereby in all respects validated, and the commissioner of the General Land Office is authorized and directed to issue patents to same. [Acts 1919, 36th Leg., 2d C. S., ch. 26, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5449h. Same.**—All sales of Public Free School Land which were sold on the 25th day of September, 1895, are hereby validated and when fully paid out in accordance with the purchase the Commissioner of the General Land Office shall issue a patent therefor. [Acts 1919, 36th Leg., ch. 81, § 1.]

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

**Art. 5449i. Same.**—In all cases where the Public Free School land sold on condition of settlement and residence, and the purchaser settled on the land, but failed to file in the General Land Office his affidavit of settlement within the time required by law, but did file, or offered to file, such affidavit, and in all cases where said lands were sold on condition of settlement, and the purchaser abandoned same on account of drouth, and in all cases where said land was sold on condition of settlement and the purchaser was drafted or volunteered into the service of the United States on account of the war, are hereby declared validated and declared to be valid, and those who abandoned the land on account of the drouth and those who were drafted or volunteered into the service of the United States on account of the war, shall not be further required to reside on the land, but those who did settle and failed to get

their affidavit of settlement in the Land Office in the time required by law, shall continue to reside on the land as required by law. [Acts 1919, 36th Leg., ch. 90, § 1.]

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

**Art. 5449j. Same.**—In all sales of public free school lands, University, Asylum and public lands made by the State of Texas, by authority of the Acts of the Legislature of date April 12th and 14th, 1883, wherein the mineral rights in said lands were not, by the State specially reserved, in its award of sale or classification of such lands, at the time of such sale, reserved to the State of Texas, the sales of such land by the State be, and the same are hereby validated, and the State of Texas hereby relinquishes unto the owners of said lands, when paid for, all of its rights and title to said minerals. [Acts 1919, 36th Leg., ch. 121, § 1.]

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

**Art. 5449k. Same.**—That where sales of Public Free School Lands, made the third day of March, A. D. 1896, were made under, and in accord with, the provisions and requirements of Chapter 48 of the Acts of the Twenty-fourth Legislature and where the purchasers of said lands have met all the requirements of purchase and payment, and have failed to meet the requirement of settlement, that said sales be, and the same are hereby declared to be, as legal and valid as if settlement had been made on said lands, and the Acts of the purchasers had been in all respects in strict compliance with the requirements of the law, and all such sales are hereby validated and made binding. [Acts 1919, 36th Leg., ch. 166, § 1.]

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

**Art. 5449l. Same.**—All sales of public free school land which were sold on the 16th day of August, 1895, and the division of surveys sold on that date, where no proof of occupancy has been made and subsequent purchasers have bought in good faith, are hereby validated, and when fully paid out in accordance with the purchase, the Commissioner of the General Land Office shall issue a patent therefor without proof of occupancy. [Acts 1920, 36th Leg. 3d C. S., ch. 39, § 1.]

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

**Art. 5449m. Same.**—All sales of Deaf and Dumb Asylum lands made on April 6, 1903 are hereby validated and when fully paid for, together with all fees, the Commissioner of the General Land Office shall issue patent therefor. [Acts 1921, 37th Leg., ch. 56, § 1.]

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

**Art. 5449n. Same.**—That all sales of public school lands situated in whole or in part in Uvalde County, State of Texas, heretofore made by the Commissioner of the General Land Office on applications filed as provided by law on the following dates, or either of them, to wit: November 28, 1904, September 2, 1908 and January 2, 1919, which sales had not been by said Commissioner canceled prior to February 1, 1921, be and the same are hereby in all things validated and the purchasers thereof, or their assigns, shall be entitled on payment of balance purchase money due the State of Texas, and all interest therein, to receive patents therefor. [Acts 1921, 37th Leg., ch. 98, § 1.]

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

**Art. 5449o. Same; postponing forfeiture.**—Resolved by the Senate of the State of Texas, the House of Representatives concurring: The Commissioner of the General Land Office is hereby authorized to and

he shall postpone the forfeiture of school land until August 25, 1922, for the non-payment of interest now due on said land. [Acts 1921, 37th Leg. 1st C. S., S. C. R. No. 5, Aug. 8, 1921, p. 243.]

## LEASES

**Art. 5457. [4218w] Lessees may remove improvements, when.**

**Improvements not removed.**—If fences were reserved by lessee of school lands when he assigned lease to defendant, they would not become defendant's, so that they could be counted as part of improvements required by art. 5424, by virtue of his purchase of the land, prior to expiration of time for removal under this article, and lessee's failure to remove within 60 days after expiration of lease as provided by said section; title not being in defendant but in the state thereafter. *State v. Elza*, 109 Tex. 256, 206 S. W. 342.

**• Art. 5458. One year to assert right to leased or sold land.**

**Construction and operation in general.**—Purpose of this act is beneficent and should be liberally construed. *Schauer v. Schauer* (Civ. App.) 202 S. W. 1010.

**Limitation of actions in general.**—Where forfeiture of sale to A. of public free school lands by land commissioner was unauthorized, a suit by B., subsequent purchaser from A. against C., a prior purchaser from A., not filed until more than a year after award to A. and to B., and more than a year after Acts 29th Leg. c. 29, §§ 1, 2, arts. 5458, 5459, became effective, would be barred. *Schauer v. Schauer* (Civ. App.) 202 S. W. 1010.

The fact of forfeiture of public free school lands by an applicant to purchase is material to the right of the purchaser on forfeiture to prosecute trespass to try title to recover the lands from the original purchaser and his lessee only as relieving him from being barred within a year. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

— **When statute does not apply.**—This article has no effect on the assertion of title to such land made by plaintiff, to whom it was validly awarded after lawful forfeiture of the previous purchase of defendant's predecessor. *Schauer v. Schauer*, 110 Tex. 257, 219 S. W. 195.

This article has no application to one asserting title under the statute of limitations of 10 years as against a purchaser from the state, but applies only to persons claiming the right to purchase or lease land already sold or leased to others. *Whitaker v. McCarty* (Com. App.) 221 S. W. 945, reversing judgment (Civ. App.) 188 S. W. 502.

**Art. 5459. Same.**

**Construction and operation in general.**—The fact of forfeiture of public free school lands by an applicant to purchase is material to the right of the purchaser on forfeiture to prosecute trespass to try title to recover the lands from the original purchaser and his lessee only as relieving him from being barred within a year. *Nations v. Miller* (Civ. App.) 212 S. W. 742.

Though the surveyor of a land district had no authority to make sale of land in another county, no one but the state can question such survey and sale by him in view of this article. *Brooks v. Slaughter* (Civ. App.) 218 S. W. 632.

This article has no effect on the assertion of title to such land made by plaintiff, to whom it was validly awarded after lawful forfeiture of the previous purchase of defendant's predecessor. *Schauer v. Schauer*, 110 Tex. 257, 219 S. W. 195.

This act has no application to one asserting title under the statute of limitations of 10 years as against a purchaser from the state, but applies only to persons claiming the right to purchase or lease land already sold or leased to others. *Whitaker v. McCarty* (Com. App.) 221 S. W. 945, reversing judgment (Civ. App.) 188 S. W. 502.

**Effect of expiration of limitation period.**—An award of state lands to a purchaser or lessee is conclusive, except as against the state, that all requirements of the law had been complied with after the short period of limitation. *Whitaker v. McCarty* (Com. App.) 221 S. W. 945.

## CHAPTER TEN

## SUITS TO RECOVER PUBLIC LANDS, RENTS AND DAMAGES

**Article 5468. The attorney general to bring suits for lands.**

**Construction and operation in general.**—Since the land commissioner has no authority to determine the legality of a patent previously issued, mandamus will not lie to compel him to issue a permit to prospect on land for which the state had previously issued a patent, which it had never attempted to set aside, the remedy for wrongful patent being by action by the Attorney General. *Fitzgerald v. Robison*, 110 Tex. 463, 220 S. W. 768.

## TITLE 80

## LANDLORD AND TENANT

Art.		Art.	
5475.	Landlord shall have preference lien; contracts under which lien shall not attach; certain contracts void; recovery of excessive payments of rent; penalty.	5479.	Distress warrant.
5477.	Duration of lien; goods stored in warehouse; exemptions.	5480.	Oath and bond.
5478.	Lien does not apply to, etc.	5484.	Judgment against sureties.
5478a.	Removal not a waiver, etc.	5489.	Tenant shall not sub-let without consent, etc.
		5490.	Owners of buildings have preference lien, etc.
		5491.	Distress warrant, how obtained.

**Article 5475. [3235] Landlord shall have preference lien; contracts under which lien shall not attach; certain contracts void; recovery of excessive payments of rent; penalty.**

See *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380.

Cited *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

**Validity.**—Since the landlord's lien is given by statute, the Legislature may restrict it as it deems best for the public interest or entirely abolish it, and no vested right of the landlord is invaded by a statute authorizing a tenant to create a lien upon a crop superior to any lien in favor of the landlord. *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

The law providing for landlord's liens upon crops grown by tenant to secure advances, is not unconstitutional because its operation is restricted to certain classes of contracts. *Hawthorn v. Coates Bros.* (Civ. App.) 202 S. W. 804.

This article, as amended in 1915 so as to make a letting of farm lands, giving to the landlord more than one-third of crops, void, violates the due process clauses of the state and federal Constitutions (Const. Tex. art. 1, § 19; Const. U. S. Amend. 14, § 1). *Rumbo v. Winterrowd* (Civ. App.) 228 S. W. 258.

**Limitation of rent.**—This article held inapplicable, where landlord agreed to keep irrigation engine and machinery in repair. *Doby v. Sanders* (Civ. App.) 198 S. W. 806.

This article, as amended in 1915, held inapplicable where landlord furnished house, garden, pasturage, etc., besides furnishing everything needed to raise the crop. *Green v. Prince* (Civ. App.) 201 S. W. 200.

A contract that landlord furnish everything except the labor to make and gather the crops, and that he have half of all crops and all of the cottonseed, is plainly excepted by the proviso to this article. *Hawthorn v. Coates Bros.* (Civ. App.) 202 S. W. 804.

Rental contract, whereby landlord was to furnish land and pasturage in return for one-third of all feed and one-fourth of all cotton grown on land, and in addition the maize stocks, after heading of feed, was not illegal, or in violation of statute. *James v. Blake* (Civ. App.) 206 S. W. 546.

A lease wherein lessor was to furnish at his own charge and expense the seeds, teams, feed, and tools necessary to make the crops, and lessee was to furnish at her own charge and expense the labor necessary to grow and harvest same, the lessor to have a lien on lessee's interest in the crops as security, for sums advanced, was not within the prohibition of this article, as amended. *Penn v. Hare* (Civ. App.) 223 S. W. 527.

Landlord and Tenant Act, making a contract for a rental in excess of one-fourth of the cotton crop void where tenant "furnishes everything except the land," did not affect validity of a contract giving landlord, who furnished tenant a dwelling in which to live, pasture for his stock, and ground for a garden, a one-third share of the crops. *Rutledge v. Murphy* (Civ. App.) 230 S. W. 1034.

**Creation and existence of lien.**—Lien created by statute for payment of debt is but part of remedy afforded for its collections, and the remedy simply acting on property is no part of the obligation of a contract. *Hawthorn v. Coates Bros.* (Civ. App.) 202 S. W. 804.

A contract giving landlord, as rent, certain share of crops grown by tenant on rented farm, need not be recorded to give third persons notice of landlord's interest therein; a landlord's lien being created by statute. *G. M. Carlton Bros. & Co. v. Hoppe* (Civ. App.) 204 S. W. 248.

Where, under the provisions of the lease, the landlord is a tenant in common of the crops grown on the place, the landlord's statutory lien does not exist. *Rosser v. Cole* (Civ. App.) 226 S. W. 510.

**Rent or advances secured.**—A landlord is entitled to a lien on his tenant's crops for supplies only when they are furnished by him, directly or indirectly, and not when he is merely guarantor or surety for payment of supplies furnished to the tenant by another. *Gaylor v. Monroe* (Civ. App.) 221 S. W. 330.



**Subject-matter to which lien attaches.**—An inclosed square in a city, with no improvements save a pavilion, was rented for a pleasure resort. The tenants erected a shooting and skating gallery and swings and benches on the grounds for the accommodation of visitors. Held that, on improvements placed on the ground outside of the pavilion, the landlord had no lien. *Rush v. Henley* (App.) 15 S. W. 201.

Landlord has a lien on tenant's crop. *Williams v. King* (Civ. App.) 206 S. W. 106.

A gasoline pump and tank between sidewalk and curb in front of leased premises, used as filling station by lessee, held subject to the landlord's statutory lien. *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

A landlord's preference lien extends to all of the crop raised, and the lien is not satisfied until all of the rent and advances have been paid. *Green v. Scales* (Civ. App.) 219 S. W. 274.

If one tenant made the contract of rental with the landlord, the fact that he did not live on the place, but that his son, a married man, did so, worked the farm, and made a crop, did not of itself destroy the relation of landlord and tenant existing between the landlord and the occupant's father; and the landlord had a lien on all crops whether the land was cultivated by the tenant in person or by such agent or subtenant. *Id.*

In a landlord's action to enforce his lien on a bale of cotton grown on the rented premises, evidence held sufficient to make prima facie proof that the bale was raised on the landlord's premises during the particular crop year, either by the tenant himself, or by an agent or subtenant, his son. *Id.*

Under a lease of land on shares, held, that lessor was entitled to a lien on lessee's half interest in the crop raised for money advanced, and that such money was to be all taken out of lessee's share; notwithstanding a clause, "Of the net proceeds, after deducting and repayment to the party of the first part of the sums that may have been advanced by him of the sale of cotton raised from said aforesaid farm, one-half shall be the property of the party of the first part, and the remaining one-half shall be the property of the party of the second part." *Penn v. Hare* (Civ. App.) 223 S. W. 527.

**Priorities.**—Lien on crops given irrigation company furnishing water by art. 5009, held superior to landlord's lien. *Texas Bank & Trust Co. of Beaumont v. Smith* (Civ. App.) 195 S. W. 617; *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

Landlord furnishing supplies to tenant directly and through a third party, held to have a lien superior to that of chattel mortgagee. *Ross v. Schultz* (Civ. App.) 198 S. W. 672.

Where chattel mortgage is executed upon future crops, and mortgagor subsequently sold land, remaining in possession as tenant under agreement to give landlord share of crops as rent, landlord's lien for rent is prior to mortgagee's lien; mortgage becoming effective upon growing of crop, but only as to mortgagor's interest therein. *G. M. Carlton Bros. & Co. v. Hoppe* (Civ. App.) 204 S. W. 248.

A chattel mortgage executed and filed before the making of a lease contract is a prior lien over one contained in the lease contract. *Oakes v. Freeman* (Civ. App.) 204 S. W. 360.

A mortgage on a crop given prior to the time when a landlord's lien attached would not take precedence over the latter. *McKelvy v. Gugenheim* (Civ. App.) 208 S. W. 757.

The landlord being a subsequent creditor and lienholder in good faith, his lien on tenant's property in the building at time of lease takes priority under art. 5655, over prior chattel mortgage thereon not forthwith deposited and filed in county clerk's office as thereby required, but filed subsequent to the lease. *Ingram v. Lattimore* (Civ. App.) 210 S. W. 297.

**Conversion of property subject to lien.**—Judgment creditor of tenant who levied upon the crops when the tenant was indebted to his landlord for rent, supplies, or advancements held liable to the landlord for conversion to the extent of so much of the converted crops as might be necessary to satisfy the landlord's claim, liability not being limited to the pro rata part of the tenant's debt to the landlord which the part of the crop levied on bore to the whole of the crop raised by the tenant; the principle of marshaling of securities not being involved. *Fields v. Fields* (Civ. App.) 216 S. W. 195.

Purchaser from tenant of property subject to landlord's lien, who takes possession of property, removes it from leased premises, and claims title thereto, is liable to conversion. *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

### Art. 5477. Duration of lien; goods stored in warehouse; exemptions.

**Duration.**—Where building was leased in 1913 for ten-year term and tenant vacated building in February, 1916, landlord's lien upon tenant's goods placed on premises existed only to end of that year. *John Church Co. v. Martinez* (Civ. App.) 204 S. W. 486.

**Conversion.**—In landlord's action against tenant's purchaser of gasoline tank and pump for conversion on theory that tank and pump were covered by landlord's statutory lien, it was no defense that mortgage on the furniture in the building executed by tenant to landlord had not been recorded, or that purchaser had no notice thereof, or that purchaser had paid a valuable consideration for the tank and pump. *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

**Priorities.**—See notes under art. 5475, ante.

**Art. 5478. [3238] Does not apply to, etc.**

**Property exempted from lien.**—A gasoline pump and tank between sidewalk and curb in front of leased premises, used as filling station by lessee, held subject to the landlord's statutory lien, such pump and tank not being "goods, wares, and merchandise," and the sale thereof by tenant in vacating premises and going out of business not being "in good faith in the regular course of business." *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

**Art. 5478a. [3239] Removal not a waiver, etc.**

**Waiver, loss, or discharge of lien.**—Plaintiffs do not waive a landlord's lien by suing out a writ of sequestration and distress warrant, though the writs are levied on part of the property on which the lien is claimed. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

**Removal of agricultural products to be prepared for market, as cotton for ginning,** does not constitute a waiver of the landlord's lien, which continues and attaches to the product so removed as if remaining on the rented premises. *Green v. Scales* (Civ. App.) 219 S. W. 274.

A landlord, suing his tenant and purchasers of cotton on which he claimed to have a landlord's lien, who agreed to the sale of the cotton by his tenant, and also consented in advance to appropriation of so much of the proceeds as would be sufficient to satisfy a note which he and the tenant had executed to a bank secured by mortgage lien on all the crops, waived his lien, and by accepting part of the proceeds of the sale, which the tenant had deposited in the bank to his credit as rents, ratified the sale. *Brod v. Luce* (Civ. App.) 225 S. W. 553. †

Though a landlord allowed his tenant to sell crops and deposit the rent to his credit, thus waiving his lien as to purchasers, the lien was not waived with respect to a judgment creditor of the tenant who levied on unsold crops. *Jarrell-Evans Dry Goods Co. v. Allen* (Civ. App.) 229 S. W. 920.

**Art. 5479. [3240] Distress warrant.**

**Parties.**—In a suit against a tenant to enforce a landlord's lien for rent, one to whom the tenant has sold part of the crops may be made party defendant. *Hall v. Johnson* (Civ. App.) 225 S. W. 1110.

**Questions for jury.**—Whether landlord indirectly furnished supplies to his tenant, entitling him to a lien therefor on his crop, or was only a surety or a silent partner in the firm which furnished them, should on conflicting evidence have been submitted to the jury. *Gaylor v. Monroe* (Civ. App.) 221 S. W. 330.

**Wrongful distress.**—Where tenant of restaurant premises sold personalty and business colorably to another, business being of no value to him or his vendee, and personalty having no rental value, he and his vendee could not recover, in landlord's action for rent and to foreclose lien, damages on their cross-actions on ground distress warrant had been maliciously sued out. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

Where a tenant, against whom a distress warrant had been issued, delivered the keys to a constable over night, and the constable redelivered them to the tenant's agent the following morning, held, that the taking and keeping of the keys, as it was done with the tenant's consent, did not constitute a conversion of his property by the landlord. *Saenz v. Hamilton Hotel Co.* (Civ. App.) 207 S. W. 159.

Where there was no seizure of property under a distress warrant, the tenant cannot complain that it was issued without petition having been filed or citation issued. *Id.*

**Art. 5480. [3241] Oath and bond.**

**Affidavit as to grounds.**—An affidavit for warrant in distress proceedings must show, either that the rent claimed was due, or that the tenant was about to remove or to remove his property from the premises. *Watson v. Corley* (Civ. App.) 226 S. W. 481.

**Art. 5484. [3245] Judgment against sureties.**

Cited, *Denson v. McCasland*, 2 Civ. App. 184, 21 S. W. 169.

**Art. 5489. [3250] Tenants shall not sub-let without consent, etc.**

**Right to assign or sublet in general.**—This article prohibits the assignment of a lease. *Gulf, C. & S. F. Ry. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228.

**Effect of unauthorized subletting.**—All produce raised on the rented premises, whether by the tenant or a so-called "subtenant," is subject to the statutory lien for rent, in the absence of consent to subleasing. *Stokes v. Burney*, 3 Civ. App. 219, 22 S. W. 126.

A subletting of a part of the demised premises without the landlord's consent renders the lease contract, at the landlord's option, subject to forfeiture. *Stubblefield v. Jones* (Civ. App.) 230 S. W. 720.

A lease was forfeited by a subletting where the sublessees occupied a portion of the premises under the lessees with their consent; it being immaterial that the lessees' consent was given subject to the landlord's approval, or that no consideration moved from the sublessees to the lessees for the use and occupancy of the premises, or that the lessees permitted the sublessees to go into possession as an accommodation and courtesy to the sublessees, or that the sublessees' occupation was merely temporary. *Id.*

**Assignment or sublease and construction and operation thereof.**—Where lease provided for forfeiture by lessor for nonpayment of rent, and secured lease moneys by lien upon property of lessees, payment of amounts due and overdue under lease held consideration for verbal assignment by lessees to one who advanced money to pay the rent due; and the fact that assignee subsequently deducted such amount as expense of transaction in cattle, will not alter effect of verbal assignment, but appellate court must presume that it was deducted pursuant to agreement. *Burnett v. Gibbs* (Civ. App.) 196 S. W. 725.

In action involving conflicting claims to leased ranch, evidence held to show sufficient verbal assignment of lease to defendant in consideration of his payment of all amounts due thereunder. *Id.*

The act of a tenant in permitting a third person to pasture stock on the leased premises together with tenant's stock, there being no surrender or abandonment, either actual or constructive, of the premises by the tenant to the third person, was not a subletting, forfeiting the lease under the statute. *Wade v. Madison* (Civ. App.) 206 S. W. 118.

Where tenant on shares, in prospect of being drafted into the army, arranged with his brother to look after the land in his absence, such arrangement did not constitute a "subletting." *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

A sublessee or subtenant, not an assignee of a lease, could not recover damages for breach of one of the lease covenants. *International Dry Goods Co. v. Lyman Drug Co.* (Civ. App.) 209 S. W. 268.

Assignment of lease to third person with landlord's written consent made him landlord's tenant and released original lessees from their contractual relations with landlord. *Id.*

Where assignee of lease did not reassign to one of original lessees, but merely permitted it to use building with consent or acquiescence of landlord, such original lessee was only a sublessee or subtenant. *Id.*

Assignment of lease to third person with landlord's written consent made him landlord's tenant. *Id.*

Where a lessee in turn leased the premises for the same length of time, there was an assignment of his lease, and the sublessees became responsible to the lessor to the same extent as if the contract of lease had been made directly to them. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

Where a lessee of land under a lease, reserving the owner's right to sell and to cancel the lease at any time, sublets the land, and the sublessee subsequently, but before entering into possession purchases the land from the owner, the sublease is not affected. *Green v. Montgomery* (Civ. App.) 211 S. W. 471.

A subtenant, like an assignee, is ordinarily precluded from questioning the title of the head landlord. *Rio Bravo Oil Co. v. Sanford* (Civ. App.) 217 S. W. 219.

No assignee of a lease or subtenant can be heard to say that he was ignorant of the terms on which the lessee held possession. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

The assignee of a leasehold estate succeeds to all the interest of the lessee and to the benefits of all the covenants and agreements of the lessor which are annexed to and run with the estate. *Cauble v. Hanson* (Civ. App.) 224 S. W. 922.

Covenant by a lessor to procure and deliver to the lessee two certain sections of land leased was a covenant which ran with the land, and the lessee's assignee may take advantage of it and is entitled to recover of the lessor damages naturally and proximately resulting from breach. *Id.*

— **Consent of landlord.**—In action involving conflicting claims to leased ranch, evidence held to show that lessor had notice of defendant's acquisition by verbal assignment of remainder of term of lease, and impliedly consented thereto. *Burnett v. Gibbs* (Civ. App.) 196 S. W. 725.

Where landlord's agent, after tenant's sale of his restaurant business and personality in the premises, received rent payments from the buyer and called on him for further payment, the landlord did not thereby necessarily accept the buyer as a tenant. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

In lessee's action against sublessee on express covenant to pay rent, where defense was that owner and lessee had accepted sublessee's assignee as lessee, evidence held sufficient to show such acceptance. *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567.

Where it was understood between the lessor and lessee of pasture lands that the lessee was to sublet or assign to other parties, the lessor, though not having the particular sublessees in mind, is bound by the lessee's assignment or sublease; the relation of landlord and tenant existing between him and the sublessees. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

Lessor, by consenting to the assignment of lease, or subleasing of land by lessee cultivating land of lessor other than that covered by lease without lessor's knowledge, was not estopped from denying the relationship of landlord and tenant with assignee or sublessee as to such land not covered by lease, regardless of whether he used reasonable diligence to ascertain whether the land being cultivated was that covered by lease; he being estopped only if he actually knew lessee was in possession and cultivating land not rented. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

Where plaintiff by his subsequent acts and conduct recognized an assignee of a lease as his tenant, he could not question the right of the lessee, whose tenancy he did not deny, to assign the lease. *Irwin v. Jackson* (Civ. App.) 230 S. W. 522.

**Art. 5490. [3251] Owners of buildings to have preference lien, etc.**—All persons leasing or renting any residence, storehouse or other building, shall have a preference lien upon all property of the tenant in such residence, storehouse or other building, for the payment of rents due and to become due, provided that in order to fix and secure the lien for rents that are more than six months due, it shall be necessary for the person leasing or renting any storehouse or other building which is used for commercial purposes, to file in the office of the county clerk of the county in which such storehouse or such other building is situated, a statement of the amount of rent due, itemized as to the months for which it is claimed to be due, together with the name and address of the tenant, a description of the rented premises, the date on which the rental contract began and that on which it is to terminate, which statements shall be verified by the oath or affirmation of the person claiming such lien, his agent or attorney, taken before some officer duly authorized to take oaths or affirmations, and such statement when so verified shall be recorded by the County Clerk in a book to be provided for such purpose. No lien for rent more than six months past due upon any storehouse or other building rented for commercial purposes shall be valid as against bona fide purchasers or unsecured or lien creditors of said tenant, unless said statement shall be verified, filed and recorded as above provided.

The several county clerks of the State shall each keep an alphabetical index for the purpose of recording the rental liens above described, and for their services in indexing and filing such liens they shall receive a fee of twenty-five cents for each lien so filed and indexed.

And provided that the lien for rents to become due shall not continue or be enforced for a longer period than the current contract years, it being intended by the term "current contract years" to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract. Such lien shall continue and be in force so long as the tenant shall occupy the rented premises, and for one month thereafter; but this Article shall not be construed as in any manner repealing or affecting any act exempting property from forced sale. [Acts 1889, p. 11; Acts 1919, 36th Leg., ch. 110, § 1.]

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

Cited, *Wichita Falls Sash & Door Co. v. Jackson* (Civ. App.) 203 S. W. 100.

**Property subject to lien.**—A landlord who lets a store-house for one year at a rent payable at the end of the term has a lien for the year's rent on the proceeds of the tenant's goods, seized in the store-house on attachment, and sold as perishable a few months after the year commenced. *Ghio v. Shutt*, 78 Tex. 375, 14 S. W. 860.

An inclosed square in a city, with no improvements save a pavilion, was rented for a pleasure resort. The tenants erected a shooting and skating gallery and swings and benches on the grounds for the accommodation of visitors. Held that, on improvements placed on the ground outside of the pavilion, the landlord had no lien. *Rush v. Henley* (App.) 15 S. W. 201.

Lien for rent due lessor of building from lessee selling automobile supplies, oil, etc., held to attach to gasoline filling station, consisting of buried tank, etc., installed in vacant space between sidewalk and curbing of street on which building abutted, "building," including land within inclosure belonging to building and appropriate to its use, even though particular space was part of street. *S. F. Bowser & Co. v. Cain Auto Co.* (Civ. App.) 210 S. W. 554.

**Duration of lien.**—A landlord may more than 30 days after the tenant was adjudicated a bankrupt file an amended claim setting up his lien under the statute, for the rights of the parties were fixed at the time of adjudication at which time the bankrupt was occupying the demised premises, and his goods and chattels contained therein were impressed with the lien, and the subsequent possession of the trustee, which was not adverse as to the landlord, did not affect the lien. *Lontos v. Coppard*, 246 Fed. 803, 159 C. C. A. 105.

**Rights of landlord.**—A landlord may on bankruptcy of the tenant prove his claim for rent for the balance of the current year and enforce the same against the proceeds of the property subject to the lien, though the debt be not provable against the bankrupt's general estate. *Lontos v. Coppard*, 246 Fed. 803, 159 C. C. A. 105.

Where, as contemplated when a partner, as authorized, took a lease, the partners incorporated, and the lease was used for the corporation's benefit, it as well as they became liable thereon, and the landlord was entitled, as against them and it, to the preference lien. *Ingram v. Lattimore* (Civ. App.) 210 S. W. 297.

**Priorities.**—One who purchases property upon leased premises takes it with constructive notice of the landlord's rights, and subject to the lien. *Lehman v. Stone* (App.) 16 S. W. 784.

Chattel mortgage filed before commencement of second year of term under a lease, held superior to the landlord's lien for rent accruing in the second year. *Meacham v. O'Keefe* (Civ. App.) 198 S. W. 1000.

Where a tenant purchased a soda fountain and executed a chattel mortgage thereon, and, being unable to pay for it, redelivered it to the vendor, who then made a sale to another person, who executed to the vendor a chattel mortgage on the fountain, leaving it in the store of the landlord, and at a later date the tenant moved from the premises, the purchaser of the fountain then becoming the tenant, and the mortgagee having paid rent to the landlord up to such date, the mortgage lien was prior to any lien of the landlord on account of subsequent rent. *B. M. Burgher & Co. v. Barry* (Civ. App.) 211 S. W. 457.

### Art. 5491. [3252] Distress warrant, how obtained.

Cited, *Lehman v. Stone* (App.) 16 S. W. 784.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**1. Creation and existence of relation of landlord and tenant.**—The relation of landlord and tenant rests at last upon a contract, and, while it need not be express, there must exist such facts as to the acts, conduct, and intention of the parties as will properly give rise to one by implication. *Dolen v. Lobit* (Civ. App.) 207 S. W. 143, 964.

The relation of landlord and tenant is always created by contract, either express or implied; but the reservation or payment of rent is not essential to the creation of the relation, though it is a usual incident of a tenancy, for a "tenant" is one occupying the lands or premises of another in subordination to that other's title, and with his consent express or implied. *Stubblefield v. Jones* (Civ. App.) 230 S. W. 720.

**2. Tenancy at will.**—Where the evidence showed that the one who contracted for plaintiff's services in posting bills was in possession of defendant's theater under an agreement to lease it, which agreement was not to be effective until a bond for payment of rent was executed, which was never done, the debtor was a tenant at will for whose debts the owner was not liable. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

**3. Implied tenancy.**—The relation of landlord and tenant ordinarily grows out of the contract between the parties, but the landlord or tenant may by their acts or declarations or conduct be estopped from denying the relationship in cases where there is no contract. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

**4. Evidence as to relation.**—In an action to have a trust declared in land, plaintiff claiming an undivided interest therein, evidence held to justify a finding that a lease of the land from defendant to plaintiff was but a lease of defendant's interest therein; defendant claiming that plaintiff was estopped to claim any interest in the land. *Graves v. Graves* (Civ. App.) 232 S. W. 543.

**6. Requisites and validity of leases.**—Lease contract held not void because not specifying which particular 200 acres of plaintiff's 300 uncultivated acres were to be put in cultivation. *Folmar v. Thomas* (Civ. App.) 196 S. W. 861.

Where leasing of plaintiff's premises was done by others so that plaintiff did not know who were his tenants, representation by defendant seeking a lease that he was tenant occupying premises was material where plaintiff in reliance on representation made lease which he would not otherwise have made. *Nimmo v. O'Keefe* (Civ. App.) 204 S. W. 883.

Lessor may recover rental of building let to prize fighter for training quarters, although lessor knew of the purpose for which the building would be used, since, to recover, it was only necessary to show a letting of the premises, a promise to pay the rent, and default; the action for rent not being founded on lessee's unlawful agreement with another to engage in a prize fight, and it not being unlawful to train for a prize fight. *Willard v. Knoblauch* (Civ. App.) 206 S. W. 734.

Where a lease of a fruit stand to be located outside a building provided that in case its maintenance on the sidewalk should be illegal space inside the building might be used, the stipulation for use of the inside space was severable from the stipulation for the use of the sidewalk, and while the use of the sidewalk was illegal, it did not vitiate the contract as a whole. *Wicks v. Comves*, 110 Tex. 532, 221 S. W. 938, answering certified questions (Civ. App.) 171 S. W. 774.

Where one tenant by fraud on the landlords obtained a lease of all the premises, his own and those occupied by other tenants, the landlords, on discovery of the fraud, were entitled to cancellation of the lease, and the other tenants could repudiate their attornment to the first, and continue their possession as tenants, after which cancellation and repudiation of attornment the landlords are entitled to have the status quo of the property preserved by injunction. *Vogelsang v. Gray* (Civ. App.) 224 S. W. 535.

A lease made by parties who had previously conveyed their interest in the property is void. *Requa v. Joseph* (Civ. App.) 225 S. W. 585.

Independently of the idea of contract, a "lease," which is more than a mere license to occupy land, possesses the property of passing an interest and partakes of the nature of an estate. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

The rule that fraud practiced will furnish no ground for recovery unless defrauded parties suffer injury, while applicable to suits for pecuniary damages, is not ordinarily applicable in suits to rescind the contract, and parties seeking to cancel lease need not plead or prove amount of damages. *Osborn v. Texas Pac. Coal & Oil Co.* (Civ. App.) 229 S. W. 359.

There is no difference between the validity of the terms of an oral contract and one in writing in respect to renting land from landlord for the rental year. *Hulshizer v. Nelson* (Civ. App.) 229 S. W. 658.

A tenant does not show himself entitled to rescission of lease by his answer to landlord's action for his breach setting up landlord's oral promise not to allow another part of premises to be used for saloon purposes. *C. R. Miller & Bro. v. Nigro* (Civ. App.) 230 S. W. 511.

A tenant is not entitled to rescission where, after knowledge of alleged misrepresentation of landlord's agent as to the condition of the premises, tenant continued on the premises for over three years under the lease. *Id.*

**8. Liability for breach of contract.**—Where landlords repudiated rental contract by suing for and sequestering land, tenants could accept renunciation, and agree contract should be put to an end, subject to their right to bring action for wrongful rescission, and their failure to make replevy bond and retain property during contract year did not affect their cause of action. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In an action wherein tenant obtained damages for breach of contract to rent land, an assignment that verdict of jury was contrary to the evidence, in finding that landlord breached the contract to tenant's damage, because it was conclusively shown landlord offered to let tenant have another tract of land in every respect equally as good in quality and condition as the tract he did not get, was without merit, since the tenant had a perfect right to insist upon the contract he made. *Hulshizer v. Nelson* (Civ. App.) 229 S. W. 658.

Landlord may relet premises upon tenant's abandonment by taking proper precaution not to create a surrender by operation of law, in which case the measure of his damages will be the agreed rental less amount realized from reletting, or he may permit the premises to remain vacant. *C. R. Miller & Bro. v. Nigro* (Civ. App.) 230 S. W. 511.

In a landlord's action against tenant for breach of contract, a petition showing lease agreement for rental of \$250 per month and plaintiff's reletting for \$150 a month for balance of term under a lease in which new tenants were to pay \$250 a month for second and third years, which were beyond the expiration of the first lease, held not objectionable, since, if the landlord used due precaution or diligence in making contract, acting fairly and honestly, the tenant could not complain. *Id.*

In a landlord's action against tenant for breach of written lease containing no agreement for landlord to make certain repairs, and answer alleging such agreement but failing to allege fraud or mistake in any of the lease terms, is subject to general exception for such defect. *Id.*

**9. Estoppel of tenant.**—Tenant, who enters on land by virtue of the demise of his landlord, is estopped from denying the title of his landlord and, never having repudiated his title, cannot acquire as against the landlord title by adverse possession. *Beason v. Williams* (Civ. App.) 229 S. W. 963; *Fincher v. Wood* (Civ. App.) 223 S. W. 868; *Gordon v. Gordon* (Civ. App.) 224 S. W. 716.

Pleadings as a whole, under principle that lessee may not deny landlord's title, held to disclose such interest in those brought in by interpleader by one sued by lessee in oil lease for price of oil as to entitle them to hearing on issue of forfeiture of lease. *Kirlicks v. Texas Co.* (Civ. App.) 201 S. W. 687.

A lease by the true owner to the son of the claimant by adverse possession, who also held as a lessee of his mother, failed to interrupt the adverse possession, upon the same principle as that which prevents a tenant from attorning to another during his term. *Lockin v. Johnson* (Civ. App.) 202 S. W. 168.

One entering possession under the tenant or lessee occupies the same position as the original tenant and lessee, and is equally estopped to deny that the possession thus acquired is that of the landlord. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

Lessee is estopped to deny lessors' title, though the proofs show the property belonged to the lessors' wives. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

A tenant, who has recognized the title of his landlord by renting the land and paying rent, cannot attack the landlord's title. *Perez v. Cook* (Civ. App.) 208 S. W. 668.

Payment of rent is evidence of permissive occupation acknowledging a tenancy which prevents the tenant from claiming that his possession was adverse to the person to whom he paid the rent. *Gordon v. Gordon* (Civ. App.) 224 S. W. 716.

In trespass to try title, a defendant who purchased a house and fence rails owned by a tenant at will, who had vacated the premises, and entered into possession of such house and the premises without change in the improvements or the portion of the property used, without notice from such tenant at will, or any one else, to the owner of an intention to claim the land adversely to the owner, was also a tenant at will, and his possession was not adverse to the owner. *West Lumber Co. v. Sanders* (Civ. App.) 225 S. W. 828.

**10. Warranty that building is adapted to lessee's purpose.**—The tenant, in the absence of agreement to the contrary, takes the rented premises as he finds them, under

the doctrine of *caveat emptor*. *Walling v. Houston & T. C. R. Co.* (Civ. App.) 195 S. W. 232.

11. **Commencement of term.**—Lease of storehouse at gross rental of \$12,900, payable in monthly payments for five years from April 1st, providing that if building was then incomplete the lessee would accept it when completed, but the lessor would refund such rent as might become due to such time as premises should be ready for occupancy, modified by letter to lessee that lease should stand canceled unless building was ready June 1st, and, in lieu of refund, lessor should not begin payment of rent until building was ready, construed, and held, that lease commenced on April 1st and terminated March 31st, five years later, although building was not ready nor occupied until July 15th. *Camp v. U. S. Tire Co.* (Civ. App.) 216 S. W. 1115.

Where a lease of a fruit stand located outside of a building provided that if the city should complain of the encroachment of the fruit stand on a portion of the sidewalk, or if the maintenance of the fruit stand is or should become illegal, a space inside of the building could be used for such fruit stand, such lease held to constitute a renting of the inside space as from the time of the inception of the contract; an existing ordinance forbidding the maintenance of fruit stands on the sidewalk. *Wicks v. Conves*, 110 Tex. 532, 221 S. W. 938, answering certified questions (Civ. App.) 171 S. W. 774.

14. **Conversion by landlord.**—Where a lessor upon ousting lessee from the premises has taken possession of the lessee's personal property, the lessee did not abridge his rights to recover for conversion by refusing a tender of the property after the conversion was complete. *Henderson v. Beggs* (Civ. App.) 207 S. W. 565.

A landlord who, after ousting a tenant from the premises for nonpayment of rent, takes possession of the tenant's personal effects found on the leased premises, and excludes the tenant from access thereto temporarily, is guilty of conversion. *Id.*

Where landlords, upon abandonment of premises, retook possession and removed personal belongings of tenants found therein to their own home without intent to appropriate the same, and so held the property subject to tenants' order, they were not guilty of conversion of such belongings. *Alsbury v. Linville* (Civ. App.) 214 S. W. 492.

In tenants' action against landlord for entering rented premises and converting tenants' personal property, evidence held to warrant finding that premises had been abandoned and that tenants' claim that they had not abandoned premises was an afterthought to bolster up a suit for damages. *Id.*

23. **Damages for failure to deliver possession.**—Ordinarily the measure of damages for breach of a covenant to deliver possession is the rental value of the property, but the lessee may also recover such special damages as naturally and proximately result from the breach. *Cauble v. Hanson* (Civ. App.) 224 S. W. 922.

Where grazing lands were leased, and the lessor failed to deliver two sections to the assignee of the lease, such assignee is not entitled to reduction of the rent in the amount of the rental value of the two sections not delivered and also an item as special damages for feed purchased to take the place of the undelivered grazing land. *Id.*

Item of \$500 for feed which lessee's assignee was obliged to purchase because of lessor's failure to deliver two sections of the land held an item of damage to be regarded as a natural and proximate result of the lessor's breach of covenant to deliver, the lands having been leased for grazing purposes when a severe drouth prevailed and pasturage was scarce. *Id.*

24. **Disturbance of possession of tenant.**—Where lessee was deprived of possession by wrongful act of third persons, it being his duty to use reasonable means to minimize his damages, jury should determine what amount plaintiff earned, or by exercise of reasonable effort he could have earned, in same or similar business elsewhere. *McCauley v. McElroy* (Civ. App.) 199 S. W. 317.

In lessee's action for damages by wrongful dispossession by third parties, expense to which he was put thereby is proper measure of damages. *Id.*

Value of pasturage upon land of which lessee was wrongfully dispossessed by third persons was proper element of damages. *Id.*

That lessee who was wrongfully deprived of possession would have sublet part of the land is no defense to his action against dispossessors, though it is defense on part of lessor. *Id.*

Where a lease of office rooms provides for re-entry without notice or demand, if any part of the rent remained unpaid for two days after it is due, a lessor on default in payment of rent for more than two days incurs no liability by ousting lessee from the premises. *Henderson v. Beggs* (Civ. App.) 207 S. W. 565.

Where landlords sued out writ of sequestration against tenants, mere fact that sheriff did not resort to physical force in ejecting them, but permitted them to effect removal themselves, made it none the less an ejection by the landlords. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In trespass to try title by buyer of land against seller's tenant, latter bringing cross-action for wrongful ouster, evidence that tenant, besides himself and wife, had one son and daughter, both of age, all working on the farm, also two teams and farm implements, held to warrant a finding he could have grown a crop on the farm with practically no outlay of money. *Rupert v. Swindle* (Civ. App.) 212 S. W. 671.

In trespass to try title by buyer of land to recover it from seller's tenant, latter, on his cross-action for wrongful ouster, was entitled to recover as damages reasonable market value of his part of the crops which it was reasonably probable he would have raised during the year, less expense of raising and harvesting them, and such sums as he and the dependent members of his family could have earned by engaging in other business. *Id.*

One wrongfully evicted was not entitled to damages for expense of moving property from road, where it was thrown by officers executing a writ of sequestration, where defendant, through such officers, offered without expense to plaintiff to take the property to place where plaintiff afterwards carried it at his own expense. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

One evicted from farm land was not required to take any steps to lessen the damage he might sustain by eviction until actually evicted, and was not required on receiving notice from landlord that he could not occupy the land to attempt to lease other premises. *Id.*

In action in tort against landlord for wrongful entry and for wrongful destruction of growing crop, the proper measure of damages is the value of the crop just as it stood upon the ground at the time and place of its destruction. *Smith v. Roberts* (Civ. App.) 218 S. W. 27.

Landlord plowing up and destroying crop on lands claimed by tenant will not be constructively charged with negligence in failing to know that his tenant has violated rental contract by taking charge of land he never rented. *Id.*

An injunction restraining a tenant from pasturing stock upon leased lands while wet and refusal to dissolve the injunction did not constitute an eviction of the tenant where the injunction might be sustained upon the theory that pasturing stock on wet lands was contrary to good husbandry. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

Where plaintiff agreed to let defendant cut hay from lands but excluded him before expiration of the term, defendant is not bound to minimize the damage by leasing other hay lands, but is entitled to recover the full amount of the loss, regardless of the fact that he might have secured other lands. *Bankers' Trust Co. v. Schulze* (Civ. App.) 220 S. W. 570.

In tenants' action to restrain landlord from ousting them, a petition alleging a written lease made by correspondence, and that plaintiffs went into possession of the property and held it for a period of one year, held sufficient as against a general demurrer and special exception, amounting to a general demurrer. *Phœbus v. Connelley* (Civ. App.) 223 S. W. 1019.

In lessees' proceeding to enjoin lessor from removing them from leased premises, notwithstanding defendant's denial under oath of a written lease for three years, the court was not compelled to refuse the injunction, but might within its discretion grant the writ. *Id.*

Unless inconsistent with its terms, the covenant of quiet enjoyment and that the lessor has the right to lease for the term expressed is always implied in a lease; the covenant being ordinarily implied by the words lease, agreement, to let, grant, and demise. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

26. **Rights as to crops.**—In an action by tenant under a lease for one year to recover from his landlord's grantee for money received for pasturage, evidence held to justify a jury finding that plaintiff was to receive only his proportion of crops grown, and that he would not be permitted to delay his surrender of premises to cut or otherwise utilize Johnson grass growing on stubble land. *Cooke v. Ellis* (Civ. App.) 196 S. W. 642.

Where mortgagor demises land before foreclosure, lessee is thereafter entitled to crops in preference to purchaser. *Temple Trust Co. v. Pirtle* (Civ. App.) 198 S. W. 627.

Where mortgagor before foreclosure demised grass lands, lessee is entitled to crops and to enter and sever same, though grass was natural growth of soil. *Id.*

The doctrine of emblements is the common-law right of a tenant whose lease of uncertain duration has been terminated without his fault and without previous knowledge on his part to enter on the leased premises to cultivate, harvest, and remove the crops planted by him before termination of the lease. *Dinwiddie v. Jordan* (Com. App.) 223 S. W. 126; reversing (Civ. App.) *Jordan v. Dinwiddie*, 205 S. W. 862.

A lease whereby the tenants were to relinquish possession in the event of sale on repayment by the lessor of the unearned rentals, having no explicit reference to emblements, did not deprive the tenants of their right, after termination of their right of general possession on giving notice of sale, to re-enter, cultivate, harvest, and remove the crops planted by them during the tenancy. *Id.*

Emblements may be the subject of contract, but, in the absence of a stipulation in the lease contract dealing therewith, the tenant is entitled to emblements. *Id.*

27. **Rights of landlord and tenant after eviction or abandonment.**—Ordinarily exemplary damages are not allowed for mere breach of contract, as a tenancy contract, but where landlord wrongfully and willfully or maliciously uses writ of sequestration to obtain possession of rented property, to which he has no lawful right, such damages may be recovered. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

Landlords, in taking possession of abandoned premises, are required to safely care for property left in premises by tenants. *Alsbury v. Linville* (Civ. App.) 214 S. W. 492.

Where plaintiff prevented defendant from cutting hay on lands which he had fenced, evidence held sufficient to sustain the award of damages, it appearing that the lands were fenced, and so were more valuable for haying than surrounding inclosed lands which defendant could have obtained. *Bankers Trust Co. v. Schulze* (Civ. App.) 220 S. W. 570.

In an action for wrongful eviction of plaintiff by lessor's grantee during the life of the lease, where it appeared that lessor had given a warranty deed to defendant, such fact did not justify the joinder of lessor as a party defendant on motion of defendant. *Robinson v. Street* (Civ. App.) 220 S. W. 648.

28. **Liability for rent.**—Liability for rent is based on privity of contract or privity of estate; and, where there is an express covenant to pay, the lessee is held in privity



of contract, and, in the absence of express covenant, the liability arises on an implied obligation whereby he is held in privity of estate. *Cauble v. Hanson* (Civ. App.) 224 S. W. 922.

29. — **Failure of landlord to repair.**—In action against tenant under lease for rent, tenant having vacated because of defects in roof, it was proper to admit in evidence written notices of defects in roof, sent to landlord after execution of lease, while tenant was holding under prior lease. *Ingram v. Fred* (Civ. App.) 210 S. W. 298.

A tenant, who leased a building for two years for a specific sum payable in monthly installments, may vacate and refuse to thereafter pay rent, where lessor has failed to keep building in repair and tenantable as agreed. *Id.*

31. — **Surrender or abandonment.**—Where terms of lease, required lessor, in case of tenant's breach, to release premises for best obtainable rent upon tenant's account, he was bound to rent it for remainder of term to ascertain amount of deficiency, in order to bind tenant for deficiency remaining due at end of any year. *John Church Co. v. Martinez* (Civ. App.) 204 S. W. 486.

Where tenant was entitled to nine months' notice of cancellation of lease, but in being notified of such cancellation was given right to immediate cancellation of lease and surrender of land, the tenant's vacation of land, without notifying owner or sublessee, from whom he had purchased lease, of his acceptance of owner's proposition to immediately end contract, was not sufficient to relieve tenant or sublessee of liability for rent. *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567.

32. — **Amount.**—If written lease was abrogated by agreement substituting another as tenant, then for any part of the term that the original lessee occupied under re-entry, after the substituted tenant vacated, the measure of recovery is not the rent stipulated in lease, but the reasonable rental value, in the absence of another contract fixing rent for such period. *Lovelady v. Harding* (Civ. App.) 207 S. W. 933.

A lease of land for pasturage purposes for one year at a rental of \$6,000 payable in installments, \$600 down and \$600 a month for five months and \$480 a month for five months, terminable on notice if the landlord should sell, held a lease at \$500 per month, and, where terminated by sale at end of five months, lessee, having paid \$3,000, was entitled to a return of \$500. *Ramsey v. Odiorne* (Civ. App.) 210 S. W. 615.

Where premises are rented without a stipulated sum being agreed upon as rental, it is implied that the tenant will pay the landlord the reasonable rental value for the use of the premises. *Kubena v. Mikulascik* (Civ. App.) 228 S. W. 1105.

33. — **Time of accrual.**—Under a lease of a ranch for pasturage for one year at \$500 per month, terminated under the terms of the lease after five months by reason of a sale of the premises, lessee should pay for first month of term, although he did not use or occupy premises that month. *Ramsey v. Odiorne* (Civ. App.) 210 S. W. 615.

When a certain amount is to be paid as rent for a fixed period and no time is stated in the lease when the rental is to be paid, it is not due until last day of the period for which the rent is to be paid. *Bailey v. Williams* (Civ. App.) 223 S. W. 311.

34. — **Persons entitled.**—Where plaintiffs who had each purchased a half section of land from the lessor agreed jointly with the lessee, holding subject to sale, that lessee should have grass on the section for grazing purposes, the relation of landlord and tenant was established, and plaintiffs were properly joined as parties plaintiff in action for rent. *Marshall v. Magness* (Civ. App.) 211 S. W. 541.

On a conveyance of the reversion in fee, the grantee is entitled to the subsequently accruing rentals, unless the grantor expressly reserves them. *Walker v. Ames* (Civ. App.) 229 S. W. 365.

35. — **Persons liable.**—Assignment of lease by lessee does not affect his liability on an express covenant to pay rent. *Goffinet v. Broome & Baldwin* (Civ. App.) 208 S. W. 567.

In the absence of express covenant to pay rent, if the lessee parts with his estate with the consent of the lessor, the privity of estate is thereby destroyed, and the lessee is not further obligated to pay rent, as there is nothing on which to base the implied obligation. *Cauble v. Hanson* (Civ. App.) 224 S. W. 922.

Where there is an express covenant to pay rent, the lessee, after assignment of his term, remains liable on his express covenant, the privity of contract being unaffected when the privity of estate is terminated by the assignment, even though such assignment was made with the consent of the lessor, and though the lessor has accepted rental payments from the assignee, such receipt of rent from the assignee not amounting to novation of the contract or release of the lessee. *Id.*

37. — **Evidence.**—In landlord's action for rent, defendant's testimony that she owned fixtures in barber shop kept by her son and had received part of shop's income for their use, etc., held insufficient to make her liability for rent a jury question. *Kiam v. Stacy* (Civ. App.) 196 S. W. 341.

In an action for rent, evidence of modification of the lease by lowering the rent for one year held too slight to be submitted to the jury. *Foster v. Dunn* (Civ. App.) 198 S. W. 374.

In landlord's action for rent, in which he claimed that the tenant was holding over after expiration of other term, and that no rent had been agreed upon, refusal to permit landlord to testify as to the reasonable rental value held error. *Kubena v. Mikulascik* (Civ. App.) 228 S. W. 1105.

38. — **Amount of recovery.**—Landlord was entitled to have attorney's fees specified in lease included in his judgment for rent, where reasonableness thereof was not questioned. *Ingram v. Texas Christian University* (Civ. App.) 196 S. W. 608.

On tenant's breach of lease for ten years and its vacation of building, lessor could

recover only rent due and payable at date of trial and foreclosure of landlord's lien, excluding rent to become due thereafter until showing of value of unexpired lease and as to whether building had been relet for lessee's account. *John Church Co. v. Martinez* (Civ. App.) 204 S. W. 486.

The liability of an original lessee for rent is regarded as being in the nature of that of a surety for the assignee, so that any credit to which the assignee is entitled inures to the benefit of the original lessee. *Cauble v. Hanson* (Civ. App.) 224 S. W. 922.

41. **Possession of tenant as possession of landlord.**—The record owner's possession, through tenants, of portions of a survey, constitutes constructive possession of entire survey except portions actually adversely occupied. *Pate v. Gallup* (Civ. App.) 195 S. W. 1151.

45. **Waste.**—In the absence of express agreement there is an implied agreement on the tenant's part to use leased farm property in a tenantlike manner without committing injury to it by acts inconsistent with good husbandry. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

46. **Improvements by tenant.**—In construing lessee's contract for building or other improvements, not containing specifications, consideration should be given circumstances, contemplation of parties, and character and purpose of improvements, and contract should be reasonably construed to render it equitable. *Folmar v. Thomas* (Civ. App.) 196 S. W. 861.

Where lease obligated tenant to erect houses and cribs and to sink wells for domestic uses, but did not state character of improvements, lessee and successors were under obligation to spend reasonable amount of money and labor to construct wells in general use in locality. *Id.*

One wrongfully evicted is not entitled to recover damages by reason of improvements, which were fixtures of permanent character, and not shown to have been made with the consent of the landlord, or with the understanding that they might be removed from the premises at the expiration of the tenancy. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

Stipulation in lease according lessees right to sublet in part or whole, carried with it right of lessees to make or permit the making of such changes and additions in building as were reasonably necessary to its use by subtenants, provided changes did not constitute substantial change in structure, and could be removed at expiration of the lease without injury to building, "alteration," as applied to a building, meaning a substantial change. *Mayer v. Texas Tire & Rubber Co.* (Civ. App.) 223 S. W. 874.

49. **Damages for failure to make improvements.**—In a landlord's action for tenant's breach of lease by abandoning premises, defendants might set up damages for restoring the premises to condition represented by the landlord, such expenditure not being merely the expense of repairs which the landlord had not agreed to do. *C. R. Miller & Bro. v. Nigro* (Civ. App.) 230 S. W. 511.

50. **Duty to make repairs in general.**—A tenant, who leased a building for two years for a specific sum payable in monthly installments, may vacate, when lessor failed to keep building in repair and tenantable as agreed. *Ingram v. Fred* (Civ. App.) 210 S. W. 298.

To exempt landlord from damages to tenant resulting from defects in roof, and at same time hold tenant liable for full contract price, which he agreed to pay upon understanding that building was tenantable, would be unreasonable and obviously unjust to tenant, and such construction of lease should not be favored. *Id.*

If landlord was obligated to repair roof of building, such obligation was not discharged by unsuccessful efforts to remedy defects, under plea that such efforts constituted reasonable diligence to accomplish purpose. *Id.*

A lease of a building, providing that lessor "shall have reasonable time to repair the same," when notified of leaks, held to contemplate that it was duty of lessor to make such repairs upon receiving such notice. *Id.*

In the absence of a covenant to that effect, the landlord is under no obligation to repair the premises, even when they become defective through decay or deterioration. *Pollack v. Perry* (Civ. App.) 217 S. W. 967.

The covenant of a landlord to make repairs on premises leased from month to month is presumed to continue as a covenant for the months after the first, where the tenant is permitted to remain in possession on paying the stipulated rent without a new agreement. *Id.*

It is the duty of the tenant to keep fences on the leased premises in repair. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

A tenant violating a duty owing to the landlord by failing to repair fences, etc., is liable for the resulting damage caused by stock entering the premises and destroying crops, although the damage was not fully accomplished before the termination of the lease. *Id.*

In a tenant's action against landlord for breach of contract to keep premises in repair, evidence of gross receipts is insufficient to ascertain the amount of tenant's loss of profits. *Midkiff v. Benson* (Civ. App.) 225 S. W. 186.

A landlord having expressly covenanted to keep a building in repair is liable for breach thereof, even though committed by another tenant subsequently renting a different part of the building, and the fact that the latter is also liable in tort does not relieve the landlord. *Id.*

A tenant may recover against landlord failing to keep building in repair for loss of profits naturally flowing for such breach of contract, where there is sufficient data to enable the jury to ascertain such loss with reasonable certainty. *Id.*

There is no implied warranty upon part of landlord that premises are fit for purposes for which they are leased and if tenant desired that landlord make changes or repairs he should have such covenant incorporated in the agreement to lease. *C. R. Miller & Bro. v. Nigro* (Civ. App.) 230 S. W. 511.

Ordinarily where a lease does not provide that landlord shall repair premises, there would be no consideration for his oral promise to repair, yet where landlord misrepresented the premises there would be sufficient consideration for his promise to put them in the condition represented. *Id.*

**51. Injuries from defective condition of premises.**—A landlord who agreed to repair floor of rented premises is liable for the negligent failure of his employé to replace a defective plank in the floor, whereby injury resulted to the tenant since he is chargeable with knowledge of the defect in the floor of which the carpenter had knowledge. *Pollock v. Perry* (Civ. App.) 217 S. W. 967.

Evidence that landlord's employé had opportunity to ascertain the defective condition of a plank, and that it was in the same condition then as when it broke under plaintiff, held sufficient to warrant the jury in finding that the servant had knowledge of the defective condition of the plank, so that it was negligence not to repair it. *Id.*

Where the landlord agrees to repair the premises, liability for personal injuries to the tenant, resulting from failure to repair, may arise on theory of negligence. *Id.*

**57. Renewal of lease in general.**—Although there was no evidence of specific agreement relating to kind of crops and amount of rental, evidence held sufficient to sustain finding of contract, where the buyer of land inquired of the tenant what rentals he had been paying to the seller for the previous year, and, on receiving the desired information, immediately told the tenant he might have the farm for another year, thus implying his assent to the rental on the same terms. *Rupert v. Swindle* (Civ. App.) 212 S. W. 671.

In a suit by tenant to restrain landlord from leasing to another after expiration of lease giving tenant an option for an extension of two years, evidence held to show that the tenant by his conduct and dealings, including offer of higher price, had waived the option to extend lease at the option price. *Mowery v. Rivero* (Civ. App.) 223 S. W. 290.

**60. Duration and termination of lease.**—Rule that tender of rent by lessee immediately after filing of suit by lessor is sufficient to relieve against forfeiture of lease is not a rule of absolute application, and trial court, in exercise of its equity powers, may deny it to a willful and persistent violator of his legal obligations. *Crawford v. Texas Improvement Co.* (Civ. App.) 196 S. W. 195

Doctrine that courts of equity do not favor forfeitures will not be applied in favor of lessee who has willfully and persistently defaulted in payment of rent, in absence of some strong counterbalancing equity. *Id.*

In suit by lessor to forfeit lease for nonpayment of rent, evidence held to support jury finding on special issue that lessee's failure to pay rent as stipulated in lease was willful and persistent. *Id.*

Fact that lessee believed that his lessor would not, without notice, forfeit lease for failure to pay rent, and that such belief was caused by lessor's conduct, does not raise any equity in favor of lessee, who has willfully and persistently defaulted in payment of rent, or estop the lessor from forfeiting lease. *Id.*

Under a lease providing for its termination in case the building should become so injured as to become unfit for use, where injury to a tin roof was merely temporary, and by ordinary repairs could be easily restored, it was not an injury within the contract. *Sherrill v. Kirkin-York Co.* (Civ. App.) 202 S. W. 775.

Repudiation by tenant by institution of action in trespass to try title to the land forfeits his right to claim further under the lease. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

Where constable, in taking possession of leased building and ousting person in possession under tenant, was not acting under direction of landlord's agent, act did not terminate lease, which provided it should terminate on re-entry. *Pantaze v. Farmer* (Civ. App.) 205 S. W. 521.

Stipulation that lease may be terminated by sale of land is valid, and will be upheld. *Jordan v. Dinwiddie* (Civ. App.) 205 S. W. 862.

Ordinarily breaches of express covenants, much less those that arise only by implication, do not forfeit the right of possession or confer the right of re-entry, in the absence of an express provision to that effect in the contract. *Wade v. Madison* (Civ. App.) 206 S. W. 118.

Assuming that defendant, an employé of a partnership using land of plaintiff with his consent without payment of rent, was a tenant of the plaintiff, such relation was ended by dissolution of the partnership and abandonment of the land, although the employé was given fences remaining after a prairie fire, where the land was open to the public and unfenced for two years before defendant re-entered and fenced it. *Dolen v. Lobit* (Civ. App.) 207 S. W. 143, 964.

Where landlords repudiated rental contract by suing for and sequestering land, tenants could accept renunciation and agree contract should be put to an end, subject to their right to bring action for wrongful rescission. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

Where lessees were not in default for the rent, lessor had no right to forfeit lease because the lessees had for about two months left the premises; lessee not being required to remain in physical possession of premises at all times. *Obets & Harris v. Speed* (Civ. App.) 211 S. W. 316.

A provision in a lease, "Should the parties of the first part (the lessors) make a sale of land herein leased, then, and in that event this lease will immediately become void," operated as a contingent limitation of the lease term, and when the contingency happened, all rights under the contract, including the right of occupancy, terminated. *Johnson v. Phelps* (Com. App.) 215 S. W. 446.

The conveyance of property which was subject to a lease providing that it could be terminated on a sale of the premises for the sole purpose of terminating the lease, property to be reconveyed after danger of suit by the lessee was past, was fraudulent as a matter of law. *Rogers v. Rogers* (Civ. App.) 230 S. W. 489.

**61. Recovery of possession.**—Landlords were authorized to take possession of premises upon abandonment thereof by tenants. *Alsbury v. Linville* (Civ. App.) 214 S. W. 492.

One in lawful possession of premises as servant under tenants who were holding over after termination of a lease, was entitled to damages, where humiliated by being thrown into the street by force of arms without any lawful process. *Chrono v. Gonzales* (Civ. App.) 215 S. W. 368.

In order that entry on land by lessor amount to a resumption of possession, it must be inconsistent and hostile to the right of possession of the tenant, and a mere entry to make preservative repairs or for any other purpose, providing same is made in subserviency to the estate of the tenant and without intention to resume possession of the premises, does not amount to a resumption of possession and control. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

**62. Renting on shares.**—Where the one raising the crop is "a cropper on the shares," the relation of landlord and tenant does not in fact exist; the relation being that of "joint owners" of the crop. *Williams v. King* (Civ. App.) 206 S. W. 106.

Under an agreement to go on a landowner's farm and cultivate a part of it, the parties to divide the crop equally, the landowner to haul the crop to the gin, the cultivator of the ground was a "cropper." *Davis v. State* (Civ. App.) 206 S. W. 690.

It is settled law in tenancy contracts upon shares to treat parties as having entered into joint business enterprises, stipulating what shall be advantage of each. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

The execution of rental contract and assignment thereof by mortgagor does not constitute the taking of mortgagees' property or an impairment of their security within federal Const. Amend. 14, prohibiting taking of property without due process of law. *Sanger Bros. v. Hunsucker* (Civ. App.) 212 S. W. 514.

Where plaintiffs rented land to defendant, and were to furnish animals, feed, and everything necessary, except labor, and were to receive as rent one-half of all the crops, and agreed to feed one team of defendant's horses, and defendant was to let plaintiffs have the use of such team during the year for their feed, and plaintiffs turned the team over to defendant to be used by him in cultivation of the crop, it was not the intention of the parties that the value of the use of team above cost of feed should form and be a part of the rents and the contract was not void as charging rent greater than that allowed by law. *Raymond v. Ashley* (Civ. App.) 222 S. W. 992.

**63. — Mode of cultivation of land.**—Where lessees obligated to cultivate, etc., undertook to apply contract, which purported to cover 200 acres as to cultivation, to lessor's uncultivated 300 acres, obligation rested on them to put 200 acres in reasonably good state of cultivation, and to surround them with reasonably good fence. *Folmar v. Thomas* (Civ. App.) 196 S. W. 861.

Damages claimed by landlord for tenant's breach of contract to cultivate land in a good workmanlike manner held not too remote, speculative, and uncertain to sustain an action therefor. *Shotwell v. Crier* (Civ. App.) 216 S. W. 262.

A contract imposing a joint obligation to farm, cultivate, and gather a crop of cotton in a thorough and farmerlike manner necessarily implied that the persons jointly contracting to so do should personally supervise and superintend the operations, and such duty was nondelegable, and recovery could not be had under the contract where a third person was hired to superintend and do the work, in the absence of allegations of a quantum meruit. *Enterprise Co. v. Neely* (Civ. App.) 217 S. W. 1088.

**65. — Rights and liabilities as to crops.**—A landlord is not the owner of any part of a growing crop being raised by his tenant before it is divided, or, if there is an agreement to divide, before it is matured and ready to be divided. *Williams v. King* (Civ. App.) 206 S. W. 106.

The owner of land cannot create a valid mortgage on an unplanted or growing crop, which belongs to the tenant, who has merely agreed to pay him a share of the crops as rents for the use of the land, and where prior to a division of the crops, the land is sold under a trust deed, the chattel mortgagee has no lien on any part of the crop. *Brod v. Guess* (Civ. App.) 211 S. W. 299.

Where a tenant under a valid contract with owner agrees to pay a crop rent, and thereafter actually plants and cultivates the specified crop, the crop may be sold or mortgaged even though at the time of the sale or mortgage the crop has not actually been planted. *Sanger Bros. v. Hunsucker* (Civ. App.) 212 S. W. 514.

Where land is rented under crop-sharing rental contract, and, while crops are growing, is sold under deed of trust, and, after sale, a portion of the land is replanted by tenant under agreement with purchaser, assignees of rental contract are entitled to the rent crop share of the replanted crops as against purchaser. *Id.*

Rental contract, entered into by purchaser under deed of trust with tenant in possession, with knowledge of tenant's rental contract with former owner, and assignment of rents thereunder, is of no effect as against assignees. *Id.*

Where cattle entered, ate, or destroyed the landlord's share of the crop, a judgment against the tenant for value of such part of the crop held sustained by evidence that the tenant did not properly repair the fences protecting the landlord's share of the crop, and that he gave the stock access to such crop. *Friemel v. Coker* (Civ. App.) 218 S. W. 1105.

**68. — Breach of contract by landlord in general.**—Value of crop before gathered held not measure of tenant's damages for landowner's breach of lease contract. *Lott v. Ballew* (Civ. App.) 198 S. W. 645.

Where landowner breached his contract to rent agricultural land on shares, thus depriving his tenant of employment, amount earned by tenant in other employments, or amount he could have earned by leasing other equally available land, should be deducted from his recovery. *Id.*

In action by tenant for landlord's failure to permit him to cultivate rented lands, instruction allowing as damages reasonable cash market value of plaintiff's share of crops he might have raised thereon held to erroneously premit consideration of expense of making and gathering crops. *Butler v. Perdue* (Civ. App.) 199 S. W. 1176.

Evidence held sufficient to support finding that lessor agreed to furnish lessee necessary water for irrigating rice crop. *Hudson v. Salley* (Civ. App.) 201 S. W. 655.

In an action for breach of a contract of employment under which it was alleged plaintiff was to have a portion of a crop and a portion of the increase in stock and profits from the milk on the farm where he was employed, plaintiff could show the value of the milk sold and the calves and pigs born during the year. *Hall v. White* (Civ. App.) 208 S. W. 669.

In action by tenants against landlords for breach of rental contract, evidence as to damages held not so vague, uncertain, and conjectural that no verdict for tenants could rightfully be based upon it. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

For breach of rental contract tenant may recover what he would reasonably have made out of his crop but for breach, but is not limited to such item, and is entitled as well to loss sustained as well as gains prevented, and may recover for damages to his feed by the eviction. *Id.*

The measure of damages for the breach of a contract leasing or renting land on shares is the value of the injured party's share of the crops which he could have made, less proper deductions, to be determined by the circumstances of each particular case. *Williams v. Gardner* (Civ. App.) 215 S. W. 981.

**69. — Eviction.**—In action by tenant on shares against landlords for wrongful eviction and breach of contract, plaintiff alleging special damages by eviction as well as exemplary damages, court properly refused to direct verdict against plaintiff because he was a single man within draft age, and had been called to army, which would have interfered with cultivation of crop in any event. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

**70. — Conversion.**—Where tenant set up share-cropping contract, and alleged that landlord and a third person conspired to oust him of the crop, it was not error to award him as damages the value of his share of the crop, without deducting the cost of harvesting, since a conspiracy includes a corrupt motive for which penalty may be inflicted. *Stewart v. Patterson* (Civ. App.) 204 S. W. 768.

**71. — Breach of contract to deliver share.**—Where plaintiff landlord was entitled to one-third of a crop free from all expenses of cultivating and harvesting it, his damages cannot be limited to the value of the crop at the time defendant tenant destroyed it, since that would deprive him of the benefit of his contract with defendant to cultivate the land properly. *Shotwell v. Crier* (Civ. App.) 216 S. W. 262.

While, as a general rule, in actions in trespass to try title and in forcible entry and detainer, the measure of damages is the rental value of the property while wrongfully withheld, a landlord may sue a tenant on shares holding over only for use of pasture land withheld after expiration of lease or the value of the grass converted, measuring its value by the number of cattle pastured at a fixed price per head. *Id.*

The measure of damages for the destruction of the landlord's share of a wheat crop by the tenant's pasturing stock thereon is the market value of plaintiff's share of such crops as would probably have been raised if defendant had complied with his contract and not destroyed the crop. *Id.*

**72. — Liabilities of third persons.**—A landlord's lien applies only while crops remain on the premises and for one month thereafter, and a landlord suing a purchaser at sale under execution against tenant as for conversion must allege and prove that the crop was at the time of the conversion either on the premises or had not within his knowledge been removed for a greater time than 30 days. *Jarrell-Evans Dry Goods Co. v. Allen* (Civ. App.) 229 S. W. 920.

In an action by landlord for conversion of cotton on which the landlord had a lien for rent and advances, where execution against the tenant had been levied on the cotton while it was in possession of the tenant either on the premises or at the place where the tenant had taken it to have it prepared for market, held, that the burden of showing waiver or loss of lien was on defendants, purchasers at execution sale, who claimed that his lien had been waived by the landlord because he allowed the tenant to sell crops, so judgment for defendants cannot be sustained on the theory that the landlord did not establish that the crops were on the premises or had not been removed for more than 30 days. *Id.*

## TITLE 80 A

## LAND SURVEYORS

Art. 5491½. Board of examiners; members; appointment; qualifications.	Art. 5491½e. Same; powers and duties; signature to field notes.
5491½a. Same; organization; quorum.	5491½f. Field notes and plats.
5491½b. Examinations; questions; applicants for license; deposit; conduct of examinations.	5491½g. Compensation of licensed surveyor; force and effect of field notes.
5491½c. Same; custody of questions and answers; second examination; license to successful applicants; duration of; revocation.	5491½h. Rights of unlicensed surveyors.
5491½d. Licensed surveyors; oath of office; bond.	5491½i. Certificates of facts shown by books, etc., in county surveyor's office.
	5491½j. Seal of licensed surveyors.
	5491½k. Repeal.

**Article 5491½. Board of examiners; members; appointment; qualifications.**—A Board of Examiners of Land Surveyors is hereby created to be composed of the Commissioner of the General Land Office and two reputable land surveyors, to be appointed by the Governor, who have had not less than fifteen years practical and active experience in the field as land surveyors. The first two surveyors so appointed shall receive a license from the said Board without examination and shall hold their membership on such board at the pleasure of the appointing authority. [Acts 1919, 36th Leg. 2d C. S., ch. 67, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5491½a. Same; organization; quorum.**—Within sixty days after the taking effect of this Act the Board shall organize by electing a Chairman and a Secretary-Treasurer. Two members shall constitute a quorum for the transaction of business and the concurrence of two members shall be necessary for the adoption or rejection of any question. [Id., § 2.]

**Art. 5491½b. Examinations; questions; applicants for license; deposit; conduct of examinations.**—The Board shall prepare in writing questions upon the theory of surveying, practical surveying, theory and use of surveyor's instruments, calculation of areas, closing of field notes, the law of land boundaries and touching such other matters pertaining to surveying as the Board may deem important. No one shall either directly or indirectly make known to any applicant for surveyors license the questions upon which such examination shall be given prior to the commencement of the examination. When the questions shall have been prepared by the Board they shall be forwarded to the custodian of questions for teachers certificates in each county under proper enclosures with suitable words on the enclosure indicating the contents. The questions shall be held unopened by such custodian and opened only in the presence of such applicants for surveyors license as may present themselves for examination at the same time and place as may be required of applicants for teachers certificates. Each applicant shall deposit the sum of ten dollars with the authority that may be authorized to receive such fees from applicants for teachers certificates. When such sum shall have been deposited the authority conducting the examination for teachers certificates shall likewise conduct the examination for land surveyors license in the same manner as for that for teachers certificates. When such applicants shall have returned the questions and answers to the source from which they were received, the authority re-

ceiving them shall return both questions and answers to the Chairman of the Board of Examiners of Surveyors, together with eight dollars of the ten dollars deposited by each applicant, and retain two dollars which two dollars shall be disposed of as are the fees paid by applicants for teachers certificates. The sum received by the Board, or so much thereof as may be necessary, may be used to defray the actual expense incurred by said Board in the execution of this Act and the remainder shall be deposited annually into the State Treasury; provided that no appropriation shall ever be made to defray the expenses of said Board or to carry into effect any of the provisions of this Act. [Id., § 3.]

**Art. 5491½c. Same; custody of questions and answers; second examination; license to successful applicants; duration of; revocation.**—When the questions and answers shall have been received by the Chairman of the Board as aforesaid, he shall either convene the Board for the purpose of passing upon the answers made to the questions and the issuance of the License or the refusal to so issue the license; or the said Chairman may transmit the questions and answers to the other members for their consideration and action as herein contemplated. All questions and answers made thereon with the action of the Board shall be deposited in the General Land Office and there safely kept not less than one year. Should a license be refused an applicant such applicant may take any subsequent examination under the same conditions as in the first instance. Every applicant who successfully passes the examination shall receive from said Board a Land Surveyors License attested by the Seal of the Board and shall be valid for life unless sooner revoked by the Board for any of the following causes; to wit: the holder declared by any court to have committed a felony, theft or fraud, to be insane or incompetent; found by the Board to have unlawfully given information concerning any undisclosed public land; found to have been directly or indirectly interested in the purchase or in the acquisition of the title to any public land; found guilty of any act or default discreditable to the surveying profession. Before any license shall be revoked the holder thereof shall be advised by written notice from the Board being mailed to him at his last known address at least thirty days before the date fixed for hearing any charge against him, stating the charge, and the time and place for such hearing. Should the Board find the charge sustained by the facts the license of such surveyor shall be revoked. The facts adduced at such hearing shall be reduced to writing. The surveyor whose license shall have been revoked may appeal from such revocation to the district court of any county. Upon such appeal the court shall admit in evidence the written record of the Board, together with such other evidence as may be offered on either side in accordance with the rules of evidence in district courts. After a revocation of a surveyor's license such surveyor shall not perform the duties of a licensed surveyor unless such license shall have been restored; provided, that applicants, who are reputable land surveyors of fifteen years actual experience in the field as such land surveyors, shall receive a license with the exemption when they shall have filed with said Board the affidavits of three credible persons to the effect that applicant is a reputable land surveyor of fifteen actual experience in the field as such and upon the payment of a fee of Two (\$2.00) Dollars to the said Board. [Id., § 4.]

**Art. 5491½d. Licensed surveyors; oath of office; bond.**—Before one who receives a land surveyors license shall be authorized to perform the duties of a land surveyor, he shall take the oath of office prescribed

by the constitution, and shall make a good and sufficient bond in the sum of one thousand dollars, payable to the Governor and his successors in office, conditioned that he will faithfully, impartially and honestly perform all the duties of a surveyor to the best of his skill and ability in all matters wherein he may be employed. The said bond shall not be void upon first recovery nor until the whole may be exhausted. The said oath and bond shall be recorded in the office of the county clerk of the county in which the licensee resides, and after being so recorded the said bond and oath of office shall be filed in the General Land Office, accompanied with one dollar as filing fee and thereupon the licensee shall be authorized to enter upon the discharge of the duties of a land surveyor. The other records and books of the Board relating to the execution of this Act shall be deposited in the General Land Office for safe keeping when not in use by the Board. [Id., § 5.]

**Art. 5491<sup>1</sup>/<sub>2</sub>e. Same; powers and duties; signature to field notes.**—Land Surveyors, licensed and otherwise qualified as provided in this Act, are hereby authorized to perform the duties that are now or may hereafter be required of county surveyors and shall be subject to the direction of the Governor, Commissioner of the General Land Office, the Attorney General, and the courts of the State in the matter of land surveying in such cases as may come under the jurisdiction of said authorities. Their jurisdiction shall be co-extensive with the limits of the State. They may be elected county surveyor of the county in which they reside and if so elected shall qualify as provided by law for county surveyors, but such election for any particular county shall not limit the jurisdiction of said surveyor to such county, nor shall the election of a county surveyor for any particular county prevent any other licensed surveyor from performing the duties of a surveyor in such county. Every field note made by one licensed under this Act shall be signed by the surveyor and followed by the designation "Licensed Land Surveyor." [Id. § 6.]

**Art. 5491<sup>1</sup>/<sub>2</sub>f. Field notes and plats.**—The field notes of every survey made by a licensed land surveyor shall in every respect conform to the requirements that are now or may hereafter be required for field notes and every survey made shall be recorded in the county surveyor's records of the proper county, and for the purpose of such record and for all other purposes licensed surveyors shall have free and unrestrained access to the county surveyor's records therein. The field notes of all surveys and plats of same made by any licensed land surveyor affecting the lines, boundaries and areas of unpatented land shall be forwarded to the General Land Office. If a licensed land surveyor should discover an undisclosed tract of public land, he shall not make known that fact to any one except to such person or persons as may have it enclosed, but he shall forward to the General Land Office a report of the existence of such tract and the acreage therein, and its probable value. [Id., § 7.]

**Art. 5491<sup>1</sup>/<sub>2</sub>g. Compensation of licensed surveyor; force and effect of field notes.**—A licensed land surveyor shall receive as compensation for his services not to exceed ten dollars per day and other expenses incident to the survey shall be agreed upon between the surveyor and the interested party, whether that be a private person, a county, a court, or the State. All fields notes made by a licensed land surveyor in whatsoever county shall have the same force and effect and be admissible in evidence the same as field notes heretofore made by county surveyors and their deputies. [Id., § 8.]



**Art. 5491 $\frac{1}{2}$ h. Rights of unlicensed surveyors.**—A surveyor who does not hold a license under this Act may nevertheless be elected to the office of county surveyor and perform the duties of that office and one who does not hold such license may be appointed deputy county surveyor and perform the duties of that office and they shall receive such compensation for their services as licensed State land surveyors; and nothing herein contained shall be construed to prevent any surveyor or person to survey for another by private contract and the criminal penalties contained herein shall not apply to such surveyor or person surveying for another by private contract nor to any surveyor surveying lands by order of court. [Id., § 9.]

**Art. 5491 $\frac{1}{2}$ i. Certificates of facts shown by books, etc., in county surveyor's office.**—Surveyors qualified under this Act and County Surveyors may make a certificate of any fact shown by the books, documents and records of any county surveyor's office and may make a certified copy of any book, document or record or entry therein shown by the record of said office, and said certificate and certified copy shall be admissible in evidence as to what said records may disclose, and for such service the surveyor may charge a fee of one dollar for each certificate and thirty-five cents for each one hundred words contained in any certified copy; provided, when a county has a county surveyor such surveyor alone shall be authorized to make certificates and certified copies and receive the fees therefor. [Id., § 10.]

**Art. 5491 $\frac{1}{2}$ j. Seal of licensed surveyors.**—Licensed land surveyors under the provisions of this Chapter shall procure a seal of offices similar to that of a Notary Public, with this exception, around the margin shall be the words "licensed state land surveyor" and between the points of the star in the said seal shall be the words "Texas," with which seal he shall authenticate all certificates and other official acts issued under the provisions of this chapter and no certificate or other instrument issued by such land surveyor shall be admitted in evidence, or have any legal effect, unless, such seal is impressed thereon. [Id., § 11.]

For section 12 of this act, see Penal Code, art. 1617b.

**Art. 5491 $\frac{1}{2}$ k. Repeal.**—All laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id., § 13.]

## TITLE 81

## LAWS

Chap.

1. Common law.
2. Special laws.

Chap.

3. Construction of laws.

## CHAPTER ONE

## COMMON LAW

Art.

5492. Common law of England adopted.

Art.

5493. Executors, etc., governed by, when.

**Article 5492. [3258] Common law of England adopted.**

Cited, *Wadkins v. Watson*, 86 Tex. 194, 24 S. W. 385, 22 L. R. A. 779; *State Nat. Bank of San Antonio v. East Coast Oil Co.*, S. A., 109 Tex. 510, 212 S. W. 621.

**Construction and operation.**—Under *City of Dallas Charter*, art. 2, § 2, subd. 1, article 2, § 3, subds. 24, 33, and article 2, § 7, subd. 4, an ordinance regulating and licensing jitney busses and requiring a surety bond by the operators was valid, and not derogative of common law. *City of Dallas v. Gill* (Civ. App.) 199 S. W. 1144.

Where the statutes and the Constitution are merely declaratory of common principles and do not define the civil rights and remedies in any given case, the common law of England, so far as not inconsistent with the Constitution and laws of the state, is applicable. *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

The question of assignability of the right of re-entry after condition subsequent broken should be governed by the same rule which is applied to the assignability of an interest in land in the adverse possession of another, and the right of re-entry after condition subsequent broken is assignable in view of art. 7733(4), notwithstanding this article. *Perry v. Smith* (Com. App.) 231 S. W. 340.

**Art. 5493. [3259] Executors, etc., governed by, when.**

**Construction and operation.**—Arts. 3309, 3621, 3622, 3623, 3235, 4099, 4101, 5493, do not authorize administrator to charge against the estate a premium paid for the making of his bond. *Jarvis v. Drew* (Civ. App.) 215 S. W. 970.

## CHAPTER TWO

## SPECIAL LAWS

**Article 5494. [3250] Notice of intention to apply for special law.**

**General and special laws.**—Act May 16, 1907 (post, arts. 7487-7502), imposing inheritance taxes, is not special, but a general, law, applying equally and uniformly to every class affected. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Constitutionality of statutes.**—Sp. Act April 1, 1913 (Loc. & Sp. Acts 33d Leg. c. 138), creating special school district and providing for assessments, etc., is valid under amendment 1909, Const. art. 7, § 3, though notice was not given as required by art. 3, §§ 56, 57. *Eagle Lake Independent School Dist. v. Hoyo* (Civ. App.) 199 S. W. 352.

Under Const. art. 3, § 56, art. 8, § 9, as amended, and *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 3870, 6901, held, that *Bexar County Road Law* (Loc. & Sp. Acts 33d Leg. c. 77, § 5), providing for annual salary for commissioners of county for acting in all capacities, is unconstitutional as an attempted regulation of county affairs by local and special act. *Altgelt v. Gutzeit*, 109 Tex. 123, 201 S. W. 400.

Const. art. 7, § 3, authorized the Legislature to pass the special act creating the *Gonzales Independent School District*, without notice, although it included the incorporated city of *Gonzales*, which had assumed control of the public schools under general laws, and become a taxing district authorized by art. 11, § 10, regardless of art. 3, § 56. *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

Irrespective of Const. art. 3, § 56, art. 7, § 3, authorized the Legislature to pass, without notice, the special act creating the *Charco independent school district*, which provided for election to determine necessity of borrowing money and the rate of taxation. *Powell v. Charco Independent School Dist.* (Civ. App.) 203 S. W. 1178.

The act creating the county court at law of *Harris county* (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 1811-50), and providing that the county judge shall receive for the

ex officio duties of his office not less than \$1,500 a year and the Harris county road act likewise providing extra compensation for the county judge, held local special laws, regulating the affairs of the county, and invalid under Const. art. 3, § 56, as to a matter which could be regulated by a general law. *Ward v. Harris County* (Civ. App.) 209 S. W. 792.

Act March 29, 1917 (Acts 35th Leg. c. 142), entitled "An act to incorporate the city of Plainview, Hale county, Texas, and to grant it a charter; to define its powers and prescribe its territorial limits, duties and liabilities, repealing all laws or parts of laws in conflict herewith, and declaring an emergency," is a local or special law, within Const. art. 3, § 56. *State v. Vincent* (Civ. App.) 217 S. W. 402.

Though the incorporated city of Gonzales had assumed control of the public schools under the general laws and become a taxing district as authorized by Const. art. 11, § 10, the Legislature may nevertheless under art. 7, § 3, provide for formation of school district by local law without notice and create a special school district including the city without notice of intention to apply for the local or special law as required by article 3, § 57. *Houston v. Gonzales Independent School Dist.* (Com. App.) 229 S. W. 467.

Sp. Laws 36th Leg. (1919) c. 74, providing for establishment of road districts and creation of a board of a permanent road commissioners composed of certain county officers and citizens selected from each commissioner's district for the carrying on of the work, is not unconstitutional as an unwarranted attempt by the Legislature to control the affairs of Limestone county by special law or to take from the commissioners' court powers conferred upon that body alone in violation of Const. art. 5, § 18, in view of art. 3, § 52, and art. 8, § 9. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.), 230 S. W. 1010.

Under Const. art. 11, § 2, and art. 8, § 9, the Legislature may pass local laws for construction as well as maintenance of public roads and highways already built without the local notice required for special or local laws, in view of art. 3, §§ 52, 56. *Id.*

Inhibition of Const. art. 3, § 56, against creating offices by special or local law, relates only to offices and officers for counties, cities, towns, election or school districts. *Id.*

Effect of giving notice.—Where an employé on a state railroad was injured, and his petition to the Legislature for privilege of entering the courts with his cause of action, of which under Const. art. 3, § 57, he was required to give advance notice of 30 days, was presented within two years after injury, the running of limitations against an action for such injuries was tolled. *State v. Elliott* (Civ. App.) 212 S. W. 695.

## CHAPTER THREE

### CONSTRUCTION OF LAWS

Art.	Art.
5502. General rules of construction.	5504. Meaning of certain words.
5503. What shall not vitiate.	

#### Article 5502. [3268] General rules of construction.

See *Gibson v. Wood* (Civ. App.) 199 S. W. 893; *Debenham v. Short* (Civ. App.) 199 S. W. 1147; *City of San Antonio v. Spears* (Civ. App.) 206 S. W. 703; *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535; *Walker v. Fields* (Civ. App.) 221 S. W. 632.

Cited, *City of Brenham v. Brenham Water Co.*, 67 Tex. 542. 4 S. W. 143; *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53; *Halbert v. Alford* (Sup.) 16 S. W. 814; *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

1. **Construction of statutes in general.**—When two constructions may be given a statute, one of which would lead to absurdities and defeat the legislative intent, while the other would clarify its meaning, purposes, and intent, and make the statute enforceable, such reasonable construction must be given it. *American Indemnity Co. v. City of Austin* (Civ. App.) 211 S. W. 812; *City of Corpus Christi v. Mireur* (Civ. App.) 214 S. W. 528; *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

Ambiguity in the language of a special law, affecting only one county, should be resolved in favor of the construction which will give effect, rather than that which will unduly limit or defeat, its purpose. *Ex parte Miller*, 85 Cr. R. 263, 211 S. W. 451.

Ordinarily, a statutory amendment affecting admissibility of evidence or probative effect of pleadings, affidavits, etc., affects suits pending at time of amendment, as well as suits filed thereafter. *Walker v. Alexander* (Civ. App.) 212 S. W. 713.

Unless a contrary intention clearly and strongly appears and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively, where to do otherwise would be to materially change existing rights. *Invader Oil & Refining Co. of Texas v. City of Ft. Worth* (Civ. App.) 229 S. W. 616.

Laws depriving citizens of rights possessed by them should be strictly construed. *Poe v. Continental Oil & Cotton Co.* (Com. App.) 231 S. W. 717.

2. — **Constitution.**—When a constitutional amendment is adopted, it becomes just as much a part of the organic law as the section amended originally was, and the

effect of the amendment is the same as if it had been originally incorporated in the Constitution. *State v. Vincent* (Civ. App.) 217 S. W. 402.

Just as liberal rule is generally applied in construction and enforcement of remedial statutes and Constitutions, stricter rule is applied when question is as to restrictive effect on legislative power of provisions of state Constitution. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 380, denying rehearing 110 Tex. 369, 218 S. W. 479.

Words in a Constitution speak from date of original insertion, unless it be provided otherwise; but words may be used in a sense broad enough to include things not at the time within human experience. *Id.*

**3. Intention of legislature.**—In construing statute, purpose is to ascertain legislative intent. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 380, denying rehearing 110 Tex. 369, 218 S. W. 479; *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878; *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

While it is for the Legislature to make a law, it is the court's duty to "try out the right intentment" of statutes upon which they are called to pass and to ascertain and enforce them according to their intentment. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Although it is plain duty of courts in construing statutes to give effect to intent of lawmaking power and seek for that intent in every legitimate way, there is no room for construction when intention of Legislature is so apparent from face of statute that there can be no question as to its meaning. *Larkin v. Pruett Lumber Co.* (Civ. App.) 209 S. W. 443.

While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of law should not be sacrificed to a literal interpretation of such words. *Milners' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

Intent of a statute must be found in its language, and not elsewhere, and its interpretation must be such as its words in their plain sense fairly sanction and will clearly sustain. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

In the construction of a statute, the application of words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the Legislature when violence will not be done by such interpretation to its language. *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

**4. — Intent in construing constitution.**—The fundamental principle in construing Constitutions is to ascertain the intent of the framers. *Cain v. Lumsden* (Civ. App.) 204 S. W. 115.

In ascertaining whether a certain interpretation should be given a constitutional provision, it is proper to consider whether its framers and the voters adopting it intended the consequences which must follow a given construction. *Koy v. Schneider*, 110 Tex. 369, 218 S. W. 479.

**5. Spirit or letter.**—Courts are not authorized to extend scope and application of statute merely because there is apparently no reason why right given in one case should not have been given in other cases. *Ætna Life Ins. Co. v. Otis Elevator Co.* (Civ. App.) 204 S. W. 376.

A statute is to be extended to cases not within the words but within the purpose thereof, as a thing within the intention of the legislators is as much within the statute as if it were within the letter. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Intention of a statute should prevail against its strict letter. *Walker v. Haley*, 110 Tex. 50, 214 S. W. 295.

The intent of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, though not consistent with the strict language, which will not be followed when it leads away from the true intent. *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

**6. Policy and purpose.**—Every statute must be construed with reference to the object to be accomplished, and in ascertaining such object the occasion and necessity of the enactment of the statute may be considered. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

It is not to be supposed that a law would require a vain thing. *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

The evil to be remedied and the object to be accomplished by a statute must be kept constantly in mind in arriving at the legislative intent. *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

Statute must be construed not only by its own language, but the court must consider the ends sought to be obtained by it in connection with the statute to which it was intended to be cumulative. *Hunter v. Whiteaker & Wasfington* (Civ. App.) 230 S. W. 1096.

**7. — Terms of constitution.**—A rule of construction applicable to constitutional amendments is that in ascertaining the intention of an amendment the court should look to the evil to be cured and the remedy sought to be applied. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

**10. Meaning of language—In general.**—Words in common use, found in statute, must be given sense in which they are ordinarily used. *State v. Yturria*, 109 Tex. 220, 204 S. W. 315, L. R. A. 1918F, 1079, reversing judgment (Civ. App.) 189 S. W. 291.

While "or" is a disjunctive conjunction and the term "and" is a conjunctive conjunction, the words are not words of technical meaning and are to receive in law the same meaning they carry in common parlance, and it being plain that in the Constitution

the terms "and" and "or" are used as convertible terms, it will be presumed that the Legislature used them in that sense in a statute. *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

Unless the context indicates otherwise, the language of statutes is to be given its ordinary signification. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

A statute will not be nullified or saved by refinement of construction, but it and provisions of the Constitution, which it is claimed to violate, will be interpreted according to the popular meaning of the language employed, except where used in a technical sense; that is, their effect will be determined by the plain and ordinary meaning of the language used. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

11. — **Language of constitution.**—Unless the context indicates otherwise, the language of the Constitution is to be given its ordinary signification. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

The language selected by the framers of a constitution, when its meaning is clear, controls the court in interpreting it. *Ex parte Meyer*, 84 Cr. R. 288, 207 S. W. 100.

The statute will not be nullified or saved by refinement of construction, but it and provisions of the Constitution which it is claimed to violate will be interpreted according to the popular meaning of the language employed, except where used in a technical sense; that is, their effect will be determined by the plain and ordinary meaning of the language used. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

12. **Plain and unambiguous language.**—Where language is plain and unambiguous, there is no room for construction, but where the meaning is doubtful the court can conjecture as to the intention of the Legislature. *Hunt v. State* (Cr. App.) 229 S. W. 869; *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352; *Gribble v. State* (Cr. App.) 210 S. W. 215, 3 A. L. R. 1096; *Henderson v. State* (Cr. App.) 229 S. W. 535.

Where language of statute is ambiguous, "construction" thereof becomes necessary; "construction" being the process or art of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

If intent of a statute can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resort to other aids for construction. *Western Indemnity Co. v. Milam* (Civ. App.) 230 S. W. 825.

13. — **Words of constitution.**—Where language of Constitution is ambiguous, "construction" thereof becomes necessary. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Where the meaning of a constitutional provision is plain, courts should not attempt to construe it, but should allow its clear meaning to apply. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

14. **General and specific words.**—General words in a statute, as "such other amusements," will not be rejected as too general nor interpreted to include all kinds of amusements, but refers to those of the species named. *Zucarro v. State*, 82 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

Under arts. 1011, 1013, authorize a personal judgment against a married woman, who owned as her separate estate property abutting on the improved street, which was the homestead of herself and her husband; her estate, under this article, not excluding her from the general term "owner." *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703.

Where an enumeration of specific things is followed by some general word or phrase, such general word or phrase, under the ejusdem generis rule of construction, is to be held to refer to things of the same kind as those specifically mentioned. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

15½. **Gender.**—Art. 7866, providing that, if a "testator" has a child at time of execution of will, a child born subsequently who survives testator shall be entitled to the share he would have received if the "father" had died intestate, held applicable to the rights of an after-born child under his mother's will. *Parker v. Swain* (Civ. App.) 223 S. W. 231.

18. **Statute as a whole.**—Intent of statute must be determined from construction of all of its provisions. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226; *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593.

Court cannot adopt construction of section of statute, no matter how plainly required by its language, standing alone, which would defeat intent of Legislature in whole statute. *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

In construing statute, all parts thereof must be given effect. *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

19. **Conflicting provisions.**—Statutes will not be construed as conflicting if such construction can be reasonably avoided. *Mitchell v. Hancock* (Civ. App.) 196 S. W. 694.

A general provision sufficiently comprehensive to include a given subject-matter will be controlled by another provision specifically relating to the same subject-matter. *State v. Valentine* (Civ. App.) 198 S. W. 1006.

20. — **Constitutional provisions.**—When one section of the Constitution expresses a general intention to do a particular thing and another section expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

23. **Title and caption.**—An act is to be interpreted in the full light of its title; but the title itself has no enacting force, and cannot confer powers not mentioned in the act. *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

24. **History and surrounding circumstances.**—If construction given by Legislature to statute reserving public lands for benefit of counties for free schools were clearly wrong, it would be duty of Supreme Court to disregard it, but construction should not be cast aside and dependent titles struck down unless construction is clearly wrong. *Slaughter v. Yoakum County*, 109 Tex. 42, 195 S. W. 1129.

Journals kept by Legislature cannot be considered by courts for purpose of determining whether Const. art. 3, § 30, prohibiting amendment in passage so as to change original purpose, has been violated in passage of a bill. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

26. **Contemporaneous construction.**—Art. 5598, as amended by Act 35th Leg. c. 206, preserving common-law defenses to actions for libel, held not a legislative construction that the former law deprived defendants of such defenses. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

27. **Executive construction.**—If construction given by executive department to statute reserving public lands for benefit of counties for free schools was clearly wrong, it would be duty of Supreme Court to disregard it, but construction should not be cast aside and dependent titles struck down unless construction is clearly wrong. *Slaughter v. Yoakum County*, 109 Tex. 42, 195 S. W. 1129.

Public policy requires solving of mere doubts in favor of construction put upon statutes by departments and officers charged with their administration. *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

Where construction of a statute is doubtful, construction given by officer of state, expressly charged with enforcement, is entitled to great weight, and should be followed, unless clearly erroneous. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

In the construction of 6 Gammel's Laws, 669, approved December 14, 1863, suspending laws authorizing disposition of state land until close of the war, the construction by the land office authorities in opening offices for such business is entitled to great weight. *Fielder v. Houston Oil Co. of Texas* (Com. App.) 208 S. W. 158.

The contemporaneous and particular construction of a statute by those whose duty it is to carry it into effect, though not absolutely controlling, is entitled to great weight by the court. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Where statute is "ambiguous"—that is, open to construction—construction given it by head of executive department of state government will be followed by courts, and upheld, unless clearly erroneous. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

27½. **Legislative construction of constitutional provision.**—Due consideration and weight, though not necessarily conclusive force, should be given a construction placed by Legislature on state Constitution. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

28. **Presumptions to aid construction.**—It is presumed Legislature charged all language used by it with a meaning and purpose, especially when language is an adopted phrase or bears evidence of having been chosen with care or is a phrase of long and frequent usage in the same connection or others involving a similar principle of construction. *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

The language of the Constitution may be presumed to have been chosen with more care than that of any other legislation. *Id.*

While Legislature had power to overturn the steady unbroken policy of the laws of the state to protect the property of the wife from the debts of her husband, it is to be assumed that, in the execution of such a purpose, proposed law would use language so plain and certain that it would need no construction. *Red River Nat. Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923.

Courts must assume that, in enacting statute, Legislature was familiar with previous decisions of Supreme Court affecting subject-matter. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

The court, in construing a statute, will not presume that the Legislature intended to provide for an absurdity. *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

29. **Statutes relating to same subject.**—In the absence of any direct judicial interpretation of the language under construction, its use in substantially the same connection, where its meaning is undisputed, would afford the best guide to the legislative intent. *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

The Mining Act of 1883 (9th Gammel's Laws, p. 406), relating to reservation of minerals in school and asylum lands, being a contemporaneous act with that of April 12, 1883 (Acts 18th Leg. c. 83), relating to school lands, each should be construed in the light of the other. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

Knowledge of an existing law relating to the same subject is attributed to the Legislature in the enactment of a subsequent statute. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Com. App.) 221 S. W. 582, affirming judgment (Civ. App.) 185 S. W. 51.

Statutes are construed with reference to the general law in existence at time of enactment and in connection with other similar statutes relating to same subject-matter. *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

In construing statute, it must be read in the light of other statutes on the same subject. *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

30. **Statutes adopted at same session.**—See *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

Acts of same Legislature are to be construed together. *Claunch v. State*, 82 Cr. R. 355, 199 S. W. 483.

31. **General and special statutes.**—See *Ex parte Bennett*, 85 Cr. R. 315, 211 S. W. 934.

The fact that a special enactment conflicts with general laws already existing when it was enacted does not affect its validity, as the repugnant portions of the general laws give way to those of the special law, and its provisions will be given the same scope and effect as they would have without the existence of a general law having contrary application. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

32. **Re-enactment of or reference to former statute and adoption of provisions previously construed.**—Where a judicial construction has been placed on a statute and the laws have been subsequently revised and the construed provision re-enacted without material change, it will be conclusively inferred that the lawmaking body intended that the same construction should be placed on the language of the statute in the future. *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 438; *Lotto v. State* (Civ. App.) 208 S. W. 563; *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

Presumption is that Legislature by amendment intended to change the law, and phraseology of the amended act materially different from that of original act raises a presumption of an intent to change the meaning. *McLaren v. State*. 82 Cr. R. 449, 199 S. W. 811.

Art. 2021, authorizing impeachment of verdict on motion for new trial, by testimony of jurors as to their misconduct, will be held to have been adopted with the construction, previously placed by the Court of Criminal Appeals on a similar statute for criminal cases, that the issue was not one in the main case tried before the jury, and therefore that the evidence thereon must be preserved by bill of exceptions or statement of facts filed in term time. *Smith v. Texas Power & Light Co.* (Civ. App.) 206 S. W. 119.

Where the language of a statute relating to a female juvenile under the age of 18 years is the same as that relating to male juveniles under 17 years of age which had been previously construed, it must be presumed that the construction of such former statute indicates the legislative intent in the latter. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

Judicial expressions interpreting a statute before it is amended are presumed to have been sanctioned and adopted by the Legislature in making the amendment. *Williams v. State* (Cr. App.) 225 S. W. 177.

33. — **Constitutional provisions.**—Where the language of Const. art. 8, § 2, authorizing the exemption from taxation of buildings used exclusively, and owned, by institutions of purely public charity, as construed by the Supreme Court, was carried without change into the subsequent amendment of the section, the presumption is conclusive that the people readopted the provision with knowledge of its declared intent. *City of Houston v. Scottish Rite Benev. Ass'n* (Sup.) 230 S. W. 978.

34. **Laws of other states.**—The decision of the highest courts of the state construing its statutes is binding on courts of other jurisdictions. *Criteser v. Gaffey* (Com. App.) 222 S. W. 193, affirming judgment (Civ. App.) *Gaffey v. Criteser*, 195 S. W. 1166.

35. **Statutes adopted from another state or country.**—Where Legislature enacts a law similar in all material respects to a federal law, it will be presumed that the construction given the federal statute by the federal courts was adopted by the Legislature. *Fennell v. Trinity Portland Cement Co.* (Civ. App.) 209 S. W. 796.

Since the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz) is largely copied from the Massachusetts Act, it should receive the same construction as that given the latter act by the courts of that state. *Home Life & Accident Co. v. Corsey* (Civ. App.) 216 S. W. 464.

When the Legislature brings over from a sister state and adopts in identical or similar terms a statute which has been construed in such state, courts of Texas customarily apply same construction to it. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

In determining the validity of statutes adopted from other states, the presumption is indulged that the Legislature was aware of the fixed judicial interpretation of such statutes in the states from which they were copied, and their validity is to be determined in the light of such construction. *Board of Water Engineers v. McKnight* (Sup.) 229 S. W. 301.

35½. — **Constitutional provisions.**—When suffrage clause is imported literally or substantially into a state Constitution from Constitutions of other states, though prior to construction thereof by courts of such other states, subsequent constructions by such courts are strongly persuasive of sense in which clause was incorporated into organic law of adopting state. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Where one state adopts a constitutional provision of another, after such provision has received judicial construction, it will be construed likewise in the adopting state. *Id.*

It is to be presumed that provisions of existing Constitutions of other states, extending meaning of "elections" to make suffrage clause or provision expressly include elections then or thereafter authorized by law, whether strictly governmental elections or not, were known to framers of Constitution of Texas in adopting a suffrage clause, but without the extension of meaning. *Id.*

36. **Mandatory or directory.**—The word "shall" is not always given a mandatory effect in construing a statute, and, notwithstanding its use, statute is sometimes held

directory, but when word is used, the presumption is that it is in imperative, and not in directory, sense. *McLaren v. State*, 32 Cr. R. 449, 199 S. W. 811.

Words "may" and "shall" are to be given that meaning which will best express legislative intent. *Hess & Skinner Engineering Co. v. Turney*, 109 Tex. 208, 203 S. W. 593.

**37. Provisos, exceptions and saving clauses.**—Statutes which constitute exceptions to general statutes are to be strictly construed. *Moss v. Bross* (Civ. App.) 221 S. W. 343.

Exceptions will not be ingrafted on statutes by implication, or merely because good reasons exist for adding them. *Spears v. City of San Antonio*, 110 Atl. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703.

**39. Remedial statutes.**—Remedial statutes will be liberally construed to accomplish legislative purpose, especially as Final Title, § 3, expressly so provides. *Taylor v. Iowa Park Gin Co.* (Civ. App.) 199 S. W. 853.

**42. Penal statutes.**—Penal statutes must be strictly construed. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

**43. Revenue laws.**—In the construction of provisions of tax laws which point out the subjects to be taxed, and indicate the time, circumstances, and manner of assessment, there is no reason for peculiar and rigid rules. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

**44. Time of taking effect.**—See *Kansas City, M. & O. Ry. Co. of Texas v. Harral* (Civ. App.) 199 S. W. 659.

Statute speaks as of time at which it takes effect. *Moorman v. Terrell*, 109 Tex. 173, 202 S. W. 727.

**47. Construction in favor of constitutionality.**—The construction of a statute which would bring it in conflict with the Constitution is to be avoided, if possible, because it is presumed the Legislature did not intend to violate the Constitution. *City of Waco v. Higginson* (Civ. App.) 226 S. W. 1084; *Maud v. Terrell*, 109 Tex. 97, 200 S. W. 375; *White v. Fahring* (Civ. App.) 212 S. W. 193; *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

Statutes should not be annulled by the courts merely because doubts may be suggested as to their constitutionality. *Kling v. Terrell* (Civ. App.) 218 S. W. 42; *Koy v. Schneider*, 110 Tex. 369, 218 S. W. 479; *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

If an act is susceptible of two constructions, one which makes it valid and the other invalid, that construction should be adopted which will sustain validity. *White v. Fahring* (Civ. App.) 212 S. W. 193; *Houston v. Gonzales Independent School Dist.* (Civ. App.) 202 S. W. 963.

An act of the Legislature should not be held void by the courts unless it clearly violates some express or necessarily implied provision of the Constitution. *Bonham v. Fuchs* (Civ. App.) 223 S. W. 1112; *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

The courts indulge a presumption in favor of the validity of legislative acts, but the presumption is not conclusive. *Ex parte Meyer*, 84 Cr. R. 288, 207 S. W. 100.

Every doubt is resolved in favor of the constitutionality of a statute. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

An act of the Legislature will not be held to be unconstitutional unless its invalidity is apparent beyond a reasonable doubt. *Hamilton v. Davis* (Civ. App.) 217 S. W. 431.

Court should uphold a statute as valid, unless clearly unconstitutional; every intentment and presumption being in favor of constitutionality. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 830, denying rehearing 110 Tex. 369, 218 S. W. 479.

Courts ought not to interpret laws so as to nullify or impair them, when their language reasonably admits of a different meaning. *Spears v. City of San Antonio*, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) *City of San Antonio v. Spears*, 206 S. W. 703.

The Legislature in enacting laws is presumed to regard the limitations imposed by the Constitution as assiduously as courts regard them in construing and applying laws, and it is properly the function of courts to seek out how by reasonable construction to uphold and enforce the legislative will as being consistent with the Constitution rather than to review and nullify it. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

### Art. 5503. [3269] Grammatical errors, etc., shall not vitiate.

See *Fromme v. State*, 85 Cr. R. 366, 212 S. W. 501.  
Cited, *Halbert v. Alford* (Sup.) 16 S. W. 814.

### Art. 5504. [3270] Meaning of certain words.

See *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Ritz v. City of Austin*, 1 Civ. App. 455, 20 S. W. 1029.

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

**Operation and effect.**—Corporations may make affidavits through their officers and agents when such affidavits are required. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

**Words judicially defined.**—Term "day," as used in enactments or contracts, means 24 hours from midnight to midnight, except where restricted. *Dallas County v. Reynolds* (Civ. App.) 199 S. W. 702.



DECISIONS RELATING TO SUBJECT IN GENERAL

**Enactment in general.**—It appearing that the members of the Thirty-Sixth Legislature thought that Senate Bill No. 32 relating to salaries of judges, was not in substance the same as House Bill No. 21, relating to salaries of judges, which was defeated, the courts ought not to interfere and hold that the former was in substance the same as the latter and that the Legislature did not have power to pass it under Const. art. 3, § 34, the question being one upon which the minds of reasonable men might differ. *King v. Terrell* (Civ. App.) 218 S. W. 42.

Where an act appears to be duly authenticated according to required standards, the power to ascertain and test whether the constitutional demands have been complied with should be vested in the Legislature itself, and when it appears that the authentication and promulgation of the legislative department has been in conformity to the Constitution, the courts will not permit any further inquiry into the matter, and will not permit legislative journals to be invoked to overturn the authenticated statute. *Id.*

The clerical correction of changing "or" to "and" in a legislative bill may be made by concurrent resolution, at least previous to the signature of the bill. *Davis v. State* (Cr. App.) 225 S. W. 532.

**Subjects and titles of acts.**—See *Wilkinson v. Lyon* (Civ. App.) 207 S. W. 638.

Const. art. 3, § 35, restricting legislative acts to a single subject, will be liberally construed, and where the provisions are germane in any degree the law will be upheld. *Davis v. State* (Cr. App.) 225 S. W. 532; *Ex parte Wilson*, 85 Cr. R. 554, 213 S. W. 984; *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

If a law has but one general object or subject fairly indicated by its title, deals only with matters related directly or indirectly to the main subject, which have a mutual connection, and are necessary to the accomplishment of the act, it does not deal with two subjects. *Ex parte White*, 82 Cr. R. 85, 198 S. W. 583; *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Acts 33d Leg. c. 72, amending Stock Law (art. 7235) in so far as it attempts to exclude Matagorda county from operation of article, held violative of constitutional provision as to title of statutes. *Ward Cattle & Pasture Co. v. Carpenter*, 109 Tex. 103, 200 S. W. 521.

Title of Acts 35th Leg. c. 190 (arts. 7012½, 7012½g), declaring that fees and charges should constitute part of fund for support of state highway commission, held sufficient under Const. art. 3, § 35, to support appropriation of license fees for use of highway department. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

Act May 16, 1907 (Acts 30th Leg. [1st Called Sess.] c. 21), (post, art. 7487 et seq.), entitled "An act to tax property passing by will or by descent or by grant or gift; taking effect on the death of the grantor or donor," does not unconstitutionally extend beyond title's scope because providing for appointment of administrator to collect inheritance taxes. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

The caption of the amendment approved March 16, 1918, which reduced the number of signers required to secure organization of Bailey county, held to disclose the purpose of the act. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

Acts 35th Leg. 4th Called Sess. c. 16 (Pen. Code, arts. 173½g-173½o), entitled an act to prohibit soliciting soldiers and sailors to have intercourse with any "immoral woman," but prohibiting such solicitation for intercourse with "any woman," does not violate Const. art. 3, § 35, requiring a statute's subject to be expressed in its title. *Ex parte Wilson*, 85 Cr. R. 554, 213 S. W. 984.

In ascertaining whether a statute is violative of Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title, it is incumbent on the court to ascertain the intention of the Legislature, and, if possible by fair construction, to uphold it, and the title of a statute will be viewed as a part of the law, and the body of the act will be referred to in construing the title. *McPherson v. Camden Fire Ins. Co.* (Com. App.) 222 S. W. 211, affirming judgment (Civ. App.) 185 S. W. 1055.

Under the express provision of Const. art. 3, § 35, an act containing matters not included within the caption is void only as to the extraneous provisions provided they are separable from the others. *Davis v. State* (Cr. App.) 225 S. W. 532.

A statute is violative of Const. art. 3, § 35, requiring the subject of the act to be stated in the title, if the title is misleading and imports a subject different from that to which the law relates. *De Silvia v. State* (Cr. App.) 229 S. W. 542.

Acts 33d Leg. (1913) c. 143, amending art. 4694, is invalid in so far as it undertakes to make a natural person liable in damages for a wrongful death caused by his agent or servant; the change not being within the scope of the caption of the amending act. *Anderson v. Smith* (Civ. App.) 231 S. W. 142.

**Amendment of constitution.**—If there is an inconsistency between a provision of the Constitution as amended and the Constitution as originally adopted, so that one or the other must yield, the subsequent provision, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto. *State v. Vincent* (Civ. App.) 217 S. W. 402.

**Amendment of acts.**—Where statutory article consists of several subdivisions dealing with same matter, one or more of such subdivisions may be amended without interfering with other parts of article. *City of Laredo v. Frishmuth* (Civ. App.) 196 S. W. 190.

Const. art. 3, § 36, prohibiting amendment or revival of statutes by reference to

title, held inapplicable to municipal ordinances. *Ex parte Parr*, 82 Cr. R. 525, 200 S. W. 404.

Acts 34th Leg. c. 105, amending Pen. Code, art. 1259a, so as to omit words "shall steal or" with reference to taking of motor vehicles and which was republished with said words omitted, held valid under Const. art. 3, § 36. *Ex parte Jackson*, 83 Cr. R. 55, 200 S. W. 1092.

Acts 35th Leg. 4th Called Sess. c. 16 (Pen. Code, art. 173½n), creating an offense and providing that it shall not be subject to existing suspended sentence law (Vernon's Ann. Code Cr. Proc. 1916, art. 865b), does not violate Const. art. 3, § 36, prohibiting amendment of a statute by reference to its title, and requiring re-enactment at length. *Ex parte Wilson*, 85 Cr. R. 554, 213 S. W. 984.

Acts 35th Leg. (1917) c. 60, (post, art. 7314) which supplemented the act of creating a Live Stock Sanitary Commission for the state of Texas found in Acts 1893, c. 56, which was modified by Acts 33d Leg. (1913) c. 169, is not invalid under Const. art. 3, § 36, declaring that no law shall be revived or amended by reference to its title because it did not set out the earlier legislation; the latter act being complete and entire in itself. *Page v. Tucker* (Civ. App.) 218 S. W. 584.

**Express repeal.**—Where an act is repealed without a saving clause, it is considered, except as to transactions passed and closed, as though it had never existed. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

**Implied repeal in general.**—Repeals by implication are not favored. *Clay v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 201 S. W. 1072; *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154; *Ayo v. Robertson* (Civ. App.) 207 S. W. 979; *St. Louis, B. & M. Ry. Co. v. Marcovich* (Com. App.) 221 S. W. 582, affirming judgment (Civ. App.) 185 S. W. 51.

An implied repeal does not result, unless the antagonism between the two statutes is so pronounced that both cannot stand, and if it is possible to fairly reconcile them, and so construe the later statute as to allow effect to the older law and still leave an ample field for its own operation, an implied repeal does not result. *St. Louis, B. & M. Ry. Co. v. Marcovich* (Com. App.) 221 S. W. 582, affirming judgment (Civ. App.) 185 S. W. 51; *Eastern Texas Electric Co. v. Woods* (Civ. App.) 230 S. W. 498.

A void act of the Legislature cannot repeal existing valid statutes. *Venn v. State*. 85 Cr. R. 151, 210 S. W. 534.

A law, general in its application and character, is not repealed or superseded by or necessarily repugnant to other laws general in character forbidding the same acts, but which have special application. *Ex parte Roya*, 85 Cr. R. 626, 215 S. W. 322.

Antagonism between two statutes must be absolute, and so pronounced that both cannot stand, before a court is warranted in holding as a mere matter of construction an earlier law, or a power conferred by such a law, repealed by implication. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Repugnancy in principle between two acts forms no reason why both may not stand, and one statute is not repealed by the repugnant spirit of another. *St. Louis, B. & M. Ry. Co. v. Marcovich* (Com. App.) 221 S. W. 582, affirming judgment (Civ. App.) 185 S. W. 51.

— **By act relating to same subject matter.**—When the law prescribes one penalty for its violation, and thereafter the Legislature prescribes another, proper construction requires holding that latter penalty supersedes and repeals former. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

While a statute contrary to a former one and expressed in negative words operates to repeal the former, the rule is applicable only when the purpose of the statutes is the same. *St. Louis, B. & M. Ry. Co. v. Marcovich* (Com. App.) 221 S. W. 582, affirming judgment (Com. App.) 185 S. W. 51.

— **Of special by general act.**—A general law will not be construed to repeal a special law on the same subject. *Westbrook v. Missouri-Texas Land & Irrigation Co.* (Civ. App.) 195 S. W. 1154.

**Suspension of act.**—Acts 35th Leg. c. 96, § 19 (art. 30) providing that if court in Twentieth and Eighty-Fifth judicial districts is in session by virtue of existing laws at time act becomes effective, the act will not be operative until after term shall have expired or be terminated by order of judge, is not unconstitutional as delegating to judge power to suspend laws contrary to Const. art. 1, § 28. *Hughes v. State*, 83 Cr. R. 550, 204 S. W. 640.

**Constitution as limitation of power.**—Where a statute is not prohibited expressly nor impliedly by the Constitution, it must be sustained. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

The general power of the Legislature of Texas is restricted only by the Constitutions of the United States and of the state. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

The power of the Legislature to make a given act penal is not limited to the permission of the Constitution, but exists where not specifically forbidden; and transporting, receiving, and possessing of intoxicating liquor may be made an offense although not named and forbidden by Const. art. 16, § 20. *Reeves v. State* (Cr. App.) 227 S. W. 668.

The Legislature is omnipotent in all instances except where a limitation set upon its powers appears embedded in the Constitution, either from express inhibitions written there or from clear and conclusive implication. *Rumbo v. Winterrowd* (Civ. App.) 228 S. W. 258.

**Laws violating state or federal Constitution.**—When the Constitution provides and commands that a thing shall be done, the matter must be done as directed, and neither

the Legislature, executive, nor the courts have authority to set aside the mandates. *Alvarado v. State*, 83 Cr. R. 181, 202 S. W. 322.

The "police power" of the state is the power to enact laws for the promotion of the public health, safety, morals, peace, order, and welfare and is nothing more nor less than the power of government inherent in every sovereignty. If a legislative enactment is reasonably adapted to the attainment of promoting public health, safety, morals, peace, or welfare, it is within the legitimate scope of the police power and does not infringe any provision of the Constitution of the United States. *Ex parte White*, 82 Cr. R. 85, 198 S. W. 583.

There is nothing in the Constitution inhibiting the Legislature from conferring on the county court the power to render a judgment as a juvenile court by Code Cr. Proc. art. 1198, especially in view of Const. art. 5, § 1, empowering the Legislature to establish such other courts as it may deem necessary and prescribe the jurisdiction thereof. *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

Acts 36th Leg. (1920) c. 38, § 15 (Pen. Code, art. 1284h), authorizing the Live Stock Sanitary Commission to require the dipping of cattle exposed to fever-carrying tick within nine months prior to the passage of the act, and making violation of such direction a misdemeanor, is not an *ex post facto* law. *Walker v. State* (Cr. App.) 229 S. W. 513.

It is competent for the Legislature to give retrospectively the capacity it might have given in advance, and to dispense retrospectively with any formality it might have dispensed with in advance. *Ogburn v. Barstow, Ward County, Tex., Drainage Dist.* (Civ. App.) 230 S. W. 1036.

— **Police power.**—Police regulations affecting the conduct of legitimate occupations are often upheld, but there is no legislative authority to prohibit a useful and harmless avocation. *Ex parte Adlof*, 86 Cr. R. 13, 215 S. W. 222.

While the courts do not undertake to catalogue the subjects on which police power may operate, such power, which is not arbitrary, is commensurate with the duty to provide for the people in their health, safety, comfort, and convenience, as consistently as may be with private property rights. *Juhan v. State*, 83 Cr. R. 63, 216 S. W. 873.

The state under its police power has the right to regulate the conduct of business to protect the public health, morals, and welfare, observing constitutional limitations, reasonable classification, and terms of control. *Id.*

The exercise of the police power is inherent in every sovereign state and cannot be surrendered. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

The police power, like every other power of the government, is subordinate to the Constitution. *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, reversing judgment (Civ. App.) 203 S. W. 109.

Police power is that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state necessary for the public welfare. *Rumbo v. Winterrowd* (Civ. App.) 228 S. W. 258.

**Conflict with federal statutes.**—Where Congress has legislated, under U. S. Const. art. 1, § 8, providing for monopolies in the matter of patent rights, trade-marks, and copyright, no state can nullify its acts. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

**Effect of partial invalidity.**—Act May 12, 1899, imposing certain restrictions on and granting certain privileges to fraternal benefit orders generally, from which, by section 16, designated orders are excluded, must be regarded as an entirety, and section 16 cannot be expunged, but all must fall as repugnant to U. S. Const. Amend. 14, and Const. Tex. art. 1, § 3, guarantying equal protection of the laws. *Supreme Lodge United Benev. Ass'n v. Johnson* (Civ. App.) 77 S. W. 661.

When part of an act has been held unconstitutional, the remainder will not be sustained unless complete in itself and capable of being executed in accordance with legislative intent. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

The presence in Acts 29th Leg. c. 122, of sections 34, 48 (arts. 5107—35, 5107—48), which are inoperative because they do not provide for any hearing for determination of benefits, to property within irrigation districts, does not render the whole act violative of the Constitution, since the main purpose of the act can be given effect without regard to the sections, and must be upheld, the subsequent acts of Legislature (Acts 33d Leg. c. 172, § 95, Acts 35th Leg. c. 87, § 95) having cured the defects. *White v. Fahring* (Civ. App.) 212 S. W. 193.

Though section 20 of Acts 29th Leg. c. 122 (art. 5107—72), violates Const. art. 16, § 30, in that it fixes the term of office of the board of directors of irrigation districts at four years, the other provisions of the act are not so dependent on, or connected with, provision fixing the terms of office as to render them invalid. *Id.*

If a part only of a statute be void, the remainder will be sustained, if it is separable, so that it may safely be presumed that it would have been passed without the void part. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

**Determination of constitutional questions.**—The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. *State v. Vincent* (Civ. App.) 217 S. W. 402.

It being the province of the court to decide only questions affecting substantial rights, it will not, in advance of any applicable conditions, determine whether due process clause of the Fourteenth Amendment would be violated by an exercise of the authority given the state treasurer, by art. 2426, as amended by State Depository Law of 1919, on failure of a depository to pay over state funds on his check, to forthwith con-

vert the securities deposited by such depository and disburse the money for account of the state funds. *Lawson v. Baker* (Civ. App.) 220 S. W. 260.

The question of the constitutionality of a statute will not be passed upon if the rights of the litigants can otherwise properly be adjudicated. *Rumbo v. Winterrowd* (Civ. App.) 228 S. W. 258.

**Persons entitled to raise constitutional questions.**—No one may invoke protective constitutional restrictions who has not sustained some practical injury resulting from the infraction of his legal rights. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687; *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

In an action on an assessment levied by special school district created by special act, taxpayer may plead unconstitutionality of act. *Eagle Lake Independent School Dist. v. Hoyo* (Civ. App.) 199 S. W. 352.

**Delegation of legislative or judicial powers.**—Arts. 1006–1017, relating to street improvements, is not unconstitutional in that article 1016 provides for a delegation of legislative power to the people of the various cities of the state; the act being an amendment of existing charters which the inhabitants may accept or reject. *Keller v. Western Paving Co.* (Civ. App.) 218 S. W. 1077; *Frankenstein v. Rushmore & Gowdy* (Civ. App.) 217 S. W. 189.

Acts 1909 (2d Called Sess.) c. 14, one section of which (art. 1016, ante), provides for its acceptance by a city before it becomes effective therein, does not violate Const. art. 3, § 1, vesting the legislative power in the Legislature and article 1, § 28. *Sullivan v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 220 S. W. 444.

Art. 7312 et seq., and Acts 33d Leg. c. 169, § 3 (art. 7314b), giving the live stock sanitary commission authority to promulgate rules for quarantine areas, etc., are not invalid as delegation of legislative authority to administrative body. *Mulkey v. State*, 83 Cr. R. 1, 201 S. W. 991.

Declaring result of local option election and issuance of order prohibiting the sale of intoxicants by the commissioners' court, under art. 5721, are merely ministerial, and not judicial or legislative acts. *Hines v. State*, 83 Cr. R. 195, 202 S. W. 91.

Under inheritance tax law of May 16, 1907 (Acts 30th Leg. [1st Called Sess.] c. 21), (post, art. 7494), providing that property cannot be sold for taxes until notice is given, sufficiency of notice is judicial question. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Legislature may confer upon municipal corporations, by special charter, police powers necessary for protection of public health, safety, and morals. *Crossman v. City of Galveston* (Civ. App.) 204 S. W. 128.

Art. 7107, authorizing sheriff to judge of reasonable amount of damage to property if damaged while in possession under replevin bond is void as undertaking to invest the sheriff with judicial power. *Morgan v. Coleman* (Civ. App.) 204 S. W. 670.

Power to extend city limits, previously vested in the Legislature, could, by amendment of the Constitution, be vested in the voters of the city. *Cohen v. City of Houston* (Civ. App.) 205 S. W. 757.

Acts 35th Leg. c. 88, §§ 105 and 118 (arts. 5011½f, 5011½u), in so far as they attempt to confer upon the board of water engineers the power to determine and establish the relative rights of claimants to water, violate Const. art. 2, dividing the powers of government, and art. 5, § 1, vesting judicial power exclusively in the courts. *McKnight v. Pecos & Toyah Lake Irr. Co.* (Civ. App.) 207 S. W. 599.

An ordinance regulating use of streets by jitneys, passed in the exercise of delegated power, is not void as exercise of legislative power reserved by Const. art. 3, § 1, to the state. *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

Acts 31st Leg. (2d Ex. Sess.) c. 14, including arts. 1006–1017, relating to street improvements, is not invalid because an attempt by the Legislature to delegate its power to make laws to the voters of cities and towns by permitting them to adopt statutory provisions relative to street improvements. *Carwile v. Childress* (Civ. App.) 213 S. W. 308.

Acts 35th Leg. c. 60, § 19 (art. 7314n), as to dipping of cattle to eradicate fever ticks, is not subject to the objection that it attempts to delegate and confer upon the live stock sanitary commission legislative authority and discretion. *Serres v. Hammond* (Civ. App.) 214 S. W. 596.

Power granted to municipalities and other agents of government to prescribe rules for prevention of diseases and the preservation of health is not a delegation of authority which is prohibited by the Constitution. *Hanzal v. City of San Antonio* (Civ. App.) 221 S. W. 237.

Art. 4459, authorizing commissioner of agriculture to declare any trees infested with injurious insect pests or contagious diseases of citrus fruits a public nuisance, with absolute power to summarily destroy them, and making the commissioner's finding as to the existence of such pests or contagious diseases final, held invalid in so far as it makes his decision final, since Legislature was not authorized to invest the commissioner with such arbitrary power. *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, reversing judgment (Civ. App.) 203 S. W. 109.

The state, having expressly declared certain things to be public nuisances, may also remit to such agencies as health boards or other proper administrative officers the authority of determining whether other things constitute public nuisance, with the power to abate them; but the determination of such boards or officers is not conclusive, and cannot be made so, unless it be with respect to something having the nature of public emergencies, threatening public calamity, and presenting an imminent and controlling exigency, before which, of necessity, all private rights must immediately give way. *Id.*

A statute which is to become effective as a law only after an affirmative vote by the people is unconstitutional, as a delegation of legislative power to the electors.

Spears v. City of San Antonio, 110 Tex. 618, 223 S. W. 166, affirming judgment (Civ. App.) City of San Antonio v. Spears, 206 S. W. 703.

A statute authorizing the performance of certain acts by city is valid, even though the decision of the city to exercise the power conferred is dependent on a vote of the electors. *Id.*

The Legislature cannot confer on the live stock commission power to create a penal offense in failing to dip cattle for fever ticks. *Ex parte Leslie*, 87 Cr. R. 476, 223 S. W. 227.

Power to pass ordinances concerning vaccination to prevent disease may be delegated to a municipal corporation. *Zucht v. King* (Civ. App.) 225 S. W. 267.

The Legislature has no right to delegate to a municipal corporation authority to control the organization of courts specially committed to the Legislature, notwithstanding the rule that legislative powers relating to matters of purely local concern may be delegated to the city. *De Silvia v. State* (Cr. App.) 229 S. W. 542.

It was not reversible error for the judge, in open court and over defendant's objection, to request counsel for plaintiff to prepare the findings and conclusions of the trial court, where the judge replied to the objection that he would not sign and approve them unless found to be correct, and they were subsequently submitted to him and signed and approved; there being no real delegation of judicial function. *Berkman v. D. M. Oberman Mfg. Co.* (Civ. App.) 230 S. W. 338.

**Distribution of governmental powers in general.**—In mandamus to compel railroad to furnish express company facilities under arts. 6616, 6617, court was not empowered to determine what constituted a reasonable rate for such facilities; the establishment of rates being a legislative and not a judicial function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

An irrigation company by its contracts with landowners having fixed rates for land, the court, in suit by other owners of like lands to compel the company to furnish water as its predecessor had contracted, could require it to comply with its obligations on the same terms as to rates as the other lands without invading rate-making power of Legislature. *Edinburg Irr. Co. v. Paschen* (Civ. App.) 223 S. W. 329.

Art. 1016, relating to improvements, does not violate Const. art. 3, § 1, which provides that the legislative power of the state shall be vested in a Senate and House of Representatives, because of the fact that it permits the cities to determine whether the provisions of chapter 11 shall be adopted by them. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

**Judicial powers and functions.—Political questions.**—Election contest is not matter pertaining to ordinary administration of law in courts, but is a political question, to be regulated by the political authority. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Ordering and holding elections and declaring their result is the exercise of political power, with which the courts can interfere only for the protection of the personal and property rights of the citizens. *Richardson v. Mayes* (Civ. App.) 223 S. W. 546.

— **Encroachment on Legislature.**—The wisdom of statutory enactments is a question solely for the Legislature. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843; *Vaughan v. Southwestern Surety Ins. Co.*, 109 Tex. 298, 206 S. W. 920.

The argument that the policy of a law is unsound is not available to control its construction contrary to the expressed legislative intent. *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.

The policy of statutes is no concern of the court so long as they do not violate the Constitution. *Ex parte McCloskey*, 82 Cr. R. 531, 199 S. W. 1101.

That no reason is apparent why the Legislature should have discriminated between employes of hotels and of restaurants does not authorize a court to construe art. 5644, so as to include both when the ordinary signification of the language excludes the latter. *Debenham v. Short* (Civ. App.) 199 S. W. 1147.

It is the court's duty to observe, and not disregard, statutory provisions. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

The courts have no power to legislate. *Ex parte Meyer*, 84 Cr. R. 288, 207 S. W. 100.

Art. 5229, declares that boys under 17 years of age charged with felonies, who do not claim the privilege of trial as juveniles, may be sent to the penitentiary, where the conviction condemned them for a period greater than 5 years, but if for less penalty the confinement shall be in the juvenile school, but the statutes make no such exemption for girls and the discrimination between the two classes, boys and girls, if wrong, is for the Legislature, and not for the courts, to remedy. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

Where the language of a statute is plain, the courts are not authorized to place on it a forced construction to mitigate a seeming hardship or to supply an apparent omission, thus assuming a legislative function. *Rowe v. Dyess* (Com. App.) 213 S. W. 232.

Courts have nothing to do with the making or repealing of statutes, and violate their true powers and endanger their own authority when they undertake the legislative role by construing an act to abrogate an important public power of long existence and continued legislative sanction, whose lawful exercise will afford a public benefit. *Lasater v. Lopez*, 110 Tex. 179, 217 S. W. 373.

Whether or not a statute is a proper one and should be changed is a legislative, and not a judicial, question, and, while a statute stands unchanged, the court must enforce it as it finds it. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

The legislative and judicial are co-ordinate departments of government of equal dignity, and each is alike in the exercise of its proper functions and cannot directly or indirectly, within the limits of its authority, be subject to the control or supervision of

the other, without unwarrantable assumption by that other of power which by the Constitution is not conferred upon it. *State v. Vincent* (Civ. App.) 217 S. W. 402.

The province of the courts is simply to declare the written law as found, and they should not by construction, when its language is plain and unmistakable, add to or take from statutory enactments. *Rudasill v. Rudasill* (Civ. App.) 219 S. W. 843.

To enforce a rate claimed to be established by a contract between express company and railroad company, the decree must follow the contract in its entirety, and any substantial variation therefrom, and substitution therefor, of the court's judgment, would be the fixing of the rate by the court in usurpation of a legislative function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

Whether purely party affairs, such as primary elections and conventions, should be regulated, and extent of any regulation, so long as reasonable, are peculiarly legislative matters, involving issues of public policy beyond concern of courts. *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880, denying rehearing 110 Tex. 369, 218 S. W. 479.

Courts are not concerned with question whether a statute conserves a wise public policy. *Id.*

Where the Legislature has declared a certain thing to be a public nuisance, the courts are warranted in going behind the findings of a Legislature and determining the contrary only in clear cases; but whether something not defined as a public nuisance by the statute is such under its general terms is a question for the courts. *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, reversing judgment (Civ. App.) 203 S. W. 109.

The Legislature's acts cannot be questioned by courts merely because judges consider them unwise, improvident, oppressive, or otherwise unsound, if a constitutional restriction, which they transcend and override, cannot be definitely indicated. *Rumbo v. Winterrowd* (Civ. App.) 228 S. W. 258.

The courts are not concerned with the wisdom of the plan adopted by the Legislature in apportioning compensation under the Workmen's Compensation Act. *Texas Employers' Ins. Ass'n v. Boudreaux* (Com. App.) 231 S. W. 756.

## TITLE 82

## LEGISLATURE

## CHAPTER THREE

## INVESTIGATING COMMITTEES—PROCEDURE

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Special session—Submission of subjects by Governor.**—Governor's proclamation or messages, submitting subject of legislation to special session under Const. art. 3, § 40, need not state the details of the legislation to be considered; such matters being within discretion of Legislature. *Ex parte* Fulton, 86 Cr. R. 149, 215 S. W. 331.

Acts 35th Leg. 4th Called Sess. 1918, c. 31, amending Allison Shipping Law, so as to make it unlawful to have or keep intoxicants in public place in local option territory or transport liquor therein, held authorized under Const. art. 3, § 40, prohibiting legislation at special session upon subjects other than those designated in the Governor's proclamation or message, by proclamation calling for legislation to restrict liquor traffic and render liquor inaccessible to soldiers. *Id.*

Special session of the Legislature having been called by the Governor to deal with the subject of intoxicants embraced in his message, the discretion as to means, within the limits of the Constitution, was with the Legislature, and beyond the control of the Governor, save in his exercise of the veto power. *Ex parte* Davis, 86 Cr. R. 168, 215 S. W. 341.

Acts 35th Leg. 1918, 4th Called Sess. c. 24, § 1, prohibiting the manufacture of intoxicants, held not invalid as having been passed at a special session and not relating to a subject presented by the Governor, as required by Const. art. 3, § 40; he having mentioned the matter of intoxicants in his proclamation, and elaborated his views in a subsequent message. *Id.*

## TITLE 83

## LEVEES, IMPROVEMENT DISTRICTS AND SEA-WALLS

Chap.	Chap.
2. Improvement districts.	3. Seawalls.
2a. Improvement districts in one or more counties.	

## CHAPTER TWO

## IMPROVEMENT DISTRICTS

Art.	Art.
5530. Commissioners' courts to establish improvement districts, powers of districts.	5535. Engineer appointed, compensation, assistants.
5532. Petition to establish district and issue bonds.	5542. Notice of election.
	5561a. Commissioners' Court may fix compensation of assessor.

**Article 5530. Commissioners' court to establish improvement districts; powers of districts.**

**Constitutional provisions.**—Const. art. 3, § 52, subds. a and b, authorizing creation of levee districts and issuance of bonds, held not impliedly repealed by art. 16, § 59, a distinct provision, having a distinct purpose, to authorize creation of certain of improvement districts dealt with by art. 3, § 52, free from the limitation on their taxing power imposed by that section. *Dallas County Levee Dist. No. 2 v. Looney*, 109 Tex. 326, 207 S. W. 310.

**Art. 5532. Petition to establish district and issue bonds.**

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 5535. Engineer appointed, compensation, assistants.**

See *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

**Art. 5542. Notice of election.**

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 5561a. Commissioners' court may fix compensation of assessor.**

—The commissioners' courts of the various counties in this State are hereby authorized to fix compensation of the Tax Assessor of their respective counties at a sum not to exceed the amount now allowed by law for like services in assessing State and county taxes, for assessing the taxes and making the tax rolls of that part of any levee improvement district lying within the city limits of cities having a population of more than seventy-five thousand (75,000) inhabitants at the last preceding census. [Acts 1921, 37th Leg., ch. 12, § 1.]

**Explanatory.**—Sec. 2 of the act repeals all laws in conflict. Took effect 90 days after adjournment.

## CHAPTER TWO A

## IMPROVEMENT DISTRICTS IN ONE OR MORE COUNTIES

Art.	Art.
5584½. District may be created; purposes of.	5584½aa. Same; posting copy.
5584½a. Petition; for creation of district wholly within one county, contents; for creation of district in two or more counties, contents; hearing on petition; order and notice.	5584½aaa. Same; deposit accompanying.
	5584½b. Examination of proposed district by State Reclamation Engineer.
	5584½bb. Hearing on petition; contents; jurisdiction of commissioners' court.



Art.	Art.
5584½bbb. Judgment and order creating district; district to be governmental agency and body corporate; general powers.	5584½jjj. Same; election; returns; canvass; declaration of result.
5584½c. Works of improvement; powers of district as to; bonds and indebtedness.	5584½k. Maintenance tax; election to determine.
5584½cc. Power of eminent domain; procedure.	5584½kk. Bonds; order directing issue; issue; denominations; maturity; interest.
5584½ccc. Rights of way; power to acquire.	5584½kkk. Same; record of.
5584½d. Entry upon lands; power of supervisors, etc.	5584½l. Same; determination of validity.
5584½dd. Levees, bridges, etc., across or under railroad tracks, etc., or public or private roads.	5584½ll. Same; registration.
5584½ddd. Rights of way across public or county roads.	5584½lll. Same; sale.
5584½e. Joint action with other districts, etc.	5584½m. Tax levy to pay bonds; sinking fund.
5584½ee. District supervisors; appointment; qualifications; duties; compensation; terms of office; vacancies in office.	5584½mm. Maintenance tax; levy; amount.
5584½eee. Same; oaths and bonds.	5584½mmm. Tax assessor; tax roll.
5584½f. Same; organization; officers; district engineer.	5584½n. Collection of tax by county tax collectors; special collectors.
5584½ff. District engineer; powers and duties; report; plan of reclamation.	5584½nn. Delinquent taxes; collection; lien of tax; penalty for nonpayment of tax.
5584½fff. Commissioners of appraisal; appointment; qualifications.	5584½nnn. Treasurer of district; county treasurer to be; bond; compensation.
5584½g. Same; notice of appointment; oath of office; organization; secretary.	5584½o. Same; accounts with districts; payments by.
5584½gg. Same; view of land; assessment of benefits and damages; report of findings; contents.	5584½oo. District depository; selection.
5584½ggg. Hearing on report of commissioners; notice of.	5584½ooo. Compensation for services by officers, etc.
5584½h. Exceptions to report of commissioners; confirmation of report; findings.	5584½p. Contracts for improvements; letting; advertisement for bids.
5584½hh. Final findings, etc., to be basis of tax levy.	5584½pp. Bond of contractor.
5584½hhh. Funds for improvements; raising by other means than bond issue.	5584½ppp. Supervision of and report on work.
5584½i. Bonds; petition for issue; contents.	5584½q. Inspection of work; payments for work.
5584½ii. Same; order for election; ballots; polling places; election officers.	5584½qq. District seal.
5584½iii. Same; deposit accompanying petition.	5584½qqq. Approval of plans by State Reclamation Engineer; necessity for.
5584½j. Same; notice of order for election.	5584½r. Same; work by private individuals or corporations.
5584½jj. Same; election; conduct of; voters.	5584½rr. Abolition of district; effect.
	5584½rrr. Additional work and funds therefor.
	5584½s. Reassessment of benefits.
	5584½ss. Suit by person, etc., objecting to approval or disapproval of reclamation plan by State Reclamation Engineer; determination; appeal.
	5584½sss. Other laws applicable.
	5584½ssss. Other districts may exercise powers, etc., conferred by act.
	5584½t. Same; procedure.
	5584½tt. Acts not repealed.

**Article 5584½. District may be created; purposes of.**—There may be created within this State conservation and reclamation districts, to be known as Levee Improvement Districts, for the purpose of constructing and maintaining levees and other improvements on, along and contiguous to rivers, creeks and streams, for the purpose of reclaiming lands from overflow from such streams, and for the proper drainage and other improvement of such lands, all as contemplated by Section 59, Article 16, of the Constitution of this State, for the conservation and development of the natural resources of this State, which said districts shall have and may exercise all the rights, powers and privileges given by this Act, and in accordance with its directions, limitations and provisions. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 1.]

Took effect April 2, 1918.

**Repeal.**—This act, the Laney Act, creating conservation districts under Const. art. 16, § 59, did not, by implication, repeal the Canales Act, Acts 35th Leg. (4th Called Sess.) c. 25 (art. 5107—267), making Const. art. 16, § 59, effective by providing for cre-

ation of conservation districts. Dallas County Levee Dist. No. 2 v. Looney, 109 Tex. 326, 207 S. W. 310.

**Art. 5584½a. Petition; for creation of district wholly within one county, contents; for creation of district in two or more counties, contents; hearing on petition; order and notice.**—When it is proposed to create a levee improvement district wholly within one county there shall be presented to the commissioners' court of the county in which the lands to be included in such district are located, or to the county judge of the county if the commissioners' court is not in session, a petition signed by the owners of a majority of the acreage of such proposed district, setting forth the proposed boundaries thereof, the general nature of the work proposed to be done, the necessity therefor and the feasibility thereof, and designating a name therefore, which shall include the name of the county in which it is situated, which petition shall be accompanied by a deposit of fifty dollars; and when it is proposed to create such a district to be composed of lands in two or more counties then a petition of the nature above indicated, signed by the owners of a majority of the acreage of such proposed district, shall be presented to the commissioners' court of the county, or, if the court is not in session, to the county judge thereof, in which is located the greater amount of acreage of such proposed district, which shall be the county of jurisdiction in respect to all matters concerning said district, and the name of which county shall be included in the name of such district; and, upon presentation of either such petition, it shall be the duty of the court to which it is presented, or the county judge of such county if the court be not in session, to fix a time and place at which such petition shall be heard before the commissioners' court of the county wherein it is filed, which date shall be not less than fifteen nor more than thirty days from the date of the order, and to order and direct the county clerk of such county, as ex officio clerk of the commissioners' court thereof, to issue a notice of such time and place of hearing, which notice shall inform all persons concerned of the time and place of hearing and of their right to appear at such hearing and contend for or contest the formation of such district, as their interests may dictate, and to deliver notice to any adult person who is willing to execute the same by posting, as hereinbefore directed. The order shall further direct the clerk forthwith to issue a notice of the filing of such petition and of its general purport, stating the time and place of hearing, which shall be mailed forthwith to the State Reclamation Engineer at his office in Austin, Texas. [Id., § 2.]

**Notice.**—Where sufficient notice of hearing of the commissioners' court of a county at which a levee improvement district was created was given, the district was lawfully created in so far as concerns the power of the commissioners' court to create it. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

**Art. 5584½aa. Same; posting copy.**—Upon receipt of the notice above provided for by any adult person willing to receive and execute the same, it shall be the duty of such person, or persons, if more than one shall act, if the district is wholly within a county, to post a copy of such notice at the door of the court house of said county, and copies at four different places within such proposed district; and if the district be composed of more than one county then there shall be posted a copy of such notice at the door of the court house of each county in which any portion of the proposed district is located, and four copies in four different places within the boundaries of the proposed district and within each county in which any portion of the lands to be included in said district is located. Such posting shall be for not less than ten days prior to the date fixed for the hearing, and the person, or persons, so posting

shall make affidavit, before some officer authorized by law to administer oaths, of his, or their, action in respect to such posting, and such affidavit when so made shall be conclusive of the facts sworn to. [Id., § 3.]

**Art. 5584½aaa. Same; deposit accompanying.**—A petition for the formation of such a district, if the district is wholly within one county, shall be accompanied by a deposit of fifty dollars, and if the district is proposed to be located in more than one county it shall be accompanied by a deposit of seventy-five dollars, which deposit shall be paid to the clerk of the court of jurisdiction, who shall therefrom, upon vouchers approved by the county judge, pay all expenses incident to the hearing herein provided for, returning any excess to the petitioners or their attorney. [Id., § 4.]

**Art. 5584½b. Examination of proposed district by State Reclamation Engineer.**—The State Reclamation Engineer, upon receipt of the notice to him herein provided for, shall forthwith, by himself, or deputy, examine said proposed district and do, or cause to be done, such work in respect thereto as may be necessary to enable him to determine the necessity, feasibility and probable costs of reclaiming the lands of such districts from overflows, and the proper drainage thereof, together with the costs of organizing such district and the maintenance thereof for a period of two years, and he shall, by himself or deputy, attend the hearing and file his written report in respect to the matters concerning which he has investigated, and give to the court such further additional information as may then be required. [Id., § 5.]

**Art. 5584½bb. Hearing on petition; contests; jurisdiction of commissioners' court.**—At the time and place set for the hearing of the petition, or such subsequent date as may then be fixed, the court shall proceed to hear such petition and all issues in respect to the creation of such proposed district, and any person interested may appear before the court in person or by attorney and contend for or contest the creation of such district, and offer testimony pertinent to any issue presented. Such court shall have exclusive jurisdiction to determine all issues in respect to the creation, or not, of such district, and of all subsequent proceedings in respect to said district if the same should be created. Such hearing may be adjourned from day to day and from time to time, as the facts may require. The court shall have power to make all incidental orders deemed proper in respect to the matters before it. [Id., § 6.]

**Review.**—The Court of Civil Appeals must treat as concluded by order of the commissioners' court of a county creating and organizing a levee improvement district questions of the correctness of the description of the boundaries of the district, and of the inclusion of land which should not have been included. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

**Art. 5584½bbb. Judgment and order creating district; district to be governmental agency and body corporate; general powers.**—If, upon the hearing of such petition, it be found that the same is signed by the owners of a majority of the acreage of the proposed district, and that due notice has been given, and that the proposed improvements are desirable, feasible, and practicable, and would be a public utility and a public benefit, and would be conducive to public health, then such court shall so find and render judgment reciting such findings and creating and establishing such district, which judgment and findings shall be embodied in an order which shall be entered of record in the minutes of said court, which order shall define the boundaries of such district,

which need not include all of the lands described in the petition, if, upon the hearing, a modification or change is found necessary or desirable. A levee improvement district created as herein specified shall be a governmental agency and a body politic and corporate, with such powers of government and with the authority to exercise such rights, privileges and functions concerning the purposes for which it is created as may be conferred by this Act, or any other law of this State to the benefits of which it may become entitled. [Id., § 7.]

**Nature of district.**—A levee improvement district was a governmental agency, and a body politic and corporate, and its existence and right to act as such could be questioned only in quo warranto proceedings prosecuted by or on behalf of the state. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

**Art. 5584½c. Works of improvement; powers of district as to; bonds and indebtedness.**—Levee improvement districts created under this Act or entitled to the benefits of its provisions, subject to the supervision and direction of the State Reclamation Engineer, or other superior authority created by law, and subject to the limitations in this Act contained, shall have full power and authority to build, construct, complete, carry out, maintain, protect, and, in case of necessity, add to and rebuild, all works and improvements within their district necessary or proper to fully accomplish any plan of reclamation lawfully adopted for or on behalf of such district, and may make all necessary and proper contracts, and employ all persons and means necessary or proper to that end; and in the accomplishment of such purposes they may or may not issue bonds, and may or may not incur indebtedness; provided, that no bonds by or on behalf of such district shall be issued nor shall any indebtedness against the same be incurred unless the proposition to issue such bonds or to incur such indebtedness shall be first submitted to the qualified property tax paying voters of such district, and the proposition adopted by a majority vote of the tax paying voters of the district voting at an election held to determine such question; and no enumeration of specific powers in this Act shall be held to be a limitation upon the general powers hereby conferred except as may be distinctly expressed. [Id., § 8.]

**Art. 5584½cc. Power of eminent domain; procedure.**—The right of eminent domain is hereby expressly conferred upon all levee improvement districts established under the provisions of this Act, for the purpose of enabling such districts to acquire the fee simple title, easement or right of way to, over and through and any all lands, waters, or lands under waters, private or public (except land and property used for cemetery purposes), within, bordering upon, adjacent or opposite to such districts, necessary for making, constructing and maintaining all levees and other improvements for the improvement of a river or rivers, creek or creeks, or streams, within or bordering upon such districts, to prevent overflows thereof. In the event of the condemnation, or the taking, damaging or destroying of any property for such purposes, the improvement district shall pay to the owner thereof adequate compensation for the property taken, damaged or destroyed. All condemnation proceedings or suits in the exercise of eminent domain under this Act shall be instituted under the direction of the district supervisors, and in the name of the levee improvement district, and all suits or other proceedings for such purposes and for the assessing of damages, and all procedure with reference to condemnation, the assessment of and estimating of damages, payment, appeal, the entering upon the property pending the appeal, etc., shall be in conformity with the statutes of this State for

the condemning and acquiring of right of way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings, and all damages which may be done to the property of any person or corporation in the construction and maintenance of levees or other improvements under the provisions of this Act shall be paid out of any funds or properties of said levee improvement district, except taxes necessarily applied to the payment of the sinking fund and the interest on the district bonds. [Id., § 9.]

**Art. 5584½ccc. Rights of way; power to acquire.**—The district supervisors of any district are hereby empowered to acquire the necessary right of way for all levees and other necessary improvements contemplated by this Act, by gift, grant, purchase or condemnation proceedings; and they may by the same methods acquire any levee or other improvements already constructed. [Id., § 10.]

**Art. 5584½d. Entry upon lands; power of supervisors, etc.**—The supervisors of any district and the engineer and employees thereof are hereby authorized to go upon any lands lying within or adjacent to said district for the purpose of examining same with reference to the location of levees, drainage ditches and all other kinds of improvements to be constructed for or within such district, and for any other lawful purpose connected with their plan of reclamation, whether herein enumerated or not. [Id., § 11.]

**Art. 5584½dd. Levees, bridges, etc., across or under railroad tracks, etc., or public or private roads.**—The said levee improvement districts are hereby authorized and empowered to make all the necessary levees, bridges and other improvements across or under any railroad embankment, tracks, or rights of way, or public or private roads or the rights of way thereof, or levees or other public improvements of other districts, or other such improvements and the rights of way thereof, or to join such improvements thereto, for the purpose of enabling the said levee improvement districts to construct and maintain any or all of the improvements necessary for the said district; provided, however, that notice shall first be given by said levee improvement district to the proper railroad authorities or other authorities or persons, relative to the additions or changes to result from the improvements contemplated by the said levee improvement district; and the said railroad authorities or other authorities, or persons, shall be given thirty days in which to agree to the said work, or to refuse to agree thereto, or in which they, if they so desire, may at their own expense construct the said improvements in their own manner; provided, such design or manner of construction shall be satisfactory to the said levee improvement district and approved by the State Reclamation Engineer or his deputy. [Id., § 12.]

**Art. 5584½ddd. Rights of way across public or county roads.**—Levee improvement districts are hereby given the right of way across all public or county roads, but they shall restore such roads where crossed to their previous condition for use, as near as may be. [Id., § 13.]

**Art. 5584½e. Joint action with other districts, etc.**—Levee improvement districts shall have authority to act jointly with each other, with political subdivisions of the State, with other States, and with the Government of the United States, in the performance of any of the things permitted by this Act; such joint acts to be done upon such terms as

may be agreed upon by their supervisors, subject to the approval of the State Reclamation Engineer. [Id., § 14.]

**Art. 5584 $\frac{1}{2}$ ee.** District supervisors; appointment; qualifications; duties; compensation; terms of office; vacancies in office.—When a levee improvement district has been created under this Act the court creating the same shall forthwith appoint by a majority vote three supervisors for such district, who shall be known as “district supervisors,” and who shall be owners of real property within such district, and whose duties shall be as hereinafter provided. Said supervisors shall each receive for his services not more than five dollars per day for the time actually engaged in work for said district and all expenses while so engaged, to be paid upon rendition of sworn accounts, approved by the county judge of the county having jurisdiction; and they shall hold their offices for two years, and until their successors are appointed and qualified, unless sooner removed by a majority vote of the court of jurisdiction; and any vacancy in office shall be filled by a majority vote of the court having jurisdiction, which court shall continue from time to time to appoint supervisors in order that the board may always be full. [Id., § 15.]

**Art. 5584 $\frac{1}{2}$ eee.** Same; oaths and bonds.—Before entering upon their duties the district supervisors shall each take and subscribe before some officer authorized to administer oaths, an oath to faithfully and impartially discharge his duties as supervisor and render true accounts of his services and expenses, and each shall enter into bond with good and sufficient security, payable to the levee improvement district, in the sum of one thousand dollars, unless the court of jurisdiction shall fix a larger amount, which it may do when in its judgment the interests of the district may so require, which bond shall be conditioned for the faithful performance of the duties of such supervisor and that he will render true accounts of his services and expenses, which bond shall be approved by the county judge of the county the commissioners’ court of which has jurisdiction, and shall be filed with the clerk of the court having jurisdiction and by him entered of record in his office, and the original bond shall be retained on file. [Id., § 16.]

**Art. 5584 $\frac{1}{2}$ f.** Same; organization; officers; district engineer.—District supervisors, after their qualification, shall organize by electing one of their number chairman and one vice-chairman, and shall elect a secretary, who need not be a member of the board; and an engineer and such other employees or assistants as may from time to time be found necessary to the successful carrying on and completion of the work and business of the district; they shall certify their organization and the name of their engineer, who shall be known as “district engineer,” to the commissioners’ court of the county having jurisdiction. [Id., § 17.]

**Art. 5584 $\frac{1}{2}$ ff.** District engineer; powers and duties; report; plan of reclamation.—The district engineer, subject to the authority of the State Reclamation Engineer, shall have control of the engineering work of the district, and shall, with such assistants as may be necessary in the judgment of the board of supervisors, as soon as practicable after his appointment, make a survey of the lands within the boundaries of the district and of all lands adjacent thereto that will be improved or reclaimed, in whole or in part, by any system of levees and drainage

that may be adopted; and shall make report in writing to the board of supervisors of his work in this regard, with maps and profiles of his surveys, which report shall contain a full and complete plan for draining, constructing levees and reclaiming the lands of the district from overflow of or damage by water from the streams in or adjacent to such district, and whose waters may in anywise affect the same, which plan may include, and where necessary shall include, costs of straightening streams from which injury to the lands of said district may result; and shall also in such report indicate the physical characteristics of the lands within the district, the location of any public roads, railroads, or the rights of way or roadways and other property or improvements located on said lands; a duplicate of which report shall be filed with the State Reclamation Engineer, for his approval. Such report before adoption may be modified by the State Reclamation Engineer, or by the board of supervisors, with his approval, and when approved by the State Reclamation Engineer and adopted by the board of supervisors, the same shall be known as and shall be designated as "The plan of reclamation." [Id., § 18.]

**Art. 5584 $\frac{1}{2}$ fff. Commissioners of appraisement; appointment; qualifications.**—As soon after the approval and adoption of the plan of reclamation as practicable, the commissioners court of the county of jurisdiction shall appoint three disinterested commissioners, who shall be known as "commissioners of appraisement," and who shall be freeholders but not owners of land within the district for which they are to act, and neither shall be related within the fourth degree of affinity or consanguinity to either of the district supervisors; and such commissioners of appraisement shall proceed as follows: [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 19; Acts 1921, 37th Leg. 1st C. S., ch. 50, § 1 (§ 19).]

Took effect Nov. 15, 1921.

**Art. 5584 $\frac{1}{2}$ g. Same; notice to of appointment; oaths of office; organization; secretary.**—The secretary of the board of supervisors, immediately following the appointment of the commissioners above mentioned shall in writing notify each of his appointment, and in the notice designate a time and place for the first meeting of such commissioners; it shall be the duty of the commissioners to meet at the time and place specified, or as soon thereafter as may be found practicable at some time and place to be agreed upon by them, when they shall each take and subscribe an oath that they will faithfully and impartially discharge their duties as such commissioners, and make true report of the work done by them, and at such meeting the commissioners shall organize by electing one of their number chairman and one vice chairman, and the secretary of the board of supervisors, or, in his absence, such person as the board of supervisors may appoint, shall be secretary of said board of commissioners during their continuance in office, and shall furnish to them such information and such assistance as may be within his power and necessary to the performance of their duties. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 20.]

**Art. 5584 $\frac{1}{2}$ gg. Same; view of land; assessment of benefits and damages, report of findings; contents.**—Within thirty days after qualifying and organizing, as above directed, the commissioners shall begin their duties, and they may at any time call upon the attorney of the district for legal advice and information relative to such duties, and may, if necessary, require the presence of the district engineer, or one of his assistants, at such times and for so long as may be necessary to the proper

performance of their duties. Said commissioners shall proceed to view the lands within such district, or that will be affected by the plan of reclamation for such district, if carried out, and all public roads, railroads, rights of way and other property or improvements located upon such lands, and all such lands without the district as may be acquired under the provision of this Act for any purpose connected with or incident to the fully carrying out of the plan of reclamation; they shall assess the amounts of benefits and all damages, if any, that will accrue to any tract of land within such district, or to any public highway, railroad, and other rights of way, roadways or other property, from carrying out and putting into effect the plan of reclamation for such district. The board shall prepare a report of their findings, which shall show the owner of each piece of property examined, and on or concerning which any assessment is made, together with such description of said property as may identify the same, with the amount of damages and all benefits assessed for and on account of or against the same, as well as the value of all property to be taken or acquired for rights of way or any other purpose connected with the carrying out of the plan of reclamation as finally approved by the State Reclamation Engineer; which report shall be signed by at least a majority of the commissioners and filed with the secretary of the board of supervisors of the district, which report shall also show the number of days each commissioner has been employed and the actual expenses incurred by each during his service as commissioner; and each shall be paid by the district five dollars per day for his services, and all necessary expenses in addition thereto, upon the approval of his accounts for such per diem and expenses by the board of supervisors. Said commissioners shall in their report fix a time and place when and where they will hear objections thereto, and such date shall be not less than twenty days from the filing of such report. [Id., § 21.]

**Art. 5584 $\frac{1}{2}$ ggg. Hearing on report of commissioners; notice of.—** When the report of the commissioners shall have been filed [filed] with the secretary of the board of supervisors he shall forthwith give notice by publication in a newspaper published in each county wherein any portion of the district is located, for at least once a week for two consecutive weeks prior to the date fixed for such hearing, of the time and place of such hearing, and he shall also mail a written notice to each person whose property will be in anywise affected by the carrying out of the plan of reclamation, if his post office is known, stating the time and place of such meeting, which notice shall state in substance that the report of the commissioners to assess benefits and damages accruing to the land and other property by reason of the plan of reclamation for the district in question has been filed in his office, and that all persons interested may examine the same and make objections thereto in whole or in part, and that the commissioners will meet on the day and at the place named for the purpose of hearing and acting on objections to such report; and the secretary upon the day of the hearing shall file in his office the original notice, with his affidavit thereto, showing the manner of publication and the names of all persons to whom notices have been mailed, and that the post offices of those to be affected to whom notices were not mailed were unknown to him and could not be ascertained by reasonable diligence; and copies of such notice and affidavit shall be filed, one with the commissioners of appraisement and one with the clerk of the commissioners court having jurisdiction. [Id., § 22.]



**Art. 5584½h. Exceptions to report of commissioners; confirmation of report; findings.**—At or before the hearing upon the report of the commissioners of appraisalment any owner of land or other property affected by such report or the plan of reclamation may file exceptions to any or all parts of such report, and said commissioners at the time and place specified in the notice shall proceed to hear and pass upon all such objections, and where such objections are sustained, in whole or in part, may make such changes and modifications from time to time as may be necessary to conform the report to their findings. When the commissioners shall have finally acted they shall make decree confirming such report, in so far as it is confirmed, and approving and confirming the same as modified or changed, in so far as it may be modified or changed. The commissioners shall have power to adjudge and apportion costs incurred upon the hearing in such manner as may be deemed equitable. The findings of the commissioners as to benefits and damages to lands, railroads and other real property within the district shall be final and conclusive. The final decree and judgment of the commissioners shall be entered of record in the minutes of the board of supervisors and certified copies thereof shall be filed with the county clerk of each county in which any portion of the lands within such district are located, as a permanent record of such county; and such filing shall be notice to all persons of the contents and purposes of such decree. [Id., § 23.]

**Suit to annul.**—Despite Const. art. 5, § 8, plaintiffs, attacking an order of the commissioners' court of a county creating a levee improvement district, held not entitled on the allegations of their petition to maintain their suit, in so far as it was to annul the report of the commissioners of appraisalment assessing damages and benefits. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 445.

**Art. 5584½hh. Final findings, etc., to be basis of tax levy.**—After the action of the commissioners of appraisalment, as aforesaid, their final findings, judgment and decree, until lawfully changed or modified, shall form the basis of taxation within and for the levee improvement district for which they shall have acted for all purposes for which taxes may be levied by, for or on behalf of such district, and all taxes shall be apportioned and levied on each tract of land, railroad and other real property in the district in proportion to net benefits to the property named in such final judgment or decree, as shown thereby. In all matters before the commissioners of appraisalment, parties interested may not only appear in person or by attorney, or both in person and by attorney, but they shall be entitled to process for witnesses, to be issued by the chairman of the commissioners of appraisalment on demand, and such commissioners shall have the same power as a court of record to enforce the attendance of witnesses. [Id., § 24.]

**Art. 5584½hhh. Funds for improvements; raising by other means than bond issue.**—Levee improvement districts created under this Act, desiring to effect and carry out their plans of reclamation without the issuance of bonds, shall, subject to the limitations hereinabove stated, be authorized and empowered, through their boards of supervisors, to make such arrangements by contributions from land owners, or otherwise, as may be necessary to provide the funds requisite to the completion of their improvements; and may, by vote of the resident property taxpayers of such districts, create such indebtedness, to be evidenced otherwise than by bonds, as may be deemed requisite. Provided, such indebtedness shall never exceed the cost of construction of improvements to be made according to the adopted plan of reclamation approved by the State Reclamation Engineer, and the cost of maintenance of such improvements

for two years as estimated by him, plus ten per cent additional to meet emergencies, modifications and changes lawfully made. [Id., § 25.]

**Art. 5584½i. Bonds, petition for issue; contents.**—Where any levee improvement district desires to issue bonds to raise funds for its works of improvement, there shall be presented to the commissioners' court having jurisdiction, or to the judge thereof, in vacation, a petition signed by the owners of a majority of the acreage of lands included within such district, praying for the issuance of bonds to an amount stated, which amount shall not exceed the estimated costs of the improvements to be made, and the maintenance of the works of improvement for two years, as approved by the State Reclamation Engineer, plus ten per cent additional to meet emergencies, modifications and changes lawfully made. The petition shall state the rate of interest to be borne by such bonds, and pray that an election be ordered within and for such district to determine whether or not bonds shall be issued by and on behalf of said district for the purposes above indicated, and to the amount stated, and whether taxes shall be levied within and for said district in payment thereof; provided, that said bonds shall bear a rate of interest not exceeding six per cent per annum. [Id., § 26.]

**Art. 5584½ii. Same; order for election; ballots; polling places; election officers.**—Upon presentation of such petition such commissioners' court, if in session, or the judge thereof if the court be not in session, shall make and cause to be entered of record upon the minutes of said court an order directing that an election be held within and for such levee improvement district at a date to be fixed in the order, to be not less than fifteen nor more than thirty days after the date of such order, for the purpose of determining the questions mentioned in such petition. At such election those desiring to vote in favor of the issuance of bonds and levy of taxes in payment thereof, shall have written or printed on their ballots: "For the issuance of bonds and levy of taxes in payment thereof"; and those desiring to vote against the proposition submitted shall have printed or written on their ballots: "Against the issuance of bonds and levy of taxes in payment thereof." Each and every levee improvement district is hereby constituted an election precinct for the purpose of the election above specified, and all other elections which may be ordered or held under any provisions of this Act. When elections are ordered the judge or court ordering the same shall fix the polling place or places for the holding of such election, and name a judge and two clerks at each polling place, and more judges or clerks if deemed necessary; and there shall be at least one polling place in each county in which any portion of the district is located. [Id., § 27.]

**Art. 5584½iii. Same; deposit accompanying petition.**—When a petition for a bond election is presented it shall be accompanied by a deposit of two hundred dollars, from which shall be paid all expenses of such election, and such other expenses as may be properly incurred up to the sale and issuance of bonds, and any excess shall be returned to the petitioners or their attorney; and when bonds are issued the amount of such expense shall be refunded to the petitioners or their attorney from the proceeds of the bonds. [Id., § 28.]

**Art. 5584½j. Same; notice of order for election.**—When an order for an election has been made, the clerk of the commissioners' court of the county having jurisdiction shall forthwith issue and place in the hands of the sheriff of the county, if the district is wholly within one

county, a notice stating in substance the contents of such election order, and the time and place or places of such election, and it shall be the duty of such sheriff, by himself or deputy, forthwith to post a copy of such notice at the door of the court house of his county, and four other copies at four different places within the boundaries of such district, which posting shall be done not less than ten days prior to the date fixed for said election; if such district is located in more counties than one, then such notice may be delivered to any adult person, who shall post copies of the same, one at the door of the court house of each county in which any portion of such district is situated, and four copies at four separate places within the boundaries of those portions of the district situated in each county, which posting shall be for not less than ten days prior to the date of said election; such sheriff or person posting shall make due return to the clerk of the court having jurisdiction of his action in the premises; the return of the individual other than the sheriff to be under oath, before some person authorized by law to administer oaths, and the return of the sheriff and such oath shall be conclusive evidence of the facts stated. [Id., § 29.]

**Art. 5584½jj. Same; election; conduct of; voters.**—All elections held under any provisions of this Act shall be governed as near as may be by the general election laws of this State, except as modified hereby, and shall be held and conducted by the judges and clerks appointed by the court of jurisdiction, or, in their absence or refusal to act, by others chosen by the voters, and the supervisors of the district shall furnish all necessary ballots and other election supplies requisite to such elections. None but qualified property tax paying voters of such district shall vote at any election to authorize the issuance of bonds by or on behalf of the district or for the creation of any indebtedness against any district. [Id., § 30.]

**Art. 5584½jjj. Same; election; returns; canvass; declaration of result.**—Immediately after any election under this Act the officers holding the same shall make returns of the result thereof to the commissioners' court having jurisdiction, and return the ballot boxes to the clerk of said court, who shall safely keep the same and deliver them, together with the returns of the election, to the commissioners' court of jurisdiction at its next regular or special session, and said court shall at such session canvass the vote and returns, and if it be found that the proposition submitted has been adopted by a majority of the qualified property tax paying voters of such district voting at said election, then the court shall declare the result, and, if the election be for the issuance of bonds, shall declare that it resulted in favor of the issuance of bonds and the levy of taxes in payment thereof; and, if the result be against the issuance of bonds, then it shall declare that the result was against the issuance of bonds and the levy of taxes in payment thereof; and, if the question be for a maintenance tax, or other tax, then it shall declare the result to be for or against such tax, as the case may be; or, if the question be any other proposition which may be properly submitted at an election, the order shall declare the result to be for or against the proposition submitted, as the case may be, and an order, or orders, declaring such result shall be entered upon the minutes of such court. [Id., § 31.]

**Art. 5584½k. Maintenance tax; election to determine.**—If, at the time of petition for a bond election, or at any other time, the supervisors

of any district created under this Act, or entitled to its benefits, shall desire to be submitted to the voters of the district the question of a maintenance tax, or other proposition proper to be submitted to them, they shall petition the commissioners' court of jurisdiction for an election upon the question so desired to be submitted, and it shall be the duty of the court to order an election, and that notice be given substantially as in case of a bond election, and notice shall be given substantially as in case of such elections, and all other proceedings shall be had in respect to the question so submitted substantially in accordance with the provisions hereof in respect to a bond election. [Id., § 32.]

**Art. 5584 $\frac{1}{2}$ kk. Bonds; order directing issue; issue; denominations; maturity; interest.**—If a bond election in any district created under this Act or entitled to its benefits shall have resulted in favor of the issuance of bonds and levy of taxes in payment thereof, after such result has been duly declared the commissioners' court of jurisdiction shall make an order directing the issuance of bonds of such district, to be known as "Levee Improvement Bonds," to the amount voted, unless a less amount was requested by the district supervisors, which bonds shall state upon their faces the purposes for which they are issued. Said bonds shall be issued in the name of the levee improvement district by and on behalf of which they are voted, shall be signed by the county judge of the county whose commissioners' court has jurisdiction, and shall be attested by the county clerk of said county, and the seal of the commissioners' court of such county shall be affixed to each; they shall be issued in such denominations, and payable at such time or times; not exceeding thirty years from their date, as may be deemed most expedient by the issuing authority, and shall bear interest not to exceed six per cent per annum. [Id., § 33.]

**Art. 5584 $\frac{1}{2}$ kkk. Same; record of.**—When bonds shall have been issued by and on behalf of any levee improvement district the supervisors of such district shall procure and deliver to the treasurer of the county whose commissioners' court has jurisdiction a well bound book in which a record shall be kept of all such bonds, with their number, amount, rate of interest, date of issuance, when due, where payable, amount received for same, and the tax levy to pay interest on and to provide sinking funds for their payment, which book shall at all times be open to the inspection of the parties interested, either as tax payers or bondholders; and upon the payment of any bond an entry thereof shall be made on such book. The county treasurer shall receive for his services in recording all these matters the same fees as may be allowed by law to the county clerk for recording deeds. [Id., § 34.]

**Art. 5584 $\frac{1}{2}$ l. Same; determination of validity.**—Before any bonds issued by or on behalf of any levee improvement district are offered for sale there shall be forwarded to the Attorney-General a certified copy of all proceedings had in the organization of the district and with reference to the issuance of such bonds in connection with the bonds themselves, and such other information with respect thereto as may be required by the Attorney-General shall be furnished; and it shall be the duty of the Attorney-General to carefully examine said bonds, in connection with the record and the Constitution and laws of this State governing the issuance of such bonds, and, if, as a result of his examination, the Attorney-General shall find that such bonds are issued in conformity with the Constitution and laws of this State and that they are valid and binding obli-

gations upon the district by or on behalf of which they are issued, he shall so officially certify, and, until he shall so officially certify, and until registered by the Comptroller, as hereinafter required, said bonds shall be without validity. [Id., § 35.]

**Art. 5584 $\frac{1}{2}$ ll.** **Same; registration.**—When the bonds of any levee improvement district have been examined and approved by the Attorney-General and his certificate thereto has issued, they shall be registered by the State Comptroller in a book kept for that purpose, and the certificate of the Attorney-General as to the validity of such bonds shall be preserved of record. Such bonds after receiving the certificate of the Attorney-General, and after having been registered in the Comptroller's office, as herein provided, shall be held, in every action, suit or proceeding in which their validity may be brought into question, *prima facie* valid; and in every action brought to enforce collection of such bonds and interest thereon, the only available defense against the validity of such bonds shall be forgery or fraud. [Id., § 36.]

**Art. 5584 $\frac{1}{2}$ lll.** **Same; sale.**—When bonds shall have been issued, approved and registered as provided in this Act, the court of jurisdiction may appoint the county judge of the county of jurisdiction, or other suitable person, to sell said bonds on the best terms and for the best price possible and approved by the district supervisors, and no sale shall be complete until approved by such supervisors. The judge or person selling such bonds shall be allowed, as full compensation for all services performed in respect thereto, one-fourth of one per cent of the amount received, and, except such commission, shall promptly pay over to the proper treasurer or depository the proceeds of said bonds, to be placed to the credit of such levee improvement district; but, before proceeding to make any sale, such judge, or any person appointed, shall execute a good and sufficient bond, payable to the levee improvement district, and approved by the commissioners' court having jurisdiction, for an amount not less than the par value of the bonds to be sold, conditioned for the faithful discharge of his duty under his appointment. [Id., § 37.]

**Art. 5584 $\frac{1}{2}$ m.** **Tax levy to pay bonds; sinking fund.**—When bonds shall have been issued by any levee improvement district, the commissioners court of the county, if the district is wholly within one county, or, if the district is located in more than one county, then the commissioners' court of each county in which any portion of such district is located, shall levy and cause to be assessed and collected taxes upon all the real property and railroads within such district, based upon and apportioned, as to each piece of property, to the net benefits which it shall have been found will accrue to such property from the completion of the plan of reclamation or other duly authorized work, which taxes shall be sufficient in amount to pay the interest on such bonds as it shall fall due, and to raise an additional sum which will create a sinking fund sufficient to discharge and redeem such bonds at maturity; and such taxes shall thereafter be levied annually so long as such bonds or any of them are outstanding, sufficient in amount to accomplish the purposes above indicated. Sinking funds shall from time to time be invested in such county, municipal district or other bonds as other sinking funds may by law be invested in, or in the bonds of the series to which such funds apply, if offered for redemption before maturity upon terms deemed advantageous to the district by its supervisors or the court of juris-

diction. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 38; Acts 1921, 37th Leg. 1st C. S., ch. 50, § 2 (§ 38).]

Took effect Nov. 15, 1921.

**Art. 5584½mm. Maintenance tax; levy; amount.**—When a maintenance tax shall have been voted in any district entitled to the benefits of this Act, the taxing authorities of such district shall thereafter levy and cause to be assessed and collected taxes upon the real property of such district based upon the net benefits thereto contemplated to be accomplished through the plan of reclamation, to an amount not exceeding the specific sum voted, and the vote in such cases may be for a specific sum, or not to exceed a specific sum. The proceeds of such taxes shall be used for the maintenance, upkeep, repairs and additions to the levees and other improvements in the district, or other lawful expense incurred by and on behalf of such district, and for no other purposes. The right to levy such taxes shall remain in force until abrogated, in whole or in part, by another election; but elections upon the question of the repeal or reduction of maintenance taxes shall not be held oftener than every five years. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 39.]

**Art. 5584½mmm. Tax assessor; tax roll.**—The secretary of the board of supervisors of levee improvement districts shall be ex officio tax assessor for such districts, and it shall be his duty when any tax is levied, at the expense of the district, to prepare a tax roll in form substantially as the assessment roll made up by county tax assessors, except that instead of ad valorem valuation it shall state net benefits assessed against property, and he shall compute against each piece of property the amount of taxes assessed against it, and enter on such roll the amount of such taxes. A certified copy of such roll, in so far as it appertains to each county in which any portion of the district is located, shall be filed with the tax collector of such county. [Id., § 40.]

**Art. 5584½n. Collection of tax by county tax collectors; special collectors.**—The tax collector of the several counties shall be charged with the assessment rolls of levee improvement districts and the amount of taxes herein provided for shall be annually extended upon the tax books of the county, and collected by the collector of the county along with other taxes; and they are required to make collections of all taxes levied and assessed against property within such districts along with all other taxes, and promptly pay over the same to the treasurer of the district; and the bonds of such collectors shall stand as security for the proper performance of their duties as tax collectors of such levee improvement districts, or, if in the judgment of the supervisors of such districts it be necessary, additional bonds, payable to such districts, may be required; and any collector failing to act hereunder in promptly collecting said taxes, or failing to give the additional bond required, shall be deemed guilty of malfeasance in office, and shall be suspended from office by the commissioners court of his county, and may be removed from office in the mode prescribed by law; and in case of suspension the boards of supervisors may appoint special collectors for their respective districts and require such security of them as they deem proper, and the persons so chosen shall have and exercise within and for the district all the rights and powers which tax collectors have or may have by law in their respective counties. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 41; Acts 1921, 37th Leg. 1st C. S., ch. 50, § 3 (§ 41).]

Took effect Nov. 15, 1921.

**Art. 5584 $\frac{1}{2}$ nn. Delinquent taxes; collection; lien of tax; penalty for nonpayment of tax.**—Tax collectors of levee improvement districts shall perform all duties and exercise all powers in respect to delinquent taxes due levee improvement districts as may be provided by law for the collection of delinquent taxes, both State and county, and the collection of such delinquent levee improvement taxes and sales of property therefor shall be governed by the laws applying to the collection of delinquent State and county taxes; and to that end levee improvement districts organized and created under this Act, and acting by a majority of their supervisors, are hereby given the power and authority to collect such delinquent taxes, and to institute and prosecute by attorneys employed by them, suits in the name of the district for their collection, paying such attorneys for their services such fees or commissions as to the supervisors may seem proper; and such districts are also authorized to do and perform all other things that may be necessary for the collection of such taxes. Taxes levied under this Act shall be a first and prior lien upon all property against which they are assessed, and shall be payable and shall mature and become delinquent as may be provided by law for State and county taxes, and upon failure to pay such taxes, when due the same penalty shall accrue and be collected as may be provided by law in case of non-payment of State and county taxes. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 42; Acts 1921, 37th Leg. 1st C. S., ch. 50, § 4 (§ 42).]

**Art. 5584 $\frac{1}{2}$ nnn. Treasurer of district; county treasurer to be; bond; compensation.**—The county treasurer of the county, the commissioners' Court of which has jurisdiction, shall be treasurer of all levee improvement districts of which such court has jurisdiction, and as such shall execute a good and sufficient bond, payable to the levee improvement district, in a sum equal to one and one-fourth of the taxes contemplated to be paid over in any one year, or such other or further amount as the board of supervisors of the district may require, which bond shall be conditioned for the faithful performance of the duties of the principal as treasurer of the levee improvement district, and shall be approved by the board of supervisors of such district. Such bond may be made by any guaranty or surety company approved by the board of district supervisors, and premiums therefor may be paid out of the maintenance fund of the district. The treasurer, as compensation for his services, shall be allowed not exceeding one-fourth of one per cent upon sums received by him by and on behalf of such levee improvement district. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 43.]

**Art. 5584 $\frac{1}{2}$ o. Same; accounts with districts; payments by.**—It shall be the duty of the county treasurer whose commissioners' court has jurisdiction, as treasurer of the levee improvement district, to open an account with each such district and to keep an accurate account of all moneys received by him belonging to such district, and all moneys paid out by him. He shall pay out no money except upon a voucher signed by two of the district supervisors and countersigned by the county judge, and he shall carefully preserve all orders for the payment of money; and as often as required by the said district supervisors or the commissioners' court he shall render a correct account to them on all matters pertaining to the financial condition of such district. [Id., § 44.]

**Explanatory.**—Acts 1921, 37th Leg. 1st C. S., ch. 50, purports, in its title, to amend section 44 of chapter 44, Acts 1917, 35th Leg. 4th C. S., together with other enumerated sections of the latter act, but in the body of the act section 44 is not mentioned.

**Art. 5584 $\frac{1}{2}$ 00. District depository; selection.**—Where the county, whose commissioners' court may have jurisdiction of any levee improvement district, has a depository, such county depository shall be the depository of the funds of the levee improvement district, and where such county has no depository then it shall be the duty of the board of supervisors of the levee improvement district to select a depository as depositories are selected for counties, and the laws applying to county depositories shall apply and govern in such cases. [Id., § 45.]

**Art. 5584 $\frac{1}{2}$ 000. Compensation for services by officers, etc.**—For all services performed by any officer or individual under this Act, the compensation for which is not expressly provided for, such officer or individual shall receive the same compensation as he would for like services if rendered as an officer of a county. Clerks recording orders hereunder shall receive the same compensation as would a county clerk for recording deeds, and persons posting notices hereunder shall receive the same compensation as would a sheriff for posting notices required by law to be posted by him officially. [Id., § 46.]

**Art. 5584 $\frac{1}{2}$ p. Contracts for improvements; letting; advertisement for bids.**—All the improvements contemplated by the plan of reclamation, as approved by the State Reclamation Engineer, shall be constructed; and among the powers that may be exercised by the board of supervisors of any levee improvement district operating under the provisions of this Act the following are hereby enumerated for greater certainty:

(a) To let contracts to build, construct, excavate and complete all or any part of the works and improvements which may be needed to carry out, maintain and protect the plan of reclamation; such contracts to be let by the district supervisors to the lowest or best bidder who is qualified to do the work, after giving notice by advertising the same in one or more newspapers of general circulation in the State of Texas, once a week for two consecutive weeks, which contracts shall be made in writing and signed by the members of such board or a majority thereof, and by the contractor, in duplicate; provided, that such work may be let without advertisement, upon contracts approved jointly by the district supervisors and the county judge of the county of jurisdiction; or

(b) To employ men and teams, and to purchase tools, machinery, rolling stock, and all necessary equipment, and to advance money in payment therefor, in building, constructing, completing and repairing all or any part of the works and improvements necessary to carry out, maintain and protect the plan of reclamation; and

(c) To sell land and other property, including all material or equipment acquired by the district, upon such terms and conditions as may be mutually agreed upon; and all moneys received from such sales shall be deposited with the county treasurer for the use and benefit of the district. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 47; Acts 1921, 37th Leg. 1st C. S., ch. 50, § 5 (§ 47).]

Took effect Nov. 15, 1921.

**Art. 5584 $\frac{1}{2}$ pp. Bond of contractor.**—The person, firm or corporation to whom such contract is let shall give bond payable to the district in such amount as the board of supervisors may determine, not to exceed the contract price, conditioned that he, they or it will faithfully perform the obligations, agreements and covenants of such contract, and



that in default thereof they will pay to said district all damages sustained by reason thereof. Such bond shall be approved by the supervisors, and shall be deposited with the depository of the district, a true copy thereof being retained in the office of the secretary of the board of supervisors. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 48.]

**Art. 5584 $\frac{1}{2}$ ppp. Supervision of and report on work.**—All work included in the contract shall be done in accordance with the specifications under the supervision of the supervisors and the district engineer. As the work progresses the engineer of such district shall make report to the supervisors, showing in detail whether the contract is being complied with, and when the work is completed he shall make a detailed report of same to the supervisors, showing whether or not the contract has been fully complied with according to its terms; and if not in what particular, it has not been so complied with. [Id., § 49.]

**Art. 5584 $\frac{1}{2}$ q. Inspection of work; payments for work.**—The supervisors shall, during the progress of the work under any contract, inspect the same; and upon the completion of any work in accordance with the contract, they shall draw a warrant on the treasurer of the district for the unpaid amount of the contract price in favor of the contractor. Payments pending the work shall not exceed in the aggregate eighty-five per cent of the contract price of the work done, the said amount of work completed to be shown by estimates of the engineer of the district. [Id., § 50.]

**Art. 5584 $\frac{1}{2}$ qq. District seal.**—Levee improvement districts created under this Act, or entitled to its benefits, shall each have a common seal which shall be circular in form, with the name of the district within the circle, with a star of five points in the center; and such districts may use [sue] and be sued in the courts of this State in and by their corporate names, and all courts of this State shall take judicial notice of their existence. [Id., § 51.]

**Art. 5584 $\frac{1}{2}$ qqq. Approval of plans by State Reclamation Engineer; necessity for.**—From and after the taking effect of this Act it shall be unlawful for any levee improvement district, whether it proposes to construct its levees or other improvements with or without the issuance of bonds, to construct, to undertake to construct, or maintain any levee or other improvements, without first obtaining the approval by the State Reclamation Engineer, as provided in this Act, of the plans for such levees or other improvements; and in the event any such levee improvement district undertakes to construct, constructs or maintains any levee or other improvement without first obtaining the approval of the State Reclamation Engineer of the plans for the same, as provided in this Act, it shall be the duty of the Attorney-General, on the request of the State Reclamation Engineer, to file suit in one of the district courts of Travis County, Texas, in which the venue of such suits is hereby fixed, to enjoin the construction or maintenance of such levee or other improvement. [Id., § 52.]

**Art. 5584 $\frac{1}{2}$ r. Same; work by private individuals or corporations.**—From and after the taking effect of this Act it shall be unlawful for any person, corporation or levee improvement district, without first obtaining the approval of plans for the same by the State Reclamation Engineer, to construct, attempt to construct, cause to be constructed, maintain or cause to be maintained, any levee or other such improvement on,

along or near any stream of this State which is subject to floods, freshets or overflows, so as to control, regulate or otherwise change the flood waters of such stream; and any person, corporation or district violating this section of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not more than one year, or by both such fine and imprisonment; and each day any such structure is maintained or caused to be maintained shall constitute a separate offense. And in the event any such structure is about to be constructed, is constructed, or maintained by any person or corporation without approval of the plans by the State Reclamation Engineer, it shall be the duty of the Attorney-General, on the request of the State Reclamation Engineer, to file suit in one of the district courts of Travis County, in which the venue of such suits is hereby fixed, to enjoin the construction or maintenance of such structure. Provided, that the provisions of this section shall not apply to dams, canals or other improvements made or to be made by irrigation, water improvements or irrigation improvements made by individuals or corporations. [Id., § 53.]

**Art. 5584½rrr. Abolition of district; effect.**—If any levee improvement district heretofore created or that hereafter may be created shall find, at any time prior to the sale of its bonds or final lending of its credit in other form, that the proposed undertaking for any reason is impracticable or apparently cannot be successfully carried out, the commissioners' court is hereby authorized to abolish such district upon petition signed by the owners of a majority of the acreage in the district, praying for the dissolution of such district, setting forth the reasons therefor, and accompanied by a deposit of fifty dollars. Such petition shall be set for hearing, notice of such hearing shall be given, the hearing thereon shall be held, and the expense thereof paid out of said deposit, all in conformity with the procedure prescribed in this Act in connection with the petition for the establishment of the district; and the commissioners' court shall have the same powers with respect to the abolition of such districts that it has with respect to their creation. If upon the hearing it shall appear to the court that such district should be abolished, the court shall so find and shall render judgment reciting such finding, and by its orders entered of record declare and decree such district abolished, and appoint the chairman of the supervisors or some other suitable person as trustee to close up its affairs without delay; the term and compensation of such trustee to be at the pleasure of the said court. If the court should not so find, it shall dismiss the petition at the cost of the petitioners, and enter such finding of record. Where any taxes have been levied and collected in the name of the district in anticipation of an issue of bonds, such taxes, so far as unexpended, shall in the event of dissolution of the district as herein provided, and on order of the commissioners' court duly entered, be returned to the taxpayers ratably, after deducting the compensation of the assessor, collector and treasurer in connection therewith, and any other claims properly chargeable against such taxes; proper receipt for all sums so refunded to be taken and filed by the treasurer. [Id., § 54.]

**Art. 5584½rrr. Additional work and funds therefor.**—If it should develop that the works and improvements set out in any plan of reclamation adopted by or on behalf of a levee improvement district are found insufficient to reclaim in whole or in part any or all of the lands and other property within the district, or if extensive repairs or additions to such

works are deemed necessary, then in respect thereto the board of supervisors of the district, upon petition of the owners of a majority of the acreage of the district, may proceed in all respects to provide additional funds for such additional works, in accordance with the provisions of this Act, in respect to the original plan of reclamation, and may, under like limitations, create additional indebtedness or issue additional bonds, but always subject to every limitation in respect to such original proceedings, as well as the approval of the new or amended plan of reclamation by the State Reclamation Engineer. [Id, § 55.]

**Art. 5584½s. Reassessment of benefits.**—If the plan of reclamation for any levee improvement district is changed or modified, or if extensive repairs or additions thereto are made as provided in Section 55 of this Act [Art. 5584½rrr], or if at any time after one year from the date of any final judgment and decree of the commissioners of appraisement, the owners of a majority of the acreage of lands within any levee improvement district shall file a petition with the commissioners court of the county of jurisdiction, alleging that the previous assessments of benefits in such final judgment and decree are insufficient or inequitable, and praying for an increase or readjustment of the assessment of benefits for the purpose of making an adequate or more equitable basis for the levy of taxes, it shall be the duty of the commissioners court to set a day for the hearing of such petition, and to issue notice informing all persons concerned of the time and place of hearing, and their rights to appear and contend for or contest an increase or readjustment of assessments of benefits, such notice to be posted at the places, for the length of time, and in all respects the same as the original notice, as is provided in Section 3 of this Act [Art. 5584½aa]; and at the time and place set for the hearing the commissioners court shall proceed to hear such petition and proof for or against the same, and if it finds that the aggregate amount of assessed benefits as shown by such previous final judgment and decree is insufficient to carry out the original plan of reclamation, or any change in or modification of or repairs or additions to the same, or that there has been a material change in the relative value of the benefits conferred on the property in the district, or that for other reasons such assessment of benefits is inadequate or inequitable, it shall order that there be made a reassessment of benefits for the purpose of providing a sufficient, more adequate or equitable basis of taxation for all purposes within such district; and thereupon it shall proceed to appoint commissioners of appraisement, as in the first instance, which commissioners shall proceed in all respects as in the first instance, and with all the powers, rights, privileges and duties, both to the commissioners and persons interested; and such commissioners shall finally make their findings and enter their judgment and decree in the matter, which thereafter, until again changed or modified, shall be the basis of the assessment of taxes within and for the district. Provided, that there shall be no reassessment of benefits that will in any way render insecure any outstanding bonds or other indebtedness of any district availing itself of the benefits of this Section, nor shall the sum of benefits as reassessed ever be less in amount than the sum total of all outstanding bonds and other indebtedness of such district; and it shall be the duty of the commissioners court of each county in which such district is located to levy annually and cause to be assessed and collected taxes based upon such reassessment, at rates sufficient to provide funds requisite to pay interest upon all outstanding bonds and other indebtedness of such district, and to pay off such bonds or other indebtedness at maturity,

and also to pay the interest on and provide necessary sinking funds to pay all bonds or other indebtedness that may hereafter be issued. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 56; Acts 1919, 36th Leg., ch. 135, § 1 (§ 56); Acts 1921, 37th Leg. 1st C. S., ch. 50, § 6 (§ 56).]

See 1918 Supp., arts. 6016 $\frac{1}{2}$ -6016 $\frac{1}{2}$ c, on the subject of notice. The act took effect Nov. 15, 1921.

**Art. 5584 $\frac{1}{2}$ ss. Suit by person, etc., objecting to approval or disapproval of reclamation plan by State Reclamation Engineer; determination; appeal.**—If the supervisors of any levee improvement district, or any person or corporation whose interests are affected thereby, be dissatisfied with the action of the State Reclamation Engineer in finally approving or disapproving any plan of reclamation for such district, the district or person or corporation dissatisfied may within fifteen days after such final action, file suit in the district court of the county whose commissioners' court has jurisdiction of the district in question, against the State Reclamation Engineer, and to which suit the district shall be made a party defendant, if the suit be on behalf of any other complaining person or corporation. The petition shall set forth the cause or causes of objection and show wherein the interests of the petitioner are injuriously affected by the action of the State Reclamation Engineer complained of. Process shall issue as in other cases and the case shall have preference of trial in the court wherein it is filed, and upon final hearing the court shall render its judgment and decree approving or disapproving of the plan of reclamation, in whole or in part, as it may find to be equitable and just; and such judgment shall stand for the action of the State Reclamation Engineer in such matters. There may be an appeal, as in ordinary cases, from the judgment of the trial court, which appeal shall have preference of hearing in the Court of Civil Appeals, the judgment of which in the matter shall be final, and shall stand for the action of the State Reclamation Engineer in respect to the matters at issue in such suit. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 57.]

For sections 58, 59 of this act, see Penal Code, arts. 1254, 1254a.

**Art. 5584 $\frac{1}{2}$ sss. Other laws applicable.**—In all matters not herein provided for levee improvement districts created hereunder shall be governed by the provisions of Chapter 146 of the General Laws of the Regular Session of the Thirty-fourth Legislature, authorizing the commissioners' court of counties to establish levee improvement districts, and amendments to such law, save that in no instance except as is specially required or permitted in this Act shall it be necessary for any county judge to approve any contract made by a board of supervisors. [Id., § 60.]

**Art. 5584 $\frac{1}{2}$ ssss. Other districts may exercise powers, etc., conferred by act.**—Levee improvement districts heretofore organized under any law of this State, and districts organized under any law of this State having for their objects the reclamation of lands through a system of levees and drainage, whether denominated levee improvement districts or not, may become entitled to and may hereafter exercise all the rights, powers and privileges conferred by this Act upon districts created under it, and to all of the enlarged powers which may be conferred under Section 59, Article 16, of the Constitution of this State, by proceeding as follows: [Id., § 61.]

**Art. 5584 $\frac{1}{2}$ t. Same; procedure.**—Whenever the owners of a majority of the acreage of any district mentioned in the preceding section [art. 5584 $\frac{1}{2}$ ssss] shall present to the commissioners' court of the county

in which such district is located their petition praying that a hearing be ordered to determine whether such district may avail itself of the provisions of this Act, it shall be the duty of the court to fix a time and place for such hearing, and cause notice thereof to be given, substantially in all respects as notice of the hearing upon the matters of the formation of a district under this Act, and at the time and place of such hearing the court shall proceed to hear and determine the issue presented by the petition, and evidence for and against the same, and if it finds that the interests of the district in question would be promoted by granting the prayer of the petition it shall so decree and enter its judgment of record, declaring it to be to the interest of such district that it avail itself of all the rights, powers and privileges conferred by this Act upon districts created under it, and that the district on behalf of which the petition is filed shall thereafter be entitled to and may exercise all rights, powers and privileges conferred by this Act upon districts created by it, and thereafter such district shall have and may exercise all such rights, powers and privileges as if created under this Act, and thereafter it shall proceed in all things as it would if created hereunder. but such decree shall not in any respect injuriously affect any financial liability of such district. [Id., § 62.]

**Art. 5584 $\frac{1}{2}$ tt. Acts not repealed.**—Nothing contained in this Act shall be construed to repeal any law upon this subject passed at the Fourth Called Session of the Thirty-fifth Legislature, but any such law shall be deemed cumulative. [Id., § 63.]

## CHAPTER THREE

### SEAWALLS

Art. 5585.	Construction and maintenance of seawalls; powers of counties and cities, etc.	Art. 5588.	Issuing bonds; election.
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**Article 5585. Construction and maintenance of seawalls; powers of counties and cities, etc.**

**Construction and operation in general.**—The construction of a sea wall within the limits of a city for the protection of the lives and property of the inhabitants of the county is "county business" within the jurisdiction of the commissioners' court under Const. art. 11, § 7, art. 5, § 18, and this article. *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560.

**Implied powers.**—The commissioners' court, having broad power to construct a sea wall, has authority to employ an attorney to aid in carrying out that power. *Galveston County v. Gresham* (Civ. App.) 220 S. W. 560.

**Art. 5588. Issuing bonds; election.**

**Construction and operation in general.**—The grant of taxing power to any county or district by the Legislature should be construed with strictness; the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

#### SPECIAL AND LOCAL ACTS RELATING TO SEA WALLS, ETC.

Acts 1919, 36th Leg., ch. 68, grants to city of Corpus Christi certain lands under water for construction of sea walls or break waters.

Acts 1919, 36th Leg. 2d C. S., ch. 52, granting certain land to city of Rockport.

Acts 1920, 36th Leg. 3d C. S., ch. 22, donating to city of Aransas Pass eight-ninths of the state advalorem taxes to aid such city to pay the interest on bonds and to provide a sinking fund for constructing seawalls, breakwaters, and shore protections.

Acts 1920, 36th Leg. 3d C. S., ch. 23, makes a similar provision for the city of Rockport.

Acts 1920, 36th Leg. 3d C. S., ch. 24, makes a similar provision for the city of Port Lavaca.

Acts 1920, 36th Leg. 3d C. S., ch. 25, makes a similar provision for the city of Freeport.

Acts 1921, 37th Leg., ch. 80, granting lands to city of Port Lavaca to aid in construction of sea walls or breakwaters and incidental improvements.

Acts 1921, 37th Leg., ch. 138, makes a similar provision for the city of Corpus Christi.

## TITLE 84

## LIBEL

Art.		Art.
5595.	Definition.	5598a. Not to affect pending suits or accrued causes of action.
5596.	Mitigation of damages.	5598b. Venue of action.
5597.	What matters deemed privileged.	
5598.	To be construed, how.	

**Article 5595. Definition.**

See *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168.

**What constitutes libel in general.**—In action against credit company for libel in placing plaintiff's name in a list of debtors, it was necessary to prove publication. *Henderson v. Credit Clearing House* (Civ. App.) 204 S. W. 370.

In action against insurance company for resulting tie-up of plaintiff's shipment because of alleged slanderous statements, evidence held to warrant finding that defendants' agent did not intend to state, and financial backer did not understand, that no reinsurance had been obtained. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

It is not libelous for one who is the owner of the assignment of another's wages to give notice of that fact to the master, but, if at the time notice is given the debt which the assignment secures had been paid, and it is maliciously claimed that it has not, the one giving notice is liable for such damages as proximately result from the unlawful act. *Evans v. McKay* (Civ. App.) 212 S. W. 630.

If any part of a newspaper publication was libelous of city officers, the whole was a libel; it all being one coherent article relative to charges against the city and officials in relation to the nonsuppression of gambling and prostitution, made by army officers. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

Defamatory language may be actionable in itself or per se, or may be actionable only on allegation and proof of special damages or per quod. *Id.*

Gas company's letter to consumer, stating that the meters had been tampered with and that the consumer would be held responsible for the safety of the new meters being installed, without charging the consumer with tampering with meter, held not libelous, even if aided by innuendo. *Fuson v. Abilene Gas & Electric Co.* (Civ. App.) 219 S. W. 208.

This article gives a full and complete definition of libel, and no other definitions can be considered in arriving at a conclusion as to whether a publication constitutes libel. *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 860.

Where defendant published an article stating that plaintiff, who was arrested on complaint of illegally transporting liquor, was discharged after hearing before justice, who held that the evidence was insufficient to show violation, the fact that the justice, without authority of law, found plaintiff not guilty, will not render defendant liable, the account not differing in substance from the judgment of the justice, and there being nothing to indicate any suppression of facts. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

**Malice.**—In cases founded on libelous publication, the jury may infer the existence of malice from absence of probable cause for making the publication; or from evidence of express malice. *Evans v. McKay* (Civ. App.) 212 S. W. 630.

Where words uttered are not actionable per se or presumptively libelous, it becomes necessary to prove express malice or that the alleged libelous matter was published in reckless disregard of plaintiff's rights and in a spirit of indifference concerning the injury which it might inflict. *Id.*

In actions for libel, there are two kinds of malice, "malice in law" and "malice in fact," or "express malice," malice in law arising in cases where the words uttered are presumed in law to be malicious. *Id.*

In libel or slander actual or express malice need not be proven by direct or extrinsic evidence, but it may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the words or acts of defendant before, at, or after the time of the communication, but it must be evidence from which the jury may infer malice existing at the time of publication and actuating it. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 131, reversing judgment (Civ. App.) 185 S. W. 402.

The malice, meant and required, as a basis for punitive or exemplary damages for a libel, must be actual and not merely imputed. *Wortham-Carter Pub. Co. v. Littlepage* (Civ. App.) 223 S. W. 1043.

**Exposing person to hatred, contempt, or ridicule.**—Accusing one of having "brainstorms" charges a natural defect, and exposes the one accused to ridicule. *Hibdon v. Moyer* (Civ. App.) 197 S. W. 1117.

Article entitled "Misstatements of (?)," and charging untruthfulness, held libelous per se, as exposing person to hatred, ridicule, or financial injury. *Id.*

Charge that saloon keeper sold to minors or knowingly to their agents, held to expose him to public hatred, contempt, ridicule, or financial injury. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

Defamatory words to be "libelous per se" must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the party, or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

To be libelous, the language of the publication on which the libel is predicated, taken in connection with the facts and circumstances alleged, must have injured plaintiff's reputation, thereby exposing him to public hatred and contempt, financial injury, etc. *Fuson v. Abilene Gas & Electric Co.* (Civ. App.) 219 S. W. 208.

Letter by vice president of railroad to Railroad Commission denying charge of discrimination made by plaintiff and stating in substance that plaintiff was unreliable, that he was a disturber in the community, and that the better element of the community would not associate with him, was libelous per se, as tending to expose plaintiff to contempt or ridicule and financially injure him and impeach his integrity and reputation. *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 860.

**Imputation of crime and immorality.**—Written language charging plaintiff with destroying valuable testimony, with conspiring to defeat the jurisdiction of courts to which he had submitted his litigation, and with trying to appropriate to himself valuable property in such a way as to avoid responsibility, held libelous. *Baten v. Houston Oil Co. of Texas* (Civ. App.) 217 S. W. 394.

Printed or written language falsely and maliciously charging crime is libelous per se. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

The untrue statement published in a newspaper that plaintiff, a physician, had been indicted for violation of the Harrison Anti-Narcotic Act (U. S. Comp. St. §§ 6237g-6237q) constitutes a libel. *Wortham-Carter Pub. Co. v. Littlepage* (Civ. App.) 223 S. W. 1043.

The publisher of an article setting out that after plaintiff, who was arrested for the illegal transportation of liquor, was discharged by a justice of the peace, the Attorney General procured an injunction against sale, is not liable because he failed to state plaintiff contended that he was transporting the liquor for export; it not appearing that the transportation for export was illegal while other transportation was not. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

**Imputation of misconduct in office.**—Printed or written language falsely and maliciously charging crime is libelous per se, so that it is libelous per se to impute to an officer in his official character incapacity, fraud, dishonesty, misconduct, or want of integrity, or to charge that he has been induced to act in his official capacity by a pecuniary or other improper consideration, such as, if true, would be ground for his removal. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

**Tendency to injure in profession or business.** Where alleged slanderous words charged plaintiff, who was holder of blank policy, with issuing unauthorized certificates, plaintiff was required to prove special damages: such words not being defamatory as a matter of law, as charging an act involving moral turpitude, reflecting on business integrity, or calculated to impair business standing. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

**Causing special damage.**—Article being libelous per se, in that it charged plaintiff with untruthfulness, it was unnecessary for plaintiff to offer evidence of special damages to authorize recovery. *Hibdon v. Moyer* (Civ. App.) 197 S. W. 1117.

Where alleged slanderous words charged plaintiff, who was holder of blank policy, with issuing unauthorized certificates, plaintiff was required to prove special damages: such words not being defamatory as a matter of law, as charging an act involving moral turpitude, reflecting on business integrity, or calculated to impair business standing. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In the case of defamatory language actionable per se damages in nonprivileged matters are conclusively presumed, but in actions per quod only any injury resulting from the use of the language must be alleged and proved. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

**Construction of language.**—Charges that minors frequented plaintiff's saloon and seemed to experience no difficulty in finding some one to buy liquor for them, and were tempted to drink held to warrant innuendo that this meant that he was guilty of selling liquor to minors. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

Alleged defamatory language must be construed as a whole. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

Words not in themselves conveying any defamatory meaning may by innuendo be shown to charge commission of a crime, but for such purpose new matter cannot be introduced, and the actual meaning of the words used cannot be enlarged. *Fuson v. Abilene Gas & Electric Co.* (Civ. App.) 219 S. W. 208.

**Damages in general.**—A verdict of \$1,500 in favor of a woman who was accosted on the streets with the demand that she permit defendant's servant to examine certain bundles under accusation that she was a thief and a shoplifter was not excessive. *W. C. Munn Co. v. Westfall* (Civ. App.) 197 S. W. 328.

Where railroad's conductor slandered plaintiff by imputing to him theft of overcoat, verdict for plaintiff for \$500 against the railroad cannot be set aside as excessive. *Beaumont, S. L. & W. Ry. Co. v. Daniels* (Civ. App.) 204 S. W. 481.

In action for slander and for wrongful interference in contractual relations, resulting in tie-up of plaintiff's shipment of cotton, damages cannot be recovered for loss of profits plaintiff might have made by engaging in other business during period of tie-up, instead of devoting his time to effort to settle shipment controversy; such damages being too remote and speculative. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

In the law of libel, general damages are those which naturally, proximately and necessarily result from publishing the libel, and are recoverable under a general averment; the elements of such damages being injury to character, or reputation, feelings, mental suffering and anguish, and other like wrongs or injuries incapable of money valuation. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

**Mental suffering.**—Damages for mental anguish caused by publication of matter actionable under Rev. St. 1911, art. 5595, defining libel, is recoverable regardless of whether there was any other injury or damage. *Hibdon v. Moyer* (Civ. App.) 197 S. W. 1117.

In action for slander, damages cannot be recovered for mental distress, not the direct result and proximate effect upon his mind and feelings of alleged slanderous statement. *Providence-Washington Ins. Co. v. Owens* (Civ. App.) 207 S. W. 666.

**Exemplary damages.**—An employé who was discharged from his employment by reason of defendant falsely and maliciously notifying the employer that the employé owed her a debt and that she had an assignment of his wages was properly allowed exemplary damages. *Evans v. McKay* (Civ. App.) 212 S. W. 680.

Exemplary damages for libel are allowable only where fraud, malice, gross negligence, or oppression exist, and are awarded in the way of punishment of the wrongdoer and not as a reimbursement of legal damages to the injured party. *Wortham-Carter Pub. Co. v. Littlepage* (Civ. App.) 223 S. W. 1043.

In an action against a newspaper corporation only for publishing a false statement that defendant was indicted by a federal grand jury, where there was no proof of any actual or express malice or gross negligence or oppression on the part of any one shown to be an officer of the corporation and it appeared that the mistake or act of the reporter whether with or without malice was not ratified by it, but on the contrary an immediate correction of the error was published as soon as discovered, exemplary damages were not allowable against the corporation. *Id.*

The "malice," meant and required as a basis for punitive or exemplary damages for a libel, must be actual and not merely imputed, and, while malice may be inferred from and proven by circumstances showing an utter disregard of the rights of another, an indifference to the infliction of the injury, or gross negligence such inference is one of fact and not of law. *Id.*

#### Art. 5596. Mitigation of damages.

See *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168; *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

**Justification and mitigation in general.**—Petition open to construction as charging saloon keeper with selling liquor to minors or knowingly to their agent, held not cured by adding that petitioners did not blame him, and thought he tried to run his place according to law. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

**Truth as justification.**—Where plaintiff, assignee of an oil lease, by failure to meet the condition of drilling a well or paying rent within the time specified, had permitted the lease to terminate, he was not entitled to a judgment for slander of title against lessors for asserting that the lease had terminated. *Ford v. Barton* (Civ. App.) 224 S. W. 268.

**Art. 5597. What matters deemed privileged.**—The publication of the following matters by any newspaper or periodical, as defined in Article 5595, shall be deemed privileged, and shall not be made the basis of any action for libel without proof of actual malice:

1. A fair, true and impartial account of the proceedings in a court of justice, unless the court prohibits the publication of the same, when in the judgment of the court the ends of justice demand that the same should not be published, and the court so orders; or any other official proceedings authorized by law in the administration of the law.

2. A fair, true and impartial account of all executive and legislative proceedings, including all reports of and proceedings in or before legislative committees, and of any debate or statement in or before the Legislature or in or before any of its committees, and including also, all reports of and proceedings in or before the managing boards of educational and eleemosynary institutions supported from the public revenue, of city councils or other governing bodies of cities or towns, of the commissioners' court of any county, and of the board of trustees of the public schools of any district or city, and of any debate or statement in or before any such body.

3. A fair, true and impartial account of public meetings organized and conducted for public purposes only.

4. A reasonable and fair comment or criticism of the official acts of



public officials and of other matters of public concern published for general information. [Acts 1901, p. 30, § 3; Acts 1919, 36th Leg., ch. 25, § 1.]

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

**Privileged communications in general.**—"Absolute privilege" is confined to cases in which the public service of the administration of justice requires complete immunity from being called to account for language used, such as language used in legislative bodies, in debates, in reports of military officers on military affairs to their superiors, language used by judges on the bench and witnesses on the stand. *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 860; *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

This article does not give newspapers an absolute privilege as to the publication of the matters therein stated. *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168.

This act preserves existing defenses to actions for libel, including defense of privilege, and does not limit such defense to publishers of newspapers or periodicals. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

Protest to comptroller against grant of liquor license held not absolutely privileged because of constitutional right to petition the government for redress of grievances. *Id.*

Where the defense of privilege in a libel suit is a vested ground of defense, it cannot be taken away by retroactive legislation, in view of Const. art. 1, § 16. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402.

In libel or slander, if one makes a statement believing it to be true, he will not lose the protection arising from the privileged occasion merely because he had no reasonable ground for his belief. *Id.*

Generally a newspaper publisher may, when done in good faith and without intent to injury, print and circulate any item whether true or false without pecuniary liability other than that arising from loss of confidence and esteem in the minds of the public. *Wortham-Carter Pub. Co. v. Littlepage* (Civ. App.) 223 S. W. 1043.

The untrue statement published in a newspaper that plaintiff, a physician, had been indicted for violation of the Harrison Anti-Narcotic Act (U. S. Comp. St. §§ 6287g-6287q) cannot be defended on the ground that it was privileged matter, so that the defendant, however innocent may have been the mistake, is liable for actual damages. *Id.*

**Judicial proceedings.**—Pleadings in civil actions are privileged publications not supporting action for libel. *Taylor v. Iowa Park Gin Co.* (Civ. App.) 199 S. W. 853.

Petition under arts. 7435, 7436, to comptroller protesting against grant of new license to saloon keeper, held not privileged as a communication in a judicial proceeding. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

The privilege of publishing an impartial account of judicial proceedings, does not justify the publication of a libelous written pleading properly filed upon which no action has been taken by the court, and is limited to proceedings while the court is in session and may have an opportunity to prohibit publication. *Baten v. Houston Oil Co. of Texas* (Civ. App.) 217 S. W. 394.

Allegations, in motion for contempt, that plaintiff had disobeyed the supersedeas granted by the trial court, in having willfully destroyed certain house on the premises involved in the action, which was valuable evidence, and in cutting and removing a great amount of timber from premises, held privileged, being pertinent, material, and relevant to the charge of contempt. *Id.*

Words spoken, written, or printed in the course of a judicial proceeding are absolutely privileged when material, relevant, and pertinent to the issues involved in the case. *Id.*

The Railroad Commission of Texas is not a judicial or quasi judicial tribunal, and a letter written by vice president of railroad to commissioner denying plaintiff's charge of discrimination and libeling plaintiff was not absolutely privileged. *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 860.

The publisher of a newspaper need not interview a defendant as to his defense before publishing an account of judicial proceedings. *Mulhall v. Express Pub. Co.* (Civ. App.) 225 S. W. 545.

The publisher of a newspaper article which stated that, after plaintiff, who was charged with illegally transporting liquor, was discharged by a justice, the Attorney General procured an injunction, is not liable for defamation because the article did not state whether the complaint on which the injunction was procured was based on information and belief or on knowledge. *Id.*

**Reports of official proceedings.**—Letter written by vice president of railroad to Railroad Commission denying plaintiff's charge of discrimination and libeling plaintiff cannot be protected except in a qualified sense, and, if malice is shown to have actuated using of libelous words clearly not necessary to defense, vice president and railroad are liable for provable damages. *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 860.

**Discharge of duty to others.**—Qualified privilege extends to communications made in good faith by one having an interest or a duty to a person having corresponding interest or duty, and embraces cases where duty is of a moral character or an imperfect obligation. *Koehler v. Dubose* (Civ. App.) 200 S. W. 238; *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 860; *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402.

Communications passing between state agents of fire insurance companies and the local agents, and communications from one insurance company to another, with refer-

ence to matters wherein the companies are mutually interested, and to protect such interest, are conditionally privileged. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

In a libel suit brought against a railroad company by a discharged baggageman in the joint service of an express company and defendant, based upon a letter to the express company by defendant's superintendent requesting his discharge because he had carried a passenger in the baggage car contrary to regulation, the letter was privileged; the superintendent in good faith believing the information upon which it was based to be true. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402.

Where defendant in slander action had occasion to suspect plaintiff of stealing from her chickens, fruit, and jelly, her accusation, made to wife of plaintiff's landlord in order to prevent renewal of lease to the plaintiff, was qualifiedly privileged, and malice must be shown by plaintiff. *Vacicek v. Trojack* (Civ. App.) 226 S. W. 505.

In an action for slander, charges made by the defendant to the sheriff were not privileged where not made with an honest desire to promote the ends of justice, but to injure the plaintiff and to cause the breaking of her engagement to marry defendant's brother. *Vogt v. Guldry* (Civ. App.) 229 S. W. 656.

Utterance or statement, charging female employé of large store with thievery, made by the store's manager in his office in the presence of other executives and employés when he was investigating a claim of theft held qualifiedly privileged and not to be made a basis for damages, actual or exemplary, unless the employé charged with the theft could show the statement was actuated by actual or express malice or want of good faith. *Foley Bros. Dry Goods Co. v. McClain* (Civ. App.) 231 S. W. 459.

**Criticism and comment on public matters.**—Although a report of a court proceeding was true, a newspaper did not have the right to base unreasonable and unfair comment and criticism thereon, although the subject of criticism was a candidate for public office. *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1168.

Under arts. 7435, 7436, 7446, statements in petition to comptroller protesting against grant of new license to saloon keeper circulated when no application was pending, held not absolutely privileged. *Koehler v. Dubose* (Civ. App.) 200 S. W. 233.

A newspaper article relative to slackness and corruption on the part of the chief of police and police judge of a city, in failing to suppress gambling and prostitution at the instance of army officers, held privileged; proof of actual malice therefore being essential, and not inferable from the falsity of the charges alone. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

Where a member of a Liberty Loan committee, during the war with Germany, while soliciting subscriptions to bonds, distributed circulars, prepared by the county council of defense, and claimed to contain a libelous statement concerning plaintiff, who had refused to subscribe, his acts, claimed to be done in discharge of a public duty, were privileged in a limited sense, and the trial court, in plaintiff's action for libel against him and others, properly refused to instruct preemptorily for plaintiff as against him. *McBroom v. Weir* (Civ. App.) 219 S. W. 855.

**Existence and effect of malice.**—In an action for libel, malice may be inferred from the falsity of the charge or imputation, unless the occasion is privileged, but, if the occasion be privileged, a proper and sufficient motive is shown repelling the inference of malice and giving rise, in view thereof, to the presumption that the communication was made in good faith, whereupon it devolves upon plaintiff to establish malice in fact. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402; *Koehler v. Dubose* (Civ. App.) 200 S. W. 233; *Simmons v. Dickson* (Com. App.) 213 S. W. 612; *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

Absolute privilege is a defense, regardless of malice. *Koehler v. Dubose* (Civ. App.) 200 S. W. 233.

"Actual malice" is necessary to render a privileged publication actionable libel, implying a wrongful act done intentionally or with evil intent, without just cause, or excuse or as the result of ill will. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

The falsity of a privileged publication is a circumstance which, taken with others, may show actual malice. *Id.*

In libel the "malice" which avoids a privilege is actual or express, existing as a fact at the time of the communication, and which has inspired or colored it, and such malice exists where one casts an imputation which he does not believe to be true, and where the communication is actuated by some sinister or corrupt motive, or motives of personal spite or ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402.

In a libel suit against a railroad company brought by a discharged employé based on a letter from defendant's superintendent to plaintiff's employer, charging violation of rules, the failure of defendant's superintendent to answer plaintiff's letters of inquiry and his refusal to investigate the charges in the letter held not inconsistent with the superintendent's good faith so as to justify a legal inference of malice. *Id.*

There can be no recovery for a slanderous utterance made under circumstances entitling it to a qualified privilege unless defendant's agent, in making the statement, was actuated by actual or express malice, or other evil motive. *Foley Bros. Dry Goods Co. v. McClain* (Civ. App.) 231 S. W. 459.

In an action by a female store employé against the company for slander by its manager in charging her with theft, evidence held insufficient to warrant the jury's

finding that the manager's utterance, made under conditions entitling it to a qualified privilege, was actuated by actual or express malice. *Id.*

**Repetition by others.**—Where statements made to another are qualifiedly privileged, the circulation of such statements by the confidant as rumors impose no liability on the one making the privileged statements. *Vacicek v. Trojack* (Civ. App.) 226 S. W. 505.

**Art. 5598. To be construed, how.**

See *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181.  
Cited, *Taber v. Aransas Harbor Terminal Ry.* (Civ. App.) 219 S. W. 360.

**Construction and operation in general.**—Art. 5598, as amended by Act 35th Leg. c. 206, preserving common-law defenses to actions for libel, held not a legislative construction that the former law deprived defendants of such defenses. *Koehler v. Duhose* (Civ. App.) 200 S. W. 238.

**Common-law defenses.**—Arts. 5595-5597, relating to libel, did not destroy any common-law defense to libel, but rather added to the same so far as newspapers and periodicals are concerned. *Light Pub. Co. v. Huntress* (Civ. App.) 199 S. W. 1163.

In action against grand jurors for making a report to the court that sheriff and others were guilty of immoral conduct unbecoming to dignity of their positions, defendants had the legal right to assert the common-law defense of conditional privilege, despite publication shall be privileged. *Rich v. Eason* (Civ. App.) 214 S. W. 581.

Any newspaper or periodical can interpose any defenses to a civil cause for libel that existed at common law or otherwise, in addition to the defenses enumerated in the libel law. *Express Pub. Co. v. Wilkins* (Civ. App.) 218 S. W. 614.

**Art. 5598a. Not to affect pending suits or accrued causes of action.**

See *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181.

**Art. 5598b. Venue of action.**—Action for damages for libel or slander shall be brought, and can only be maintained, in the county in which the plaintiff in any such action resided at the time of the accrual of the cause of action, or in the county where the plaintiff resided at the time of filing suit, or in the county of the residence of the defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff. [Acts 1919, 36th Leg., ch. 87, § 1.]

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

## TITLE 85

## LIBRARY AND HISTORICAL COMMISSION

Art. 5600. Commission, how constituted.	Art. 5602. Powers and duties of the Commission.
5601. Meetings; compensation.	5602a. Style; official seal.
5601a. State Librarian; appointment, qualifications, compensation.	5606. Duties of State Librarian.
5601b. Assistant librarian; appointment, duties, bond, compensation.	5607a. Distribution of reports.
5601c. Assistants in the State Library; appointment and qualifications.	5608. Legislative reference section.
	5609b. Penalty for injuring or defacing library property.

**Article 5600. Commission, how constituted.**—The Governor, shall, by and with the advice and consent of the Senate, appoint five persons who shall constitute the Texas Library and Historical Commission. Appointments shall be made for the term of six years, except appointments to fill vacancies, which shall be made by the Governor for the unexpired term. Provided: That

The members of the Commission shall at their first meeting be divided by lot into three groups, two members to serve two years, two four years, and one six years from the date of appointment, and that all appointments shall thereafter be for six years. [Acts 1909, p. 122, § 2; Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1 amending art. 5600.]

**Art. 5601. Meetings; compensation.**—The Commission shall hold at the State Capitol at least one regular meeting annually, and as many special meetings as may be necessary. Each member of the Commission shall receive while in attendance at the meetings of Commission a per diem of \$5.00, and the actual expenses incurred in attending the meetings. [Acts 1909, p. 122, § 2; Acts 1913, p. 281, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1 amending art. 5601.]

**Art. 5601a. State Librarian; appointment, qualifications, compensation.**—The Commission shall elect a state librarian, who shall not be of their number and who shall be a trained and experienced librarian of administrative ability. Said state librarian shall serve at the will of the Commission and shall give to the governor an acceptable bond in the sum of five thousand (\$5,000.00) dollars for the proper care of the State Library and its equipment. In addition to his salary, the state librarian shall be allowed his actual expenses when traveling in the service of the Commission. Such expenses shall be certified to under oath in the same form as other accounts of the State Library.

The term, "trained and experienced librarian" is for the purpose of this law defined as a man or woman who shall have had at least one year's training in a library school and at least three year's administrative experience as head of a free public or institutional library, or as an assistant of high rank in such library. [Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1 adding art. 5601a.]

**Art. 5601b. Assistant librarian; appointment, duties, bond, compensation.**—The Commission shall appoint an assistant librarian who shall rank as head of a department and who in the absence of the State Librarian may sign and certify accounts and documents in the same manner and with the same legal authority as the State Librarian.

The said Assistant Librarian shall give acceptable bond to the Gov-

error in the sum of \$3,000 and shall take oath of office in the same manner as the state Librarian. [Id., adding art. 5601b.]

**Art. 5601c. Assistants in the State Library; appointment and qualifications.**—Assistants in the State Library shall be appointed by the Library and Historical Commission and shall be divided into four grades: Heads of departments, library assistants, clerks [clerks], and laborers. Heads of departments and library assistants shall be required to have technical library training; heads of departments shall have had at least one year of experience in library work prior to appointment. Clerks shall be required to hold a diploma from a first class high school according to the standards of the State Department of Public Instruction or the University of Texas, or to present satisfactory evidence of educational training equal to that provided by such high school, and also to present satisfactory evidence of proficiency in stenography and typewriting or book-keeping.

Laborers must present satisfactory evidence of education sufficient to do such elementary clerical work as shall be required of them.

Provided: That the archivist must present satisfactory evidence of one year's advanced work in American or Southwestern history in a standard college and of a fluent reading knowledge of Spanish and French; and that the Archivist is not required to have technical library school training or any library experience. [Id., adding art. 5601c.]

**Art. 5602. Powers and duties of the Commission.**—The Commission is authorized and empowered to purchase within the limits of the annual appropriation allowed by Act of the legislature from time to time, suitable books, pictures, etc., the same to be the property of the State. The Commission shall give advice to such persons as contemplate the establishment of public libraries in regard to such matters as the maintenance of public libraries, selection of books, cataloguing, and library management. The Commission shall conduct library institutes, and encourage library associations. [Acts 1909, p. 122, § 3; Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1 amending art. 5602.]

**Art. 5602a. Style; official seal.**—The style of the Library governed by the Texas Library and Historical Commission shall be "Texas State Library." A circular seal of not less than one and one-half inches, and not more than two inches in diameter, bearing a star of five points, surrounded by two concentric circles, between which are printed the words, "Texas State Library," is hereby designated as the official seal of the Texas State Library; and the seal above designated shall be used in authentication of the official acts of the State Library. [Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1 adding art. 5602a.]

**Art. 5606. Duties of the State Librarian.**—The duties of the State Librarian, acting under the direction of the Texas Library and Historical Commission, shall be as follows:

First. He shall record the proceedings of the Commission, keep an accurate account of its financial transactions, and perform such other duties as may be assigned him by said Commission.

Second. He shall have charge of the State Library and all books, pictures, documents, newspapers, manuscripts, archives, relics, mementos, flags, etc., therein contained.

Third. He shall endeavor to collect all manuscript records relating to the history of Texas in the hands of private individuals, and where the originals cannot be obtained he shall endeavor to procure authenticat-

ed copies. He shall be authorized to expend the money appropriated for the purchase of books relating to Texas, and he shall seek diligently to procure a copy of every book, pamphlet, map or other printed matter giving valuable information concerning this State. He shall collect portraits or photographs of as many of the prominent men of Texas as possible. He shall endeavor to complete the files of the early Texas newspapers in the State Library; and he shall cause to be bound the current files of not less than ten of the leading newspapers of the state, and the current files of not less than four leading newspapers of other states, and of as many county papers, professional journals, denominational papers, agricultural papers, trade journals and other publications of this state as seem necessary to preserve in the State Library an accurate record of the history of Texas.

Fourth. He shall demand and receive from the officers of state departments having them in charge, all books, maps, papers, manuscripts, documents, memoranda, and data not connected with or necessary to the current duties of said officers, relating to the history of Texas, and carefully classify, catalogue and preserve the same. The attorney general shall decide as to the proper custody of such books, etc., whenever there is any disagreement as to the same.

Fifth. Any state, county or other official is hereby authorized and empowered in his discretion to turn over to the State Library for permanent preservation therein any official books, records, documents, original papers, maps, charts, newspaper files and printed books not in current use in his office, and the state librarian shall receipt for the same.

Sixth. The state librarian shall endeavor to procure from Mexico the original archives which have been removed from Texas and relate to the history and settlement thereof, and in case he can not procure the originals, he shall endeavor to procure authentic copies, thereof. In like manner, he shall procure the originals or authentic copies of manuscripts preserved in other archives beyond the limits of this state, in so far as said manuscripts relate to the history of Texas.

Seventh. He shall preserve all historical relics, mementos, antiquities, and works of art connected with and relating to the history of Texas, which may in any way come into his possession as state librarian. He shall constantly endeavor to build up an historical museum worthy of the interesting and important history of this state.

Eighth. He shall make and certify to copies of papers or documents in the State Library, upon application of any person interested, and shall charge the same fees as are allowed the secretary of state for similar services. And such certified copies of papers and documents shall be received in evidence by the courts the same as like papers and documents of other state departments. He shall collect all such fees in advance and turn them over to the state treasurer in the form required by law, and shall be authorized to approve the vouchers for all expenditures made in connection with the State Library.

Ninth. He shall give careful attention to the proper classification, indexing and preserving of the official archives that are now or may hereafter come into his custody.

Tenth. He shall make a biennial report to the Texas Library and Historical Commission, to be by them transmitted to the governor, to be accompanied by such historical papers and documents as he may deem of sufficient importance.

Eleventh. He shall ascertain the condition of all public libraries in this state, and report the results to the commission. He is authorized in

his discretion to withhold from libraries refusing or neglecting to furnish their annual reports or such other information as he may request, public documents furnished the Commission for distribution, or inter-library loans desired by such libraries. [Acts 1909, p. 122, § 9; Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1, amending art. 5606.]

**Art. 5607a. Distribution of reports.**—That until a permanent state agency for the distribution of state documents to the public and institutional libraries of Texas and the exchange with libraries elsewhere shall be provided for by law, 150 copies of all annual, biennial and special reports of state departments, boards, and institutions, findings of all investigations, bulletins, circulars, laws issued as separates, legislative manuals, 75 copies of all daily legislative journals, bound journals, bills, resolutions, session laws and compiled statutes, and 150 copies of all other publications, except routine business forms and court reports shall be delivered by the State Contract Printer to the State Library for distribution and exchange. All requisitions for such publications as must by law be approved by the state expert printer or other official or officials performing the duties appertaining to the state expert printer, shall be sent to him in duplicate, one copy to be kept for his files, the other to be delivered to the State Library on the day on which the work is by him assigned to the state contract printer. All daily legislative journals, bills, resolutions, and other legislative documents hereinbefore required to be delivered to the State Library shall be delivered daily to the said State Library by the state contract printer, and at the close of each legislative session, all daily journals, bills, and resolutions, in the hands of the sergeants-at-arms of the House and the Senate shall be delivered to the State Library to be disposed of at the discretion of the librarian. No accounts of the state contract printer for the printing of documents hereinbefore required to be delivered to the State Library shall be approved by the State Printing Board or other state officials or officials performing the function appertaining to the State Printing Board nor warrants therefor issued by the comptroller unless the state contract printer shall show a receipt from the State Library for such delivery as hereinbefore required.

Provided: That the state librarian shall at the beginning of each fiscal year revise the mailing list of libraries entitled to receive state publications under the provisions of this act and desiring to receive them: and if the number of such publications hereinbefore required to be delivered to the state librarian shall be insufficient to supply such libraries, the said state librarian is hereby authorized to request of the state printer or Board or the official or officials performing the functions appertaining to the State Printing Board such a number of copies as will supply such libraries.

Provided further: That the State Printing Board or the official or officials performing the duties appertaining to the State Printing Board shall upon receiving such request of the state librarian cause to be printed such a total number as will enable the state contract printer to deliver to the said state librarian the number requested: and the state contract printer shall deliver to the state librarian the said number of copies instead of the number hereinbefore specified. [Acts 1913, p. 281, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1, amending art. 5607a.]

**Art. 5608. Legislative reference section.**—The said Library is authorized and directed to maintain for the use and information of the members of the Legislature, the heads of the several state departments,

and such other citizens as may desire to consult the same, a section of the State Library for legislative reference and information. This section shall possess available for use, explanatory check lists and catalogues of the current legislation of this and other states, catalogues of the bills and resolutions presented in either branch of the legislature, check lists of the public documents of the several states, including all reports issued by the various departments, boards and commissions of this state, digests of such public laws of this and other states as may best be made available for legislative use. The Legislature Reference Section shall give the members of the legislature such aid and assistance in the drafting of bills and resolutions as may be asked. [Acts 1909, p. 122, § 11; Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1, amending art. 5608.]

**Art. 5609b. Penalty for injuring or defacing library property.**—Penalty for injuring or defacing library property. That whoever wilfully injures or defaces any book, newspaper, magazine, pamphlet, manuscript, or other property belonging to any public library, reading room, museum, or other educational institution, by writing, marking, tearing, breaking, or otherwise mutilating, shall be punished by a fine not greater than the replacement value of the property injured, and that a copy of this article shall be posted in a conspicuous place in such library, reading room, museum, or other educational institution. [Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1, adding art 5609b.]

**Explanatory.**—Sec. 2 repeals all laws in conflict. The act took effect 90 days after July 22, 1919, date of adjournment.



## TITLE 86

## LIENS

Chap.	Chap.
1. Judgment liens.	tisans, craftsmen, factory operatives, mill operatives, servants, mechanics, quarrymen, common laborers and farm hands.
2. Mechanics, contractors, builders and material men.	5. Liens on domestic vessels.
2a. Liens on oil, gas, or water wells, mines, quarries, and pipe lines.	7. Chattel mortgages.
3. Liens of railroad laborers.	8. Other liens.
4. Liens of accountants, bookkeepers, ar-	

## CHAPTER ONE

## JUDGMENT LIENS

Art.	Art.
5610. Clerk of county court shall keep judgment record.	5615. Index shall show what.
5611. Clerks of courts shall make and deliver abstracts of judgments.	5616. Lien of judgment, when.
5612. Abstract shall show what.	5617. Lien exists, how long.
5614. Clerk of county court shall record and index abstracts.	5618. Satisfaction of, shown how.
	5619. Satisfaction of to be entered on judgment record.

**Article 5610. [3283] Clerk of county court shall keep a judgment record.**

See *Spence v. Brown*, 86 Tex. 430, 25 S. W. 413, reversing (Civ. App.) 22 S. W. 983. Cited, *First Nat. Bank of Decatur v. Cloud*, 2 Tex. Civ. App. 627, 21 S. W. 770.

**Art. 5611. [3284] Clerks of courts shall make and deliver abstracts of judgments.**

See *Herring v. Walker*, 3 Civ. App. 614, 22 S. W. 819; *Spence v. Brown*, 86 Tex. 430, 25 S. W. 413, reversing (Civ. App.) 22 S. W. 983. Cited, *First Nat. Bank of Decatur v. Cloud*, 2 Tex. Civ. App. 627, 21 S. W. 770.

**Art. 5612. [3285] Abstract shall show what.**

See *Spence v. Brown*, 86 Tex. 430, 25 S. W. 413, reversing (Civ. App.) 22 S. W. 983. Cited, *Nye v. Moody*, 70 Tex. 434, 8 S. W. 606.

**Abstract—Requisites and sufficiency in general.**—An abstract of a judgment is sufficient, whatever its form, which shows the essential facts prescribed. *Gullett Gin Co. v. Oliver*, 78 Tex. 182, 14 S. W. 451.

It is not necessary for the abstract to specify the character in which the parties sued or defended. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247.

— **Amount and credits.**—Where abstracts of a justice's judgment recited amounts of judgments incorrectly, no lien was created by filing and registry thereof. *Lemons v. Epley Hardware Co.* (Civ. App.) 197 S. W. 1118.

An abstract of judgment need not affirmatively show, that there were no credits to which the judgment was entitled, in order to give a lien on land when filed with the county clerk of another county; it being sufficient that the abstract shows correctly the names of the parties to the suit, the number of the suit, the court in which the judgment was rendered, the date of the judgment, the amount thereof, the rate of interest it bore, the costs of suit, and the total amount due. *Willis v. Pegues* (Civ. App.) 218 S. W. 96.

**Art. 5614. [3287] Clerk of county court shall record and index abstracts.**

See *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501.

**Sufficiency of record in general.**—The record of an abstract, which the clerk failed to certify, was invalid, and insufficient to create the lien. *Herring v. Walker*, 3 Civ. App. 614, 22 S. W. 819.

The certificate to the abstract need not be recorded with the abstract, in order to give a lien on the land of the judgment debtor, in the absence of any statute requiring it to be recorded. *Spence v. Brown*, 86 Tex. 430, 25 S. W. 413, reversing (Civ. App.) 22 S. W. 983.

**Art. 5615. [3288] Index shall show what.**

See *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501; *Ullmann v. Jasper*, 70 Tex. 446, 7 S. W. 763.

**Sufficiency of index.**—An index of a judgment record in which plaintiff's name appears as W. & Co., and in which the name of one of defendants fails to appear except in the firm name, by which they were sued, is insufficient. *Steffens v. Cameron* (Sup.) 19 S. W. 1068.

This article is sufficiently complied with by placing defendant's name in the proper alphabetical position, followed by plaintiff's name, though neither party is designated as defendant or plaintiff, and though neither the word "versus" or "against," nor any abbreviation thereof, is placed after the name of either party. *Von Stein v. Trexler*, 5 Civ. App. 299, 23 S. W. 1047.

**Art. 5616. [3289] Lien of judgment, when.**

See *Ullmann v. Jasper*, 70 Tex. 446, 7 S. W. 763; *Pierce v. Wimberly*, 78 Tex. 187, 14 S. W. 454; *Herring v. Walker*, 3 Civ. App. 614, 22 S. W. 819; *Spence v. Brown*, 86 Tex. 430, 25 S. W. 413.

**Indexing as condition precedent to lien.**—See *Gullett Gin Co. v. Oliver*, 78 Tex. 182, 14 S. W. 451; *Steffens v. Cameron* (Sup.) 19 S. W. 1068.

The presumption is that the index was made when the judgment was registered, and the party relying on the lien is entitled to such presumption, in the absence of rebutting evidence. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247.

**Land to which lien attaches—Estate or interest of judgment debtor.**—The common-law rule that a judgment lien attaches only to such estate in land as is owned by judgment debtor at the time the abstract of judgment was filed, notwithstanding a prior unrecorded deed, has been abrogated by art. 6824. *Diltz v. Dodson* (Civ. App.) 207 S. W. 356.

Purchaser of land sold on alias execution under judgment recovered by vendors against vendee and assigned, abstract of judgment being legally issued and filed for record, held not in position of one who finds record title in judgment debtor, and fixes lien on his property which would be effective, though debtor may have conveyed to another by unrecorded deed, being in position of claiming lien on property not shown by record to be debtor's. *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 552, 991.

A judgment creditor has no lien upon vendor's lien notes held by judgment debtor from sale of land after rendition of judgment, and cannot invoke equitable powers of court and through instrumentality of an injunction and receivership subject them to payment of judgment. *Tunnell v. Johnson* (Civ. App.) 209 S. W. 451.

**Rights of lienholder.**—One who converted mortgaged property to his own use, the property being subject to prior lien in favor of judgment creditors, is liable to such creditors to the extent of the value of the property converted, not to exceed the amount of their judgment. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

**Priorities.**—Where an abstract of judgment is filed for record prior to the deposit of a deed, and is recorded the day after the deposit of said deed, but before the deed is actually recorded, held, the party claiming under the deed has a title good against the lien of the judgment. *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501.

A judgment is not a lien as against a deed recorded before the judgment is indexed. *Nye v. Moody*, 70 Tex. 434, 8 S. W. 606.

Where deed reserving vendor's lien for purchase-money note was recorded, and such lien assigned by unrecorded instrument, the original deed was notice to vendor's creditors only until purchase-money note was outlawed, and liens of judgments against vendor secured after note was barred by statute of limitations are superior to assignee's rights under vendor's lien. *Price v. Traders' Nat. Bank* (Civ. App.) 195 S. W. 934.

Despite article 1104, purchaser of land sold on alias execution under judgment recovered by vendors against vendee and assigned, abstract of judgment being legally issued and filed for record, held to take subject to title previously conveyed away by vendee by deed not filed for record until more than three weeks after abstract of judgment was filed, recorded, and indexed, as record of abstract of judgment creates lien only on property actually owned by judgment debtor. *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 552.

Where at time judgment was rendered for creditor, court determined that all of the judgment debtor's land was within the homestead exemption, and the homestead was abandoned after another creditor had obtained a judgment, the creditor who obtained the second judgment had a prior lien upon any excess over the homestead exemption, but the creditor first obtaining judgment had a first lien upon the balance remaining. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

The holder of an unrecorded deed to land sold under execution, when sued in trespass to try title, had the burden of showing that the judgment creditor had notice of the deed at the time the abstract of his judgment was recorded. *Ives v. Culton* (Com. App.) 229 S. W. 321, affirming judgment (Civ. App.) 197 S. W. 619.

Though a contract employing an attorney to sue on notes for the attorney's fees stipulated therein amounted to an equitable assignment of an interest in the judgment to the attorney, such interest was severable from that of the client, and the client's interest was not affected by the attorney's previously and independently acquired knowledge of an unrecorded deed to land sold in satisfaction of the judgment. *Id.*

**Foreclosure of lien.**—If any part of judgment constituted valid lien on land in controversy, such lien could be foreclosed, either by execution sale or by decree of foreclosure in suit for that purpose. *Ives v. Culton* (Civ. App.) 197 S. W. 619, judgment affirmed (Com. App.) 229 S. W. 321.

### Art. 5617. [3290] Lien exists, how long.

**Construction and application in general.**—This article has no reference to decrees establishing or foreclosing contract liens. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247.

**Duration of lien—issuance of execution.**—A judgment ceases to be a lien if more than 12 months are allowed to elapse between the issuance of a first and a second execution, even though the first execution was issued within 12 months from the date of the judgment. *Adams v. Crosby*, 84 Tex. 99, 19 S. W. 355.

Plaintiff in trespass to try title claimed under a sheriff's deed as purchaser at an execution sale. The judgment was recovered in 1885, execution issued in 1886, abstract filed for record in 1887, and execution under which plaintiff claimed issued in 1889. Held, in the absence of anything to show that the 1886 execution was issued within 12 months after rendition of judgment, and that therefore the judgment was not dormant when the abstract was filed in 1887, that judgment was properly rendered for defendant. *Evans v. Frisbie*, 84 Tex. 341, 19 S. W. 510.

### Art. 5618. [3291] Satisfaction of judgment, shown how.

Cited, *Evans v. Frisbie*, 84 Tex. 341, 19 S. W. 510.

**Satisfaction.**—Evidence held to support court's finding that neither fraud nor duress was practiced upon judgment creditor to induce her to accept \$30 in full satisfaction of a judgment for \$175. *Irby v. Andrews* (Civ. App.) 211 S. W. 290.

**Merger.**—Where a judgment was rendered against a surety on a note, and also against a railroad company on its notes given as collateral to secure the note, and the railroad company subsequently became insolvent and went into the hands of receivers, an intervention by the judgment creditor in the receivership proceedings did not affect the status of the judgment on the note, and did not result in a merger of the two suits or judgments. *Walker v. Chatterton* (Com. App.) 222 S. W. 1100, reversing judgment (Civ. App.) 192 S. W. 1085.

### Art. 5619. [3292] Satisfaction of judgment to be entered on judgment record.

Cited, *Evans v. Frisbie*, 84 Tex. 341, 19 S. W. 510.

## CHAPTER TWO

### MECHANICS, CONTRACTORS, BUILDERS AND MATERIAL MEN

Art. 5621. In favor of whom.	Art. 5627. What is sufficient diligence; what included on property in city or county.
5622. When to be filed.	5629. When sold separately purchaser may remove.
5623. Written notice to owner; filing with county clerk; owner to file contract and bond of contractor; effect.	5631. On homesteads, how fixed.
5623a. Duty of owner to take bond; form and contents; suit on bond; change of plans not to discharge sureties.	5632. Notice to owner of property.
5624. Form of fixing lien on unwritten contracts.	5633. Diligence, what is sufficient.
5625. Form when material is furnished to contractor or builder and not the owner of property.	5634. Contractor to be furnished by owner with account.
5626. Description of property.	5635. Original contractor to defend suit by subcontractors, etc.
	5636. When indebtedness accrues.
	5637. Liens upon equal footing.
	5638. Speedy enforcement of.

### Article 5621. [3294] In favor of whom.

See *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733; *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608.

**Validity.**—The materialman's lien law is justified upon the ground that the material for which the lien is sought has been converted into a part of the realty and has increased the value of the realty by becoming a part thereof. *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

**Property subject to lien.**—No materialman's or laborer's lien can attach to public buildings, as a courthouse, erected by a county, but independent of any statute, a municipality has implied authority to bind contractors to pay the claims of laborers and

materialmen, and hence, the county may by contract, regardless of any statute, obligate the contractor to give bond to secure materialmen and laborers, for such agreements are justifiable, just as lien statutes, on the theory that they protect public interest by securing responsible dealers and better materials. Mosher Mfg. Co. v. Equitable Surety Co. (Com. App.) 229 S. W. 318.

**Right to lien—Constitution as origin.**—Const. art. 16, § 37, is a self-executing provision and creates a mechanic's lien for repairs, etc., which lien does not depend upon the statute to be enacted for its enforcement. McBride v. Beakley (Civ. App.) 203 S. W. 1137; Wichita Falls Sash & Door Co. v. Jackson (Civ. App.) 203 S. W. 100; City Nat. Bank of Wichita Falls v. Laughlin (Civ. App.) 210 S. W. 617.

— **Nature of claim.**—This article does not give contractor lien for services rendered in constructing roadbed or laying out railroad; only lien being for materials furnished. San Antonio, U. & G. R. Co. v. Hales (Civ. App.) 196 S. W. 903.

There being no statutory provision for giving notice of mechanic's lien on "articles made," one who makes store fixtures for lessee, and, without actual notice of lien to lessor, permits them to be put in leased store, relinquishes against landlord's lien, any priority of lien. Rev. St. 1911, arts. 5621, 5622, 5624. Wichita Falls Sash & Door Co. v. Jackson (Civ. App.) 203 S. W. 100.

Contractor to erect building is not entitled to lien to secure notes given by owners of land not to him, but to materialman. Herring v. Barber (Civ. App.) 203 S. W. 142.

— **Contract with or consent of owner.**—A lien can be enforced by an original contractor though his contract is not in writing. State v. Cherokee Iron Mfg. Co., 2 Civ. App. 588, 22 S. W. 253.

Where contract for improving street provided that contractor was granted mechanic's lien on premises to secure payment of contract price, lien provided for held a "mechanic's lien," and not a "mortgage lien," nor a "pledge of land." Schutze v. Dabney (Civ. App.) 204 S. W. 342.

— **Breach of contract.**—That improvements called for by a mechanic's lien contract were completed by other workmen would not affect owner's liability to pay or his liability by virtue of a deed of trust and secured note given to induce payee to pay for such improvements. Blackmon v. Texas Securities Co. (Civ. App.) 196 S. W. 590.

— **Assignment of contract.**—Where contractor's assignment of his contract was recognized by owner before subcontractors and lien claimants gave statutory notice of their claims, assignee's rights were superior to those of such subcontractors. Gordon-Jones Co. v. Welder (Civ. App.) 201 S. W. 681.

In mechanic's lien proceeding, evidence that contractor assigned contract before abandoning it held to sustain finding that nothing was due contractor at date of abandonment. *Id.*

— **Persons entitled to lien.**—The equitable owner of property, who has transferred the legal title to another merely for the purpose of building, cannot, on furnishing material for such building, claim a lien therefor as against real lienholders. Texas Fidelity & Bonding Co. v. Elliott (Civ. App.) 195 S. W. 301.

Materialman, who had given proper notice to fix lien, was not deprived of lien, though owner, after such notice, paid the contractor the full contract price. Fox v. Christopher & Simpson Iron Works Co. (Civ. App.) 199 S. W. 833.

**Operation and effect.**—Defendants, in consideration of work and materials furnished for their homestead, gave a mechanic's lien on the improvements, and the land on which the same was situated, "which said land is more particularly described as follows: 'Tract or parcel of land known as lot No. nine, (9,) in block No. two.'" The house was built on lots 9 and 10, both of which were designated as defendants' "homestead" at the time of their purchase. Held, that the particular description of the land on which the lien was given in the contract must prevail over the general description, and there was no lien on lot 10, but under this article, there was a lien on the improvements on both lots, and the purchaser on foreclosure of the lien could remove the improvements from lot 10. Crooker v. Grant, 5 Civ. App. 182, 24 S. W. 639.

A subcontractor, giving owners notice of its claim against contractor, established a lien against the property; but such lien did not create a personal liability of the owners for payment of claim. Fox v. Christopher & Simpson Iron Works Co. (Civ. App.) 199 S. W. 833.

**Assignment of lien.**—An assignment of builders' lien without an assignment of the debt would be without meaning or use, and the lien follows the debt. Miller v. Guaranty Trust & Banking Co. (Civ. App.) 207 S. W. 642.

**Waiver of lien.**—Where contract of subcontractor expressly waived and released lien for labor or material, in action on quantum meruit, alleging rescission, subcontractor held not entitled to mechanic's lien. Collinsville Mfg. Co. v. Street (Civ. App.) 196 S. W. 284.

### Art. 5622. [3295] When to be filed.

See Collinsville Mfg. Co. v. Street (Civ. App.) 196 S. W. 284; Gordon-Jones Const. Co. v. Welder (Civ. App.) 201 S. W. 681; Wichita Falls Sash & Door Co. v. Jackson (Civ. App.) 203 S. W. 100; Hicks v. Faust, 109 Tex. 481, 212 S. W. 608.

Cited, Webb v. Koger, 78 Tex. 1, 14 S. W. 238; Bosley v. Pease (Civ. App.) 22 S. W. 516.

**Time for filing.**—Where a person enters into a contract with the owner of a building to furnish material for the building, and there is no middleman or other contractor intervening between them, he must be deemed an "original contractor," having four

months within which to file a lien, and is not, therefore, confined to the thirty days allowed a "day laborer or other person" for that purpose. *Matthews v. Wagenhaeuser Brewing Ass'n*, 83 Tex. 604, 19 S. W. 150.

**Effect of filing.**—Claimant sold ice and refrigerating machinery to a Texas corporation which became a bankrupt. The machinery was complete in itself and could be disconnected without injury to the bankrupt's plant as it theretofore existed by unbolting four connections. Adjudication in bankruptcy followed less than a month after delivery, and claimant within four months of delivery filed the contract of sale which was in the form of a letter with an acceptance written thereon by the bankrupt. The letter showed that the bankrupt was engaged in manufacturing artificial ice at the place of its address. Held that as claimant had a materialman's lien under Const. art. 16, § 37, and as the requirements of arts. 5622-5627, are intended merely to give notice to persons other than the purchaser, claimant acquired a lien valid as against the trustee in bankruptcy who under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (U. S. Comp. St. § 9631), took the rights of a lien creditor, for the land on which the machinery was installed could readily be located from the contract. *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439.

A mechanic's lien exists from the time the work is begun, if the verified account is filed for record within four months after the demand becomes due, and is entitled to priority over a mortgage executed by the owner during the performance of the work, though the lien was not recorded when the mortgage was executed. *Schultz v. Alamo Ice & Brewing Co.*, 2 Civ. App. 236, 21 S. W. 160.

**Recording.**—This article does not make it necessary that they be recorded in a book kept exclusively for that purpose, and a record thereof in the general deed record books is sufficient where it appears that such books were also kept and used to record mechanics' liens, and that no book was kept in the county clerk's office for such purpose alone. (*Bosley v. Pease* [Civ. App.] 22 S. W. 516, followed.) *Lignoski v. Crooker* (Civ. App.) 22 S. W. 774.

### Art. 5623. [3296] Written notice to owner; filing with county clerk; owner to file contract and bond of contractor; effect.

See *Wichita Falls Sash & Door Co. v. Jackson* (Civ. App.) 203 S. W. 100; *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608; *Neel v. First Presbyterian Church of Marlin* (Civ. App.) 225 S. W. 411.

**In general.**—A mechanic's lien account, and affidavit, filed within 90 days after delivery of plate glass, sent to replace glass broken on former shipment, held filed within 90 days after last delivery, as required by art. 5636. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

One who furnished material to a subcontractor to be used in the construction of a building may fix a lien upon the property and secure the payment of the price of the material so furnished, without regard to the original contractor; the latter not being entitled to written notice referred to in such statute. *Burns & Hamilton Co. v. Denver Inv. Co.* (Civ. App.) 217 S. W. 719.

**Constitutionality.**—The provision limiting recovery by subcontractors to original contract price does not violate Const. art. 16, § 37, guaranteeing lien to materialmen and laborers. *Gordon-Jones Const. Co. v. Welder* (Civ. App.) 201 S. W. 681.

The provision requiring owner to contract with the builder to give a bond conditioned as required by article 5623a, held void, being an interference with the law of liberty of contract. *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

The economic advantage of the owner, if any, of having the lien satisfied by the bond would not justify the exercise of the police power requiring him to make a compulsory contract with the contractor to give a bond. *Id.*

**Notice to owner.**—Claimant sold ice and refrigerating machinery to a Texas corporation which became a bankrupt. The machinery was complete in itself and could be disconnected without injury to the bankrupt's plant as it theretofore existed by unbolting four connections. Adjudication in bankruptcy followed less than a month after delivery, and claimant within four months of delivery filed the contract of sale which was in the form of a letter with an acceptance written thereon by the bankrupt. The letter showed that the bankrupt was engaged in manufacturing artificial ice at the place of its address. Held that as claimant had a materialman's lien under Const. art. 16, § 37, and as the requirements of arts. 5622-5627, providing for the filing of the contract within four months, are intended merely to give notice to persons other than the purchaser, claimant acquired a lien valid as against the trustee in bankruptcy who under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (U. S. Comp. St. § 9631), took the rights of a lien creditor, for the land on which the machinery was installed could readily be located from the contract. *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439.

Materialman who has furnished material to contractor, and between whom and owner there is no relation of creditor and debtor, and who did not give owner written notices of the items of material furnished to contractor and how much there was due and unpaid on bill of material, and who did not file itemized account of claim in office of county clerk, cannot recover balance due on such material from owner, who has paid contractor all that was due him after waiting a reasonable time after completion of the building, and who had no notice of materialman's claim; owner being under no legal relation to the materialman selling the contractor so as to render him personally liable for contractor's debt. *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

— **Sufficiency.**—In mechanic's lien proceedings by several materialmen and subcontractors, the giving of notice of claim by one subcontractor does not inure to the benefit of others, their right depending upon their own compliance with the statutory requirements unaided by the diligence of others. *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

Verbal notice, when either given to the owner or his agent, is not a sufficient compliance with this article, as it read prior to amendments by the Thirty-Fourth and Thirty-Fifth Legislatures. *Burns & Hamilton Co. v. Denver Inv. Co.* (Civ. App.) 217 S. W. 719.

The agent of the owner of a building being constructed to whom notice may be given under this article, as it read prior to the amendments by the Thirty-Fourth and Thirty-Fifth Legislatures, must be such agent as the owner has expressly vested with authority to receive such notice, or referred to as the one to whom such notice might be given, or be an agent of general authority in such managerial or directing situation with reference to the construction of the building as constitutes him the alter ego of the owner. *Id.*

**Itemized account.**—Where a materialman has failed to file any account or claim in the county clerk's office, he cannot enforce his claim as against the owner or its property in mechanic's lien proceedings, the filing of an itemized account as well as written notice being a prerequisite to the enforcement of the debt, not only as against subsequent purchasers, but also as against the owner. *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

**Limitation of amount of owner's liability.**—Materialman's lien against building is limited to amount due from owner to contractor when materialman's notice is served. *Thelander v. Becker* (Civ. App.) 199 S. W. 848.

Materialmen are charged with notice whether any debt is due contractor from owner when materialmen's notice of liens are filed. *Id.*

Where no installment of the price of the work was due the contractor for work done when a materialman or a mechanic gave notice to the owner's agents for the purpose of receiving such notice, the materialman or mechanic secured no right against the owner or the property, through the giving of such notice, accompanied by presentation of an order for payment from the contractor, claimed to operate as an assignment. *Leeper-Curd Lumber Co. v. Barbuzza* (Civ. App.) 216 S. W. 216.

Where the owner of a building in the process of construction has paid to the contractor amounts in excess of a materialman's claim after being properly served with written notice, the materialman's right either to a personal judgment or a foreclosure is not affected because the contractor abandoned the contract, and the owner completed the building at a cost in excess of the contract price. *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

— **Payments to original contractor.**—When notice is given to the owner or his agent of the fact that material has been furnished a contractor, subcontractor, agent, or receiver, a lien is fixed on the property to the extent of the sum afterwards paid under the original contract. *Texas Fidelity & Bonding Co. v. Elliott* (Civ. App.) 195 S. W. 301.

The lien of materialmen upon the contract money paid to the contractor after notice of such lien, is not affected by the fact that the money so paid to the contractor was used by it to pay current weekly pay rolls of workmen, necessary to be paid to avoid stoppage of the work. *Id.*

Materialman, who had given proper notice to fix lien, was not deprived of lien, though owner, after such notice, paid the contractor the full contract price. *Fox v. Christopher & Simpson Iron Works Co.* (Civ. App.) 199 S. W. 833.

Building contractor's assignment of owner's negotiable note as collateral security held payment of contract price so as to preclude materialmen from thereafter fixing liens against owner's property though the owner's note was not such payment. *Thelander v. Becker* (Civ. App.) 199 S. W. 848.

That the owner under a building contract, providing that 20 per cent. of the contract price be reserved until completion of the building, agrees with the contractor to modify such requirement so as to permit the use of part of the reserve fund, does not affect the owner's liability to subcontractors and materialmen whose notices of claim were not then filed. *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

Where owner paid contractor, after materialman, by giving owner notice of his claim for material furnished subcontractor and by filing and recording proper account within proper time, acquired lien, personal judgment against owner and contractor for amount of materialman's claim was proper. *Wilson v. Sherwin-Williams Paint Co.*, 110 Tex. 156, 217 S. W. 372.

Materialman who has given owner notice of claim for material furnished subcontractor at a time when owner's indebtedness to contractor exceeded such claim, and who has filed and recorded proper account within 90 days from date of furnishing last item, is entitled to lien for amount of claim, though contractor after material was furnished and before notice was served on owner had settled in full with subcontractor, and though materialman had not given owner notice as each item of material was furnished. *Id.*

Materialman who has furnished material to contractor, and between whom and owner there is no relation of creditor and debtor, and who did not give owner written notices of the items of material furnished to contractor and how much there was due and unpaid on bill of material, and who did not file itemized account of claim in office of county clerk, cannot recover balance due on such material from owner, who

has paid contractor all that was due him after waiting a reasonable time after completion of the building, and who had no notice of materialman's claim; owner being under no legal relation to the materialman selling the contractor so as to render him personally liable for contractor's debt. *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

**Bond.**—Sureties of contractor to erect church building held not released because of changes in plans and specifications which architect authorized and church trustees paid for. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

In order to constitute a sufficient statutory obligation, the bond of a contractor with a county must comply substantially with the terms and requirements of the statute, and when it appears from the bond that no effort was made to condition it for the payment of laborers and materialmen, since this article will not be read into the instrument to create a liability not disclosed by the language used. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

### Art. 5623a. Duty of owner to take bond; form and contents; suit on bond; change of plans not to discharge sureties.

Cited, *Williams v. Baldwin* (Civ. App.) 202 S. W. 975.

**Validity.**—Art. 5623, as amended by Acts 1915, c. 143 (Vernon's Ann. Civ. St. Supp. 1918, art. 5623), requiring owner to contract with the builder to give a bond conditioned as required by this article, held void, being an interference with the law of liberty of contract, since the economic advantage of the owner, if any, of having the lien satisfied by the bond would not justify the exercise of the police power requiring him to make a compulsory contract with the contractor to give a bond. *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

Vernon's Ann. Civ. St. Supp. 1918, art. 5623a, providing that no change in the plans of building, construction, or method of payment shall avoid or affect liability on the bond of a building contractor, and limiting defenses to those which may be made by the contractor, does not violate federal Const. Amend. 14, as depriving the sureties of the right to contract, or as denying sureties the equal protection of the law. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

This article is unconstitutional as an unwarranted interference with the right of contract. *Williams v. Baldwin* (Com. App.) 228 S. W. 554.

In so far as this article provides that no change or alteration in the plans, building construction, or method of payment shall affect the liability under a contractor's bond, it is unconstitutional. *Southern Surety Co. v. Nalle & Co.* (Civ. App.) 231 S. W. 402. Contra, see *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

**Operation and effect in general.**—This article does not relate to a bond given under art. 6394f, requiring public school contractors to give bond. *Cooper v. H. H. Hardin & Co.* (Civ. App.) 219 S. W. 550; *Larkin v. Pruett Lumber Co.* (Civ. App.) 209 S. W. 443.

This article being operative when defendants signed as sureties, it became part of their contract, and they are bound with knowledge of its provisions and the extent to which it would affect their rights and liabilities. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

**Validity of bond.**—A building contract made under this article was valid, though the contract and bond were not filed with the clerk before the work was commenced. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

While a person cannot be both obligor and obligee in a bond, yet one furnishing material for the construction of a church building may recover on the contractor's bond, though members of the church committee who were named as obligees signed as sureties. *Alfalfa Lumber Co. v. Hope* (Civ. App.) 225 S. W. 81.

Failure to record a contractor's bond, which, save as to amount, complied with this article, does not affect its validity and prevent recovery. *Id.*

Though a contractor's bond was for less than one-half of the contract price as specified, that will not invalidate the same. *Id.*

Contractor's bond providing that, "in order to secure compliance by the contractors with each and all of his obligations and covenants, they have this day entered into bond, payable to the owner, in the sum of \$5,000," held to have been taken by owner voluntarily and without statutory compulsion. *Williams v. Baldwin* (Com. App.) 228 S. W. 554.

**Liability on contractor's bond.**—One furnishing material to a building contractor could not recover against surety company's contractor for completion of building. *Fox v. Christopher & Simpson Iron Works Co.* (Civ. App.) 199 S. W. 833.

Where a contractor agreed to pay a subcontractor certain specified prices for building work by providing funds necessary to meet the subcontractor's weekly pay roll with final payment of the balance within 30 days after acceptance of the work, etc., and the subcontractor duly completed his contract but the weekly advancements exceeded the total sum due, held, that the contractor could not recover such excess from the subcontractor's sureties on a bond guaranteeing the subcontractor's faithful completion of his contract, since to do so would extend the sureties' liability beyond the terms of their bond. *McGregor & Henger v. Escajeda* (Civ. App.) 216 S. W. 398.

**Discharge of sureties.**—Independently of and under Acts 34th Leg. c. 143, amending art. 5623, and adding this article, sureties of contractor to erect church building held not released because of changes in plans and specifications which architect authorized and church trustees paid for. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

A building contract and contractor's bond entered into subsequent to Acts 34th Leg.

c. 143, adding this article, was entered into with reference to such statute, and owner's payment of the full contract price for the building before it was completed and accepted, and failure to retain 20 per cent. of the contract price as provided, did not release the bondsmen as against the owner. *Tarkington Prairie Lodge, A. F. & A. M., No. 493, v. George W. Smyth Lumber Co.* (Civ. App.) 214 S. W. 588.

Where a construction contract was complete as a binding obligation when the sureties signed the contractor's bond containing blanks, and none of the matters mentioned, either in the stickers pasted on the contract subsequently or in a letter, tended to make a new or different contract further than authorized by this article, the sureties' plea of non est factum is no defense against materialmen and subcontractors. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

Where contractor's bond taken by owner voluntarily and not in compliance with this article, included materialmen and laborers as obligees, and was conditioned for the payment of claims for labor performed and material furnished, the sureties were not discharged from liability to laborers and materialmen by reason of owner's payments to contractor in violation of the bond unless materialmen and laborers knew of such violation at the time of furnishing the material and performing the labor. *Williams v. Baldwin* (Com. App.) 228 S. W. 554.

**Right of action on contractor's bond.**—One furnishing material to a building contractor could not recover on bonds given by a surety company to owner to indemnify owner against loss. *Fox v. Christopher & Simpson Iron Works Co.* (Civ. App.) 199 S. W. 833.

Under provision of building contract between surety which had given indemnity bond to owner and its contractor to complete the work, held, that a materialman was entitled to recover for materials furnished. *Id.*

A subcontractor, suing the sureties for a building contractor, had the right to sue directly on the bond, and to disregard his right of action on his express contract. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

Where a building contractor executed a bond conditioned in part upon prompt payment to all subcontractors, "furnishers of material," etc., and plaintiff furnished and delivered on the premises to a subcontractor certain material that went into the house, for the express purpose of being so used, plaintiff was "a furnisher of material" within the bond. *Koehler v. Standard Sanitary Mfg. Co.* (Civ. App.) 230 S. W. 785.

Where a building contractor executed a bond partly conditioned upon payment to all furnishers of material used in the building, plaintiff, which furnished materials for use in the building to a subcontractor, was in privity with the chief contractor and could sue him on the bond. *Id.*

**Actions on contractors' bonds.**—The suit on the contractor's bond, being against the owner as well as the building contractors, the owner is entitled to recover his attorney's fees against the contractor's surety. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

In suit between materialmen, subcontractors, and laborers against the owner, the contractors, and their sureties, though the contractors had assigned to their sureties any balance due from the owner, the court did not err in failing to render judgment for the sureties for such a balance, where the owner had a claim for damages from delay in completion and for attorney's fees, which claim might properly be set off in equity against his assigned obligation to the contractors. *Id.*

Proof that the bond of a contractor engaged to construct a church building was found in the custody of the treasurer of the church, who was the official custodian of its papers, the bond itself being duly signed by personal sureties, warrants a finding of delivery. *Alfalfa Lumber Co. v. Hope* (Civ. App.) 225 S. W. 81.

Sureties executing contractor's bond could not by agreement with owner confer exclusive jurisdiction to try action on bond on courts of specified county; the venue in such action being fixed by statute, and not by contract. *Neel v. First Presbyterian Church of Marlin* (Civ. App.) 225 S. W. 411.

#### **Art. 5624. [3297] Form of fixing lien on unwritten contract.**

See *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439; *Wichita Falls Sash & Door Co. v. Jackson* (Civ. App.) 203 S. W. 100.

Cited, *Lyon v. Elser*, 72 Tex. 304, 12 S. W. 177.

For decision under prior statute, see *Gillespie v. Remington*, 66 Tex. 108, 18 S. W. 338.

#### **Art. 5625. [3298] Form when material is furnished to contractor or builder and not the owner of property.**

Cited, *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439.

#### **Art. 5626. [3299] Description of property.**

Cited, *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439.

#### **Art. 5627. [3300] What is sufficient diligence; what included on property in city or country.**

See *Reeves v. York Engineering & Supply Co.*, 249 Fed. 513, 161 C. C. A. 439.



**Art. 5629. [3302] When improvements sold separately, purchaser may remove.**

Cited, *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

**Art. 5631. [3304] On homestead, how fixed.**

**In general.**—A trust-deed upon a homestead to secure money borrowed for the purpose of erecting a building thereon creates no lien. *Ellerman v. Wurz* (Sup.) 14 S. W. 333.

Mere reference to contract between contractor to erect building on homestead land and owners of homestead, in deed of trust given to materialman, did not create lien in favor of materialman against homestead. *Herring v. Barber* (Civ. App.) 203 S. W. 142.

Where the owner of a lot not fully paid for contracted for the building of a house thereon, and subsequently, being unable to meet his payments, rescinded the contract of purchase, destroyed his unrecorded deed, and had title taken in the name of the contractor, who in turn conveyed it back to the owner, retaining a vendor's lien, the homestead right of the owner attached before the transfer was made, the lot having been dedicated for that purpose, and the dedication having been completed when the improvements were begun, so that as to parties with notice no valid lien could be created to secure the antecedent debt. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

Where omissions by contractor on improvements to homestead are unintentional and do not impair the structure as a whole, and may be compensated for by deduction from contract price, there is a substantial performance which entitles contractor to lien. *Harrop v. National Loan & Investment Co. of Detroit, Mich.* (Civ. App.) 204 S. W. 878.

In foreclosure of mechanic's lien on homestead, a lien should not be adjudged for attorney's fees. *Id.*

Where husband and wife, having homestead on three lots, conveyed one lot to wife's sister to have house built on it to rent, other part of lots being sufficient for homestead, and occupied by husband and wife as such, lot on which house was built was segregated as part of homestead, and lost character, and mechanic's lien attached. *Ferguson v. Smith* (Civ. App.) 206 S. W. 966.

Where a portion of the homestead has been abandoned, in foreclosing a materialman's lien on such portion there is no legal objection to including the amount of attorney's fees in the foreclosure. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

One who with his wife gives a materialman's lien on his homestead by written contract cannot defeat the lien by showing he also intended to cover the cost of the labor in such contract, but that he or his creditor failed to do so. *Id.*

The fact that an advancement was a loan to husband and wife to improve their homestead did not avoid the effect in fixing lien for the money so borrowed, where the facts showed that all of the loan was used for such purpose. *Turbeville v. Book* (Civ. App.) 226 S. W. 814.

The fact that money lent husband and wife to improve their homestead was turned over to the husband by the contractor to pay for material and labor does not vitiate or avoid the lien of the loan, particularly where no question is raised by either husband or wife as to whether the improvements were constructed in strict accord with the contract. *Id.*

Foreclosure of a mechanic's lien upon community property and homestead could not be set aside by the wife, although not made a party to the suit and not served with citation, except for fraud upon her homestead rights, the foreclosure sale being regular, and where a bank purchased the judgment and had the property sold thereunder and resold to the husband who gave vendor's lien notes therefor sufficient to cover the judgment, such vendor's lien notes constituted a valid lien upon the property as against the wife, at least to the extent of the amount owing upon the mechanic's lien notes. *Cooley v. Miller* (Com. App.) 228 S. W. 1085.

**Necessity of compliance with requirements.**—One B. purchased land, and made a trust-deed to a building association to secure a loan, the deed reciting that it was not a homestead, and was free from all liens and exemptions. B. began to build a house for himself and family on the land, and purchased from W. lumber for that purpose. B., before all the lumber was furnished, moved, with his family, onto the lot. Held that, the property being the homestead of B. and his family, W. could acquire no lien against it, except by contract entered into when the material was furnished, and signed by the husband and wife, and acknowledged by her as required in the sale of a homestead. *Sutherland v. Williams* (Sup.) 11 S. W. 1067.

There can be no lien upon homestead acquired by materialman who furnished material for building erected thereon, not to owners of homestead, but to builder who contracted with owners, unless such materialman has complied with statute. *Herring v. Barber* (Civ. App.) 203 S. W. 142.

In absence of substantial compliance with building contract, no lien can be fixed on homestead. *Harrop v. National Loan & Investment Co. of Detroit, Mich.* (Civ. App.) 204 S. W. 878.

Where a contract for improvements on a homestead was not executed in compliance with the statutes in reference to mechanics' liens on homesteads, it could not fix a lien for the improvements in favor of the contractor. *Wright v. A. G. McAdams Lumber Co.* (Civ. App.) 218 S. W. 571.

**Sufficiency of contract.**—Where a contract for the erection of a building on a homestead by its own terms creates a lien in favor of the contractor, an allegation in the

petition that the contract was filed with the county clerk, and recorded by him in a specified book, shows sufficient compliance with statutory requirements. *Lignoski v. Crooker* (Civ. App.) 22 S. W. 774.

Sale of homestead under trust deed given to secure notes, executed in payment of improvement of homestead, under contract signed by husband and wife, was valid. *Bowers v. Bennett* (Civ. App.) 203 S. W. 82.

Deed of trust on homestead to secure payment of note given by husband and wife to contractor to erect building is invalid where there is no contract in writing for work and material, though money secured on note is afterwards used to improve homestead. *Herring v. Barber* (Civ. App.) 203 S. W. 142.

Where husband and wife give deed of trust on homestead which does not show contract for erection of building, or consideration, deed, though duly executed by both, does not create lien on homestead. *Id.*

A mechanic's lien contract on a homestead need not set out specifications of building, except general essentials. *Harrop v. National Loan & Investment Co. of Detroit, Mich.* (Civ. App.) 204 S. W. 878.

Contract for lien on homestead providing for construction of \$2,000 house, \$600 to be paid in cash, and \$1,400 to be secured by mechanic's lien, is not invalid, as far as the owner is concerned, because contract was really to repair and enlarge an old house; contractor allowing \$600 for lumber and material in standing walls. *Id.*

A contract for mechanic's lien on homestead, could validly provide that a failure to complete improvements should not defeat lien for contract price, less such amount as would be reasonably necessary to complete improvement. *Id.*

A contract signed by husband and wife giving a materialman's lien upon their described homestead for material for "the erection, repairs, and improvements on our homestead," and reciting consideration, time of payment, and rate of interest, held sufficient, although containing no itemization or description of material, since it could be shown by parol the quantity, pieces, or articles that were agreed on, and that they were thereafter actually delivered. *Lipscomb v. Adamson Lumber Co.* (Civ. App.) 217 S. W. 228.

A contract for improvement of the homestead of husband and wife, to subject it to forced sale, need not insure value received for the moneys expended. *Turbeville v. Book* (Civ. App.) 226 S. W. 814.

Lien on homestead of husband and wife for improvements held fixed by a contract in writing complying with Const. art. 16, § 50, and this article. *Id.*

Where contract for the improvement of the homestead of husband and wife by erecting a building complied with Const. art. 16, § 50, and this article, the resulting lien is enforceable against the homestead, though the building as finished cost more than the contract called for, where the wife knew of such changes and increase\*in cost. *Id.*

Homestead interest of wife is no more a defense to a suit to foreclose a mechanic's lien, when executed according to law, than it is a defense in an action to foreclose a vendor's or tax lien. *Cooley v. Miller* (Com. App.) 228 S. W. 1085.

A reference to a contract to erect a building on homestead land in a deed of trust given to a materialman on the same day created a lien in favor of the materialman against the homestead; the trust deed and the contract constituting one contract. *Barber v. Herring* (Com. App.) 229 S. W. 472.

### Art. 5632. [3305] Notice of sub-contractor or laborer to owner of property.

See *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

**Construction and operation.**—Where several lien creditors showed notice of claim to the owner of a building being constructed at a time when he held funds in excess of existing lawful demands against him subject to enforcement in point of priority, then whether their notices were filed in point of time or not, if fixation is completed within the statutory period, they should be paid in full, but should the funds be less than the aggregate of such claims payment should be made pro rata. *Rotsky v. Kelsay Lumber Co.* (Com. App.) 228 S. W. 558.

Where the owner, after deducting the amount of claims for liens already filed, paid further amounts to the contractor, succeeding claims should be treated as claims in the first instance, except that they attach only to any balance left in the owner's hands either from previous assignments or liens, but when the entire contract price is exhausted the owner cannot be held for further payments. *Id.*

Where lien claims and equitable assignments arise out of construction of a building, diligent claimants are entitled to priority over others, and claimants, who by their delay have allowed the owner to pay out funds they might otherwise have impounded, cannot thereafter demand that they share with diligent claimants. *Id.*

**Effect of notice.**—In case of liens against the property of an owner of a building in construction, the impounding of funds due the contractor dates from the service of statutory notice, presuming that fixation is completed as required by statute. *Rotsky v. Kelsay Lumber Co.* (Com. App.) 228 S. W. 558.

Should an owner of a building after notice of a claim pay out to the contractor funds lawfully impounded, he becomes personally liable to assignees, and his property becomes bound to answer to liens fixed by diligent claimants. *Id.*

### Art. 5633. [3306] Diligence, what is sufficient.

See *Hess v. Denman Lumber Co.* (Civ. App.) 218 S. W. 162.

**Art. 5634. [3307] Contractor to be furnished by owner with account.**

See *Hickory Jones Co. v. Mettaufer* (Civ. App.) 208 S. W. 745.

**Art. 5635. [3308] Original contractor to defend suits by sub-contractors, etc.**

See *Hicks v. Faust*, 109 Tex. 481, 212 S. W. 608; *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

**Art. 5636. [3309] When indebtedness accrues.**

**Accrual of indebtedness.**—A mechanic's lien account, and affidavit, filed within 90 days after delivery of plate glass, sent to replace glass broken on former shipment held filed within 90 days after last delivery as required by Rev. St. art. 5636. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

**Art. 5637. [3310] Liens upon equal footing.**

See *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

**Art. 5638. Enforcement of.**

**Construction and operation.**—This article has no application to a materialman asserting an equitable assignment of a portion of the contract price. *Rotsky v. Kelsay Lumber Co.* (Com. App.) 228 S. W. 558.

Where lien claims and equitable assignments arise out of construction of a building, diligent claimants are entitled to priority over others, and claimants, who by their delay have allowed the owner to pay out funds they might otherwise have impounded, cannot thereafter demand that they share with diligent claimants. *Id.*

**Retention of funds by owner.**—Where several lien creditors showed notice of claim to the owner of a building being constructed at a time when he held funds in excess of existing lawful demands against him subject to enforcement in point of priority, then whether their notices were filed in point of time or not, if fixation is completed within the statutory period, they should be paid in full, but should the funds be less than the aggregate of such claims payment should be made pro rata. *Rotsky v. Kelsay Lumber Co.* (Com. App.) 228 S. W. 558.

In case of liens against the property of an owner of a building in construction, the impounding of funds due the contractor dates from the service of statutory notice, presuming that fixation is completed as required by statute. *Id.*

Should an owner of a building after notice of a claim pay out to the contractor funds lawfully impounded, he becomes personally liable to assignees, and his property becomes bound to answer to liens fixed by diligent claimants. *Id.*

Where the owner, after deducting the amount of claims for liens already filed, paid further amounts to the contractor, succeeding claims should be treated as claims in the first instance, except that they attach only to any balance left in the owner's hands either from previous assignments or liens, but when the entire contract price is exhausted the owner cannot be held for further payments. *Id.*

**Foreclosure suit.**—Mechanic's lien defendant cannot destroy court's jurisdiction, which had attached to him, by leaving state and instructing his attorney to make no further defense. *Cruz v. Texas Glass & Paint Co.* (Civ. App.) 199 S. W. 819.

Mechanic's lien defendant who answered original petition was bound to take notice of materialman's intervention. *Id.*

Original contractor, payee of notes and beneficiary of mechanic's and builder's lien, who subsequently purchased property, as part consideration assuming payment of notes, was not necessary party to proceedings to foreclose lien in sense that failure to make him party rendered foreclosure void. *Hartfield v. Greber* (Com. App.) 207 S. W. 85.

In action to foreclose contract lien, where there was no contention as to whether contract had been complied with, the introduction in evidence of the notes and contract lien held to establish prima facie case for foreclosure of the lien. *Johnson v. Barker* (Civ. App.) 215 S. W. 348.

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## CHAPTER TWO A

### LIENS ON OIL, GAS, OR WATER WELLS, MINES, QUARRIES, AND PIPE LINES

**Article 5639a. Contracting laborers and materialmen entitled to lien.**

See *Burns & Hamilton Co. v. Denver Inv. Co.* (Civ. App.) 217 S. W. 719.

## CHAPTER THREE

## LIENS OF RAILROAD LABORERS

Art. 5640. Railroad laborers, etc., to have lien, when.	Art. 5641. Lien, how foreclosed. 5643. Lien ceases, when.
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**Article 5640. [3312] Railroad laborers, etc., to have lien, when.**

**Construction and operation in general.**—This article is separate and distinct from arts. 5621 to 5639, as to general mechanics' liens, and the only requirement is that steps to enforce the lien be taken within 12 months after its creation. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

The lien arises when the work is done, and the execution of notes thereafter does not create a lien. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

**Who entitled to lien.**—The word "laborer," means one who performs manual services in construction, repair, or operation contemplated by the statute, and does not embrace one who may work in preparing materials to be used in the construction of the road. *St. Louis, A. & T. Ry. Co. v. Mathews*, 75 Tex. 92, 12 S. W. 976.

This article gives no lien to one who has undertaken and performed a subcontract for the construction of several miles, at a specified sum per mile. *Krakauer v. Locke*, 6 Civ. App. 446, 25 S. W. 700.

L. contracted with a railroad company to build its road, and made a contract with R. to make excavations for a stipulated price. R. performed his contract, hiring men therefor, using his own teams and implements, and superintending the work. Held, that R. was a contractor, and not a mechanic, operative, or laborer, and that he was not entitled to a lien. (*Krakauer v. Locke*, 6 Civ. App. 446, 25 S. W. 700, followed.) *Parks v. Locke* (Civ. App.) 25 S. W. 702.

This article does not give contractor lien for services rendered in constructing road-bed or laying out railroad. *San Antonio, U. & G. R. Co. v. Hales* (Civ. App.) 196 S. W. 903.

If a note is made payable at a time when the right to enforce a mechanic's lien has been lost by expiration of time, it will be presumed, in absence of agreement to the contrary, that the parties intended to substitute the note for the lien, and it will be deemed that the lien was waived. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

Where the contractor for railroad work accepted notes in payment without reserving therein a lien, his lien after the expiration of a year expired. *Id.*

**Property subject to lien.**—Nothing but railroad right of way and equipment is subject to lien. *San Antonio, U. & G. R. Co. v. Hales* (Civ. App.) 196 S. W. 903.

**Art. 5641. [3313] Lien, how foreclosed.**

**Foreclosure suit.**—In suit against railroad company for services for construction of roadbed wherein it was sought to foreclose lien on railroad's property, allegation that all property was subject to lien, in the absence of an exception, held sufficient description. *San Antonio, U. & G. R. Co. v. Hales* (Civ. App.) 196 S. W. 903.

Where laborer's lien claimant and the intervener in a suit on notes of a railroad waived their lien, or admitted having none, the court had no jurisdiction, and could only dismiss as to them. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

**Art. 5643. [3315] Lien ceases, when.**

Cited, *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

## CHAPTER FOUR

LIENS OF ACCOUNTANTS, BOOK-KEEPERS, ARTISANS,  
CRAFTSMEN, FACTORY OPERATIVES, MILL OPER-  
ATIVES, SERVANTS, MECHANICS, QUARRYMEN,  
COMMON LABORERS AND FARM HANDS

Art. 5644. Who entitled to liens.	Art. 5648. Lien ceases when.
5645. Liens, how fixed.	

**Article 5644. Who entitled to liens.**

See *Ball v. Beaty* (Civ. App.) 223 S. W. 552; *Security Trust Co. of Houston v. Roberts* (Com. App.) 208 S. W. 892.

**Persons entitled to lien.**—That no reason is apparent why the Legislature should have discriminated between employes of hotels and of restaurants does not authorize a court to construe this article, so as to include both when the ordinary signification of the language excludes the latter so that it does not authorize a lien upon a "restaurant," since "restaurant," given its ordinary signification under art. 5502, is not a "hotel," in view of legislative policy indicated by arts. 4536 and 5246a, and it does not become such because the proprietor kept a price list of the rooms in and recommended a nearby hotel, and the selling of cigars by a "café" or "restaurant" does not make it a "store" or "shop." *Debenham v. Short* (Civ. App.) 199 S. W. 1147.

**Property subject to lien.**—Common laborers working with a threshing machine do not have a lien upon the grain threshed by it. *Gibson v. Wood* (Civ. App.) 199 S. W. 893.

**Priority.**—A lien of a printer on a printing press and engine is subordinate to the lien of a chattel mortgage registered before the employé began his employment, notwithstanding the statute provides for a "first lien." *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

An existing chattel mortgage lien is superior to an after acquired and established laborer's lien. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Com. App.) 215 S. W. 559.

Where a chattel mortgage on an automobile was duly executed, filed, and registered, subsisting and unpaid when defendant made repairs on the automobile, and defendant had full notice thereof, the chattel mortgage was superior to the lien for work and materials furnished for repairs, whether defendant retained possession or not, and whether the repairs increased the value or not. *Holt v. Schwarz* (Civ. App.) 225 S. W. 856.

**Art. 5645. Liens, how fixed.**

See *Debenham v. Short* (Civ. App.) 199 S. W. 1147; *Hickory Jones Co. v. Mettaufer* (Civ. App.) 208 S. W. 745; *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

**Affidavit.**—Where plaintiff sought to fix his laborer's lien only against certain machinery specifically described in his affidavit, he would acquire no lien on realty, there being nothing in affidavit to indicate whether machinery was attached to realty. *Security Trust Co. of Houston v. Roberts* (Com. App.) 208 S. W. 892.

**Computation of time for filing account.**—Affidavit and account for laborer's lien must be presented and filed within 30 days from the date the debt, under the original contract, becomes collectable and enforceable, and agreement between employer and employé for extension of time of payment does not extend time for perfecting lien, the word "accrued" as used in the latter article meaning original maturity date. *Security Trust Co. of Houston v. Roberts* (Com. App.) 208 S. W. 892.

**Art. 5648. Lien ceases, when.**

See *Security Trust Co. of Houston v. Roberts* (Com. App.) 208 S. W. 892.

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CHAPTER FIVE

LIENS ON DOMESTIC VESSELS

**Article 5650. [3316] Lien on vessels, when.**

Cited *Ball v. Beaty* (Civ. App.) 223 S. W. 552.

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CHAPTER SEVEN

CHATTEL MORTGAGES

Art. 5654. Reservation of title in chattel mortgages, and to be recorded.	Art. 5660. Property not to be removed.
5655. All instruments intended to operate as liens to be recorded.	5661. Not to be recorded at length; mortgages on articles attached to realty described in instrument; form of instrument; separate record book.
5656. Duty of clerk receiving.	
5657. Copy to be received in evidence.	

**Article 5654. [3327] Reservations of title, mortgages, and to be recorded.**

See *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

**Validity.**—Arts. 5654, 5655, making void, as to bona fide purchasers, instruments made to secure purchase price of personal property when not registered although exe-

cuted in another state where they were not required to be registered, do not deny citizens of such other state any rights, in that they fail to give full faith and credit to the public acts of the other state. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

**Construction and operation in general.**—It is settled policy of Texas that enforcement against innocent purchasers for value of secret undisclosed liens upon and reservation of titles to personalty, possession of which has been voluntarily surrendered and the possessor clothed with an apparent full and unincumbered title, shall not be had. *Chambers v. Consolidated Garage Co.* (Civ. App.) 210 S. W. 565, judgment affirmed *Consolidated Garage Co. v. Chambers* (Sup.) 231 S. W. 1072.

**Conditional sales.**—Although conditional sale contract provided that sale by buyer would vest title, until such sale was made buyer had legal title subject to seller's mortgage, and such title and none other passed to trustee in bankruptcy under Bankruptcy Act July 1, 1898, § 70, subd. "a." *Park v. South Bend Chilled Plow Co.* (Civ. App.) 199 S. W. 843.

An instrument in the form of a lease contract of automobile is a "chattel mortgage," where a sale of the automobile was in contemplation and the lease contract was taken to secure payment. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

Where a contract recited the sale of a piano, stool, and scarf, but described the property upon which a lien was created as the piano, the stool and scarf will not be held subject to lien. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

Where a building contractor has installed certain passenger elevators in the building, and included them in the estimate of material and labor furnished, the company selling the elevators to the contractor has no enforceable lien therefor as against the owner of the building, merely because it has reserved title until full payment, which by statute has the effect of a chattel mortgage lien, the reservation not having been filed until after the owner of the building became a bona fide subsequent purchaser. *First Nat. Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S. W. 133.

A contract of sale of an auto in Texas, where the contract was made and was to be performed, passed title, leaving in the seller no other interest than that of lienor, notwithstanding provision reserving title to the seller till paid for. *Buchanan-Vaughan Auto Co. v. Woosley* (Civ. App.) 218 S. W. 554.

The statute converting conditional sales into chattel mortgages, and requiring their registration to protect the mortgagee against the claims of bona fide purchasers, is inapplicable to sales conditional in the sense that payment is conditioned on the honoring upon presentation of the draft given for the price, especially where the draft is a forged one, and the seller is induced to take it by fraud. *Gose v. Brooks* (Civ. App.) 229 S. W. 979.

— **Mortgage.**—A note reciting the consideration to be the sale of certain personal property and certain crops to be raised on a designated farm, and that title was not to pass from the payee until payment in full, held to constitute a chattel mortgage when recorded under art. 5655, as the recitation of reservation of title might be treated as surplusage. *Fourmentin v. Scott* (Civ. App.) 216 S. W. 901.

**Waiver of reservation of title.**—Where goods were sold under a conditional contract, declared by statute to be a mortgage, seller did not waive his lien by taking notes in evidence of the goods sold. *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

Where goods were sold under a conditional sale contract, declared by statute to be a chattel mortgage, seller did not impair his right to a lien by a transfer of notes given in evidence of the goods sold to a bank as collateral, thereafter reacquiring the same; the transfer of the notes in both cases carrying with it such rights in the mortgage as the owner of the notes had. *Id.*

**Necessity of registration.**—Where owner shipped pianos to a party on consignment, such contract created the relation between the parties of owner and factor, and the contract did not fall within the provisions of arts. 5654, 5655, in regard to chattel mortgages. *Chase Hackley Piano Co. v. Clymer* (Civ. App.) 202 S. W. 214.

Contract to hold piano for sale, title to remain in music company, money to be immediately paid over, piano to be returned upon request, was bailment, with right to sell, and not mortgage required to be registered. *Renfroe v. Hall* (Civ. App.) 202 S. W. 218.

Where a sale is conditional, in that title is to pass, not upon delivery of the property, but upon subsequent payment, in order to affect subsequent purchasers or creditors, it must be filed as a chattel mortgage. *Menke v. First Nat. Bank* (Civ. App.) 206 S. W. 693.

A conditional sale of an automobile in California, where it is not necessary to register the instrument, upon removal of the automobile to Texas by the purchaser, will be considered a chattel mortgage, and unless registered in Texas will be void as against bona fide purchaser. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

Where plaintiff in California sold an automobile to defendant under an unrecorded conditional sales contract whereby plaintiff retained title, and defendant took the car to Texas, and there sold it to a good-faith purchaser for value, held, that such purchaser acquired title as against plaintiff. *Consolidated Garage Co. v. Chambers* (Sup.) 231 S. W. 1072; affirming judgment (Civ. App.) *Chambers v. Consolidated Garage Co.*, 210 S. W. 565.

**Suits.**—Statement in prayer of petition to recover buggies that plaintiff is owner is surplusage, and should be treated as such, where petition shows he sold them by contract reserving title, constituting a mortgage, and under article 5660 entitles plaintiff, as mortgagee, to possession to satisfy the debt. *Joseph W. Moon Buggy Co. v. Moore-Hustead Co.* (Civ. App.) 196 S. W. 328.

In a suit by the seller to recover the title and possession of picture machines, conditionally sold, and in the alternative to recover part of the purchase price with interest and foreclosure, the seller cannot recover both the machines and the purchase price. *Black v. Southern Film Service* (Civ. App.) 212 S. W. 295.

**Art. 5655. [3328] All instruments intended to operate as liens to be recorded.**

See *Fourmentin v. Scott* (Civ. App.) 216 S. W. 901.

Cited, *Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354, 10 S. W. 252; *Beene v. National Liquor Co.* (Civ. App.) 198 S. W. 596.

**Validity.**—Arts. 5654, 5655 do not deny citizens of such other state any rights, in that they fail to give full faith and credit to the public acts of the other state. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

**Construction and operation in general.**—This article did not repeal art. 6841, requiring registration in the county to which the property might be removed, and that where a mortgage was filed in the county of the mortgagor's residence, and he moved to another county, taking the property with him, with the consent of the mortgagee, the mortgage was void as to subsequent purchasers, unless within four months it was filed in the county to which the property was removed. *Reed v. Spikes* (App.) 15 S. W. 122.

**Chattel mortgages.**—Where owner shipped pianos to a party on consignment, such contract created the relation between the parties of owner and factor, and the contract did not fall within the provisions of arts. 5654, 5655, in regard to chattel mortgages. *Chase Hackley Piano Co. v. Clymer* (Civ. App.) 202 S. W. 214.

An instrument in the form of a lease contract of automobile is a "chattel mortgage," within arts. 5654, 5655, where a sale of the automobile was in contemplation and the lease contract was taken to secure payment. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

A description in a chattel mortgage of certain mules as "two grey mules about 16 hands high and one bay mule about 16 hands high. Said property now situated in Tarrant county, on the J. B. Grieder farm about 4½ miles northwest of Grand Prairie, Tex.," held sufficient to charge a livery stable keeper who claimed a lien for the keeping of such mules with notice of the mortgage. *Oak Cliff State Bank & Trust Co. v. Travis* (Civ. App.) 219 S. W. 286.

**Creditors, purchasers and mortgagees.**—One who purchases property subject to chattel mortgage with knowledge as to provisions for application of purchase price on mortgage debt and applies price to other transactions, held to hold the property subject to rights of mortgagee. *Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson* (Civ. App.) 200 S. W. 197.

A "creditor," is one who has acquired rights by an attachment or other process of law, and not merely a general creditor who has acquired no interest in the property. *Alsbury v. Alsbury* (Civ. App.) 211 S. W. 650.

One who signed a note and chattel mortgage as a surety is not a creditor as to whom the mortgage is void because not registered. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

If the consideration, or part thereof, for a chattel mortgage, was the extension of the note secured, there is a sufficient consideration to entitle the mortgagee to protection, as a subsequent mortgagee in good faith, as against a prior unfiled mortgage. *First Nat. Bank v. Todd* (Com. App.) 231 S. W. 322, reversing judgment (Civ. App.) 212 S. W. 219.

A mortgagee must have advanced a consideration for the mortgage and had no notice of the unrecorded lien, in order to be a mortgagee in good faith. *Id.*

**Filing, recording and registration.**—A mortgage must be filed, as soon as it can be by reasonable exertion, taking into consideration all the circumstances of the case; and it is for the jury to determine whether a mortgage was filed "forthwith" after its execution. *Freiberg v. Brunswick-Balke-Collender Co.* (App.) 16 S. W. 784.

Where secretary-treasurer by course adopted by corporation for transacting its business was authorized to execute a chattel mortgage, constructive notice from recording the same will be imported to defendant, purchaser of mortgaged property, where his right to deny such notice rests solely on claim that officer's acts were ultra vires. *Peyton v. Sturgis* (Civ. App.) 202 S. W. 205.

A contract giving landlord, as rent, certain share of crops grown by tenant on rented farm, need not be recorded to give third persons notice of landlord's interest therein; a landlord's lien being created by statute. *G. M. Carlton Bros. & Co. v. Hoppe* (Civ. App.) 204 S. W. 248.

Where chattel mortgage was executed in the afternoon and filed at 9 o'clock the next morning, a finding that it was filed within a reasonable time was justified. *Oakes v. Freeman* (Civ. App.) 204 S. W. 360.

A conditional sale of an automobile in California, where it is not necessary to register the instrument, upon removal of the automobile to Texas by the purchaser, will be considered a chattel mortgage under arts. 5654, 5655, and unless registered in

Texas will be void as against bona fide purchaser. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

In landlord's action against tenant's purchaser of gasoline tank and pump for conversion on theory that tank and pump were covered by landlord's statutory lien, it was no defense that mortgage on the furniture in the building executed by tenant to landlord had not been recorded, or that purchaser had no notice thereof, or that purchaser had paid a valuable consideration for the tank and pump. *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

— **Foreign registration.**—A chattel mortgage duly executed and recorded under the laws of the state where it is executed and the property located is valid as against purchasers in good faith in another state to which the property is removed by the mortgagor unless that state has enacted some statute to the contrary or unless the transaction contravenes the settled law or policy of the forum. *Consolidated Garage Co. v. Chambers* (Sup.) 231 S. W. 1072.

— **Record as notice and effect as to priority.**—Defendant's chattel mortgage having been filed for record prior to petition in bankruptcy, trustee was not entitled to have mortgage canceled without first tendering amount due thereon, unless mortgage was void. *Park v. South Bend Chilled Plow Co.* (Civ. App.) 199 S. W. 843.

Record of chattel mortgage, made by one who is not the owner of the property, is not constructive notice to one dealing with owner. *Wunschel v. Farmers' State Bank of Burkburnett* (Civ. App.) 203 S. W. 924.

Where an automobile was mortgaged to a bank, as security for notes, extending over a considerable period of time, the mortgagor retaining possession and right to use and care for the machine at his expense, one furnishing necessary repairs had an artisan's common-law lien, superior to a recorded chattel mortgage; arts. 5665-5667, providing for mechanic's liens, being but declaratory of the common law, fixing no priority as to other liens, as is done in the case of liens on buildings and improvements on land by arts. 5628, 5629. *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

Where plaintiff lent sawmill machinery to defendant, the mere fact that defendant gave a chattel mortgage on all of his sawmill machinery, which included that lent, was not notice to plaintiff of defendant's repudiation of his title so as to start the running of limitations, though the mortgage was filed for record, for plaintiff was not bound to make periodic searches of the records to discover whether defendant had repudiated. *Williams v. Davenport* (Civ. App.) 212 S. W. 675.

A lien of a printer on a printing press and engine under art. 5644, is subordinate to the lien of a chattel mortgage registered before the employé began his employment, notwithstanding such statute provides for a "first lien." *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

Registration of a deed of trust and a chattel mortgage, valid in their description of the property and otherwise, which created liens on the property in controversy, constituted constructive notice to parties seeking protection as innocent purchasers through an execution sale subsequently made upon a judgment. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

A properly recorded chattel mortgage on an automobile is a lien superior to the lien of a mechanic for repairs made subsequent to the mortgage, though the mortgage obligated the mortgagor to keep the automobile in repair, where it also provided that he should not incur or permit any incumbrance or lien of any character against it. *Dallas County State Bank v. Crismón* (Civ. App.) 231 S. W. 857.

— **Failure to file or record mortgage.**—The failure of the clerk to enter the mortgage in the proper book after it has been filed with him does not affect the rights of the mortgagee. *Cleveland v. Empire Mills*, 6 Civ. App. 479, 25 S. W. 1055.

Where a note was given, secured by a chattel mortgage, and the payee did not record the mortgage, and indorsed the note to plaintiff, and assigned the chattel mortgage to him, the plaintiff's duty to record mortgage could not be inferred from his mere acceptance of the note and unrecorded mortgage, and the plaintiff was entitled to recover against the original payee as an indorser. *Palm v. Nunn* (Civ. App.) 203 S. W. 1124.

The landlord being a subsequent creditor and lienholder in good faith, his lien on tenant's property in the building at time of lease takes priority, over prior chattel mortgage thereon not forthwith deposited and filed in county clerk's office as thereby required, but filed subsequent to the lease. *Ingram v. Lattimore* (Civ. App.) 210 S. W. 297.

Where judgment creditor caused execution to issue and be levied upon automobile in possession of judgment debtor, his lien attached at time of levy and was superior to lien of unregistered chattel mortgage on automobile of which he had no notice at such time, notwithstanding notice at time of execution sale. *Alsburly v. Alsburly* (Civ. App.) 211 S. W. 650.

A chattel mortgage not filed for registration is void only as to the creditors of the person making it, and as against purchasers or mortgagees or lien-holders in good faith, but is valid between the parties. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

The assignee of an unregistered chattel mortgage which was valid as between the parties may follow and seize the property where it was removed by the mortgagor without the consent of the mortgagee. *Id.*

Where the ticket for a bale of cotton was delivered by the grower to a bank holding a recorded crop mortgage, and the bank transferred the ticket to plaintiff, who had no knowledge of defendant's crop mortgage, plaintiff is entitled to the cotton as against



defendant; the transfer of the ticket carrying with it possession and it not appearing that defendant's mortgage was recorded. *McLendon Hardware Co. v. J. A. Hill & Son* (Civ. App.) 226 S. W. 825.

**Art. 5656. [3329] Duty of clerk receiving.**

See *Boykin v. Rosenfield*, 69 Tex. 115, 9 S. W. 318.

**Art. 5657. [3330] Copy of instrument evidence of what.**

Decisions under prior law, see *Grounds v. Ingram*, 75 Tex. 509, 12 S. W. 1118; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331.

**Admissibility in evidence of certified copy.**—A certified copy of a chattel mortgage, filed in the office of the county clerk after being duly authenticated for record, is admissible in evidence in like manner as the original. *Edwards v. Osman*, 84 Tex. 656, 19 S. W. 868.

**Art. 5660. [3333] Property not to be removed.**

**Removal or transfer of property.**—See *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

Statement in prayer of petition to recover buggies that plaintiff is owner is surplusage, and should be treated as such, where petition shows he sold them by contract reserving title, constituting, under art. 5654, a mortgage, and under this article entitles plaintiff, as mortgagee, to possession to satisfy the debt. *Joseph W. Moon Buggy Co. v. Moore-Hustead Co.* (Civ. App.) 196 S. W. 328.

Where the chattel mortgagee of cordwood, attached in suit against the mortgagor, authorized the sale of the wood on condition that the proceeds be turned over to him to hold in escrow awaiting final judgment in the suit, which was done pursuant to agreement between the attorneys for plaintiff and defendant mortgagor, the mortgagee became bailee of the proceeds of the sale. *Loya v. Bowen* (Civ. App.) 215 S. W. 474.

The assignee of an unregistered chattel mortgage which was valid as between the parties may follow and seize the property where it was removed by the mortgagor without the consent of the mortgagee. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

**Art. 5661. [3334] Not to be recorded at length; mortgages on articles attached to realty described in instrument; form of instrument; separate record book.**

Former law.—See *McEride v. Beakley* (Civ. App.) 203 S. W. 1137.

DECISIONS RELATING TO SUBJECT OF CHAPTER SEVEN IN GENERAL

1. **Chattel mortgages—Nature.**—No particular form is necessary to constitute a mortgage a chattel mortgage if it fairly indicates the creation of a lien specifying the debt and the property on which it rests, and when it is so drawn that a person reading cannot understand it otherwise than as a lien on the property described, and where it has been properly registered, it may be received in evidence as a mortgage. *Fourmentin v. Scott* (Civ. App.) 216 S. W. 901.

2. — **Distinguished from other transactions.**—A bill of sale covering two race horses, but providing in a separate defeasance clause that, if the seller should within ten days repay the recited consideration, etc., held to be a chattel mortgage, and not a sale; "repay" meaning "to pay back; to refund; as, to repay money borrowed or advanced," notwithstanding a stipulation that the title to the property is to become absolute on default of the repayment by the seller of the consideration; such provision being ineffectual, as oppressive to creditors and contrary to public policy. *Walker v. Wilmore* (Com. App.) 212 S. W. 655.

3. — **Property which may be the subject of mortgage.**—Where a tenant under a valid contract with owner agrees to pay a crop rent and thereafter actually plants and cultivates the specified crop, the crop may be mortgaged even though at the time of the mortgage the crop has not actually been planted. *Sanger Bros. v. Hunsucker* (Civ. App.) 212 S. W. 514; *Williams v. King* (Civ. App.) 206 S. W. 106.

Equity will enforce a mortgage against property which the mortgagor does not own or which is not in being at the time of the mortgage, if the mortgage contains such a description as to identify the property when it comes into possession or being. *Watson v. D. A. Paddleford & Son* (Civ. App.) 220 S. W. 779. Certified questions answered, 110 Tex. 525, 221 S. W. 569; *Williams v. King* (Civ. App.) 206 S. W. 106.

One cannot mortgage that which he does not own, so as to create a lien thereon prior to his becoming such owner. *Williams v. King* (Civ. App.) 206 S. W. 106.

Bill of sale covering gasoline engine, pipes, pump, rods, and trough could not transfer such part of the property as had become part of the realty under the law of fixtures. *Boyd v. Hurd* (Civ. App.) 207 S. W. 339.

Thirty thousand pound engine, embedded in 6-foot deep concrete foundation, by 4 feet long, 1½ inch in diameter, bolts, covered with concrete, became, as a matter of law, a part of the realty by reason of method of attachment and impossibility of removal without injury to real estate. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

A chattel mortgage on electric exciter, sold to corporation operating plant subject to vendor's lien, was entitled to priority over vendor's lien, where it was not attached to the realty in such manner as to constitute it a fixture. *Id.*

Mere possession by bailee of property is not sufficient to create any right in favor of third person who takes mortgage upon them. *First Nat. Bank of Canadian v. Jones* (Civ. App.) 209 S. W. 468.

A chattel mortgage on future crops is enforceable in equity, when the crops come into the possession of the mortgagor, if their acquisition was contemplated when the mortgage was made. *Perkins v. Alexander* (Civ. App.) 209 S. W. 789.

The owner of land cannot create a valid mortgage on an unplanted or growing crop, which belongs to the tenant, who has merely agreed to pay him a share of the crops as rents for the use of the land, and where prior to a division of the crops, the land is sold under a trust deed, the chattel mortgagee has no lien on any part of the crop. *Brod v. Guess* (Civ. App.) 211 S. W. 299.

Where machinery was sold to a mortgagor under an agreement that it should remain personalty and should be subject to a chattel mortgage for payment, the intention of the seller and mortgagor will control, and the machinery being such that it could be removed without damage to the realty, it did not become part of the realty under the doctrine of fixtures. *Murray Co. v. Simmons* (Com. App.) 229 S. W. 461.

5. — **Parties.**—Where a factor mortgaged goods belonging to his principal without the knowledge of principal or act of estoppel on principal's part, the principal's right to the goods is superior to that of mortgagee. *Chase Hackley Piano Co. v. Clymer* (Civ. App.) 202 S. W. 214.

Where an impostor secured possession of mules by representing to their owner that he was J. R. J., the nephew and partner of a mule dealer of the same name, a resident of A., in another state, and gave for them \$2,900 draft on such other J. R. J., who really existed, and the bank in A., on inquiry, telegraphed that "J. R. J.'s draft for \$2,900 will be paid," there was no completed sale to the impostor, but at most a voidable sale to the real J. R. J., and, on the return of the draft as a forgery, an innocent mortgagee of the mules from the impostor had no title as against the owners, as the payment by forged draft was not a payment, and the impostor had no authority, even apparent, to dispose of the mules, which were purchased as firm property, for his personal and private benefit. *Gose v. Brooks* (Civ. App.) 229 S. W. 979.

6. — **Consideration.**—The extension of time granted to the debtor in which to pay the debt was a sufficient consideration to sustain his chattel mortgage to secure the debt. *Watson v. D. A. Paddleford & Son* (Civ. App.) 220 S. W. 779, certified questions answered 110 Tex. 525, 221 S. W. 569.

8. — **Bill of sale as mortgage.**—Written bill of sale and contemporaneous agreement to retransfer the property on the seller's payment of the consideration were in effect a chattel mortgage and not a pledge, under which either party by agreement might have possession. *Keppler v. Kelly* (Civ. App.) 201 S. W. 447.

Though an instrument may contain all of the terms of an absolute conveyance, if it is apparent from the language used that it was intended as security for a debt, it will be treated as a mortgage. *Walker v. Wilmore* (Com. App.) 212 S. W. 655.

9. — **Form of instrument.**—A stipulation in chattel mortgages giving mortgagee the right in case he feels unsafe or insecure in the collection of the debt to declare all the indebtedness due and take possession of the mortgaged property is valid and enforceable. *Central Transfer & Storage Co. v. Wichita Falls Motor Co.* (Civ. App.) 222 S. W. 688.

10. — **Description of property.**—See *Oak Cliff State Bank & Trust Co. v. Travis* (Civ. App.) 219 S. W. 286.

Description of mortgaged property as the first four bales of cotton and cotton seed grown by the mortgagor in a certain year held sufficient. *Ross v. Schultz* (Civ. App.) 198 S. W. 672.

A crop mortgage describing the property as "10 bales of cotton, now being picked and to be ginned," covers cotton which was then in the process of being picked, and is not restricted to such cotton as was being separated from the stalk on the day of execution. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

A chattel mortgage describing the property as one span brown mules, bought of the said B. & B., who were the mortgagors, held sufficient as against any one who had notice of the mortgage, but a description as "one white horse about 16 hands high, branded —," is insufficient. *Id.*

It is not necessary to name the year in which the crops are to be grown, in order to make the mortgage on a future crop a valid one, since what the parties contemplated at the time controls. *Perkins v. Alexander* (Civ. App.) 209 S. W. 789.

Chattel mortgage given as security on machinery sold the mortgagor, a gin company, by the mortgagee, held not void for uncertainty of description, though the list of the property did not of itself sufficiently identify it, in view of a stipulation that it was to be located on a certain gin lot identified by evidence. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

A chattel mortgage, describing the property mortgaged as "any three bales of cotton to be planted and cultivated by me in the year 1912 on the place known as the — farm, — miles from R., or any other farm in C. county," was void as against creditors for want of certainty as to the property mortgaged as it pointed out no particular cotton and no particular land on which the cotton was to be produced. *Watson v. D. A. Paddleford & Son*, 110 Tex. 525, 221 S. W. 569, answering certified questions (Civ. App.) 220 S. W. 779, and 223 S. W. 1117.

A description in chattel mortgage of a crop which does not mention the year in which it was to be raised, nor specify the land on which it was to be grown, is too indefinite to cover the particular crop without proof of intention of the parties to specify the crop. *Smith v. Coburn* (Civ. App.) 222 S. W. 344.

Where a chattel mortgage itself gives means by which the property can be definitely identified, although the description is not as accurate as it should be, the instrument is not void for indefiniteness of description. *Rus v. Farmers' Nat. Bank of Sealy* (Civ. App.) 228 S. W. 985.

11. — **Execution.**—Evidence, in a suit upon notes and chattel mortgage given by purchaser of machinery, held insufficient to show that fraud or deceit was practiced inducing defendants to sign the contract. *Board v. Emerson-Brantingham Implement Co.* (Civ. App.) 203 S. W. 421.

15. **Construction and operation.**—Property mortgaged and estates and interests of parties therein.—A mortgage will convey all property ascertainable from the description, and the specified property becomes subject to the lien, but other property not within the description contained in the mortgage will not pass, so that chattel mortgagee of first four bales of cotton grown by mortgagor, has no lien on remaining cotton entitling him to sue for conversion, where tenant's interest in first four bales did not satisfy landlord's superior lien. *Ross v. Schultz* (Civ. App.) 198 S. W. 672.

In action to foreclose mortgage on cattle, evidence held to sustain finding that a third person to whom cattle belonged had done nothing which would lead an ordinarily prudent person to believe that they belonged to mortgagor, and that mortgagor had a right to mortgage them. *First Nat. Bank of Canadian v. Jones* (Civ. App.) 209 S. W. 468.

A chattel mortgage on half of a crop of cotton to be raised on certain land, mortgagor to have cotton ginned and baled, held to contemplate that lien was to cover and apply to one-half of bales of cotton, that might be raised, and not an undivided one-half interest in crop, thus giving mortgagee right to elect which bales she should take or sell; and a second mortgagee, who had sequestered and sold the part of the crop before first mortgagee selected her bales, is liable in conversion to the extent of the full value of the part taken. *Citizens' Guaranty State Bank v. Johnson* (Civ. App.) 211 S. W. 271.

One cannot convey by chattel mortgage a greater title than he possesses. *Brod v. Guess* (Civ. App.) 211 S. W. 299.

In a mortgage on entire crop of 130 acres of rice to be planted on the B. farm, the particular description of the farm is controlling over the general description by number of acres, so that the mortgage would not include 30 acres planted on the J. farm, with the 100 acres actually planted on the B. farm, particularly where mortgagor was not contemplating planting the 30 acres when executing mortgage. *D. S. Cage & Co. v. Southern Rice Growers' Ass'n* (Civ. App.) 218 S. W. 78.

15½. — **Renewal.**—Renewal of chattel mortgage, by executing new mortgage and discharging old mortgage of record, merely continues lien, and renewed mortgage is superior to chattel mortgage executed before renewal, but subsequent to original mortgage. *First State Bank of Saltillo v. Ennis Title Co.* (Civ. App.) 200 S. W. 1122.

Where mortgagor of automobile did not receive letter from mortgagee demanding payment of overdue installment note until after car had been taken by mortgagee, there was no acceptance of its offer by the mortgagor, who did not act on it to his injury, or part with any consideration for it, to effect a contract of extension of the note, or waiver of right to take possession. *Lipper v. McClain* (Civ. App.) 223 S. W. 349.

16. **Bona fide purchasers.**—Despite deficiencies in description of mortgaged chattels, it was sufficient as to one who purchased knowing of incumbrance; parol evidence being admissible to supply any deficiency in description. *Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson* (Civ. App.) 200 S. W. 197.

In an action between conflicting lienholders, evidence held insufficient to sustain a verdict to the effect that appellant, a chattel mortgagee, did not take its mortgage in good faith. *Burlington State Bank v. Marlin Nat. Bank* (Civ. App.) 207 S. W. 954.

Mortgagee, having filed mortgage, has the right to assume that purchaser of mortgaged property purchased goods with full knowledge that property was incumbered, and a purchaser who buys property with either actual or constructive notice of mortgage, pays purchase price to the mortgagor at his peril. *Weeks v. First State Bank of De Kalb* (Civ. App.) 207 S. W. 973.

In action by a subsequent chattel mortgagee to foreclose a mortgage, where a prior mortgagee intervened, evidence held to warrant a finding that plaintiff was not a bona fide subsequent mortgagee for value, although the mortgage was executed in renewal of an older mortgage, and although the mortgagee advanced the fees or charges for preparing the instrument, and although mortgagor was credited with a balance left over of \$1.60. *First Nat. Bank v. Todd* (Civ. App.) 212 S. W. 219.

Where plaintiff's contract, reserving title to property, was not recorded in the proper county, and in a suit against a subsequent purchaser the undisputed evidence showed payment by him of a valuable consideration, the adequacy of the consideration was not a proper subject of inquiry. *Ten-Pennett Co. v. James* (Civ. App.) 227 S. W. 528.

Where, in an action to recover property to which plaintiff had reserved title from a subsequent purchaser, the uncontradicted testimony showed that he paid \$100 in cash and an automobile estimated to be worth \$250, and the jury found the value of the property was \$375, the amount paid was not so grossly inadequate as to raise a suspicion that defendant was not an innocent purchaser for value. *Id.*

**17. Priorities of mortgages.**—Landlord furnishing supplies to tenant directly and through a third party, held to have a lien superior to that of chattel mortgagee. *Ross v. Schultz* (Civ. App.) 198 S. W. 672.

A chattel mortgage filed before commencement of second year of term under a lease, held superior to the landlord's lien for rent accruing in the second year. *Meacham v. O'Keefe* (Civ. App.) 198 S. W. 1000.

Where chattel mortgage is executed upon future crops, and mortgagor subsequently sold land, remaining in possession as tenant under agreement to give landlord share of crops as rent, landlord's lien for rent is prior to mortgagee's lien; mortgage becoming effective upon growing of crop, but only as to mortgagor's interest therein. *G. M. Carlton Bros. & Co. v. Hoppe* (Civ. App.) 204 S. W. 248.

A chattel mortgage executed and filed before the making of a lease contract is a prior lien over one contained in the lease contract. *Oakes v. Freeman* (Civ. App.) 204 S. W. 360.

Where land on which gins stood was sold, and deed of trust given, and company with notice of deed sold machinery for gins, chattel mortgage to secure price stipulating it should remain personalty, as against vendor of gins, seeking to foreclose deed of trust, machinery became part of realty, and deed could be foreclosed on it. *Murray Co. v. Jacksboro Oil & Milling Co.* (Civ. App.) 205 S. W. 517.

Where machinery composing part of plant sold by vendor subject to vendor's lien is replaced by new machinery, consisting of 30,000-pound engine, which was embedded in concrete foundation 6 feet deep and attached to foundation by iron bolts 4 feet long, the vendor's lien was entitled to priority over chattel mortgage on such engine. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

Where a tenant purchased a soda fountain and executed a chattel mortgage thereon, and being unable to pay for it, redelivered it to the vendor, who then made a sale to another person, who executed to the vendor a chattel mortgage on the fountain, leaving it in the store of the landlord, and at a later date the tenant moved from the premises, the purchaser of the fountain then becoming the tenant, and the mortgagee having paid rent to the landlord up to such date, the mortgage lien was prior to any lien of the landlord on account of subsequent rent. *B. M. Burgher & Co. v. Barry* (Civ. App.) 211 S. W. 457.

An existing chattel mortgage lien is superior to an after acquired and established laborer's lien. *Ferrell-Michael Abstract & Title Co. v. McCormac* (Com. App.) 215 S. W. 559.

Where a chattel mortgage on an automobile was duly executed, filed, and registered, subsisting and unpaid when defendant made repairs on the automobile, and defendant had full notice thereof, the chattel mortgage was superior to the lien for work and materials furnished for repairs, whether defendant retained possession or not, and whether the repairs increased the value or not. *Holt v. Schwarz* (Civ. App.) 225 S. W. 856.

Where defendants, having a half interest in a laundry property, gave a mortgage covering all the property to a bank, and on the day the mortgage was recorded purchased from plaintiff the other undivided half interest, plaintiff not retaining a lien in the bill of sale, but taking a mortgage to secure the purchase price which he filed forthwith, held, that the bank's lien was inferior to plaintiff's lien. *Central Texas Exch. Nat. Bank v. Sparkman* (Civ. App.) 228 S. W. 297.

Where a cotton gin was mortgaged and on the mortgagor securing upon credit a steel gin stand, etc., the old frame gin stands were removed, but it did not appear that discontinuance in use injured them, the mortgagee, whose deed of trust did not specify the machinery, cannot hold the new machinery, which was subject to a chattel mortgage for the purchase price, particularly as the deed of trust did not obligate the mortgagor to keep the old machinery in repair or operation. *Murray Co. v. Simmons* (Com. App.) 229 S. W. 461.

Evidence held insufficient to show determination of priority. *Short v. Blair & Hughes Co.* (Civ. App.) 230 S. W. 427.

**18. — Mortgagee as bona fide purchaser.**—Where plaintiff drew a bill of sale of a car from H. to B. without reference to a company, except that its name appeared thereon above H.'s signature, and plaintiff took a mortgage upon the car from B., plaintiff may not claim that the company is estopped by the bill of sale, or that he is an innocent purchaser as against the company. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

**19. — Notice affecting priority.**—Where a chattel mortgagee, never knew of or assented to any mortgage being taken in his name for the protection of a firm until between 9 and 10 months after payment of the mortgagor's note to him, and until long after the rights of a third person under mortgage to himself had accrued, and transfer by the mortgagee to the firm of whatever right he had under the mortgage was subsequent to the mortgage in favor of the third person, the mortgage to such third person was not affected or destroyed. *Whitaker v. Sanders & Samuels* (Civ. App.) 223 S. W. 256.

**20. Rights and liabilities of parties—Possession or control of property.**—Under agreement after default in notes that mortgagee should have possession of working outfit covered by the mortgage, held, that use of property in construction of roads which mortgagor had not contracted to build was not wrongful, and that all that mortgagee was required to pay was profits actually earned and not reasonable value of use. *Montgomery v. Gallas* (Civ. App.) 202 S. W. 993.

Mortgagor has the right to sell the incumbered property, subject to the incumbrance. *Weeks v. First State Bank of De Kalb* (Civ. App.) 207 S. W. 973.

A mortgagee of chattels entitled to possession need not make a demand in order to

recover the same from the possession of an assignee of the mortgagor. *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

Under mortgage securing installment notes payable each month, and providing that failure to pay any one shall mature all, etc., holder has right, on failure to pay a note at maturity, to take possession of property and hold or dispose of it in character of mortgagee, not of owner, to pay debt, without being liable for conversion. *Lipper v. McClain* (Civ. App.) 223 S. W. 349.

The entire series of notes representing the price of an automobile being due and unpaid, the vendor chattel mortgagee, under the terms of the mortgage, provided that failure to pay any note on maturity would mature the entire series, had right to take possession of the car, and no cause of action for its rental or value arose in favor of the buyer mortgagor out of his action in so doing. *Litchfield v. Fitzpatrick* (Civ. App.) 224 S. W. 926.

The rule that the mortgagor cannot recover possession of the mortgaged property from the mortgagee in rightful possession without paying the mortgage debt does not apply where the value of the use to which the mortgagee has put the mortgaged property exceeds the mortgage debt, and in such case the mortgagor may recover the mortgaged property and the excess of the value of such use over the amount of the mortgage debt. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

An innocent mortgagee of mules, to which mortgagor had no title, held entitled to be reimbursed by the owner, upon the latter's reclaiming them, for their feed and care while in mortgagee's possession. *Gose v. Brooks* (Civ. App.) 229 S. W. 979.

**21. — Conversion of or injury to property.**—Action of sellers of machinery in asking buyer if he had insured machinery was equivalent to request that machinery be insured for benefit of sellers, in accordance with requirements of a chattel mortgage, and buyer's reply in affirmative was an assurance that he had so insured it. *Walter Connally & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Where chattel mortgagee was entitled to lien on part of proceeds of insurance policy, if proceeds of policy had not been exempt from garnishment, service of writ on insurance company would have conferred on mortgagee right to such proceeds to extent of their lien superior to right of holder of vendor's lien. *Id.*

A chattel mortgage gives the mortgagee no lien upon proceeds of a fire insurance policy upon the property, where the policy is taken by the debtor for his own protection. *Westchester Fire Ins. Co. v. Thomas Goggan & Bro.* (Civ. App.) 203 S. W. 163.

Unauthorized sale of mortgaged chattels by mortgagee and payee of notes secured thereby, held by another as collateral, and the appropriation of the avails without the knowledge of the holder of the note, is a "willful and malicious injury to property" within the meaning of Bankruptcy Act, § 17, as amended by Act Feb. 5, 1903 (Comp. St. § 9601), providing that a discharge in bankruptcy shall not release the bankrupt from liability for willful and malicious injuries to the person or property of another. *Sabinal Nat. Bank v. Bryant* (Com. App.) 221 S. W. 940, reversing judgment (Civ. App.) 191 S. W. 1179.

Defendant having the right, under chattel mortgage pleaded and in evidence, to take possession for default shown, cannot be held liable for doing so, though also pleading consent of mortgagor to such taking and not showing it otherwise than by the mortgage. *J. M. Radford Grocery Co. v. Jamison* (Civ. App.) 221 S. W. 998.

Where mortgagee of chattels assigned same to a third person and third person disposed of them, such third person is responsible to the mortgagee for the value of the chattels. *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

Conversion of mortgaged automobile did not result from the mortgagee's failure at once to proceed to foreclosure after taking possession of the car pursuant to the terms of the mortgage on default in payment of a single monthly installment note. *Lipper v. McClain* (Civ. App.) 223 S. W. 349.

A mortgagee has no right to a judgment foreclosing his lien against mortgaged property in the hands of a purchaser from the mortgagor, and in the same suit to recover a judgment for conversion of that property, the right of a mortgagee to suit for conversion being based on the assumption that his security has been destroyed or impaired. *Smith v. Wall* (Civ. App.) 230 S. W. 759.

**22. — Measure of damages for conversion.**—As to the measure of the mortgagor's damages for mortgagee's wrongful detention of the mortgaged property, compensation to the mortgagor is not the limit of recovery, but one of the considerations fixing the measure of damages is that the wrongdoer shall not be allowed to profit by his own wrong, so that the mortgagor may recover, in addition to the property or its value, not merely the interest on such value during the time of detention, but the value of the use of the property during such time in case it exceeds interest; and the principle of preventing profits from wrongdoing renders it immaterial that the injured mortgagor replaces the property by purchase, or that he in fact loses money in the use of the property so purchased, and also limits the value of the use to the use of the property for the purpose alone for which it was used by the mortgagor and the mortgagee, rather than the value of the use for other purposes for which it was adapted and for which it could have been hired out by the owner, at least in the absence of pleading by the mortgagor that he could and would have rented out the property for some other use. *Montgomery v. Gallas* (Civ. App.) 225 S. W. 557.

**24. Waiver or loss of lien.**—The fact that mortgagee expected mortgagor to sell mortgaged property and thus secure money with which to pay debt, and that mortgagee knew that mortgagor was selling property, is not in itself sufficient to support finding that mortgagee waived lien. *Weeks v. First State Bank of De Kalb* (Civ. App.) 207 S. W. 973.

Chattel mortgagee of attached cordwood, by his agreement with the attorneys for plaintiff and defendant mortgagor that the wood might be sold and the proceeds turned over to him to hold in escrow awaiting final judgment, held not to have waived his mortgage lien, superior to the attachment lien of plaintiff, nor to have done anything to estop him from asserting his lien after proper surrender of the fund in his hands or its deposit in court. *Loya v. Bowen* (Civ. App.) 215 S. W. 474.

A mortgagee may by his words or acts waive his lien on the property covered. *Medlin v. Hambright* (Civ. App.) 225 S. W. 577.

25. **Payment, release or satisfaction.**—Where the chattel mortgagee of attached cordwood agreed with the attorneys for plaintiff and for defendant mortgagor that the wood might be sold and the proceeds turned over to him to hold in escrow awaiting final judgment, the mortgagee became a bailee of the proceeds, and could not apply them to the extinguishment or reduction of defendant mortgagor's debt to him, and could not assert any superior right in them until he had surrendered the fund to plaintiff, or paid it into court, this irrespective of registration statutes. *Loya v. Bowen* (Civ. App.) 215 S. W. 474.

Where the owner of cattle covered by a chattel mortgage sold part of the cattle, accepting a part payment of \$150, and the purchaser before delivery resold them to a third party, and it appeared that neither the original purchaser nor his vendee knew of the existence of the mortgage at the time of the sale but that upon obtaining knowledge thereof they agreed with the mortgagee's agent that the proceeds upon sale in a certain market should be paid to the mortgagee, who was thereupon to release the mortgage, the payment of the \$150 constituted a consideration for the agreement to release, since, if the original purchasers had refused to carry out the contract in event that the mortgagee should have insisted on its rights, it could have required the return of the payment, and the agreement to release deprived them of such right, and also because by the agreement the mortgagee, which was the real vendor, relinquished all its rights to such payment. *Lee v. Clay, Robinson & Co. of Texas* (Com. App.) 219 S. W. 1090.

Where mortgagor turned automobile over to mortgagee in conformity with an agreement whereby mortgagee undertook within a reasonable time to sell the car for an amount sufficient to satisfy the note secured by the mortgage and leave the mortgagor \$245, mortgagor could not recover on such agreement, where he failed to turn over to the mortgagee the license tax receipt referred to under Act March 24, 1919 (Gen. Laws, c. 138), since, either the contract was void, because an attempt to bind mortgagee to commit a crime, or was breached by the mortgagor by failing to deliver the receipt. *Overland Sales Co. v. Pierce* (Civ. App.) 225 S. W. 284.

26. **Foreclosure.**—In suit to foreclose a mortgage covering all crops grown for the year 1915 and all succeeding years, evidence that the mortgagor was plaintiff's tenant in 1915, and continued as such during 1916 and 1917, sufficiently showed that the parties contemplated when the mortgage was made that a crop would be grown on the leased land in 1917. *Perkins v. Alexander* (Civ. App.) 209 S. W. 739.

The sale of piano to plaintiff for plaintiff's use in conducting an immoral business being an illegal transaction, defendant, in plaintiff's suit to recover possession of the piano as having been taken from plaintiff's possession by force, could not set up that the chattel mortgage on the piano, given by plaintiff to secure notes for the purchase price, gave defendant the power, as assignee of the mortgagee, of seizure and sale. *Colburn v. Coburn* (Civ. App.) 211 S. W. 248.

Where the mortgage by its terms confers the power of seizure and sale upon the mortgagee only, such power does not extend to mortgagee's assignee, and, if he attempts to exercise it, he is a trespasser. *Id.*

A chattel mortgage, executed to indemnify a surety on a claimant's bond authorizing the trustee to take possession and sell the property if judgment should be rendered against the mortgagor and he should not appeal, and providing, in case of an appeal the mortgage should remain in force, and if judgment should be rendered against the surety the same remedy should apply, and providing that the surety's remedies and rights should be fully matured without it being required to first pay any judgment, costs, and expenses, did not authorize a seizure and sale in case of a judgment against the claimant from which he appealed. *Warren v. Johnson* (Civ. App.) 218 S. W. 104.

A chattel mortgage to indemnify the surety on a claimant's bond, authorizing a sale of the property if judgment was rendered against the mortgagor and no appeal taken, used the word "appeal" as meaning a taking of the case to a higher court by any authorized method, including a writ of error. *Id.*

In suit for the amount of promissory notes and to foreclose chattel mortgage lien on mules, automobile, and cotton raised by one defendant, and against the other defendant for conversion of the cotton, evidence held to show that plaintiff mortgagee authorized defendant mortgagor to sell the cotton and to receive the money therefor. *Medlin v. Hambright* (Civ. App.) 225 S. W. 577.

27. **Judgment.**—Where mortgagor's purchaser had not paid mortgagor the price, the court in mortgagee's action against mortgagor and purchaser properly gave mortgagee judgment against purchaser for such price, even though purchaser was a bona fide purchaser, since the payment thereof to mortgagee relieves the purchaser from his indebtedness to mortgagor and does equity between parties. *West Furniture Co. v. Cason* (Civ. App.) 218 S. W. 774.

## CHAPTER EIGHT

## OTHER LIENS

Art.	Art.
5663. In favor of hotels, etc.	5665. Possession may be retained, when.
5663a. Same; satisfaction of lien.	5666. Where no price agreed upon.
5663b. Same; hotel or inn defined.	5667. Sales may be made for charges.
5664. Livery stable keepers.	5671. Other liens, etc., not affected.

**Article 5663. [3318] Lien in favor of hotels and boarding houses.**—Proprietors of hotels, boarding houses or inns, whether individual, partnership or corporation shall have a special lien upon all baggage and other property in and about such hotel, inn or boarding house brought to the same by or under control of his guests or boarders for the accommodations, board and lodging or either and for all money paid for and advanced to them and for such other extras as are furnished at the request of such guests and said inn keeper, boarding house keeper and hotel-keeper, shall have the right to detain such baggage and other property until the amount of such charges are paid and such baggage and other property shall be exempt from attachment or execution until such lien and the costs of satisfying it are paid. [Acts 1874, p. 200, § 1; P. D. 7116f; Acts 1919, 36th Leg., ch. 71, § 1.]

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

**Art. 5663a. Same; satisfaction of lien.**—The inn keeper, boarding house keeper, or hotel keeper shall retain such baggage and other property upon which he has a lien for a period of thirty days, at the expiration of such time if such lien is not satisfied, he may sell such baggage or other property, at public auction, first giving notice of the time and place of sale by posting at least three notices thereof in public places in the county where the inn, hotel or boarding house is situated and also by mailing a copy of such notices to said guest or boarder at the place of residence designated by the register of such inn or hotel if the register shows a place of residence; and after satisfying the lien and any costs that may accrue, and residue remaining shall on demand, within sixty days, be paid such guest or boarder and if not demanded within sixty days from date of sale, such residue shall be deposited by such proprietor with the treasurer of the county in which said hotel, inn or boarding house is located, accompanied with a true and correct statement made under oath and which residue shall be retained by the county treasurer for a period of one year, and if not claimed within that time by the owner thereof, the county treasurer shall pay the same into the State Treasury, and it shall be placed to the credit of the escheat fund. [Acts 1919, 36th Leg., ch. 71, § 2.]

**Art. 5663b. Same; hotel or inn defined.**—Under the meaning of this Act a hotel or inn is a place where the proprietor makes it his business to furnish food or lodging, or both to all who apply, paying suitable compensation therefor, provided further that the words hotel or inns shall be construed to include rooming houses. [Id., § 3.]

**Art. 5664. [3319] Lien of livery stable keepers and pasturers.**

See *Oak Cliff State Bank & Trust Co. v. Travis* (Civ. App.) 219 S. W. 236; *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

Cited, *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

**Duties of livery stable keepers and pasturers.**—The law places the obligation on one taking cattle into his pasture to take care of them. *Rabe v. State*, 87 Cr. R. 497, 222 S. W. 1106.

**Right to lien.**—If one who is allowed by the owner of a horse to have possession of it, and keep it in the town of A., but who is forbidden to take it to the town of B., nevertheless takes it to B., and boards it at a livery-stable there, the stable keeper will not acquire a lien thereon. *Stott v. Scott*, 68 Tex. 302, 4 S. W. 494.

The lessor of pasture lands held a lien on the cattle of sublessees of such lands for the rent due from the lessee. *Russell v. Old River Co.* (Civ. App.) 210 S. W. 705.

This article does not give the owner of a leased pasture a lien on the animals pastured therein by the lessees. *Broad & Pearce v. Cage* (Civ. App.) 220 S. W. 104.

One taking cattle into a pasture of which he has control has a lien on the cattle for pasturage, although nothing is said concerning the price or who shall care for and control the cattle. *Rabe v. State*, 87 Cr. R. 497, 222 S. W. 1106.

**Conversion of animals subject to lien.**—Where, according to the evidence, S., the owner of cattle stolen, placed them in the pasture of H., controlled by one T., who looked after the place, and to both of whom rent was due from S. under their pasturer's lien, and ownership was alleged to be in S., there was a variance, and the indictment should have alleged ownership in T. or real ownership in S. and special ownership in T. *Rabe v. State*, 85 Cr. R. 373, 212 S. W. 502.

### **Art. 5665. [3320] Mechanics may retain possession of article repaired, when.**

See *Wichita Falls Sash & Door Co. v. Jackson* (Civ. App.) 203 S. W. 100.

Cited, *Guaranty State Bank of Tyler v. Reeves* (Civ. App.) 213 S. W. 235.

**Right to lien.**—An artisan who repairs an automobile has a lien at common law, for his charges, independent of statute. *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

Where owner of automobile, being held by a garage keeper for repair charges sued to recover automobile, and tendered sequestration bond to protect the garage keeper, and the garage keeper retained automobile by furnishing replevy bond, his lien did not cover storage charges for the period of time in which he was in possession of the automobile after having replevied it, since he would have been protected, without the retention of the automobile, by the sequestration bond. *Hudson v. Breeding* (Civ. App.) 224 S. W. 718.

**Effect of surrender of possession.**—A garage which voluntarily surrenders possession of an automobile loses its lien for repairs, though it subsequently comes into possession of the car. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441.

**Rights of third persons.**—Where a garage is sold and the buyer in taking possession of the garage comes into possession of an automobile held by seller to protect a lien for repair charges, the buyer gets no right to the lien on such automobile, unless the lien claimed has been assigned to him by the seller. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441.

Where an automobile was mortgaged to a bank, as security for notes, extending over a considerable period of time, the mortgagor retaining possession and right to use and care for the machine at his expense, one furnishing necessary repairs had an artisan's common-law lien, superior to a recorded chattel mortgage; arts. 5665-5667, providing for mechanic's liens, being but declaratory of the common law, fixing no priority as to other liens, as is done in the case of liens on buildings and improvements on land by arts. 5628, 5629. *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

**Waiver of lien.**—In a suit to recover money due for labor and material in repairing an automobile and to foreclose a lien after it had been delivered to owner's son, who gave a note, evidence held insufficient to show a waiver of the lien. *McBride v. Beakley* (Civ. App.) 203 S. W. 1137.

Where there was no express agreement waiving lien for repairs on an automobile, the taking of the note of the owner's son on its delivery to him, did not have that effect. *Id.*

### **Art. 5666. [3321] Where no price is agreed upon.**

See *McBride v. Beakley* (Civ. App.) 203 S. W. 1137.

Cited, *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

### **Art. 5667. [3322] When property may be sold for charges.**

See *McBride v. Beakley* (Civ. App.) 203 S. W. 1137.

Cited, *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

**Attack on sale.**—Allegations that a car left with defendants for repairs was sold after notice, under this article, and that certain accessories had been converted, etc., held to state a good cause of action, although not alleging that plaintiff was entitled to possession of the car or had tendered the charges due, since the petition did not admit that charges were due or that sale was legal, and in any event the allegations alleging the conversion of accessories rendered the petition good at least in part. *J. C. Killgore & Co. v. Whitaker* (Civ. App.) 217 S. W. 445.

### **Art. 5671. [3326] Other liens and contracts not affected.**

Cited, *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

**Right to lien.**—Arts. 5661, 5665-5667, relate to common-law liens, and art. 5671 and Const. art. 16, § 37, do not make possession an essential element of a lien for repairs given by such article of the Constitution. *McBride v. Beakley* (Civ. App.) 203 S. W. 1137.



**Priorities.**—This article means that priorities of liens existing independent of the statute shall be preserved, and therefore cannot be considered as making a chattel mortgage lien superior to a mechanic's lien, since both liens exist independent of such statute. *City Nat. Bank of Wichita Falls v. Laughlin* (Civ. App.) 210 S. W. 617.

The lien of a livery stable keeper for board of mules, created after the execution of a mortgage on such mules, of which the livery stable keeper has notice, is inferior to the lien of the mortgage. *Oak Cliff State Bank & Trust Co. v. Travis* (Civ. App.) 219 S. W. 286.

#### DECISIONS RELATING TO SUBJECT-MATTER OF CHAPTER IN GENERAL

**1. Liens in general.**—An agreement to mortgage designated property, when carried so far that nothing remains undone except the formal execution of the mortgage, may, as between the parties, be treated as creating an equitable lien. *Houston Nat. Exch. Bank of Houston v. Gregg County* (Civ. App.) 202 S. W. 805.

Under agreement between officers of debtor and creditor banks for delivery of a note secured by bills receivable, where nothing remained but performance, held, that creditor bank was entitled to equitable lien, though note was not executed or the collateral sent to it. *Id.*

A garage owner has no lien on automobile for storage charges, unless automobile was stored under contract with the owner thereof. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441.

Where a garage is sold and new owner continues to hold a car he knows is being wrongfully withheld from its owner, he cannot claim lien on such car for storage charges. *Id.*

Where a garage, holding an automobile on which it claims a lien, is sued by owner for possession, and replevies automobile after a writ of sequestration has been issued, the garage cannot claim a lien for storage for the time it held automobile after it had been replevied. *Id.*

An executory agreement in writing to give a lien on land is sufficient to create a lien in equity on such land, though mortgage or lien is itself never executed, under the maxim that equity regards that as done which ought to be done. *Luse v. Rea* (Civ. App.) 207 S. W. 942.

Where land is conveyed in terms subject to a mortgage or other lien, the grantee does not by accepting the deed become liable personally for the debt. *George v. Blumberg* (Civ. App.) 211 S. W. 309.

Mortgagee of lands is but a lienholder, the legal title remaining in the owner of the mortgaged premises, with an unimpaired right to lease and obtain the emblements in the way of growing crops. *Sanger Bros. v. Hunsucker* (Civ. App.) 212 S. W. 514.

One purchasing property incumbered with a mortgage is not personally bound to pay debt unless he assumes it, but mortgage remains a lien against the land. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

County held not entitled to an equitable lien, based on the doctrine of estoppel, as against the seller of materials to its bridge contractor, though after the property was delivered to the contractor the county paid it 60 per cent. of the contract price of the work, and after its delivery and the making of the payment the seller caused the property to be seized. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

Corporation may, by contract with stockholder, acquire a lien on the stock for debts due the corporation by the stockholder. *Turner v. Cattleman's Trust Co. of Ft. Worth* (Com. App.) 215 S. W. 831.

If broker who acted as agent for both parties to real estate exchange transaction was a party to or had notice of the fraud that induced consummation of transaction, he is in no position to assert a lien for commissions on one of the tracts of land conveyed, reserved in the deed after the transaction had been rescinded because of such fraud, though rescission did not specifically provide for the cancellation of commission notes. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

A lien on land may be established in cases where there is no personal liability. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

Contract by owner of lot abutting on street, granting paving contractor, "in consideration of said improvements to and upon said premises, and the fact that thereby the value thereof will be enhanced in excess of the cost \* \* \* a mechanic's lien on said premises to secure the payment of indebtedness," held to give the contractor an enforceable lien on the abutting property of the owner to secure the owner's indebtedness to the contractor for paving the street, notwithstanding that the work was not done on the property itself, and notwithstanding that the lien was miscalled a "mechanic's lien." *Dabney v. Schutze* (Com. App.) 228 S. W. 176.

Where notes recited that they were secured by a deed of trust on certain land, and where deed of trust purporting to secure payment of such notes was forged, one who received notes in part payment of the purchase price for other land on the strength of the recitals in notes and deed of trust as to the execution of such deed of trust to secure notes held entitled to an equitable deed of trust lien on the land, though no deed of trust was in fact executed. *Rea v. Luse* (Com. App.) 231 S. W. 310.

**2. Waiver or release of lien in general.**—A lien may be waived by express agreement, or by implication from the facts inconsistent with its continued existence. *McBride v. Beakley* (Civ. App.) 203 S. W. 1137.

The rule that a lienor's delivery of possession is a waiver of his lien originated in case where the lien itself was dependent upon the possession, and does not apply where possession is not an essential to the existence of the lien. *Id.*

One will not be held to have intentionally waived a lien unless the intent is expressed or is plain and clear; the presumption always being against it. *Id.*

By Bankruptcy Act 1898, § 67 (U. S. Comp. St. § 9651), all liens obtained within four months prior to the adjudication in bankruptcy, whether voluntary or by process of a state court, and whether the proceedings in bankruptcy be voluntarily or involuntarily begun, are vacated by the adjudication of bankruptcy. *Archenhold v. Schaefer* (Civ. App.) 205 S. W. 139.

A county which contracted with a construction company for completed bridges, and accepted a bond as surety for the contractor's faithful performance, thereby waived its right, if it had any, to invoke the doctrine of equitable liens on property sold the contractor by third parties. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

If broker who had acted as agent for both parties to real estate exchange transaction was a party to or consented to rescission of transaction on ground that it had been induced by fraud, he could not enforce the lien on land of defrauded party, reserved in the deed by which the land was conveyed. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

**3. Vendor's lien—In general.**—There is no right to a vendor's lien to secure purchase price of chattel after delivery. *Park v. South Bend Chilled Plow Co.* (Civ. App.) 199 S. W. 843.

A vendor's lien is but an incident to the debt, and follows the debt in whatever form it may be evidenced. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

**4. — Lien reserved in contract or conveyance.**—A general warranty deed for a stated consideration, one-half paid in cash and the balance evidenced by a note and retaining a vendor's lien therein for the enforcement of such balance, is an executory contract under which superior legal title remained in the vendor. *Walls v. Cruse* (Civ. App.) 217 S. W. 240.

**5. — Implied or equitable lien.**—A vendor's lien exists to secure payment of purchase money on real estate sold on credit, even though no such lien is expressly retained. *L. C. Denman Co. v. Standard Savings & Loan Ass'n* (Civ. App.) 200 S. W. 1109; *Luse v. Rea* (Civ. App.) 207 S. W. 942.

In action for compensation under party wall agreement, where plaintiff pleaded lien and sought foreclosure and where amount to become due was in nature of purchase price of undivided interest in wall, defendant's liability would create an equitable lien on his property. *McCormick v. Stoneheart* (Civ. App.) 195 S. W. 883.

Vendor who retained lien became entitled, on the principle of subrogation, to implied vendor's lien springing out of contracts of purchase and assumption by defendants from original vendee and his assignee. *L. C. Denman Co. v. Standard Savings & Loan Ass'n* (Civ. App.) 200 S. W. 1109.

In suit to enforce implied vendor's liens upon interests in lease, etc., it could not be contended that property which defendants purchased from original purchaser was subject to any kind of implied lien to secure payments of debts due by original purchaser for personal property purchased by him from plaintiffs. *Blair v. Armstrong* (Civ. App.) 204 S. W. 465.

Where purchase-money notes recited that they were secured by deed of trust lien on land, one who took notes believing they were in fact so secured is entitled to equitable lien on the land, notwithstanding no deed of trust was in fact executed. *Luse v. Rea* (Civ. App.) 207 S. W. 942.

Where grantee took a deed in blank and on sale by him filled in the name of his purchaser, the first grantee had an implied equitable lien, though not connected with the record title. *Gray v. Fenimore* (Com. App.) 215 S. W. 956.

Where plaintiff company furnished material for a plant to the value of \$1,900, and the owner sold the plant to defendant, the deed reciting it was subject to \$1,900 against the plant, the \$1,900 being part consideration for the conveyance, for payment of the amount of any balance due equity implied a lien on the plant and land in favor of plaintiff, though the deed did not expressly reserve one. *Burton-Lingo Co. v. Standard* (Civ. App.) 217 S. W. 446.

Where land was sold partly for cash and partly for other land, and the seller did not know of mortgage on such other land created by the buyer conveying it, and such mortgage was foreclosed, the seller could sue, not only for a money judgment, but also unless the right of a third party had intervened for a judgment fixing a lien on the land sold. *Smith v. Price* (Civ. App.) 230 S. W. 836.

**6. — Operation and effect.**—Where a lien is retained in a note or deed, or contract to convey title or bond for title, the legal title is in the vendor, and the equitable title is in the vendee. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287; *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

The vendor's lien reserved by a purchase-money note is substantially a mortgage. *Pope v. Beauchamp* (Com. App.) 206 S. W. 928.

Where deed expressly retains the vendor's lien to secure the purchase money or the unpaid part thereof, the contract is executory, and the vendor retains the superior title upon which he may recover upon purchaser's failure to pay. *Waco Development Co. v. McNeese* (Civ. App.) 209 S. W. 464.

As between a vendor and vendee, a deed reserving an express vendor's lien is regarded as executed and not executory, except so far as necessary to collect the purchase money. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Though a vendor's lien is retained in a deed, the vendee is entitled to possession and holds exclusively for himself, and not as agent or vendee for any one, but as the true owner against the world. *Id.*

A vendor's lien retained to secure notes given for the purchase price of land was a mere incident to the debt itself and could be developed into title sufficient to sustain an action in trespass only by foreclosure, sale, and purchase. *Burns v. Dyer* (Civ. App.) 230 S. W. 457.

7. — **Amount and extent of lien.**—Where purchaser before maturity, etc., of notes given partly for purchase price of land, had knowledge by recitals therein that vendees, husband and wife, occupying premises as a homestead, gave deed to vendor, who in turn deeded to husband, held purchaser was entitled to judgment for full amount of notes, but only to lien on premises for amount owing on land at date notes were executed. *Thomas v. Ash* (Civ. App.) 199 S. W. 670.

8. — **Property subject to lien.**—Where vendor sells plant with machinery located thereon subject to vendor's lien, and machinery is subsequently removed and new machinery installed, the new machinery takes the place of the old machinery, and becomes subject to the lien, on the ground that depreciation of vendor's security will not be permitted. *Van Valkenburgh v. Ford* (Civ. App.) 207 S. W. 405.

Where two parcels of land, one of which was subject to vendor's lien notes, were conveyed to a single grantee, and the habendum clause of the deed recited that it was agreed that the vendor's lien should be retained until all the notes were paid, held that the lien was spread over both parcels. *Lanham v. West* (Civ. App.) 209 S. W. 258.

A vendor who accepted from purchaser in part payment of the purchase price third person's notes, which recited that they were secured by deed of trust on other land, and did not appear to be purchase-money notes, held not entitled to a vendor's lien on such other land to secure payment of the notes. *Rea v. Luse* (Com. App.) 231 S. W. 310.

9. — **Priority of lien.**—Contract for sale of machinery and purchase-money chattel mortgage construed, and held that sellers had lien on proceeds of policy insuring machinery superior to one holding vendor's lien on land upon which machinery was situated, and who had an assignment indorsed on policy after a loss occurred. *Walter Connolly & Co. v. Hopkins* (Civ. App.) 195 S. W. 656.

Purchase-money notes, to secure payment of which a vendor's lien is retained in deed, are a first lien as against a deed of trust given by the grantee. *Houston v. Johnson* (Civ. App.) 197 S. W. 1121.

An instrument reciting "I further agree that said note for \$2,000 shall be secured by the first lien on said lot 9 \* \* \* and be a prior lien to the \$600 note," held only a subordination of the vendor's lien on lot 9, leaving it a first lien on lot 10; such two lots being both covered by the vendor's lien and a trust deed securing the \$2,000 note. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

In broker's action on commission notes and to foreclose lien reserved in deed, where broker's lien as shown by facts pleaded was inferior to vendor's lien for purchase price, vendors were entitled to show they had a lien superior to that of broker, and to have jury pass on such issue. *Speer v. Dalrymple* (Com. App.) 222 S. W. 174, reversing judgment (Civ. App.) 196 S. W. 911.

Creditors who attached the interest of their debtor in certain lands, in which the record showed he had only a vendor's lien, but which in fact had been reconveyed to him by an unrecorded deed, thereby secured a lien upon the title given him by the deed, but such lien was subject to the vendor's lien, which he had assigned by unrecorded assignment to another. *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

Where one for whose use and benefit the title to land was held by another subject to a deed of trust and a vendor's lien subordinate thereto purchased coupon notes for interest on the debt secured by the deed of trust, with intention that the debt evidenced by the notes should not be paid, and that the lien held to secure them should not be extinguished, but preserved for its benefit, the notes were not paid, and the lien not extinguished, as no injustice would be done the holder of the vendor's lien. *West v. McCelvey Loan & Investment Co.* (Civ. App.) 229 S. W. 913.

10. — **Assignment of lien or claim for purchase money.**—Defendant, who pursuant to agreement with vendee to carry debt purchased notes given in payment of balance of purchase price, held entitled to enforce vendor's lien, securing notes, against entire tract, although vendee agreed with his mother, who furnished money for first payment, that she should have part of land. *Nobles v. Long* (Civ. App.) 202 S. W. 752.

As vendor may pass his superior legal title to the holder of an unpaid purchase-money note, the assignee of the note and superior title may likewise pass such title to a subsequent assignee of the same unpaid note. *R. B. Godley Lumber Co. v. C. C. Slaughter Co.* (Civ. App.) 202 S. W. 801.

The fact that a transfer of a purchase-money note and lien and vendor's superior legal title occurs at different dates would not affect the transferee's right to recover the land. *Id.*

The equitable rule that assignee of a vendor's lien with notice that part of land had been sold subsequent to assignment might be required to so act as not to deprive purchaser of his equitable right to have land not conveyed first subjected to payment of debt is not applicable where lienholder releases part of security without knowledge of sale. *Biswell v. Gladney* (Com. App.) 213 S. W. 256.

Where land was sold, and vendor's lien notes given for the price, and the vendor transferred three of the notes to a third person, the reconveyance of the land by the buyer to the vendor did not effect a merger extinguishing the vendor's lien. *H. O. Wooten Grocer Co. v. Lubbock State Bank* (Com. App.) 215 S. W. 835.

The purchase of a vendor's lien note carries with it the lien, and the transferee of such a note can take a written assignment and place it of record, thus securing himself against wrongful release by the original owner. *Id.*

Purchasers of second series of vendor's lien notes resulting from resale of land after reconveyance to the seller held chargeable with duty to inquire as to the ownership of the whole or part of the first series of vendor's lien notes resulting from the first sale, notwithstanding a declaration, in a transfer of part of the first series of notes, of the creation of second lien to secure other notes of the first series, though giving rise to a dubious inference they were then owned by the seller; the inference not being sufficiently cogent to be tantamount to a payment of the notes and release or extinguishment of the lien, particularly in view of the assumption of the indebtedness by the seller in the deed of reconveyance. *Id.*

Innocent purchaser of secured vendor's lien note may enforce it against the land, although it grew out of a simulated sale of a homestead made to raise a loan and though the person from whom he purchased was a purchaser with notice of the defect. *Brooker v. Wright* (Civ. App.) 216 S. W. 196.

One purchasing a secured vendor's lien note from an innocent purchaser may enforce it against the land, although he had notice before the purchase that the note arose out of a simulated sale of a homestead. *Id.*

Since the failure to record an assignment of a note and vendor's lien securing it leaves the assignor, according to the record, with only his lien in the land which is not subject to attachment, such failure does not give the attaching creditor of the assignor any right superior to the assignee, even if the assignment is an instrument whose recording is not only authorized under art. 6823, but is required under art. 6824 to be effectual against creditors and subsequent purchasers. *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

Though the failure to record an assignment of a note and the vendor's lien securing it would protect an innocent purchaser or creditor who relied upon a release or some affirmative act of the assignor to defeat the lien, such failure does not affect the right of the assignee, even against purchasers or creditors, where there is no affirmative declaration or equivalent act by the record owner of the lien. *Id.*

The transfer of vendor's lien notes to an assignee does not carry the vendor's superior title to the land. *Smith v. Tipps* (Civ. App.) 229 S. W. 307.

Where plaintiff, assignee of three vendor's lien notes, was transferee of the legal title of only one of the two vendors, plaintiff, after two of the three notes had become barred, could recover only half the land from the original purchaser, notwithstanding a disclaimer by the nontransferring vendor. *Id.*

11. — **Transfer of property by purchaser.**—Recitals of deed conveying land subject to a vendor's lien in consideration of a payment of \$10, and the transfer of the indebtedness of a third person to the grantee, held not to show an assumption by the grantee of the debt secured by the vendor's lien. *George v. Blumberg* (Civ. App.) 211 S. W. 309.

A grantee assuming payment of lien indebtedness for which his grantor is personally liable thereby becomes liable to and can be sued by the holder and owner of such indebtedness, but a purchaser who does not assume payment of the prior vendor's lien is not personally liable. *Allen v. Traylor* (Com. App.) 212 S. W. 945.

Where land was sold, resold to one who did not assume payment of the vendor's lien, and part of it again sold by him to defendant, who as part consideration assumed payment of the sum of \$4,784, with interest accrued and to accrue, representing part of the unpaid principal sum due on the vendor's lien notes, assuming and agreeing to pay on the principal and interest of the notes and an amount equivalent to \$23 a lot on each lot conveyed to him, defendant was liable to the holder of the vendor's lien notes for the specific amount on the principal and interest thereof. *Id.*

A subsequent purchaser who assumed and agreed to pay the vendor's lien notes given by his immediate grantor is liable to the holder of the notes as principal, not as surety. *Strickland v. Higginbotham Bros. & Co.* (Civ. App.) 220 S. W. 433.

A purchaser who gave vendor's lien notes cannot sue a subsequent purchaser who assumed the notes on those notes, though he retained a lien on the land; his only right under the lien being to redeem in case of foreclosure of vendor's lien. *Id.*

The institution of suit by the vendor against a subsequent purchaser from the purchaser who made the notes is a sufficient acceptance of the assumption of the notes by the subsequent purchaser. *Id.*

The retention by the purchaser who gave vendor's lien notes of a lien on property after he sold to another who assumed the payment of the notes does not make the liability of the subsequent purchaser that of surety only. *Id.*

A vendor who reserves a lien for the purchase money has superior title to the purchaser, and a subsequent purchaser from the vendee acquires only the vendee's title, and cannot claim the land against the vendor or his successor without showing payment of the purchase money. *Rooney v. Porch* (Civ. App.) 223 S. W. 245.

Where purchaser by his deed acknowledged and continued in full force and effect a vendor's lien securing purchase-money note, neither he nor subsequent purchasers claiming under him with full knowledge of all the facts could deny the existence of the note, on the ground that it had been discharged, by merger in that it had come into the purchaser's possession. *Beauchamp v. Zellmer* (Civ. App.) 227 S. W. 965.

A purchaser of land assuming the payment of outstanding vendor's lien notes given by prior owners becomes, as between himself and the prior owners, the principal obligor, and they his sureties. *Hall v. Conine* (Civ. App.) 230 S. W. 823.

12. — **Waiver, loss or discharge of lien.**—Where innocent purchaser of vendor's lien note was also a purchaser of property at its sale under trust deed, although sale was void because purchaser had notice that prior deeds were intended as mortgages, he could still foreclose lien of his vendor's lien note to enforce payment of note. *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

Where a purchaser conveyed to a corporation subject to vendor's lien, and suit by vendor was dismissed, corporation agreeing to reconvey land if amount due was not paid, and on failure to make payment deeds held in escrow were delivered to vendor and recorded, corporation and vendee refusing to deliver possession, held, that vendor had not lost rights as holder of superior title. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Vendors prosecuting a suit to final judgment under a claim of superior title as vendors thereby waived their right of foreclosing a vendor's lien in a subsequent action, although they lost in the first action. *Marshall v. Mayfield* (Com. App.) 227 S. W. 1097.

Where vendor retained lien to secure payment of purchase price, he may, on purchaser's default, either elect to disaffirm the contract and sue for the land, or elect to affirm and foreclose the lien. *Gambrell v. Tatum* (Civ. App.) 228 S. W. 287.

Grantor who retained vendor's lien, though agreeing with the grantee after his default in payment, to undertake to find some one who would purchase the property and relieve the grantee from certain indebtedness, could, on a disagreement between them as to what indebtedness such a purchaser should assume, abandon effort to find a purchaser, and sue for recovery of the property for the default in payment. *Dollins v. Brooks* (Civ. App.) 229 S. W. 344.

Land was sold for \$3,000, \$1,000 paid in cash furnished to the purchasers for that purpose by defendant. The purchasers, being unable to pay the \$2,000 balance, contracted to execute two deeds, one to the vendors, conveying to them an undivided half interest in the land in consideration of their canceling the notes for such balance, and the other to defendant, conveying to him the other undivided half interest, defendant to pay \$500 to the sellers on the execution and delivery of the deeds. The purchasers placed the vendors and defendant in possession of the property through a tenant who attorned to each of them as owners and paid rent to each for the use of the property. Held, vendors were not estopped to claim that defendant had abandoned his contract rights by his letter advising vendors to go ahead and foreclose their vendor's lien, by the fact that after the writing of such letter the vendors received rent on the property, on the theory that any claim of right by vendors under the letter would have the effect to take away from defendant, as co-owner, his interest in the property; for defendant was not a co-owner; his being thus placed in possession not being a conveyance to him of any interest in the property. *Daugherty v. Roasberry* (Civ. App.) 229 S. W. 924.

Where a vendor sold the land retaining title to secure payment of purchase-money notes representing the entire agreed consideration none of which were ever paid by the purchaser a subsequent sale by the vendor to another purchaser cancels the contract of sale to the first purchaser and vests the legal and equitable title in the second purchaser. *Head v. Moore* (Civ. App.) 232 S. W. 362.

13. — **Payment, release or satisfaction.**—Vendee cannot avail himself of the right to partial release of vendor's lien without strict compliance with conditions of the deed governing such right. *White v. Tegnell* (Civ. App.) 206 S. W. 213.

Under deed containing provision for partial release of vendor's lien, vendees were entitled to such a release upon payment of one of purchase-money notes, though upon resale of part of land to be released from lien they had not tendered money received from such resale to vendors and demanded release. *Id.*

Where the receiver of a corporation which had conveyed lands, retaining lien to secure the discharge of vendor's lien notes by the grantee, executed a release to which the holder of the vendor's lien notes was not a party, such release is not binding on the holder of the vendor's lien notes, and does not constitute evidence of the intention in the minds of the parties to the conveyance. *Lanham v. West* (Civ. App.) 209 S. W. 258.

Where a vendor of land agreed to release any part of land sold by vendee upon payment of \$25 per acre on land to be released, vendee could not, after making a general payment on notes without asking that such payment be applied to release of some designated tract, thereafter claim that it should be so applied. *Vineyard v. Miller Land Co.* (Civ. App.) 209 S. W. 693.

Where vendor agreed to discharge his lien upon any designated tract of land upon payment of \$25 per acre out of proceeds of such particular tract, equity would protect purchaser from vendee of particular tract of land who had furnished money paid to vendor against any lien of vendor, if said payment amounted to 25 per acre, but a purchaser who had not paid as much as \$25 per acre had no right to demand that previous payments made by land company on notes in excess of \$25 per acre for other lands sold should be applied to discharge of lien on his land. *Id.*

Payment by a purchaser of notes secured by vendor's lien after the vendor had conveyed the property to another does not affect the title of the subsequent purchaser. *Rooney v. Porch* (Civ. App.) 223 S. W. 245.

In action on purchase-money notes and to foreclose vendor's lien securing notes, where defendants tendered amount due prior to commencement of the suit and also tendered amount in court at time of suit, court properly refused to enter judgment and foreclosure of lien on the notes not due; there having been no default subjecting the undue notes to payment. *Easley v. Easley* (Civ. App.) 229 S. W. 343.

A grantee from whom the grantor seeks to recover the land conveyed because of default in payment of balance of purchase money, for which a vendor's lien was re-

tained, destroys the legal effect, as a defensive tender, of his offer to pay the balance of the purchase money, by alleging conversion of machinery, asking that its value be deducted from amount still due, and offering to pay the remainder only. *Dollins v. Brooks* (Civ. App.) 229 S. W. 344.

As a matter of law, the purchaser of land could apply the proceeds of a federal loan, the procuring of which was a condition precedent to the obligations of the contract, to the payment of any of the purchase-money notes he might choose, where the contract did not in express terms provide which note should be paid. *Faulkner v. Otto* (Civ. App.) 230 S. W. 447.

A purchaser of land assuming the payment of outstanding vendor's lien notes given by prior owners becomes, as between himself and the prior owners, the principal obligor, and they his sureties, and the purchase of the notes by him or any one for his benefit constitutes a payment of the debt and merges the lien in the title. *Hall v. Conine* (Civ. App.) 230 S. W. 823.

H. purchased certain land, assuming the payment of outstanding vendor's lien notes executed by prior owners. Subsequently he executed to plaintiffs a deed of trust conveying to them said land and a stock of merchandise and authorizing them, after 90 days, to sell both and distribute the proceeds among H.'s creditors, any surplus to be returned to H. Plaintiffs, as trustees, afterwards sold the stock of merchandise, and with the proceeds acquired all of the notes issued by the prior owners. Held, the presumption was that plaintiffs, as trustees, took up the notes for the benefit of the trust estate, thus extinguishing the lien and releasing the prior owners from further liability as sureties on the notes. *Id.*

Where plaintiff holding a vendor's lien note against defendant sent a release to the representative of a loan company to take up the note in making a loan on the land to the amount of the difference between the purchase price of a part thereof sold to a third party and the indebtedness to plaintiff, and the representative procured checks both from the third party and from defendant, but misappropriated them a judgment for defendant cannot be sustained on the ground that plaintiff's negligence in delivering the release was the proximate cause of the injury to defendant, where the representative did not use it to obtain defendant's check, which was given solely because the third party's attorney approved the transaction. *Shaw v. First State Bank* (Com. App.) 231 S. W. 325, affirming in part and reversing in part (Civ. App.) *First State Bank of Abilene v. Shaw*, 214 S. W. 442.

The fact that vendor's lien notes are long overdue is not proof that they have been paid and that the vendor has released the lien. *Head v. Moore* (Civ. App.) 232 S. W. 362.

14. **Marshaling.**—See *Fields v. Fields* (Civ. App.) 216 S. W. 195.

If one, who, pursuant to agreement with vendee to carry debt, purchased purchase-money notes, was entitled to judgment for amount of such notes, he was also entitled to judgment foreclosing vendor's lien securing notes. *Nobles v. Long* (Civ. App.) 202 S. W. 752.

Where vendor owned five lots, four of which were subject to trust deed, and he sold the fifth lot and three others on consideration that the vendee discharge the trust deeds on all of them, and the mortgagee without his consent released one lot and then sought foreclosure, the vendor was entitled as against vendee to a vendor's lien on the two unincumbered lots, until the mortgage lien was discharged. *Nix v. Albert Pick & Co.* (Civ. App.) 203 S. W. 1112.

In suit against a decedent's estate to have sold land of the estate subject to plaintiffs' note for the purchase money thereof secured by deed of trust on the land, a vendor's lien thereof being preserved and in effect recited in the note and deed of trust, and plaintiff's claim as evidenced by the note and deed of trust having been established in the county probate court, held, there was no pleading or proof justifying sale of remainder of the land before sale of the portion which a later lienholder claimed should be last sold to protect her claim. *Fryckberg v. Scott* (Civ. App.) 213 S. W. 21.

Where persons jointly interested in land, as an accommodation for one of the joint owners, mortgaged the land, the accommodation mortgagors are entitled to require the holders of notes to resort first to the interest of the accommodated mortgagor in the property. *Harris v. Hamilton* (Com. App.) 221 S. W. 273, reversing judgment (Civ. App.) 185 S. W. 409.

15. **Enforcement of vendor's lien.**—Where vendor brought an action against purchasers of vendee to foreclose, there was no election of remedies, and he could subsequently sue the vendee on an unpaid vendor's lien note. *Rector v. Brown* (Civ. App.) 208 S. W. 702.

If vendor sues to foreclose his lien, he has elected to affirm the contract and rely upon his debt and lien, and after such suit stands in the position of a mortgagee, and cannot rescind the contract as executory. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

Where vendor brought suit to foreclose his lien against maker of purchase money notes, even if he had made a party to the proceeding maker's grantee, who was in military service, the latter could not recover under *Soldiers' and Sailors' Civil Relief Act*, § 301 (U. S. Comp. St. § 3078¼f), prior payments of purchase money as damages for vendor's recovery of the property without proceeding under such act, since vendor by lien foreclosure elected to affirm contract and to treat grantee as owner and to assume the position of mortgagee, so that grantee's rights were governed by section 302 (U. S. Comp. St. § 3078¼ff), and not section 301. *Id.*

Where vendor violated *Soldiers' and Sailors' Civil Relief Act*, § 302 (U. S. Comp. St. § 3078¼ff), in foreclosing lien on soldier's property because of nonpayment of notes which soldier had guaranteed to pay upon conveyance of property to him by the maker without making soldier a party to the proceedings, soldier's right to damages was not

affected by fact that maker was a party, and that soldier's father who was made a party was his agent and in possession, or by the fact that soldier's brother was a co-owner; the right under the statute being personal to the soldier in view of subdivision 3, and sections 203, 204 (U. S. Comp. St. §§ 3078¼d, 3078¼dd). *Id.*

While filing of suit to foreclose vendor's lien might extend time to pay the debt, it did not waive vendor's right to rescind or destroy his legal title. *Walls v. Cruse* (Civ. App.) 217 S. W. 240.

A subsequent purchaser who assumed and agreed to pay the vendor's lien notes given by his immediate grantor is liable to the holder of the notes as principal, not as surety, and he can be sued without joining his grantor. *Strickland v. Higginbotham Bros. & Co.* (Civ. App.) 220 S. W. 433.

Where the vendor of land had granted extensions of the lien not without payment of interest and permitted the purchasers to remain in possession for 15 years without any return, it was not inequitable, in suit in trespass to try title or in the alternative to foreclose the lien, to render judgment for return of the land, where the purchaser had not been able to secure any offer to purchase or loan on the land until after judgment was rendered. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

Purchaser's grantee under quitclaim deed, against whom no personal or money judgment was asked in the seller's suit to recover of the buyer on vendor's lien notes and to foreclose vendor's lien, is not in position to protest the foreclosure of the lien. *Riggs v. Baleman* (Com. App.) 228 S. W. 179.

In suit to foreclose vendor's lien, brought against the buyer and his grantee, the grantee's answer admitting title to land was in the state, and he a naked trespasser without interest, the grantee, after such admission, cannot be permitted to come in and litigate title to the land. *Id.*

The buyer of land from defendant who bought from plaintiff deraigned title from plaintiff, and was a proper and necessary party to plaintiff's suit to foreclose vendor's lien. *Id.*

A note from grantee to grantor, if given as part of the consideration of the purchase, for which vendor's lien was retained, is canceled by operation of law, by judgment in grantor's favor in action by him to recover the land for default in payment of balance of purchase price. *Dollins v. Brooks* (Civ. App.) 229 S. W. 344.

In suit to foreclose vendor's lien, wherein plaintiffs pleaded abandonment by a defendant by letter to them of his rights under a parol agreement to acquire an interest in the property, the court having confined trial to the single issue of abandonment of the agreement by such defendant, held that judgment for plaintiffs should not cancel such defendant's deed of trust, constituting a second and subsequent lien on the property and giving defendant until the property was sold under foreclosure a right of redemption. *Daugherty v. Roasberry* (Civ. App.) 229 S. W. 924.

The holder of a lien upon tracts of land acquires no title thereto without foreclosure by proceedings in which all persons who had acquired interests in the land were made parties. *Pope v. Witherspoon* (Civ. App.) 231 S. W. 837.

16. — **Defenses.**—In a suit on vendor's lien notes, the purchaser of land can interpose as a defense the illegality of the contract, by which the equitable title was conveyed to him and the lien retained, to defeat recovery on the lien notes. *Stone v. Robinson* (Civ. App.) 218 S. W. 5.

17. — **Limitations.**—See notes under arts. 5694, 5695.

21. — **Sale and proceeds.**—In action to restrain defendant from subjecting plaintiff's stock held as collateral to balance due on vendor's lien notes after foreclosure, evidence held not to sustain a finding that land sold for an inadequate price. *Cattlemen's Trust Co. v. Cantrell* (Civ. App.) 196 S. W. 354.

Where assignee of judgment foreclosing vendor's lien, by agreeing to release owners of the land from liability on such judgment in consideration of their refraining from bidding at foreclosure sale and by later repudiating such agreement immediately prior to the sale, when it was too late for owners to bid, prevented owners from bidding at sale, owners could have sale set aside for fraud; effect of express and unconditional renunciation of contract being to entitle owners to treat contract as terminated. *Moore v. Jenkins*, 109 Tex. 401, 211 S. W. 975.

In suit to foreclose vendor's lien against vendee and one purchasing the land from him subject to the lien, but not assuming the lien, in which suit no apportionment of the costs between defendants was made by the decree, it was the right of such purchaser to have the costs satisfied out of the proceeds of the foreclosure sale before applying such proceeds to paying the lien. *Gough v. Jones* (Com. App.) 212 S. W. 943.

Mere inadequacy of price for which land was sold on foreclosure of vendor's lien notes does not justify setting aside the sheriff's sale. *Strickland v. Higginbotham Bros. & Co.* (Civ. App.) 220 S. W. 433.

On foreclosure of a vendor's lien, an agreement by the vendor's attorney that if one jointly liable on the judgment would refrain from bidding the vendor would release him from further liability was a fraud in law, as preventing or chilling the bidding, but such agreement did not make the sale absolutely void, but merely voidable, and it was subject to recognition by the parties as valid, and, so long as it so stood, a sale of other land under an alias execution for a deficiency was valid as between the parties, and could not be attacked collaterally. *Ives v. Culton* (Com. App.) 229 S. W. 321.

Failure to give notice to owners of land, as required by art. 3757, of sale under judgment foreclosing vendor's lien, renders the sale voidable. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

Where judgment purporting to foreclose vendor's lien was rendered on a note barred by limitations, and without any citation to or appearance by the landowners,

and sale thereunder was without notice to them, they seeking to avoid the judgment, sale need not offer to repay what was paid by the purchaser, who bought through an agent knowing of the fraud. *Id.*

22. — **Title and rights of purchasers at sale.**—Purchaser at foreclosure of a first lien, a vendor's lien, acquires the land subject, but not subordinate, to rights of holder of second lien, a mortgage, who was not party to foreclosure. *Houston v. Johnson* (Civ. App.) 197 S. W. 1121.

24. **Right to recover possession of land in general.**—Vendor who had retained superior title and elected to recover land was entitled to recover where purchase-money notes had not been paid. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

26. **Lien of purchaser of land for purchase money.**—On sale of land to enforce equitable lien of purchaser under contract for sale of land for purchase money paid, surplus arising from sale of land belongs to owner of land. *Speer v. Hansen* (Civ. App.) 213 S. W. 324.

32. **Attorney's lien.**—Agreement with attorneys who were to collect notes that they should have collection fees therein provided held equitable assignment to them of interest in fund, or, if not, equitable lien. *Ives v. Culton* (Civ. App.) 197 S. W. 619.

In suit involving priority between prior unrecorded deed and judgment lien, held that plaintiff attorney, who knew of conveyance, did not acquire lien for payment of his interest. *Id.*

Where client assigned note to attorney as collateral for specified indebtedness, and not for collection, or to secure payment of fees for services rendered, there was no attorney's lien on note for such services. *Thomson v. Findlater Hardware Co.*, 109 Tex. 235, 205 S. W. 831, 2 A. L. R. 1486.

Evidence held not to support finding that defendant attorney who filed a special plea by way of intervention had no interest in judgment sought to be canceled, so that judgment creditor could compromise the entire judgment without consent of attorney. *Irby v. Andrews* (Civ. App.) 211 S. W. 290.

In Texas an attorney at law has not been given a general lien on a cause of action or judgment or money until collected and in his hands. *Finkelstein v. Roberts* (Civ. App.) 220 S. W. 401.

In suit to cancel oil lease executed by plaintiffs, husband and wife, wherein their attorney intervened to enforce lien on leasehold in hands of defendants, declaration of equitable lien on leasehold interest of a defendant in favor of attorney held erroneous in view of contract between attorney and plaintiffs, contemplating attorney should acquire no vested interest prior to forfeiture of lease and second lease for best price obtainable. *Id.*

37. **Liens incident to partnerships.**—Law fixes lien for interest of partner in personal property of firm, and in suit by partner to recover fifth interest in tools and profits, no evidence was necessary, except that there was partnership property in hands of defendant, and that plaintiff owned an interest. *Levin v. Steinle* (Civ. App.) 200 S. W. 1137.

39. **Liens incident to tenancies in common.**—Upon payment of taxes, a co-owner acquires right to exact contribution, which right is secured by a lien upon his cotenant's interest in the land. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

42. **Pledges.**—Where the assignee of purchaser's contract for a resale of land at a profit assigned such right to secure payment of his note before he had obtained the purchaser's assignment of his right to recover a deposit under contract of sale, the holder of note had no claim upon the deposit. *J. M. Frost & Sons v. Cramer* (Civ. App.) 199 S. W. 838.

If officers of debtor and creditor banks settled all terms regarding payment of drafts and giving of note and security, and nothing remained except performance, contract was within class which may be enforceable as an executory agreement. *Houston Nat. Exch. Bank of Houston v. Gregg County* (Civ. App.) 202 S. W. 805.

The assignment, by client to attorney, of note as collateral for a specified indebtedness, did not constitute an equitable assignment of client's interest in the note to the extent of an indebtedness to attorney for professional services not included in specified debt, where parties did not agree that pledged note was to cover such debt. *Thomson v. Findlater Hardware Co.*, 109 Tex. 235, 205 S. W. 831, 2 A. L. R. 1486.

Where note given by railway company for money borrowed was void for failure of officers of company to comply with arts. 6717, 6727, defendant holder would have no right to enforce notes received by company for stock and pledged by it as collateral, although defendant had a cause of action against company on implied promise to pay money received. *Lumpkin v. Brown* (Civ. App.) 206 S. W. 217.

Where collateral has been transferred to secure a debt which remains unpaid, it may by agreement of the parties thereto be made to apply also to other debts. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 218 S. W. 1109.

It is not essential to the validity of a pledge that it be specifically mentioned in the note secured thereby, and a lien can be foreclosed on stock which the evidence showed was pledged as collateral security for the note, though not mentioned in the note. *Stan-ton v. Security Bank & Trust Co.* (Civ. App.) 232 S. W. 854.

43. — **Title of pledgor.**—That one intrusted jewelry to another for safe-keeping does not authorize the other to pledge it, and he cannot divest the owner of ownership by pledging it, even to an innocent pledgee. *City Nat. Bank of Eastland v. Conley* (Civ. App.) 228 S. W. 972.

44. — **Pledgee as bona fide purchaser.**—Where party sold piano and received purchase price, and thereafter pledged another piano, which he did not own, to secure de-



livery, and pledgee subsequently received notice of ownership of pledged piano, and later entered into agreement with seller to accept pledged piano in place of one he bought, the pledgee was not a purchaser without notice. *Renfro v. Hall* (Civ. App.) 202 S. W. 218.

48. — **Conversion of property before default.**—Where a bailee, holding cotton liners in trust for the owner as security, violates the trust by selling the property and placing it beyond the owner's reach, the measure of damages for conversion is the highest market price of the property between the date of the conversion and the filing of suit. *Early-Foster Co. v. Mid-Tex Oil Mills* (Civ. App.) 208 S. W. 224.

In an action against a bank for damages for conversion of corporate stock placed as collateral to a note, the measure of damages was the value of the stock at the time converted, less the amount of the note. *First Nat. Bank v. Kerr* (Civ. App.) 225 S. W. 1106.

50. — **Payment or discharge of debt.**—Where assignment from plaintiff of balance due plaintiff as subcontractor for materials was held by bank as a mere pledge of collateral to secure payment of certain indebtedness due it by plaintiff, the cashing by the bank of a check for less than the amount claimed by plaintiff, which check had been sent the bank by the contractor and recited that it was in full, when there was a dispute as to whether the contractor should pay liquidated damages for delay, did not constitute an accord and satisfaction. *Llano Granite & Marble Co. v. Hollinger* (Com. App.) 212 S. W. 151.

Where subcontractor of road construction contract made contract whereby third party constructed road with funds furnished by subcontractor, and deposited third party's note with original contractor as collateral to secure advances to third party by original contractor for subcontractor, any act by original contractor, as far as receiving payment, was binding on subcontractor. *McFarland v. Ray McDonald Co.* (Civ. App.) 213 S. W. 946.

Where the holder of a note has collateral to secure its payment, for the purpose of collection and application to the debt the collateral is the property of the holder of the note, and if he holds it as security for payment of more than one debt, he may, in the absence of contrary agreement, apply such proceeds as he may deem proper on the several debts. *Slaughter v. Texas Life Ins. Co.* (Civ. App.) 218 S. W. 1109.

52. — **Return of property on payment or other discharge.**—Where bank on payment of note delivered corporate stock held as collateral to the person who placed the stock with the bank, when it knew that the stock should be delivered to another, who was the true owner of the stock, it was guilty of conversion. *First Nat. Bank v. Kerr* (Civ. App.) 225 S. W. 1106.

53. — **Sale of property.**—The pledgee's right to sell collateral held by him to secure his debt, and the manner in which such right shall be exercised, are proper matters of contract, though, in the absence of an agreement, the law confers upon the pledgee the right to sell at public auction after due advertisement and after reasonable notice to the pledgor of the time and place of sale. *Haynes v. Western Union Telegraph Co.* (Com. App.) 231 S. W. 361, reversing judgment (Civ. App.) *Western Union Telegraph Co. v. Haynes*, 212 S. W. 260.

54. — **Actions to enforce right of action pledged.**—One to whom a vendor's lien note had been pledged as collateral security for a debt can foreclose the lien without first suing on the original debt. *Poythress v. Ivey* (Com. App.) 228 S. W. 157.

In a suit by the pledgee of a note to foreclose the vendor's lien securing it, before suit by him on the debt for which the note was pledged as collateral security, the equities between the maker of the note and the pledgor of the paper as to the excess after satisfying the original amount due by the pledgor can be adjusted by the court, and if the pledgor has no interest in the excess, pledgee can recover only enough to satisfy the balance due on the debt to which the pledge is collateral. *Id.*

In an action to recover moneys advanced under the provisions of an assignment of an interest in a life insurance policy, a petition setting out the instrument, and alleging its execution and that its purpose was to secure the repayment of sums advanced, and alleging the total amount of indebtedness, was sufficient. *Hicks v. Emerson-Brantingham Implement Co.* (Civ. App.) 229 S. W. 348.

56. **Subrogation.**—Indorsement of vouchers to bank, which advanced money to pay claims against railroad company of character mentioned in art. 6625, constituted assignment of vouchers to bank, which in consequence became subrogated to right of original holders. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

Subrogation is of two kinds, one by operation of law, other by contract. *Id.*

Tenant who redeems common property from incumbrance has right to contribution from his co-owners, and as between him and defaulting cotenants lien is not extinguished, but is kept alive for his benefit, and may be foreclosed upon failure of co-owners to reimburse him within reasonable time. *Johnston v. Johnston* (Civ. App.) 204 S. W. 469.

Subrogation may arise by agreement of the parties or by implication in equity to prevent fraud or injustice. *Aaron Frank Clothing Co. v. Deegan* (Civ. App.) 204 S. W. 471.

Where a county treasurer negligently issued checks to fictitious persons upon unauthorized warrants, which checks the county depository bank paid upon forged indorsements, the treasurer could not be subrogated to the county's rights against the bank, since public policy forbids that he profit by his own negligence. *Padgett v. Young County* (Civ. App.) 204 S. W. 1646.

"Subrogation" is a doctrine of equity and is the substitution of another person in place of a creditor, so that the person in whose favor it is applied succeeds to the rights

of the creditor in relation to the debt. *Sanger Bros. v. Ely & Walker Dry Goods Co.* (Civ. App.) 207 S. W. 348.

Right of subrogation does not necessarily depend upon privity of contract between the one paying the debt and the creditor or debtor, but arises from the nature of the transaction. *Miller v. Guaranty Trust & Banking Co.* (Civ. App.) 207 S. W. 642.

Brokers, agents of both borrowers and lender in making a loan secured by a note and trust deed sought to be canceled because they failed to pay over the money to the borrower, cannot be subrogated to rights of holders of original vendor's lien notes on the mortgaged land until they have satisfied them, and the lender likewise cannot claim subrogation, since he is chargeable with the knowledge of all facts in the possession of his agents. *Steele v. Butler* (Civ. App.) 227 S. W. 506.

Where plaintiff in exchange of land delivered warranty deed, with covenant qualified as being subject to a mortgage, there being no agreement that the payment of such mortgage should constitute part of the consideration for the land, plaintiff was in the position of a surety on the debt which was to be paid out of the land, and before he could be subrogated to the rights of the mortgagee to sue he must pay the entire debt, and not only the interest. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

57. — **Discharge of incumbrances by purchasers of property.**—Where creditor under a trust deed bought at a sale and, to protect its title, purchased a prior mortgage which had been assumed by the grantor in the trust deed, it is entitled to be subrogated to the senior lien, but the land is the primary fund for its payment, and foreclosure must be first had, after which it may have judgment for any deficiency. *Farmers' & Merchants' State Bank of Ballinger v. Cameron* (Civ. App.) 203 S. W. 1167.

Where plaintiff loaned defendant money with which to buy land for defendant, without agreement for subrogation, and defendant paid part of the purchase money, giving notes for the rest which he ultimately paid, such payment extinguished the debt, and the doctrine of subrogation did not apply in favor of the lender. *Aaron Frank Clothing Co. v. Deegan* (Civ. App.) 204 S. W. 471.

A grantee named in deed which never became effective, because the grantor during his life retained control thereof, held not subrogated to the lien of vendor's lien notes against the property, which he discharged. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

The right of purchaser at execution sale to redeem from lien claims is restricted to those properties to which he acquired legal title, and by payment of liens on other property he is not subrogated to the judgment debtor's right therein, where not compelled to do so to save himself a loss, since the right of subrogation is never accorded to a mere volunteer. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

A purchaser of land from a trustee under a deed of trust at a sale, void by reason of art. 5693, was entitled under the doctrine of subrogation to the debt and the right to sue on the notes, if they were not barred by the provisions of arts. 5694, 5695. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

Where joint judgment debtor under a judgment foreclosing a vendor's lien paid the judgment and took an assignment and agreed to release owner from liability on such judgment in consideration of an agreement to refrain from bidding, but repudiated such agreement prior to sale, thus preventing owner from bidding, the assignee, who had paid the judgment, is entitled to be subrogated to the vendor's lien for the amount paid by him on the judgment, or to have such judgment enforced for his protection; the sale having been set aside for fraud. *Moore v. Jenkins*, 109 Tex. 401, 211 S. W. 975.

One who pays purchase price of homestead subject to vendor's lien, or part thereof, on behalf of purchaser under agreement with the purchaser that vendor's lien shall be retained as security for the money advanced, is entitled to be subrogated to vendor's rights to such lien, and where amount advanced is in excess of that secured by vendor's lien, he is subrogated to the extent of the amount of the lien. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

Where a deed was declared a mortgage, purchaser from the grantee, who had constructive notice of rights of original grantors, and hence was not an innocent purchaser, is entitled to be subrogated to the rights of original grantee to require the property to be subjected to vendor's lien notes in the hands of a third party, and upon the payment of such notes is entitled to enforce the lien against the property to the extent that he had to pay the notes, with interest, and to a lien on the land for taxes paid, with legal interest. *Harris v. Hamilton* (Com. App.) 221 S. W. 273, reversing judgment (Civ. App.) 185 S. W. 409.

A purchaser of an abandoned homestead was not entitled to invoke the equitable rule of subrogation, as against the judgment creditors of original grantors of the homestead, by reason of his payment to an innocent purchaser of a note, given in a simulated sale of the homestead to a third person, who reconveyed to the wife; payment of such note being assumed as part of the purchase price to the wife, there being no agreement by any one that he should be subrogated to the rights of the innocent purchaser of the note and lien securing the same. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

Where a number of tracts of land had been sold subject to a vendor's lien, and two of them were resold to a subsequent purchaser who discharged the portion of the lien note chargeable against his tracts, a subsequent incumbrancer for money loaned to the first purchaser has no right of subrogation against the subsequent purchaser, especially where it was not shown the money loaned was applied to the payment of the original vendor's lien note, though the subsequent incumbrance recited the existence of that indebtedness. *Pope v. Witherspoon* (Civ. App.) 231 S. W. 837.

58. — **Persons making advances for discharge of debt or incumbrance.**—On payment of note secured by deed of trust on horse, sureties held subrogated to the creditor's

rights under the deed of trust, and entitled to its foreclosure. *Billingsley v. West* (Civ. App.) 197 S. W. 1054.

One loaning money on a deed of trust which was used in paying off a builder's and mechanic's lien was subrogated to all the rights of the holders of the builder's lien. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

Where mortgagee is compelled to pay taxes to protect his lien, he is subrogated to the lien created by the tax assessment. *Lewis v. Powell* (Civ. App.) 205 S. W. 737.

A transaction by which a bank loaned money to contractors for payment of wages due laborers, which money was so used, held not to constitute an equitable assignment of labor debts, nor subrogate the bank to the laborers' claims against contractor's surety. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

A creditor, who pays off mortgages on property and takes a new mortgage in the aggregate amount, will be subrogated to the rights of the old mortgagees or against an existing inferior mortgage, although formal releases were made and recorded; the holder of the inferior mortgage, of whom the creditor had no actual knowledge, not being prejudiced thereby. *Sanger Bros. v. Ely & Walker Dry Goods Co.* (Civ. App.) 207 S. W. 348.

Payment of debt through payment of judgment in mechanic's lien suit and procuring assignment of judgment held to create privity of contract between assignor, assignee, and debtor, and a substitution of the assignee in the place of the assignor in its relation to the debt. *Miller v. Guaranty Trust & Banking Co.* (Civ. App.) 207 S. W. 642.

Bank which paid judgment in mechanic's lien suit and took assignment under an arrangement with one of judgment debtors that debt should be carried forward under a new arrangement held not a volunteer, but to be subrogated to rights of assignor, so that, where judgment was set aside because of lack of service upon one defendant, the original debt and lien would be recognized as a subsisting charge upon the property. *Id.*

Where community of which third wife was member made deferred payments on land purchased by community of husband and second wife, it was entitled to be subrogated to rights of vendor lienholder against land, whose claim it satisfied, or husband's heirs in partition could seek reimbursement equal to their inherited interest in funds expended in discharging debts against common property. *Guest v. Guest* (Civ. App.) 208 S. W. 547.

The right of subrogation is never accorded to a mere volunteer. *Houston v. Shear* (Civ. App.) 210 S. W. 976.

Bank, which advanced money to bridge building contractor to pay wages of laborers and later secured an order on county which retained balance due under bridge contract, held not subrogated to the rights of the laborers and not protected by contractor's bond as to the debt. *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

Defendant bank, which without authority, but in good faith, applied proceeds of plaintiff's notes left with it for collection to payment of notes of plaintiff and his brother to A., also left with it for collection, on which, as between plaintiff and his brother, the brother alone was obligated, is not entitled to subrogation to A.'s rights as against plaintiff, because this would deprive plaintiff of one of his legal rights without his consent, and without wrongdoing on his part, and because subrogation should be enforced only where it will benefit a meritorious claim without doing injustice to others. *First State Bank & Trust Co. of Hereford v. Vardeman* (Com. App.) 221 S. W. 585, affirming judgment (Civ. App.) 188 S. W. 695.

Where vendee conveyed the land to one who assumed payment of a note secured by a vendor's lien, and it was subsequently conveyed several times until conveyed to one who did not assume payment of the note, and the original vendor foreclosed to collect interest which he was compelled to pay on a mortgage existing at the time of the original deed, and interest due on the vendor's lien note, and purchased at the foreclosure sale, to which the vendee was not a party, and subsequently conveyed the land to another, undertaking to release the vendor's lien, the original vendee is entitled, upon being compelled by the original vendor to pay the note, to foreclose the vendor's lien upon the land, being subrogated to the rights of the original vendor. *Brown v. Farquhar* (Civ. App.) 225 S. W. 541.

Where vendee in his deed to another took an express assumption of payment from his grantee for a note secured by vendor's lien and expressly retained a lien to secure the same, he received more than a mere personal promise of the grantee to pay the note, and in substance took an express contract lien to secure the part of the purchase money he himself owed in the purchase of the land and for which he was obligated, and he thereby retained an interest in the land for which he was entitled to protection in a court of equity, if it could be done without injustice to others. *Id.*

Where, in fraud of the homestead rights of a wife, a consent decree was entered between the husband and his children by a former marriage, vesting title to land in the children subject to a life estate in the husband and subject to outstanding liens, the children, in seeking subrogation to the rights of creditors whose prior liens they had paid, did not come into court with such a case as appealed to the equitable powers of the court. *Bell v. Franklin* (Civ. App.) 230 S. W. 181.

Under a consent decree between a husband and his children by a former marriage, whereby, in fraud of the wife's homestead rights, title to land was vested in the children subject to a life estate of the husband and subject also to outstanding liens, payments by the children of taxes and interest on prior liens were voluntary, and they were not entitled to be subrogated to the interest of the lienholder. *Id.*

By entering on the land and repudiating his deed and appropriating the rents and revenues to his own use, a grantor placed himself in default and appropriated part of that which should have been applied to pay the interest and taxes on a mortgage subject to which the land had been conveyed, and cannot claim that he was subrogated to the rights of the mortgagee by reason of his having paid interest and taxes. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

59. — **Benefit of remedies of creditor.**—See *Texas & P. Ry. Co. v. Archer* (Civ. App.) 203 S. W. 796.

Where surety has procured his principal to execute deed of trust to secure note upon which surety is liable, and has paid such note, he will be subrogated to rights of payee, and is entitled to foreclose lien by procuring sale by trustee under trust deed. *Eustis v. Frey* (Civ. App.) 204 S. W. 118.

Purchaser of notes at receiver's sale, part of consideration for notes being amount of debt represented by judgment in mechanic's lien suit, which judgment was set aside, held entitled by reason of doctrine of subrogation to valid lien on premises to secure payment of amount paid for notes with interest. *Miller v. Guaranty Trust & Banking Co.* (Civ. App.) 207 S. W. 642.

TITLE 87

LIMITATIONS

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| 2. Limitation of personal actions.  |                        |

CHAPTER ONE

LIMITATION OF ACTIONS FOR LANDS

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|---|---|
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Article 5672. [3340] Three years' possession, when a bar.

See *Grigsby v. May*, 84 Tex. 240, 19 S. W. 343; *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293; *Martin v. Burr* (Sup.) 228 S. W. 543.

In general.—In an action for the recovery of land, three year's possession by a defendant, who cannot show his possession to be within the limits of the survey under which he claims, is not a bar. *Horst v. Herring* (Sup.) 8 S. W. 306.

In an action to recover possession of real estate, the defense of three years' adverse possession was not available where defendant's title or color of title rested in parol. *Finch v. Trent*, 3 Civ. App. 568, 22 S. W. 132.

A void deed is neither title nor color of title. *Spikes-Nash Co. v. Manning* (Civ. App.) 204 S. W. 374.

Where the one-time owner had by prior conveyance parted with whatever title he had to the land, the claims of a subsequent grantee to title by virtue of the three-year statute of limitations cannot be sustained. *Raley v. D. Sullivan & Co.* (Com. App.) 207 S. W. 906.

The three years' statute of limitations barring suits against one who had title from sovereign does not bar an action against purchaser under an executory contract of sale by the holder of the vendor's lien. *Stone v. Robinson* (Civ. App.) 218 S. W. 5.

The 3-year statute of limitations of peaceable and adverse possession under title or color of title from and under the sovereignty of the soil does not apply in favor of purchasers of land in suit by owner of vendor's lien to foreclose the lien on the land. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

To support title to land under the three years' statute of limitation, the deed under which the claim is made must contain a description sufficient to identify the land; a deed void for uncertainty of description necessarily being insufficient to support the plea. *Langham v. Gray* (Civ. App.) 227 S. W. 741.

Art. 5673. [3341] "Title" and "color of title" defined.

Cited, *Garvin v. Hall*, 83 Tex. 295, 18 S. W. 731.

Void, irregular or defective deeds.—In an action to recover possession of real estate, the defense of three years' adverse possession was not available where defendant's title or color of title rested in parol. *Finch v. Trent*, 3 Civ. App. 568, 22 S. W. 132.

Title derived through deed of a surviving husband of community property not made to pay community debts was not acquired "by a regular chain of transfer from or under the sovereignty of the soil" supporting limitation under three-year statute. *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

The grantee in possession under a deed, control of which the grantor retained during life, held not to trace his claim of title through a regular chain of transfers, etc., and so the three-year statute of limitation was not applicable in a suit by those claiming under the will. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

Where a duly recorded deed conveying land was signed by husband and wife, though it did not appear that the wife was examined privily and apart from her husband, such conveyance is sufficient color of title to support a claim of title by limitations under the five-year statute, though the property being the separate property of the wife, the conveyance was void. *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49.

A grantee of a purchaser at a sale under a trust deed did not have a title acquired "by a regular chain of transfer from or under the sovereignty of the soil," supporting limitation under the three-year statute, where the holder of the legal title to the land

before the mortgage lien was foreclosed was not a party to the suit to foreclose. *Martinez v. Logan* (Civ. App.) 222 S. W. 611.

Deed purporting to convey a tract or parcel of land, part of the J. S. Johnson one-quarter league, beginning at the northwest corner of said Johnson survey, running thence south, etc., held sufficient in its description for adverse possession to be claimed thereunder, though omitting to give the state and county of location, the date line showing it was executed at Beaumont, Tex., and the deed beginning state of Texas, county of Jefferson, and reciting that both grantor and grantee were citizens of such county, from which the presumption followed the land was located therein, and the check delivered to the grantor in payment for the land, together with a written notice of sale executed by the grantor, being sufficient to identify the land. *Langham v. Gray* (Civ. App.) 227 S. W. 741.

If the common source of title or his heirs had sold the land in question to plaintiffs or plaintiffs' predecessor before conveying to defendants, defendants did not hold "title or color of title" to support limitation of three years. *Southwestern Settlement & Development Co. v. Village Mills Co.* (Civ. App.) 230 S. W. 869.

**Patents, grants, certificates and surveys.**—An award of a school survey located in a prior survey of which there had also been an award is not "color of title from the sovereignty of the soil," required to give a superior right by three years' adverse possession under statute. *Allen v. Draper* (Civ. App.) 204 S. W. 792.

While a patent could not convey paramount title to land located within a prior school survey, it constituted "color of title from the sovereignty of the soil," within the three-year statute of limitation, sufficient to enable patentees to secure a right thereto superior to one having an award of prior school survey. *Id.*

In trespass to try title based on adverse possession, it is no defense that state has refused to issue a patent to defendants, where defendants could at any time have obtained a patent by making a correction in field notes; there being no issue as to the boundaries to the land in controversy, the boundaries as existing on the ground being old recognized established surveys. *Stark v. Rogers* (Civ. App.) 216 S. W. 473.

**Equitable title.**—The three-year limitation statute applying to "title" acquired by "a regular chain of transfer from or under the sovereignty of the soil" refers to a legal title, and not to an equitable right or title. *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

The title acquired by an alleged trustee as to two-thirds of land to which he had a legal title, the beneficial interest in which belonged to plaintiffs, was not such title as would support the three-year period of limitations as to such interest. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

#### Art. 5674. [3342] Five years' possession, when a bar.

See *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293; *Martin v. Burr* (Sup.) 223 S. W. 543.

**In general.**—In an action for the recovery of real estate, a defendant who has maintained five years' adverse possession, under a duly-registered deed, with concurrent payment of taxes, may plead the bar of the statute, but he is not entitled to this privilege if the possession and payment of taxes have not been concurrent. *Snowden v. Rush*, 69 Tex. 593, 6 S. W. 767.

Plaintiff having entered under a deed duly registered, and defendant under a tax-deed which is void on its face, the possession of the latter is confined to his actual occupancy, and, notwithstanding the entry of defendant, plaintiff may acquire title by adverse possession to all the land not within the limits of defendant's actual occupancy. *Claiborne v. Elkins*, 79 Tex. 330, 15 S. W. 395.

To constitute adverse possession under five-year statute of limitation payment of taxes must be concurrent with holding under deed. *Gallup v. Runnels* (Civ. App.) 199 S. W. 504.

Evidence in trespass to try title examined, and defendants held to have met all requirements of both the five and ten year statute of limitations, and by proof of knowledge of and recognition by plaintiff's vendor of adverse possession of defendants for more than such periods of limitation. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

The several requisites to title to land under the five-year statute of limitations must concur for the entire period. *Griswold v. Comer* (Com. App.) 203 S. W. 139.

Fraud alone will not prevent the running of the five-year statute of limitations, though the party invoking the statute has put it in motion by his own wrong through participation in the fraud. *Davis v. Howe* (Com. App.) 213 S. W. 609.

In action to recover land in which defendants set up the five-year statute of limitations in bar of plaintiffs' right to recover evidence held to support finding that defendants' predecessor occupied land under a recorded deed and paid taxes thereon for more than five years. *Morris v. Moore* (Civ. App.) 216 S. W. 890.

Evidence of the possession of plaintiff's predecessors, which continued under color of title for five years prior to the suspension of the statute on January 28, 1861, having been accompanied by payment of taxes on the land held to show adverse possession. *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49.

To acquire, under the five-year statute of limitation, the full title given by art. 5679, all the requirements of the statute must be strictly complied with. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Under the five-year statute of limitations adverse possession must be for a consecutive period of five years, coupled with concurrent payment of annual taxes for such consecutive period. *Martinez v. Logan* (Civ. App.) 222 S. W. 611.

Title may be acquired to an undivided interest in land under the five-year statute of limitations by payment of taxes. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

**Possession.**—When the other elements of adverse possession are present, the land will be deemed sufficiently inclosed when it was fenced on three sides and there was deep water on the fourth. *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 38 Sup. Ct. 496, 62 L. Ed. 1096.

The mere fencing of land though land is claimed under a deed duly of record, and taxes are duly paid thereon, will not, of itself, without the statutory contemplated use, cultivation, or enjoyment, give such purchaser title by limitation under either the 5 or 10 year statutes. *Stringer v. Johnson* (Civ. App.) 222 S. W. 267.

Evidence that an adverse possession claimant had fenced the land in question some five years previously, that he had cleared some of it, and recently erected a house upon it, held to establish an assertion of exclusive ownership under the five-year statute. *Todd v. Hand* (Civ. App.) 225 S. W. 770.

In partition where a cotenant claimed the land by adverse possession, evidence held to warrant a finding that the possession and assertion of adverse claim under a recorded deed was of such unequivocal and notorious character and so long continued that it could be presumed that plaintiffs had notice thereof, and their rights were barred by limitation. *Terry v. Terry* (Civ. App.) 228 S. W. 299.

In an action to quiet title to land, where defendants set up title by limitation, evidence held insufficient to establish such title not showing an actual, visible, adverse, continuous, and exclusive possession by defendants' predecessor under claim of right which would ripen into title. *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029.

**Payment of taxes.**—Compliance with the five-year statute of limitations requires that the payment of taxes for each of the five years be made before they have become delinquent for said year. *Houston Oil Co. of Texas v. Jordan* (Com. App.) 231 S. W. 320; reversing in part (Civ. App.) 212 S. W. 544.

Where plaintiff claimed title to land under the five-year statute of limitations, he was bound to show payment of taxes before they became delinquent under arts. 7615, 7616, et seq., for it is essential to acquire title under the five-year statute that the landowner receive the notice, which he must have by payment of taxes before they become delinquent. *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

Payment of taxes after delinquency is insufficient under the five-year statute of limitations. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491. Contra. see *Fogle v. Baker* (Civ. App.) 205 S. W. 752; *Settegest v. Floyd* (Civ. App.) 214 S. W. 686.

In trespass to try title, where there was no evidence that defendant's grantors paid any taxes thereon, and defendants pleaded the five-years limitation, it was error to charge that if defendant's grantor went into possession under his deed, cultivating, using, and enjoying the premises, paying taxes thereon, in any, and claiming adversely under his deed for five years before suit, they should find for defendants. *Hitchler v. Scanlan*, 83 Tex. 569, 19 S. W. 259.

Payment of taxes should be shown to a reasonable certainty in every case where title is claimed under the five-year statute of limitations. *Gallup v. Runnels* (Civ. App.) 199 S. W. 504.

Evidence held insufficient to show concurrent payment of taxes for any consecutive five years. *Id.*

Tax deed covering land of which occupant held possession in subordination to title of true owner conveyed title and interest which occupant possessed, and in effect broke seizin which he had up to that time, so that, to establish title, he must do so under 10 years' adverse possession after deed. *Morrison v. O'Hanlon* (Civ. App.) 202 S. W. 97.

In a suit to recover possession of land adversely, held the five-year statute of limitation does not apply, where defendant has paid taxes for only four years. *Spikes-Nash Co. v. Manning* (Civ. App.) 204 S. W. 374.

One who was in possession of land under claim of ownership and under deed duly recorded, and rendered it for taxation during 10-year period, will be presumed, in absence of a contrary showing, to have paid taxes when due; he being dead and the tax records destroyed. *Morris v. Moore* (Civ. App.) 216 S. W. 890.

As certainly as the payment of taxes implies the assertion of a claim of right, in an open and public way, which may reach the owner, so the discontinuance of tax payments signifies the abandonment of such claim. *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

In trespass to try title, wherein a former owner had intervened, it was not error to permit proof that he had rendered the property and paid taxes, thereby showing that he was claiming against all parties. *Bishop v. Paul* (Civ. App.) 217 S. W. 435.

Possession for five years otherwise sufficient to ripen into title under the five-year statute is insufficient, where during part of the time the records showed that the occupant paid taxes on land other than that of which he was in possession. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

In trespass to try title, plaintiff claiming under an instrument found by the jury to be a deed, but claimed by defendants to be a mortgage, evidence held insufficient to raise the issue of payment of taxes for the year 1912 by defendants, material on the issue of limitation. *Langham v. Gray* (Civ. App.) 227 S. W. 741.

The five-year statute of limitations does not require that claimant of title to land under it make a rendition of the property for taxes, but merely demands the payment of such taxes as may be due. *Ammerman v. Bourland* (Civ. App.) 230 S. W. 804.

In an action of trespass to try title, plaintiffs claiming that they had paid taxes which was admitted except that the school tax collector testified that another rendered the north half of the north half of the land for two years and paid the taxes for such years, it should appear, for plaintiffs to substantiate their claim of prescription under

the five-year statute, that the school district has incorporated as such, and that levies and taxes were made by it for the series of years involved. *Id.*

The burden of proof is on plaintiffs claiming in trespass to try title under the five-year statute of limitations affirmatively to show payment of all taxes due, if any, during the full period of five years. *Id.*

Where deed was registered September 7, 1904, payment of taxes for the years 1904 to 1908, inclusive, was sufficient to sustain a plea of five-year limitations, it not being necessary to pay taxes for the year 1909. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

It was not sufficient, under the five-year statute of limitations, that taxes were paid, where payment was made on a wrong description, so that no credit of taxes was made on the assessment of taxes against the tract of land in question, since such payment would not afford owner of legal title any notice that some one else was paying taxes on his land. *Id.*

**Claim under deed duly registered—In general.**—This article does not apply to one who claims under a deed which is void on its face. *Stayton, C. J., dissenting. Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120.

Record of deed made by survivor of community without compliance with statute requiring filing of inventory is not sufficient to secure protection of this article. *Griffin v. West Ford*, 60 Tex. 501.

A cattle company was entitled to prescribe under the five-year statute by virtue of a recorded deed to K. for company's benefit. *Burnham v. Hardy Oil Co.*, 195 S. W. 1139.

Certificate of acknowledgment not bearing seal of notary was insufficient to admit deed to record, and such deed was inadmissible in evidence in support of five years statute of limitation in trespass to try title. *McDonald v. Stanfield* (Civ. App.) 197 S. W. 892.

Where plaintiffs in trespass to try title claimed under a prior grant, defendant's evidence that he paid taxes on land described under a subsequent grant showed that one of the essentials for acquiring title under the five-year statute of limitations was lacking. *Dallas Hunting & Fishing Club v. Nash* (Civ. App.) 202 S. W. 1032.

When a deed is the basis of possession of land, it defines the extent of the hostile claim. *Boy v. McDowell* (Civ. App.) 207 S. W. 937.

The object of the five-year statute of limitation in requiring a deed and its due registration being to define the boundaries of the land claimed and to give notice to the true owner of such adverse claim, the validity of the deed is immaterial; it being sufficient if it is an apparently valid instrument with the essential parts of a deed. *Davis v. Howe* (Com. App.) 213 S. W. 609.

A deed under a tax sale, void as running to a deputy of the sheriff making the sale, is sufficient color of title under the five-year statute of limitations. *Id.*

Where plaintiffs had unbroken possession of the land in suit from August, 1909, until September, 1915, for them to perfect title under the five-year statute of limitation, it was not necessary that their deeds be of record; they holding under a deed to their predecessor duly registered within the meaning of the statute. *Settegast v. Floyd* (Civ. App.) 214 S. W. 636.

In action to recover land in which defendants set up the five-year statute of limitations in bar of plaintiffs' right to recover, evidence held to support finding that defendants' predecessor occupied land under a recorded deed. *Morris v. Moore* (Civ. App.) 216 S. W. 890.

Competent proof that the deed was executed is unnecessary where it had been duly recorded and not revoked. *Todd v. Hand* (Civ. App.) 225 S. W. 770.

A conveyance by grantors of all their right, title and interest in certain described lands, followed by the habendum clause of a general warranty deed, is a deed to the land, and not a mere quitclaim of the grantor's interest, and will support a plea of five years' limitation. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

**Registration.**—Although the registration of a tax-deed before the expiration of the period of redemption does not make it a muniment of title, or render it available as a basis of possession, yet, upon the expiration of the redemption period, such prior registration becomes good, and a new registration is not required. *Davis v. Hurst* (Sup.) 14 S. W. 610.

Where partition between heirs, under which defendant claims, was not by parol, and not under probate proceedings, but by deed showing on its face it was muniment of title necessary to be recorded under five-year statute of limitations, bar of statute is not complete as to interest in land conveyed to defendant by partition deed, not registered until after suit brought. *Griswold v. Comer* (Com. App.) 209 S. W. 139.

Where one claiming under color of title conveyed the land, but the deed to the grantee, who was placed in possession, was not recorded for nearly a year, the failure to record the deed broke the chain of possession, and the grantor's previous possession could not be counted in making up the five-year period, though the land was shortly thereafter reconveyed to him. *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49.

The deed under which possession is held must be registered, whether it is a deed from a predecessor in title with whom the claimant holds in privity or a deed from any other source. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Under the statute of limitation of five years, a delay of five months in registering a deed in the chain of title under which adverse possession was claimed broke the continuity of the possession, and was not excused by the fact that the deed was placed in a bundle of registered title papers and that the grantee understood that a third person was to record the deed. *Id.*

It was not necessary to claim title to land by prescription under the five-year statute that each deed in succession from the first possessor should have been recorded; the statute requiring only that each claimant in succession shall hold and claim under a



duly recorded deed, and that the title conveyed by the deed is in fact for the benefit of claimant. *Ammerman v. Bourland* (Civ. App.) 230 S. W. 804.

The five-year statute of limitations begins to run from the time of registration of the deed on which the plea is based. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

— **Description of land.**—A deed to support a plea of five years' limitation must contain such a sufficient description that it will appear from its terms or reference to other instruments of record in the chain of title that it conveys the very land in controversy, so that its registration will put the adverse party on notice that the land is thus being claimed, as an owner of land is not bound to run down references to facts outside the chain of title to ascertain the meaning of the deed. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491; *Langham v. Gray* (Civ. App.) 227 S. W. 741.

In trespass to try title, a plea of five-year statute of limitations was supported by a deed referring to adjoining surveys on three sides and a river on the other, although name of patentee and number of certificate were erroneous. *Randolph v. Lewis* (Com. App.) 210 S. W. 795.

Limitation under 5-year statute of limitations is available only when the party asserting it claims under a deed purporting to convey the property claimed, and does not apply to land more than 90 feet from a street, when the deed purports to convey only 90 feet. *Cass v. Green* (Civ. App.) 224 S. W. 938, opinion supplemented 227 S. W. 238.

**Forged deed.**—In adverse possession proceedings excluding evidence that a deed to claimant for the land involved had been forged, is not reversible error, where the claimant had secured and claimed under a prior deed. *Todd v. Hand* (Civ. App.) 225 S. W. 770; *Fogle v. Baker* (Civ. App.) 205 S. W. 752.

The rule that five years' adverse possession of land under a forged deed, or deed executed under a forged power of attorney, will not bar an action as in other cases, does not apply to the bar announced in the ten-years statute. *Moses v. Dibrell*, 2 Civ. App. 457, 21 S. W. 414.

The fact that a deed was executed by "Wesley Baker" as "the sole heir of G. W. Baker, of Payette county, Illinois," does not render the deed a "forgery," by reason of the fact that the deed conveys land which was at one time owned by George W. Baker, who has no descendant or relative named Wesley Baker. *Fogle v. Baker* (Civ. App.) 205 S. W. 752.

An affidavit that deed was a forgery did not constitute evidence of forgery in fact, but merely called for proof of the deed's execution. *Todd v. Hand* (Civ. App.) 225 S. W. 770.

A deed executed under a forged power of attorney was a forged deed, within the meaning of the five-year statute of limitations. *Olsen v. Grelle* (Com. App.) 228 S. W. 927.

### Art. 5675. [3343] Ten years' possession, when a bar.

See *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

Cited, *Snowden v. Rush*, 69 Tex. 593, 6 S. W. 767.

**In general.**—In suit in trespass to try title, where no equity suit was necessary to set aside a deed as a condition precedent to recovery of land, general statute of limitations which apply to suits for the recovery of real estate, and not four-year statute of limitations, is applicable. *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

In trespass to try title, plaintiff claiming under ten-year statute of limitations, though defendant showed on plaintiff's cross-examination that plaintiff had not paid taxes on any portion of land, that did not show conclusively that plaintiff was not claiming adversely. *Houston Oil Co. of Texas v. Holland* (Civ. App.) 196 S. W. 668.

Where, after having paid for land, defendants were informed by vendor that he could not give deed, as land belonged to a certain third person, defendants could not acquire title under 10-year statute, as against such person, without setting up claim adverse to him. *Thomas v. Ash* (Civ. App.) 199 S. W. 670.

Claim of right is unnecessary to constitute adverse possession under ten-year statute. *Fowler v. Woods* (Civ. App.) 200 S. W. 247.

Claimant of land under chain of title from persons who merely occupied and claimed adversely must specially plead the limitation of ten years. *Luttrell v. Click* (Civ. App.) 200 S. W. 255.

Where commissioner, pursuant to decree in partition suit, conveyed land by deed dated December 11, 1896, and grantee who took immediate possession and those holding under him down to and including defendant had had continued adverse and uninterrupted possession of land, using and cultivating same from date of purchase until November 9, 1914, defendant would have title under ten-year statute. *Boese v. Parkhill* (Civ. App.) 202 S. W. 120.

The right to the use of water for irrigation runs with and is appurtenant to the land, and hence, like land, is subject to the 10-year statute of limitations.—*Kountz v. Carpenter* (Civ. App.) 206 S. W. 109.

The ten-year statute would begin to run in favor of plaintiff when he took possession of lands within a valid survey claiming title by virtue of a deed, although no patent had been issued to lands within the survey, since those claiming adversely to plaintiff by virtue of the survey could, in view of art. 7742, have maintained trespass to try title. *Spearman v. Mims* (Civ. App.) 207 S. W. 573.

In trespass to try title, held that plaintiff was not entitled to recover by virtue of prior possession of alleged owners from whom he claims to have purchased, or by virtue of title acquired by such owners under the 10-year statute. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

Arts. 5458, 5459, prescribing a limitation of one year for suits by persons claiming the right to purchase state lands theretofore sold, has no application to one asserting title under the statute of limitations of 10 years as against a purchaser from the state, but applies only to persons claiming the right to purchase or lease land already sold or leased to others. *Whitaker v. McCarty* (Com. App.) 221 S. W. 945, reversing judgment (Civ. App.) 188 S. W. 502.

Under 10-year adverse possession statute, no deed to land is necessary, and no muniment of title is required, but possession in compliance with statute in absence of contrary evidence carries presumption it is under claim to land, though, where evidence raises issue as to assertion of claim of which the possession is notice, it becomes a jury question, and finding is conclusive. *Thompson v. Richardson* (Com. App.) 221 S. W. 952, affirming judgment (Civ. App.) 186 S. W. 275.

Where possession is taken of another's land, but in recognition of true title and constructive possession of title holder, occupant is in possession in subjection to recognized title, and cannot perfect claim of title or defense under 10-year adverse possession statute as against true owner without bringing to his notice a repudiation of the recognition and of assertion of adverse claim, from which his right under statute must date. *Id.*

Actual possession and cultivation of the land in controversy is all the notice required to start the running of the 10-year statute of limitations, whether the possessors had any deed to the land or not, and whether the record owners knew of their own interest. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

Every owner of land is presumed to know its boundaries, take notice when they are invaded, and when such invasion arises by reason of field notes and muniment of title, issued to the adverse claimant's grantor and not from the intent of such claimant to acquire lands belonging to another by limitation, 10 years' possession and use vests such claimant with complete legal title. *Houston Oil Co. of Texas v. Olive Sternenberg & Co.* (Com. App.) 222 S. W. 534, affirming judgment (Civ. App.) 200 S. W. 232; *Same v. Patterson* (Com. App.) 222 S. W. 538, affirming judgment (Civ. App.) 199 S. W. 1140.

**Possession.**—See *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Where party claims title by adverse possession under 10-year statute, improvements made by him within 10-year period cannot be considered. *Bailey v. Kirby Lumber Co.* (Civ. App.) 195 S. W. 221.

Under ten years statute of limitation, possession does not extend to land of deed not duly recorded. *McDonald v. Stanfield* (Civ. App.) 197 S. W. 892.

An admission of title in another, by claimant under 10-year adverse possession statute, before bar of statute is complete, will defeat his own title by limitations. *Thompson v. Richardson* (Com. App.) 221 S. W. 952, affirming judgment (Civ. App.) 186 S. W. 275.

The mere fencing of land though land is claimed under a deed duly of record, and taxes are duly paid thereon, will not, of itself, without the statutory contemplated use, cultivation, or enjoyment, give such purchaser title by limitation under the 10-year statute. *Stringer v. Johnson* (Civ. App.) 222 S. W. 267.

In trespass to try title where the land was claimed under the 10-year statute of limitations and inclosed by a fence by the limitation claimant, and it appeared that the record owner before the expiration of the 10-year period entered and cut and removed the timber from the inclosure without opposition, held, that the entry of the true owner and the removal of the timber were sufficient to stop the running of limitations in favor of the limitation claimant. *Black v. Goolsbee* (Civ. App.) 226 S. W. 463.

Though defendant and those under whom he claimed cleared and fenced land involved in trespass to try title, and had continuous, peaceable, adverse, and uninterrupted possession thereof for more than ten years before suit was commenced, unless they either cultivated, used, or enjoyed it during such time, they did not acquire title by ten years' limitations. *Smith v. Wood* (Civ. App.) 229 S. W. 583.

If ten years' possession of land involved in trespass to try title was not completed when the occupant disclaimed title in another suit, such disclaimer operated to break the continuity of his adverse possession, and he never acquired title to the land by force of the ten-year statute, as the ten years would have to be computed from the date of filing disclaimer; ten years from such date not having in fact elapsed when the present suit was commenced. *Id.*

**Evidence.**—In action to recover land claimed under ten-year statute of limitation, verbally given plaintiff by her father, evidence tending to show that the only claim of ownership to the land was made by her father held not sufficient to show plaintiff's adverse occupation. *Stark v. Leonard* (Civ. App.) 196 S. W. 708.

In trespass to try title, deed showing upon its face that it had been altered by erasures and insertions, which were not explained, held admissible as memorandum under ten years statute of limitation. *McDonald v. Stanfield* (Civ. App.) 197 S. W. 892.

Evidence in trespass to try title examined, and defendants held to have met all requirements of the ten year statute of limitations, and by proof of knowledge of and recognition by plaintiff's vendor of adverse possession of defendants for more than such periods of limitation. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1077.

In trespass to try title, evidence held to show that the possession and claim of one of plaintiff's predecessors in interest had matured into title under the ten-year statute of limitations before such predecessor executed a timber deed. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

In trespass to try title, undisputed evidence held to show that defendants had title by the ten-year statute of limitations. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

In trespass to try title, in which plaintiffs' title rested on limitations for 10 years,

held, that judgment for plaintiffs was warranted under the evidence. *Foster v. Guerra* (Civ. App.) 219 S. W. 295.

In an action by one claiming land by adverse possession, evidence held to sustain a finding that plaintiff held the land as described in his petition for a period of 10 years. *Kirby Lumber Co. v. Conn* (Civ. App.) 222 S. W. 342.

In action to recover land, evidence held sufficient to sustain a finding in favor of plaintiff under the ten-year statute of limitations. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

In an action to quiet title to land, where defendants set up title by limitation, evidence held insufficient to establish such title not showing an actual, visible, adverse, continuous, and exclusive possession by defendants' predecessor under claim of right which would ripen into title. *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029.

### Art. 5676. [3344] Ten years' possession construed to embrace what.

**In general.**—In an action to recover more than 160 acres, uninclosed, held, that the defendant, not claiming under the memorandum, and whose 10 years' adverse possession had not expired at the time of the passage of the act, could not plead the bar of the statute. *Snowden v. Rush*, 69 Tex. 593, 6 S. W. 767.

Possession resumed by a grantor cannot be held to be under color of his original grant, and his claim under the statute of limitations is restricted to the limits of his actual occupation, unless they embrace less than the permitted acreage. *Bullock v. Smith*, 72 Tex. 545, 10 S. W. 687.

Where party claims title by adverse possession under 10-year statute, and his possession includes portions of adjoining tracts, the location of his home is controlling factor, and incidental possession of other tract is not adverse beyond its actual limits. *Bailey v. Kirby Lumber Co.* (Civ. App.) 195 S. W. 220.

Burden was upon defendants claiming land beyond their inclosure under the 10-year adverse possession statute to show that their possession extended to such land. *Thompson v. Richardson* (Com. App.) 221 S. W. 952, affirming judgment (Civ. App.) 186 S. W. 275.

One who takes possession of land, without written memorandum, asserting claim only to the part actually inclosed, cannot hold in excess of the inclosure, though if his improvements cover less than 160 acres, and he claims the whole, he can perfect title by limitations to such portion of the adjoining outlying survey as is requisite to make his holding comprise 160 acres. *Id.*

In trespass to try title, whether plaintiff's predecessor, who plaintiff claimed to have acquired title by limitation under 5 and 10 year statutes, had kept the land continuously inclosed by a fence for any period of 5 or 10 years, and during such period continued its use and enjoyment as a pasture for stock, held for the jury. *Stringer v. Johnson* (Civ. App.) 222 S. W. 267.

As between the record owner and a limitation claimant, the latter cannot claim a specific 160 acres by actual possession for 10 years or less than 160 acres, unless the 160 acres so claimed has been definitely designated on the ground for 10 years before the institution of the suit, but the limitation claimant can avoid such rule by showing that the specific 160 acres is a fair partition as between him and the record owner. *Kirby Lumber Co. v. Conn* (Civ. App.) 222 S. W. 342.

One holding possession for more than ten years of a field 5 or 6 acres in a survey containing 640 acres cannot claim adverse possession to an undivided 160 acres not definitely located, where he exercised no actual possession outside field, and he bought from one who only claimed the field, and owner of survey had no notice of any claim beyond limits of field. *Houston Oil Co. of Texas v. Holland* (Com. App.) 222 S. W. 546, reversing judgment (Civ. App.) 196 S. W. 668.

One who, while residing on and in possession of tract of land in one section, for more than 10 years claimed ownership of a separate 160-acre tract of land in another section, and cultivated 20 acres thereof, acquired title to the entire 160 acres, though the 20 acres so cultivated were inclosed, since the possession and occupation of the 20 acres was separate and distinct from the tract of land on which he resided, and the doctrine of inclosure was therefore not applicable. *Lutcher v. Reed* (Civ. App.) 224 S. W. 540.

Actual possession of a part does not give constructive possession to 640 acres under Act 1841 (Laws of Republic, 5th Cong. p. 167), § 17 (Paschal's Dig. art. 4624), or to 160 acres under this article, in the absence of a claim of right to the 640 acres or 160 acres, as the case may be. *Houston Oil Co. of Texas v. Ainsworth* (Com. App.) 223 S. W. 185.

In trespass to try title, evidence that defendant continuously for 10 years cultivated a small portion of land, claiming ownership of the entire tract of 160 acres, and inclosed the land so cultivated with a fence, held sufficient to sustain finding of jury that defendant had acquired title to the 160 acres by adverse possession. *W. T. Carter & Bro. v. Brown* (Civ. App.) 230 S. W. 889.

Where a section, together with four or five other sections, constituted a pasture inclosed by a pasture fence, and where the amount of land included therein did not exceed 5,000 acres, claimant, in obtaining title by adverse possession, was not limited to 160 acres, but was entitled, if at all, to title to the entire section. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

**Possession under written memorandum.**—Description by metes and bounds in deed, together with actual possession, was notice to true owner of adverse claim, although deed

erroneously referred generally to the land as being in a different survey. *Tucker v. Angelina County Lumber Co.* (Com. App.) 216 S. W. 149.

Under the 10-year statute possession of a part of a tract of land under a deed extends by construction to the limits described in the conveyance. *Crawford v. Thos. Goggan & Bros.* (Civ. App.) 217 S. W. 1106.

Though a deed was void and the grantee never took possession of the land, his heirs, claiming under the deed as heirs, could prove title to the boundaries described in the deed. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Tax deed describing land as "4,000 acres of land lying and being in Sabine county on the Sabine river, and known as the grant originally made to A.," held sufficient, under evidence that there was but one A. league in Sabine county, and that such league was on the Sabine river, and was an original grant containing 5,500 acres, to constitute a memorandum of title, fixing the boundaries of the land claimed by person claiming thereunder to give such person title by adverse possession to all the land in the A. league in Sabine county. *Temple Lumber Co. v. Mackechney*, 228 S. W. 177, affirming judgment (Civ. App.) *Mackechney v. Temple Lumber Co.*, 197 S. W. 744.

A deed is a sufficient memorandum of land claimed for purposes of acquiring title by adverse possession, if the description would have been sufficient to pass title; reasonable and not absolute certainty in fixing the boundaries being required. *Id.*

### Art. 5677. [3345] Land surrounded by other lands, etc., peaceable possession of defined.

See *Crawford v. Thos. Goggan & Bros.* (Civ. App.) 217 S. W. 1106.

**In general.**—This article is without application, when the land owned by the person is merely adjacent to and not surrounded by that claimed and fenced by another. *Kendrick v. Polk* (Civ. App.) 225 S. W. 826.

This article held inapplicable, where one section, with a pasture fence built practically along one line thereof was included in a pasture with four or five other sections. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

### Art. 5678. [3346] Same.

**In general.**—The "actual possession" means pedal possession, living upon, occupation of land, or making improvements. *Schaeffer v. Williams* (Civ. App.) 208 S. W. 220.

Where testimony did not show that any part of land in controversy fenced with more than 5,000 acres was cultivated and used for agricultural or manufacturing purposes, or was in actual possession of defendant, ten-year statute of limitations did not apply. *Id.*

Where the inclosure exceeds 5,000 acres, a claimant by inclosure cannot escape the effect of the statute by asserting that within his inclosure of more than 5,000 acres there are lands which are leased and not owned by him and which should therefore be deducted from the acreage inclosed to reduce it to an inclosure of less than 5,000 acres in legal effect. *Vergara v. Myers* (Civ. App.) 227 S. W. 1118.

### Art. 5679. [3347] Possession gives full title, when.

See *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675; *Martin v. Burr* (Sup.) 228 S. W. 543.

Cited, *Snowden v. Rush*, 69 Tex. 593, 6 S. W. 767; *Todd v. Hand* (Civ. App.) 225 S. W. 770.

**Nature and extent of title acquired.**—Under contract providing that vendee should have 30 days for examination of abstract of title furnished by vendors, and should point out defects to vendors, who should have reasonable time to cure defects, where vendee did not within 30 days point out defects which were not remedied, he cannot recover partial payments made on theory that vendors may not perfect title; vendors having a good title by limitations. *Lieber v. Nicholson* (Com. App.) 206 S. W. 512.

The defense of innocent purchaser of the legal paper title is not available against the owner of a title by limitation. *Bryan v. Ross* (Civ. App.) 214 S. W. 524.

A contract for an abstract showing "good title" is not complied with by showing a title by limitations. *Wakeland v. Robertson* (Civ. App.) 219 S. W. 842.

Purchaser's possession for prescriptive period without recognizing an outstanding title superior to that of vendor under which he was holding held to give vendor good title as against third persons where purchaser did not during the prescriptive period openly and continuously manifest the purpose to disclaim against the title under which he entered upon the land by some act manifesting an intention to repudiate the relation of vendor and purchaser, notwithstanding a mere mental reservation or intention or declaration that such possession was not held against third persons. *Robertson v. Smith* (Civ. App.) 220 S. W. 620.

To acquire under the five-year statute of limitation the full title given by this article, all the requirements of the statute must be strictly complied with. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Under the statute making possession of land under certain circumstances a perfect defense to trespass to try title if pleaded and proved, such possession is a defense though not pleaded by way of confession and avoidance. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

Since a limitation claimant of an undefined part of the land of another is a joint tenant with the record owner, the limitation claimant can maintain trespass to try

title for a specific part of the land against third persons, who showed no title, although he has not occupied all of such land, as there can be no partition, except as between owners. *Kirby Lumber Co. v. Conn* (Civ. App.) 222 S. W. 342.

Owner under a grant which conflicted with and extended over on an earlier grant from the state was technically a trespasser, but when he opened a field thereon and continuously cultivated it and used it for the purpose for which it was adapted for the period prescribed by the statute of limitations, he lost the character of trespasser and became owner. *Houston Oil Co. of Texas v. Olive Sternberg & Co.* (Com. App.) 222 S. W. 534, affirming judgment (Civ. App.) 200 S. W. 232; *Same v. Patterson* (Com. App.) 222 S. W. 538, affirming judgment (Civ. App.) 199 S. W. 1140.

Plaintiff could not acquire by limitations title to land of which she had never been in possession, unless person in possession had possession as her enant. *Bishop v. Williams* (Civ. App.) 223 S. W. 512.

A purchase of part of a tract of land accompanied with more than 20 years' possession of the part bought and the making of improvements gives title to the land. *Gordon v. Gordon* (Civ. App.) 224 S. W. 716.

**What will not divest title—In general.**—Where, after defendants' use of water for irrigation purposes for 14 years, plaintiff began using the excess water running through defendants' ditches, such use did not destroy defendants' already acquired prescriptive title to all of such water, or prevent the continued running of the statute of limitations. *Kountz v. Carpenter* (Civ. App.) 206 S. W. 109.

**Subsequent loss of possession.**—After the acquisition of title by adverse possession, the fact that the adverse owner moves from the premises does not constitute an abandonment in law, nor work a forfeiture of the title acquired as against the former owner. *Stark v. Leonard* (Civ. App.) 212 S. W. 677.

### Art. 5680. [3348] "Peaceable possession" defined.

**In general.**—In order to gain title by adverse possession, occupancy must be for a consecutive period of the required number of years. *Kirby Lumber Co. v. Conn* (Civ. App.) 222 S. W. 342.

An instruction defining "peaceable possession" as that which is continuous and not interrupted by adverse suits, being within the language of this article, is correct. *Collins v. Megason* (Civ. App.) 228 S. W. 583.

Evidence that defendant, who claimed to have acquired title by adverse possession under the 10-year statute, but who had not herself occupied the land, had leased the property during all except 2 of the 10 years, without proof that she had a tenant in possession during such 2 years, held insufficient to establish title by adverse possession. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

**Interruption by suit.**—In trespass to try title, where plaintiffs' title was one by limitation, a former suit by defendants against plaintiffs' tenants did not break the continuity of plaintiffs' possession of the land involved in the instant suit, where, although the petition in the former suit described generally the land involved therein as being a certain survey which in fact included the land in the instant suit, such general description was followed by a particular description by metes and bounds, not including it; the particular description controlling the general. *Stark v. Brown* (Civ. App.) 210 S. W. 811.

Where judgment was rendered September 25, 1908, which divested from plaintiff's predecessor all title, plaintiff's possession coupled with that of her predecessor did not ripen into title under the ten-year statute of limitations, where plaintiff's suit was filed in April, 1918, and the owner of the record title filed a cross-action in July, 1918. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

**Continuity of possession.**—Appointment of a receiver for a corporation does not stop the running of limitations against the corporation, as to one holding land of the corporation adversely. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

If title of the claimant by adverse possession were not already perfect, a lease within the statutory period of only 8 acres out of a tract of over 160 acres, made by the true owner to a third person, would prevent perfection of the adverse claimant's title. *Lockin v. Johnson* (Civ. App.) 202 S. W. 168.

Evidence held to show that defendant had the alley fenced and covered with a barn continuously for more than ten years, thus acquiring title by the statute of limitations. *Bradford v. Sorenson* (Civ. App.) 204 S. W. 382.

Evidence held to show continuity of possession for the necessary 10 years. *Atchison, T. & S. F. Ry. Co. v. Abraham* (Civ. App.) 209 S. W. 265.

Where the grantee of one who entered on and under color of title and held possession for some time failed to record his deed for about a year, the continuity of possession was broken and the running of the statute stopped, even though the grantor had a vendor's lien on the land for the purchase price, and it was subsequently reconveyed to him. *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49.

One in possession of property under a claim of right thereto may attempt to buy his peace from adverse claimants without recognizing the title of adverse claimants or interrupting the period of limitations. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318.

In trespass to try title, in which plaintiff claimed title under the statutes of limitation, finding of continued occupancy during required period held warranted, notwithstanding that in several instances there was a period of about two months between the time when one occupant moved out and another moved in. *Morrison v. Bennette* (Civ. App.) 228 S. W. 307.

Defendant broke the continuity of his possession, so that the running of limitations was stopped, if he stated to plaintiff that he knew her father's heirs owned the land, or if defendant made a statement to the effect that he did not claim the land adversely. *Collins v. Megason* (Civ. App.) 228 S. W. 583.

In trespass to try title, where defendant relied on adverse possession, evidence held sufficient to warrant finding that his possession was continuous, and that the breaks were no greater than were reasonably required for change in tenants, and that therefore the possession was continuous. *Id.*

In action to recover title to land, which was used principally as a pasture for stock, there being evidence that the husband of one of the defendants at one time stretched a single wire, not sufficient to turn stock, along part of the land, intending to segregate a portion as his wife's property, and that a short time thereafter plaintiffs' predecessor R., then claiming the property, removed the wire and notified defendants, and there was nothing to indicate that his stock were disturbed or his actual possession otherwise interfered with, an instruction that the action of defendant's husband was not sufficient to interrupt the peaceable and continuous possession of plaintiffs and their predecessors if the jury believed that R., immediately on discovering the wire, removed it, was not error. *Thomas v. Calahan* (Civ. App.) 229 S. W. 602.

Where the land which was agricultural was allowed to lie idle one year, that fact did not constitute an abandonment which would preclude previous possessors from relying on their possession as against one entering wholly without title. *Beason v. Williams* (Civ. App.) 229 S. W. 963.

Owner's entry upon land to cut timber therefrom interrupted the running of the statute of limitations in favor of adverse claimant as to all of such land except that portion inclosed by claimant, since owner's entry on land carried with it constructive possession of all the land not in claimant's actual possession. *Evans v. Houston Oil Co. of Texas* (Com. App.) 231 S. W. 731.

### Art. 5681. [3349] "Adverse possession" defined.

See *Lyles v. Dodge* (Civ. App.) 228 S. W. 316; *Martin v. Burr* (Sup.) 228 S. W. 543; *Carrington v. Carrington* (Civ. App.) 230 S. W. 1029.

**In general.**—Adverse possession, to be available, must have been continuous for the statutory period. *Holstein v. Adams*, 72 Tex. 485, 10 S. W. 560.

Party is charged with what his deed calls for, and where he makes mistake in paying taxes on one lot instead of another this will not aid him on question of adverse possession of the lot on which he meant to pay taxes. *Morrison v. O'Hanlon* (Civ. App.) 202 S. W. 97.

In action to try title, the issue being whether defendant was an innocent purchaser, or took with notice that a deed to his grantor was in fact a mortgage, where the jury found that he took with notice, and also that he had held by limitation for the required time, it was error to give effect to the latter finding, since limitations are of no avail to a purchaser with notice. *Hays v. Morris* (Civ. App.) 204 S. W. 672.

An owner of land claimed adversely by another is charged as a matter of law with knowledge of location of land and its boundaries. *Randolph v. Lewis* (Com. App.) 210 S. W. 795.

Title of a fraudulent grantee is protected by the statute of limitation. *Davis v. Howe* (Com. App.) 213 S. W. 609.

Entry into possession of land under a contract of exchange not accompanied by a deed starts the statute of limitation in favor of the person so entering. *Bryan v. Ross* (Civ. App.) 214 S. W. 524.

Where a vendor of land in a deed agreed to "give a road 20 feet wide from the old Tyler road to the S. E. corner of the above tract sold to the said M.," and provided "said road sold to remain open permanently," but did not place any restrictions as to the use in a special way, or for a forfeiture, such easement could be devoted to pedestrians, and failure to use such road for passage of wagons was not an abandonment or extinguishment of the easement, and adverse possession could not be predicated thereupon. *Henderson v. Le Duke* (Civ. App.) 218 S. W. 655.

**Actual and visible appropriation.**—The fact that within inclosure were lands controlled by others than defendant did not render any the less adverse defendant's possession of lands therein which it had owned and controlled. *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

It is only necessary that the outside inclosure of lands claimed by adverse possession be maintained for the required period; condition of inside fences during that time being immaterial. *Id.*

Temporary breaks in the inclosure of property claimed by adverse possession do not arrest limitation. *Id.*

Actual occupancy by residence on land is not necessary to constitute adverse possession. *Houston Oil Co. of Texas v. Holland* (Civ. App.) 196 S. W. 668.

Mere marking of lines will not amount to disseisin of owner, nor give constructive possession which will support plea of statute of limitations to lands not in actual possession. *McDonald v. Stanfield* (Civ. App.) 197 S. W. 892.

That land claimed by plaintiff was contained in inclosure containing land owned by both defendant and his father, and that inclosure was jointly used by both, would not prevent defendant from acquiring title by adverse possession, where land was claimed by him and not by his father. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

Where adjoining landowner, at time that defendants erected a fence inclosing their land, knew that they claimed all land inclosed except a parcel of his land, which was included by an offset in fence, defendant's holding, except as to parcel included by offset,

would be adverse, although fence, had it been run in a straight line, would not mark true boundary. *Id.*

The mere fencing of land for more than ten years does not show use or occupancy sufficient to give title. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

Fence inclosing 360 acres of land was a sufficient notorious assertion of holder's adverse claim, though land was in a very rough, broken, uninhabited country. *Masterson v. Pullen* (Civ. App.) 207 S. W. 537.

One of the essentials required to perfect a title by limitation is that the adverse claim must be open and notorious in order to inform the true owner that his title is contested. *Boy v. McDowell* (Civ. App.) 207 S. W. 937.

Where a party's improvements were all on a certain survey, and there was no visible evidence of his claim to the land in controversy in another survey, except an encroachment by fencing a small portion thereof, there was no such possession of the land as gave notice of any claim except as to that inclosed. *Fielder v. Houston Oil Co.* (Com. App.) 210 S. W. 797.

That a grantee had several Mexican tenants who at times camped upon the 30-acre tract in tents for purpose of cutting timber for wood and charcoal, etc., and at times cultivated a small garden on the land, held not as a matter of law to give grantee title by adverse possession as against true owner. *Stringer v. Johnson* (Civ. App.) 222 S. W. 267.

Where a person who has acquired title by adverse possession to a certain portion of a league purchases a tract contiguous thereto, the continued actual possession of the land to which he had acquired adverse possession without enlargement or extension so as to reach the land purchased would not give him title by adverse possession to land purchased; his possession of other tract not being extended thereto by construction. *Id.*

Where there was a conflict between surveys of two grants by the state and holders of junior grant were in actual possession of the part of the land in conflict, cultivating and using it, claiming to the extent of the boundaries of their recorded deed, and there was not shown any actual possession or use of any part of the prior grant by the owners of that title and the possession by the owners of the subsequent grant was exclusive, open, adverse, and notorious, it matured into a legal title by the limitations statute. *Houston Oil Co. of Texas v. Olive Sternenberg & Co.* (Com. App.) 222 S. W. 534, affirming judgment (Civ. App.) *Same v. Olive Sternenberg & Co.*, 200 S. W. 232; *Same v. Patterson* (Com. App.) 222 S. W. 538, affirming judgment (Civ. App.) 199 S. W. 1140.

Possession, to be adverse in contemplation of the statutes, must be open, visible, and notorious, for the full period required. *W. T. Carter & Bro. v. Richardson* (Civ. App.) 225 S. W. 816.

**Possession as notice.**—Since a landowner need not constantly examine records to guard against instruments affecting his title, he is not to be charged with notice of registration of hostile deed to his tenant, where his possession is not disturbed. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

Possession of premises usually carries with it the presumption of a claim of title. *Boy v. McDowell* (Civ. App.) 207 S. W. 937.

The actual possession of a few acres of a tract of land by inclosure with other land owned by claimant is insufficient to put the owner upon notice that any claim of adverse possession is asserted beyond that actually fenced. *Fielder v. Houston Oil Co. of Texas* (Com. App.) 208 S. W. 158.

An owner of land is bound to take notice of the actual possession of another, and is charged with knowledge of his boundaries, and whatever is reasonably sufficient to notify the owner that another has set up a claim to his land hostile to and inconsistent with the true ownership puts in operation the statute of limitations. *W. T. Carter & Bro. v. Richardson* (Civ. App.) 225 S. W. 816.

**Possession of part.**—The record owner's possession, through tenants, of portions of a survey, constitutes constructive possession of entire survey except portions actually adversely occupied. *Pate v. Gallup* (Civ. App.) 195 S. W. 1151.

Where plaintiff held possession for at least 12 years of field of from 5 to 6 acres in tract of 160 acres, claiming whole tract, and using field for purposes to which it was adapted, plaintiff secured title to whole tract by adverse possession. *Houston Oil Co. of Texas v. Holland* (Civ. App.) 196 S. W. 668.

When actual owner enters, trespasser is thereafter confined to land enclosed or of which he has actual pedal possession. *McDonald v. Stanfield* (Civ. App.) 197 S. W. 892.

Purchaser of survey taking possession and using parts in conflict with another survey and parts not in conflict and extending invasion of the conflicting survey held to have adverse possession of the entire conflict. *Houston Oil Co. of Texas v. Patterson* (Civ. App.) 199 S. W. 1140.

The purchaser of a survey, conflicting, unknown to him, with a senior survey, by going into possession and using some parts in conflict and others not in conflict, held to acquire title to all the conflicts. *Houston Oil Co. of Texas v. Olive Sternenberg & Co.* (Civ. App.) 200 S. W. 232.

Where deed conveys two separate tracts, one farm land the other woodland, actual possession by the grantee of the farm land only is not sufficient to continue the grantor's adverse possession as to the woodland. *Sandmeyer v. Dolljisi* (Civ. App.) 203 S. W. 113.

Where one having a deed to land took actual possession of part of a 20-acre tract, all outside the calls of his deed, making adverse claim to all of it, his adverse possession extended to all the tract, provided his claim was of sufficient notoriety; the true owner not having actual possession of any of his land, so that rule giving priority to his constructive possession had no application, and this though the adverse occupant erroneously believed his deed covered the tract. *Woodley v. Becknell* (Civ. App.) 214 S. W. 932.

Where one claims only to the true boundary, wherever situate, his possession beyond such line through mistake is not adverse; but one claiming ownership of all the land within his marked boundaries, which are embraced in the description in a deed under which he claims, is claiming adversely, although he erroneously believes the marked boundary to be the true boundary. *Tucker v. Angelina County Lumber Co.* (Com. App.) 216 S. W. 149.

One taking possession of a league of land of which 15½ acres were improved, and claiming an indefinite 640 acres not designated, but not exercising any control over, or adverse possession of, any part of the league other than that covered by the actual improvements, acquired no title by limitation to any part of the league outside of the improved land. *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

When naked possession alone is relied on as constituting title to land, there must be an actual occupancy of the land, and the possession cannot be extended by construction beyond the actual occupancy. *Ludtke v. Wilson* (Civ. App.) 222 S. W. 351.

Where there was an overlap of 48 acres and a field of 50 or 60 acres, cultivated and occupied by the junior patentee, who resided on the junior patent, occupied about 15 acres of the overlap, the remainder being on the junior patent, such possession of part of the overlap being in good faith was sufficient to give constructive title to all the overlap, notwithstanding the claim that such possession did not extend beyond actual possession, because merely incidental to possession of the residence of the junior patentee on the junior patent. *Houston Oil Co. of Texas v. Olive Sternenberg & Co.* (Com. App.) 222 S. W. 534, affirming judgment (Civ. App.) *Same v. Olive Sternenberg & Co.*, 200 S. W. 232; *Same v. Patterson* (Com. App.) 222 S. W. 538, affirming judgment (Civ. App.) 199 S. W. 1140.

To constitute an "adverse enjoyment of land," the act of enjoyment must be of such character as to afford grounds for an action by the real owner, and the occupancy of one subdivision of a larger tract is not notice to the owner of another subdivision not actually occupied that the occupant is claiming or intends to claim any portion of his land. *Gerhart v. Moore* (Civ. App.) 229 S. W. 876.

**Possession of surface as possession of minerals.**—Where land has been conveyed reserving oil and gas rights, grantee is entitled to the ordinary possession of the surface, and such possession alone will not defeat by limitation the title to the minerals which were reserved. *Luse v. Parmer* (Civ. App.) 221 S. W. 1031; *Wallace v. Hoyt* (Civ. App.) 225 S. W. 425; *Henderson v. Chesley* (Civ. App.) 229 S. W. 573.

The fact that persons in possession of a tract of land hold under deeds conveying the tract to them by metes and bounds description without any mention of the mineral rights thereunder does not make their possession of the surface a possession of the minerals thereunder, which had been previously severed by reservation in a deed conveying property to the possessors' remote grantor. *Wallace v. Hoyt* (Civ. App.) 225 S. W. 425.

Where land was granted with a reservation of mineral rights and a remote grantee bored a well to a depth of about 300 feet for obtaining either water or oil, such act held not sufficient to show such adverse possession of the mineral rights as was necessary to set the statute of limitation in operation; no oil or water being discovered, and the well being subsequently abandoned. *Lyles v. Dodge* (Civ. App.) 228 S. W. 316.

**What constitutes hostile possession.**—Entry of claimant on the land need only be with intent to claim it as his own, to hold it for himself, such continuing to be nature of his possession, and his entry or holding need not be founded on some character of title. *Houston Oil Co. of Texas v. Jones*, 109 Tex. 89, 198 S. W. 290.

Where one rents land to another such tenancy is sufficient notice of adverse possession, although he never mentioned his claim to any one. *Salinas v. Shaw* (Civ. App.) 198 S. W. 605.

Claim of ownership of land, to give rise to title by limitation, must be open and a distinct claim of ownership, and mere assertion by occupant that he might as well have land as another does not show the assertion of exclusive hostile right or title. *Morrison v. O'Hanlon* (Civ. App.) 202 S. W. 97.

Mere permissive possession of land, however long continued, will not give title by adverse possession. *Texas & N. O. R. Co. v. Orange County* (Civ. App.) 206 S. W. 539.

Though a person in possession of land, acknowledging a better right in the state, may hold adverse possession as against true owner; the mere holding of land, under the belief that the land is the state's and with the purpose of acquiring it lawfully at some future time, does not define the attitude of the possessor as hostile to the claim of the owner of whose existence he is ignorant. *Masterson v. Pullen* (Civ. App.) 207 S. W. 537.

Plaintiff, who took possession of land for purpose of acquiring land from state under belief that land was vacant, but who after being told that land was not vacant, and with knowledge of real owner, continued for a period of ten years to hold land and make substantial improvements in fence inclosing land, held to have held land adversely to true owner. *Id.*

An encroachment upon the land of another, due solely to a mistake in the location of the true boundary, is inconsistent with a claim of ownership to any portion of the land beyond the limits of the inclosure. *Boy v. McDowell* (Civ. App.) 207 S. W. 937.

As regards hostility of possession, it is enough that those in possession by themselves or tenants are claiming for themselves in hostility to all others. *Atchison, T. & S. F. Ry. Co. v. Abraham* (Civ. App.) 209 S. W. 265.

As there is no penal law against trespass and people are accustomed when it inflicts no apparent damage to pass at will over uninclosed and unoccupied lands, ordinary use of a way over such lands will not be deemed adverse so as to ripen into a prescriptive way. *Nave v. City of Clarendon* (Civ. App.) 216 S. W. 1110.



Where a landowner platted a town site which designated lands adjacent to the railway as reserved for railway purposes and sold lots according to the plat, a purchaser of a lot adjacent to the railway who constructed a cement sidewalk to give access to his hotel to patrons must be deemed to have evinced an intention to use the premises permanently for a way so that such use will ripen into a prescriptive title. *Id.*

Purchaser's possession under an executory contract is adverse to all the world, except the vendor or one who stands by privity of contract in a similar relation to him as vendor. *Robertson v. Smith* (Civ. App.) 220 S. W. 620.

Where K.'s possession of land owned by S. was under some sort of a trade with S., S.'s absence and failure to assert his right in opposition to K. raised no presumption of K.'s adverse right. *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

Having acquired the mortgagor's title, and the land being subject to the mortgagees' lien when she placed her deed of record and took possession, possession of buyer from mortgagor was not adverse to mortgagees' claim of lien, she being entitled to possession as owner, and the mortgagees at no time having been entitled thereto. *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293.

Where there was evidence that the one on whose adverse possession defendant relied had recognized the title of one of the heirs of the patentee having a one-sixth interest, it was not error to refuse a directed verdict for defendant for the other five-sixths interest, since if the holding was not adverse to one heir it was not adverse to the others. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318.

The real test of adverse possession is whether the acts done by the possessor on the land and the use made thereof were of such nature and character as reasonably to notify the true owner that a hostile claim was being asserted. *W. T. Carter & Bro. v. Richardson* (Civ. App.) 225 S. W. 816.

A lease by railway company to the remote grantor of the owner of a lot adjoining right of way, of a small strip adjacent to the lot, does not show that the possession of that strip by the subsequent owners was permissive under the lease, where it was not included in the description in the deeds to them and there was no evidence that they had knowledge of its existence. *Texas & P. Ry. Co. v. Belcher* (Civ. App.) 226 S. W. 471.

Adverse claimant in possession of land claimed **did not** by purchase from owner thereof of another tract of land three-quarters of a mile distant from land so occupied and claimed acknowledge owner's title to the land so occupied so as to preclude him from obtaining title thereto by adverse possession, but such purchase was merely a circumstance for the jury to consider in connection with other facts and circumstances in evidence in determining whether the adverse claimant's possession was adverse during a continuous period of 10 years at any one time. *Evans v. Houston Oil Co. of Texas* (Com. App.) 231 S. W. 731, reversing judgment (Civ. App.) 211 S. W. 605.

Occupancy of land by one who entered thereon by permission of the owner **did not** give occupant title by adverse possession, since the possession in such case was that of the owner. *Id.*

One in actual possession of land for four years as the agent of persons who were merely tenants at will was charged with constructive knowledge of the facts and conditions of their entry, though he did not know to whom the land belonged, as respected his right to hold adversely to the landlord. *Lobit v. Dolen* (Civ. App.) 231 S. W. 831.

**Necessity of claim of right.**—The possession with recognition of the rights of the owner becomes adverse only by an express repudiation of the rights of the owner which is brought to the owner's notice, or is so notorious and public as to require the owner to take notice. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318; *Thompson v. Richardson* (Com. App.) 221 S. W. 952, affirming judgment (Civ. App.) 186 S. W. 275; *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

Where occupant of land took possession in subordination to better title, having so entered, he was required thereafter to change character of possession and make it of such character as to indicate unmistakably assertion of claim of exclusive possession in him, if he sought title by limitation. *Morrison v. O'Hanlon* (Civ. App.) 202 S. W. 97.

Possession is adverse within the statute, although entry on land is made with no original right, but only for the purpose of acquiring limitation and making a home. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

Where, in fencing their land, defendants procured permission from adjoining landowner to make an offset in their fence for a short distance, so as to inclose a parcel which was concededly his land, adjustment to be made later, held, there was no adverse possession under 10-year statute as to such parcel, where no further agreement was made, which would give notice that such land was being claimed. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

An encroachment upon the land of another, due solely to a mistake in the location of the true boundary, may be converted into an adverse claim to land beyond the inclosure sufficient to mature into a title by limitation by acts showing a hostile intent, such as actual notice to the owner that legal title to the entire tract was claimed. *Boy v. McDowell* (Civ. App.) 207 S. W. 937.

By result in plaintiff's favor, within the limitation period, of a survey of the land in question under agreement of the parties that they should abide thereby, claim of right under which defendant had entered was terminated, and thereafter possession was not hostile, but permissive, and would not ripen into title, unless there was a repudiation of the permissive possession, with notice. *Carr v. Bordner* (Civ. App.) 219 S. W. 282.

Mere declaration or statement of the surface owner's attorney, evidencing a hostile claim to minerals under the land, could not of itself have changed the character of the

possession of the surface from a consistent to an adverse possession of the minerals, mere possession of the surface not being possession of the minerals at all; there having been a severance of the minerals. *Henderson v. Chesley* (Civ. App.) 229 S. W. 573.

**Vendor and purchaser.**—The five years' statute of limitations barring suits to recover land does not begin to run against a suit on the vendor's lien until the purchaser asserts a claim to the land hostile to the lien. *Stone v. Robinson* (Civ. App.) 218 S. W. 5.

Where purchasers went into possession with knowledge of purchase-money note and lien securing it, and that it must be paid, and held in privity with the vendor through deeds down to themselves, their possession was not inconsistent with the rights of the vendor or the holder of the note. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

Purchaser's possession under an executory contract is adverse to all the world, except the vendor or one who stands by privity of contract in a similar relation to him as vendor, and is not adverse to his vendor until the relation of vendor and purchaser is disclaimed or repudiated by one of the parties with notice to the other. *Robertson v. Smith* (Civ. App.) 220 S. W. 620.

A vendor's possession, in the absence of circumstances showing the contrary, is adverse to his vendee; but such is not the case where the vendor remaining in possession has sold the minerals, but not the surface. *Green v. West Texas Coal Mining & Developing Co.* (Civ. App.) 225 S. W. 548.

**Landlord and tenant.**—Where land had rental value of \$1,000, while cotenant was in actual possession of part and constructive possession of remainder, court properly refused to award other cotenants recovery of rents, possession, plea of not guilty in trespass to try title, and setting up statute of limitations not constituting ouster. *Broom v. Pearson* (Civ. App.) 200 S. W. 191.

Possession of tenant is possession of landlord, and cannot be said to be adverse, in support of limitations, until landlord has notice of repudiation of tenancy and adverse claim of his tenant. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

Where record title to land was in defendant, and H. obtained and held possession as subtenant of defendant's tenant, plaintiffs who obtained and had recorded a warranty deed from H. and wife could not acquire title by adverse possession; the execution of the deed not being a repudiation of the tenancy, and there being no other repudiation. *Rio Bravo Oil Co. v. Sanford* (Civ. App.) 217 S. W. 219.

Where tenants at will of land used in their stock business discontinued their business, but did not surrender possession, but afterwards gave the posts and wire in their fence to their former agent, who had been in actual possession, and he rebuilt the fence, inclosing part of the land with other land of his own, he stood in his former employers' shoes, and occupied the relation of tenant at will to the landlord, and his possession could not be adverse to the landlord until the landlord had actual or constructive knowledge of his adverse claim. *Lobit v. Dolen* (Civ. App.) 231 S. W. 831.

**Tenants in common.**—The possession of a cotenant, or tenant in common, will be presumed to be in right of the common title, and he will not be permitted to claim protection of the statute of limitations unless it clearly appears that he has repudiated his cotenant's title and is holding adversely thereto. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89; *Terry v. Terry* (Civ. App.) 228 S. W. 299.

A tenant in common claiming title to land by adverse possession must show exclusive possession, not merely possession with other members of family against whom he claims title, though exercising exclusive control and claiming title. *Hardin v. Wanslee* (Civ. App.) 197 S. W. 1031.

Acts relied on by a tenant in common in showing an ouster of his cotenant, and assertion of adverse claims, must be more certain and unequivocal in character than is necessary in ordinary cases where no privity of estate exists, and notice of the adverse holding must be brought home to the cotenant either by information or by acts of unequivocal notoriety. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

The existence of the relationship of tenants in common robs the possession and use of the property by one of them of all probative force as against others, and, the possession being lawful, no inference of adverse claim arises therefrom. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

In partition action, defendant, claiming to have acquired title to the whole tract by adverse possession as against a cotenant, must show, not only continuous possession of the land for the required period of time, cultivating, using and enjoying it, but also that such continuous possession and use was after repudiation of the cotenancy, with notice of repudiation to the cotenant. *Parsons v. Hubbard* (Civ. App.) 226 S. W. 441.

Defendants may have acquired title by adverse possession as against some of the cotenants without having acquired adverse title as against other cotenants, where the former did not become parties to the partition action until six years after the action was commenced by the latter. *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114.

In partition where a cotenant in possession claimed by adverse possession, the registration of a deed under which he held was constructive notice to his cotenants of the existence of the deed. *Terry v. Terry* (Civ. App.) 228 S. W. 299.

In partition between cotenants wherein one claims adversely, it must be shown to claim the protection of statute of limitations that the cotenant against whom the adverse claim is asserted had actual knowledge thereof or that possession and assertion of a hostile claim was of such notorious character that such cotenant would be presumed to have notice thereof. *Id.*

A cotenant not in possession must have actual knowledge of the fact that cotenant in possession is disputing his right to the property, or such cotenant's possession and assertion of hostile claim must be so notorious as to authorize the presumption that the other joint owner had knowledge thereof; but possession under deed or deeds executed by a cotenant and purporting to convey the entire property is hostile to that of the co-

tenant, and he is charged with knowledge of the hostile character thereof. *Olsen v. Grelle* (Com. App.) 228 S. W. 927.

**Husband and wife.**—Where a husband abandoned his wife, leaving her in possession of the community lands, which possession she retained for 16 years, the wife could not acquire title to the lands by limitations. *Hardin v. Hardin* (Civ. App.) 217 S. W. 1108.

If the former husband of defendant gave the land to the mother of plaintiff's grantors, and placed her in possession, before he could hold adversely to those holding under her there would have to be some act on his part repudiating her claim. *Kendrick v. Polk* (Civ. App.) 225 S. W. 826.

Where father made parol gift of land to daughter and daughter's husband conducted, along with the father, the business of a partnership on the premises, the husband having the sole and exclusive management of the business, the possession of the husband was not adverse to the daughter, as a partnership has no separate legal entity such as a corporation possesses. *Carleton-Ferguson Dry Goods Co. v. McFarland* (Civ. App.) 230 S. W. 208.

**Persons in fiduciary relation.**—To constitute the possession of a trustee adverse to the beneficiaries, the repudiation of the trust must be clear and unequivocal, and the beneficiaries must have notice thereof. *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496.

An employee of a partnership living in a house of the partnership on the property was estopped to claim title adversely to the partnership under the statute of limitation or otherwise without a clear repudiation of his holding as a licensee and notice of such repudiation brought home to the partnership through some member or members of the firm under such circumstances as to be legally binding upon the firm and the members thereof individually, although one of the partners without authority made a parol gift of the house and lot to the employee without knowledge or consent of the other partners, employee not making permanent improvements which would enhance the value of the lot; but employee could set up the statute of limitations as to the undivided interest of the partner making the gift of the house and lot. *Leonard v. Cleburne Roller Mills Co.* (Civ. App.) 229 S. W. 606.

**Evidence.**—Evidence that house and improvements of adverse possession claimant were on one tract, and only minor and incidental improvements on a second tract, did not make his adverse holding of second tract beyond his actual possession thereof a jury question. *Bailey v. Kirby Lumber Co.* (Civ. App.) 195 S. W. 221.

Evidence of adverse possession held not undisputed, so as to require judgment against plaintiffs. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

A witness' testimony that he had lived on land claimed by adverse possession for 12 years under an arrangement with claimant's predecessor in title to evict squatters, etc., held not to establish title by adverse possession as matter of law. *Jones v. Keith Lumber Co.* (Civ. App.) 195 S. W. 869.

Evidence held sufficient to show that outside inclosure of lands claimed by adverse possession was sufficiently maintained for more than the necessary period. *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

In trespass to try title, evidence held to support a finding that defendant had lived on the land for a period long enough to give him title by adverse possession. *Settegast v. Blakely* (Civ. App.) 196 S. W. 253.

Evidence held sufficient to support a finding that defendant took possession of land adversely for himself, and not as agent of another. *Salinas v. Shaw* (Civ. App.) 198 S. W. 605.

Evidence held sufficient to support a finding that plaintiff, claiming by adverse possession, had constructed her buildings within the boundaries of defendant's land, and not to show that one claiming land adversely claimed only to specified boundaries, so as to render judgment for an undivided 160 acres erroneous. *Houston Oil Co. of Texas v. Brown* (Civ. App.) 202 S. W. 102.

In action where plaintiff claimed title to 160 acres of land by adverse possession, the question of encroachment not being raised, the distance plaintiff was on defendant's land was immaterial. *Id.*

Evidence held to show that roadway over defendant's land was used with his permission, and that use was not exclusive, nor adverse, nor reasonable necessary. *Espejo Land & Irrigation Co. v. Urbahn* (Civ. App.) 203 S. W. 920.

In suit by adjoining landowner to recover land inclosed within defendants' fence, evidence held to warrant a finding that defendants claimed to fence except for a short distance, where fence departed from line originally adopted. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

Evidence held to show prior appropriation and use by defendants and their vendors of one head of water for irrigation for a period of more than 10 years. *Kountz v. Carpenter* (Civ. App.) 206 S. W. 109.

Evidence held to support finding that possession was hostile to claim of all others. *Atchison, T. & S. F. Ry. Co. v. Abraham* (Civ. App.) 209 S. W. 265.

In an action involving the title to land, evidence held insufficient to show that the possession of any part of the land by an heir and tenant in common was ever adverse to his brothers, also tenants in common. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

In an action involving question of whether plaintiff had acquired title by adverse possession, testimony that an agent of defendants, who claimed to be legal owners of the land, urged witness to persuade plaintiff to compromise, was admissible to show notice to defendants of plaintiff's adverse claim. *Stark v. Haynes* (Civ. App.) 211 S. W. 343.

On the question of whether plaintiff acquired title by adverse possession, plaintiff's testimony that her brother had told her that agent of defendants, who claimed legal

title, had told him to offer to compromise with plaintiff, was admissible to prove her claim to the land, and that offer of compromise was made by defendants. *Id.*

In a suit for land where plaintiffs set up adverse title, evidence held sufficient to identify the parcel to which they set up an adverse claim. *Stark v. Leonard* (Civ. App.) 212 S. W. 677.

In trespass to try title, evidence held not to show that plaintiff had prior and continuous possession, by virtue of which he was entitled to recover. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

In action by purchaser at vendor's lien foreclosure sale, evidence held to show that purchaser during his possession for the prescriptive period did not recognize a title in third persons superior to that of vendor under which he was holding. *Robertson v. Smith* (Civ. App.) 220 S. W. 620.

Evidence that K. took possession of land owned by S. under some sort of a trade, the character of which is not shown, does not warrant the jury in finding that the possession was taken under such circumstances as to set in motion the bar of limitations, especially where K. subsequently abandoned any character of occupancy for more than half a century. *Durham v. Houston Oil Co. of Texas* (Com. App.) 222 S. W. 161, affirming judgment (Civ. App.) 193 S. W. 211.

In trespass to try title, evidence for defendant describing land occupied adversely held sufficiently definite to sustain a verdict in his favor. *Ludtke v. Wilson* (Civ. App.) 222 S. W. 351.

Evidence that the person in possession through whom defendant claimed under the statute of limitations had attempted unsuccessfully to purchase the interest of one heir of the original patentee, and had gone into possession with the understanding he was to set off the interest of that heir if he could purchase from the others, held to raise the issue whether his possession was adverse to the heirs. *Chapman v. Dickerson* (Civ. App.) 223 S. W. 318.

In suit to recover title and possession of certain land, wherein a defendant claimed title to an undivided 80 acres in the 160-acre tract, the question whether defendant's possession through a tenant was sufficient to put the true owner on inquiry held for the jury. *W. T. Carter & Bro. v. Richardson* (Civ. App.) 225 S. W. 816.

In partition against purchasers from plaintiffs' cotenants claiming to have acquired title by adverse possession, question as to whether plaintiffs permitted cotenant to remain on the land held proper. *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114.

In partition where a cotenant claimed the land by adverse possession, evidence held to warrant a finding that the possession and assertion of adverse claim under a recorded deed was of such unequivocal and notorious character and so long continued that it could be presumed that plaintiffs had notice thereof, and their rights were barred by limitation. *Terry v. Terry* (Civ. App.) 228 S. W. 299.

### Art. 5682. [3350] Possession may be held by different persons.

**Tacking successive possessions.**—In trespass to try title, evidence held sufficient to sustain a finding that defendant had title by limitation of five years on account of the adverse possession of its predecessor. *Houston Oil Co. of Texas v. Billingsley* (Com. App.) 213 S. W. 248.

Where plaintiff's predecessor in title was ousted of possession of the land by decree of the federal court, plaintiff cannot, though her predecessor continued in possession and delivered possession to her, tack the later possession with the earlier possession. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

In an action of trespass to try title to recover the title and possession of land, evidence held to raise an issue as to whether defendant's remote grantor or intervenor's testator's grantor matured limitation title. *Conn v. Southwestern Settlement & Development Co.* (Civ. App.) 222 S. W. 612.

**Privity of estate.**—Under the statute of limitations, a vendee's possession may be tacked to the possession of those under whom he holds in privity, if all the other elements are present. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

**Vendor and purchaser.**—Where a vendor conveyed, retaining a lien to secure purchase-money notes, and by action in court rescinded the conveyance for nonpayment of lien notes, later obtaining quitclaim deeds from the purchasers, such transactions made no break in the privity of vendor's title. *Brady v. McCuiston* (Civ. App.) 210 S. W. 815.

Grantee has a right to avail himself of adverse claim exercised by his grantor to boundaries recited in deed. *Barry v. Jones* (Civ. App.) 219 S. W. 1113.

There was no continuous holding under deeds duly registered by a grantor and grantee where the grantee's deed was not registered for five months, though the grantor retained an express vendor's lien to secure payment of the purchase-money notes, on the theory that the grantee was holding under the grantor's registered title. *Daugherty v. Manning* (Civ. App.) 221 S. W. 983.

Where plaintiff claimed title by adverse possession, variance between description of land in petition and description in deed between plaintiff and predecessor was harmless, where the deed was not offered as a muniment of title, but for the purpose of proving privity between plaintiff and such predecessor to establish continuity of possession for required period. *Morrison v. Bennette* (Civ. App.) 228 S. W. 307.

**Landlord and tenant.**—In trespass to try title, evidence held sufficient to support a finding that defendant had acquired title by adverse possession through a tenant. *Salinas v. Shaw* (Civ. App.) 198 S. W. 605.

A lease by the true owner to the son of the claimant by adverse possession, who also held as a lessee of his mother, failed to interrupt the adverse possession, upon the same principle as that which prevents a tenant from attorning to another during his term. *Lockin v. Johnson* (Civ. App.) 202 S. W. 168.

One entering possession under the tenant or lessee occupies the same position as the original tenant and lessee, and is equally estopped to deny that the possession thus acquired is that of the landlord. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

Where land was occupied by one who was avowedly the tenant of the owner, the possession of such tenant was equivalent to possession by the owner on the question of notice to third parties of said owner's rights. *Houston Oil Co. of Texas v. Choate* (Com. App.) 232 S. W. 285.

Inclosure of land by claimant's tenants inures to the benefit of the claimant. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

### Art. 5683. [3351] Right of the state not barred, etc.

**In general.**—This article does not prevent the acquisition of title by adverse possession to a portion of railroad right of way, since that article was amended after there were extensive railway holdings to meet the construction theretofore placed on it as permitting adverse possession to give title against cities, counties, and towns, and if railway rights of way had been intended to be included, they could have been expressly mentioned. *Texas & P. Ry. Co. v. Belcher* (Civ. App.) 226 S. W. 471.

**State.**—An award of a school survey, coupled with proof of occupancy, payment of a part of purchase money, interest, and taxes, is such a right as can be destroyed by adverse possession, notwithstanding title will remain in state until it gives a patent. *Allen v. Draper* (Civ. App.) 204 S. W. 792.

**Claimant under purchase from state.**—In trespass to try title based on adverse possession, it is no defense that state has refused to issue a patent to defendants, where defendants could at any time have obtained a patent by making a correction in field notes; there being no issue as to the boundaries to the land in controversy, the boundaries as existing on the ground being old recognized established surveys. *Stark v. Rogers* (Civ. App.) 216 S. W. 473.

The rule that a purchaser from the state, before the issuance of a patent, has a title to land, subject to divestiture through adverse possession, though the state cannot be thus barred, applies, though the tract claimed by adverse possession is not a multiple of 40 acres, and assuming that, because of this fact, the adverse claimant cannot compel the land commissioner to substitute him for the purchaser, or demand a patent on payment of the purchase price, as such title as the purchaser has may nevertheless be acquired. *Whitaker v. McCarty* (Com. App.) 221 S. W. 945, reversing judgment (Civ. App.) 188 S. W. 502.

The title acquired by an adverse possessor of lands sold by the state, prior to patent, is only such as the purchaser had, and is subordinate to that of the state, and subject to forfeiture until compliance with the conditions of purchase, and upon a declaration of forfeiture all right and title reverts in the state. *Id.*

**County.**—Where county granted land to railroad for depot purposes, but failed to sell land by commissioner at public auction as required by law, the railroad, by entering upon land, making improvements thereon, and continuing possession and paying taxes for more than 40 years, secured title thereto by adverse possession. *Texas & N. O. R. Co. v. Orange County* (Civ. App.) 206 S. W. 539.

**Alley.**—Where title to land dedicated as alley was obtained by defendant by limitation, defendant did not rededicate land to city by sale of property with reference to map filed in deed records, where no mention was made of the alley, and where owner had not made or recorded plat; the reference to deed being for purpose of identifying lots, and not for purpose of dedicating alley. *City of Pearsall v. Crawford* (Civ. App.) 213 S. W. 327.

**Art. 5684. [3352] Does not run against infants, etc.**—If a person entitled to commence suit for the recovery of real property or to make any defense founded on the title thereto, be at the time such title shall first descend or the adverse possession commence:

- (1) A person, including a married woman, under twenty-one years of age, or
- (2) In time of war, a person in the military or naval service of the United States, or
- (3) A person of unsound mind, or
- (4) A person imprisoned, the time during which such disability or status shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this chapter; providing that on and after the first day of November, A. D., 1920, the period of limitation shall not be extended so as to authorize any person who has the right of action for the recovery of any lands, tenements, hereditaments to institute suit therefor against another having peaceable and adverse possession thereof, using and enjoying the same after the expiration of twenty-five years next after the cause of action shall have

accrued, and provided further that this article shall in no way affect suits pending when this Act takes effect, and all such suits shall be tried and disposed of under the law then in force. [Acts 1841, p. 109, §§ 14-17; P. D. 4621-4; 1895, p. 35; Acts 1919, 36th Leg. 2d C. S., ch. 55, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**In general.**—The disability of coverture, beginning subsequent to the commencement of the adverse possession, is not available, although the party was under age at that time, and married later on. The one disability cannot be tacked to the other. *Ragsdale v. Barnes*, 68 Tex. 504, 5 S. W. 68.

Adverse possession under ten-year statute is unaffected by minority during part of such period of woman claiming title through marriage to deceased record owner's husband after limitation period had expired. *Fowler v. Woods* (Civ. App.) 200 S. W. 247.

**Minors.**—Where adverse possession commenced in the lifetime of the owner, minority of his heirs does not affect the bar or interrupt running of the statute. *Sandmeyer v. Dolijsi* (Civ. App.) 203 S. W. 113.

**Art. 5684a. Adverse possession under chain of title.**—On and after the first day of November A. D. 1920, a person who has had; and held the peaceable and adverse possession of lands, tenements and hereditaments, the title to which has passed out of the State, using and enjoying the same under deed or deeds duly recorded constituting a regular chain of title, for a period of twenty-five years immediately preceding shall have a good marketable title thereto. [Acts 1919, 36th Leg. 2d C. S., ch. 55, § 2.]

## CHAPTER TWO

### LIMITATION OF PERSONAL ACTIONS

<b>Art.</b>	<b>Art.</b>
5685. Actions to be commenced in one year.	5692. Actions for specific performance.
5686. Survival of cause of action.	5693. Time in which power of sale may be exercised.
5687. Actions to be commenced in two years.	5694. Rights under vendor's lien barred, when.
5688. What actions barred in four years.	5695. Contracts of extension, how made and construed; proviso.
5690. All other actions barred, when.	5696. Judgments shall be revived, when.
5691. Actions on foreign judgments barred, when.	5699. On action to contest a will.

**Article 5685. [3353] Actions to be commenced in one year.**

Cited, *Hinkle v. Thompson* (Civ. App.) 195 S. W. 311.

**Art. 5686. [3353a] Survival of cause of action.**

**Assignment of cause of action.**—Barratry was offense at common law, and though this article allows assignment of unliquidated claim for damages for personal injury or other choses in action, state has right to denounce, as offense of barratry, solicitation of employment to collect such claims. *Ex parte McCloskey*, 82 Cr. R. 531, 199 S. W. 1101.

**Art. 5687. [3354] Actions to be commenced in two years.**

See *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049.  
Cited, *St. Louis Southwestern Ry. Co. of Texas v. Shields Grain & Coal Co.* (Civ. App.) 220 S. W. 183.

**Subdivision 1.**—In trespass to try title to a strip of land, which for more than two years has been occupied by a railroad track, where the company by cross-bill seeks condemnation of the right of way, the right of the land-owner to compensation for the injury to the land not taken is not barred by this subdivision. *Texas Western Ry. Co. v. Cave*, 80 Tex. 137, 15 S. W. 786.

**Subdivision 2.**—Where one partner had loaned casings to an oil company and had been notified about four years before the suit that the casing had been abandoned, such notice, being notice to the partnership, barred an action for conversion by another partner. *Canadian Oil & Gas Co. v. Webb* (Civ. App.) 203 S. W. 135.

Where a father, owning land in common with his children, collected rent for more than 30 years without accounting therefor, or recognizing children's right to participate therein, and appropriated rent to own use, children were barred from recovering their interest in such rents as were collected for more than 2 years prior to action, though 5 years prior to action he recognized children's interest in property by joining with them in mortgaging property. *Johnson v. Johnson* (Civ. App.) 206 S. W. 369.

In an action to recover the possession of personal property on a farm purchased by

defendant at the time of the purchase, evidence held insufficient to show defendant's adverse possession thereof for two years. *McGlasson v. Fiorella* (Civ. App.) 228 S. W. 254.

Subdivision 4.—See *American Surety Co. of New York v. Board of Trustees of Independent School Dist. of Ft. Worth* (Civ. App.) 224 S. W. 292; *City of Ft. Worth v. Same* (Civ. App.) 224 S. W. 294.

The four-year statute of limitation, and not the two-year statute, applies to an action to recover for deficiency in land conveyed resulting from mutual mistake of the parties as to the quantity of land. *Hohertz v. Durham* (Civ. App.) 224 S. W. 549; *Gillispie v. Gray* (Civ. App.) 214 S. W. 730.

In an action by a national bank against its former vice president and director, under U. S. Rev. St. § 5239 (U. S. Comp. St. § 9831), to recover damages for an excessive loan made by defendant director in violation of section 5209 (U. S. Comp. St. § 9761), the two-year limitation of *Vernon's Sayles' Civ. St. Tex. 1914*, art. 5687, was inapplicable; the action being within the general description of art. 5690, and subject only to the limitation of four years thereby prescribed. *Corsicana Nat. Bank of Corsicana v. Johnson*, 251 U. S. 68, 40 Sup. Ct. 82, 64 L. Ed. 141.

A conditional promise, in writing, to pay if ever the promisor is able, coupled with proof of such ability subsequent to the promise, is sufficient to take a case out of this subdivision, even if such ability is not a continuing one. *Lange v. Caruthers*, 70 Tex. 718, 8 S. W. 604.

Action for establishment of trust and recovery of lots so held, although seeking personal judgment in alternative, was not action of debt barred by two-year statute of limitations. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849, 204 S. W. 314, 207 S. W. 307.

Where, under contract providing that defendant should pay for materials, plaintiff paid therefor, a suit for money paid was barred within two years subsequent to date of purchase and appropriation by defendant. *Palo Pinto County v. Beene* (Civ. App.) 199 S. W. 866.

An action for price of goods or commodities sold on a written order, containing no express promise to pay, is not within the two years' statute, but the four years' statute, of limitations. *Lewis v. Taylor* (Civ. App.) 204 S. W. 333.

One who loaned money to another to purchase land for the latter, who agreed to convey the land to the lender, in default of payment could not maintain suit nearly five years thereafter to establish a lien on the land or recover the money; the parol promise being barred by the statute of limitations of two years. *Aaron Frank Clothing Co. v. Deegan* (Civ. App.) 204 S. W. 471.

In a suit by the county upon the treasurer's bond for loss occasioned by his violation of official duty, the statute of limitation of two years is not applicable. *Padgett v. Young County* (Civ. App.) 204 S. W. 1046.

Cause of action for fraud of buyer of peanut threshers was not barred by the two-year statute of limitations, where falsity of original representations of seller's agent was concealed by further misrepresentations, whose falsity was not discovered until within two years of suit brought. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

An action for fraud and deceit is subject to the bar of limitations of two years. *Id.*

As suit by county against county tax assessor and sureties on his official bond, predicated entirely upon recovery of money which the county had voluntarily allowed and paid the assessor in excess of the maximum compensation allowable for his official services under arts. 7583-7585, and art. 3385, was not for an act in violation of the duties covered by his bond, under arts. 3894, 3895, 7547, but an action in the nature of debt for money received, the two-year statute applied against the county. *Grayson County v. Cooper* (Civ. App.) 211 S. W. 249.

A cause of action for fraudulent misrepresentations, inducing the purchase of oil stock in January and March, 1913, the buyer having discovered the fraud within a few months by working for the company, was barred, on December 20, 1915, by the two-year statute of limitations, which begins to run when the fraud is discovered. *Bain v. Lovejoy* (Civ. App.) 215 S. W. 984.

Where plaintiff allowed defendant, whom he had engaged to clear land, to give written orders on merchants for merchandise, the fact that defendant gave written orders on merchants for part of the money and goods received does not render the two-year statute inapplicable, on the theory that the contract was one in writing. *Powers v. Schubert* (Civ. App.) 220 S. W. 120.

Where the original petition stated a cause of action on express contract, plaintiff could not recover on an implied contract and quantum meruit set up in an amended petition which was not filed until more than two years after the accrual of the cause of action upon quantum meruit. *Kuhn v. Shaw* (Civ. App.) 223 S. W. 343.

The two years' statute of limitations did not apply to a suit on a contract in writing. *Leeson v. City of Houston* (Civ. App.) 225 S. W. 763.

The collection and retention by the county treasurer of commissions to which he is not entitled constitutes official malfeasance, giving rise to an action on his bond to which the four, and not the two, years' statute of limitations would apply. *Charlton v. Harris County* (Civ. App.) 223 S. W. 969.

The recitals in deed of public school lands on which there was due the state a certain sum per acre that, as part of the consideration for the deed, the grantees assumed the obligation and debt, including principal and interest, payable to the state, constituted an express agreement by the grantees to pay their grantor's obligation to the state, including each installment of interest, and their grantor's cause of action against them for breach of such agreement by failure to pay such interest installments was one for debt evidenced by and founded upon a contract in writing, to which the four-year statute of limitations was applicable, and not a cause of action to be re-

imbursed money paid as surety, to which the two-year statute would apply; for, although the grantor had paid the interest installments before suit, his right of action did not arise from defendants' duty or implied promise to reimburse him, but from breach of their duty themselves to pay the installments. *Smith v. Nesbitt* (Sup.) 230 S. W. 976.

Where plaintiff alleged he was fraudulently induced to subscribe for stock, and his allegations further showed a purpose to recover what he paid, that the certificates had not been issued, and that he had received nothing and consequently could make no offer of restoration, and that the notes he executed were worthless, in that they had been canceled by defendant, he appeared to have repudiated the contract and to seek restoration of the status quo, so that his action was, in effect, for rescission, and the two-year statute was not applicable. *Clark v. Texas Co-op. Inv. Co.* (Com. App.) 231 S. W. 281, reversing judgment (Civ. App.) *Texas Co-op. Inv. Co. v. Clark*, 212 S. W. 245.

Where a purchaser of a half interest in a sawmill verbally assumed payment of half the mortgage indebtedness of his vendor, and later purchased the other half, and also assumed the remaining half of the indebtedness, the contract of assumption not being a contract in writing, the two-year statute applied, and the mortgagee could not recover a personal judgment against the purchaser, where more than two years had elapsed from the time of the assumption and maturity of the debt; but this did not prevent the mortgagee from foreclosing the mortgage assumed, the notes not having been barred at the time of the purchase. *McCaslin v. Pittsburg Foundry & Machine Co.* (Civ. App.) 232 S. W. 887.

**Subdivision 5.**—In a suit on an open account, an item, "Balance on settlement, \$401.69," is too general. *Leverett v. Wherry* (App.) 15 S. W. 121.

Where items of goods sold, for defects in which set-off was claimed, were sold at one time, a bill rendered when the goods were shipped, and payment demanded by draft, the transaction was not a portion of a mutual account under the four-year statute, but the two-year statute applied. *Caffarelli Bros. v. Lyons Bros. Co.* (Civ. App.) 199 S. W. 685.

Proprietor of chili parlor who also sold soda water and near beer in connection with his chili business held not a "merchant." *Dillard v. Dugger Grocery Co.* (Civ. App.) 232 S. W. 360.

That chili parlor proprietor was given credit for near beer bottles and cases delivered by him to his creditor on two separate occasions did not make the creditor's action against him one on a "mutual and current account concerning the trade of merchandise" there being in such case but one account, and the delivery of the bottles and cases being merely payments thereon. *Id.*

A watch, watch fob, and pistol turned over to his creditor by a proprietor of a chili parlor held not "merchandise," since chili parlor proprietor was not dealing in such articles, but merely gave them as his personal possessions to his creditor toward payment of his account. *Id.*

**Subdivision 6.**—See *Alley v. Bessemer Gas Engine Co.* (C. C. A.) 262 Fed. 94; *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

A cause of action for exemplary damages for the refusal of a carrier to transport a passenger pursuant to her ticket because she was a negro was barred in two years as a tort. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

### Art. 5688. [3356] What actions barred in four years.

See *Kendall v. Hackworth*, 66 Tex. 499, 18 S. W. 104; *Benavides v. Houston Ice & Brewing Ass'n* (Civ. App.) 224 S. W. 385.

Cited, *Meusebach v. Half*, 77 Tex. 185, 13 S. W. 979; *Chicago, T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

**Subdivision 1.**—An action to recover the balance due on a railroad grading contract is an action "founded upon a contract in writing" and, is not barred until the lapse of four years from the time the cause of action accrued. *Galveston, H. & S. A. Ry. Co. v. Johnson*, 74 Tex. 256, 11 S. W. 1113.

The suit on the bond, given on appeal from a justice of the peace can be barred only by this article, limiting to four years an action for debt founded on a contract in writing. *Wooldridge v. Rawlings* (Sup.) 14 S. W. 667.

A mortgage was foreclosed, and the premises bid in by the mortgagee. One who had purchased after the execution of the mortgage, and whose deed was duly recorded, was not made a party to the foreclosure. The mortgagee took possession of the premises within four years after the sale on foreclosure. Held, that after the expiration of the four years the mortgage could be foreclosed against the purchaser, and that the right to a foreclosure was not barred by this article. *King v. Brown*, 80 Tex. 276, 16 S. W. 39.

Where original carrier's agent, pursuant to consignee's letter, reshipped goods over defendant railway, advising consignee thereof, held sufficient compliance with art. 710, making four-year statute of limitations, applying to written contracts, applicable to consignee's action for damages. *Ft. Worth & D. C. Ry. Co. v. Bone* (Civ. App.) 195 S. W. 244.

An action against a grantee for the amount of grantor's vendor's lien note which the grantee assumed and agreed to pay is an action for debt evidenced by or founded on a contract in writing within this article. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 198 S. W. 170.

An action for price of goods or commodities sold on a written order, containing no express promise to pay, is not within the two years' statute, but the four years' statute, of limitation. *Lewis v. Taylor* (Civ. App.) 204 S. W. 383.

Where letter was written to defendant describing wheat to be sold at price certain, to which defendants replied in writing that they would take a carload if sample suited, and the samples were sent and a telegram or letter was forwarded ordering the car



of wheat which was shipped and accepted, the contract was in writing under the statute of limitations. *Id.*

Where a purchaser of land on August 10, 1907, as part of purchase price, gave three notes, due, respectively, in three, four, and five years, and his vendee in 1911 made agreement with then owner of notes whereby, in consideration of increased interest, notes were made payable August 10, 1912, four years' statute would bar personal recovery in a suit on the notes, and not on the subsequent agreement, brought after August 10, 1916. *Henson v. C. C. Slaughter Co.* (Civ. App.) 206 S. W. 375.

Where the beneficiary in an accident policy wrote to the insurer within 90 days after death of insured, as provided by the policy, to furnish blanks required for proof, but insurer failed to furnish same, such failure constitutes a waiver of insurer's right to such proof, and of the contractual period of limitation stated in the policy in pursuance of art. 4742, and hence the statutory period of four years applied. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

A bill of lading executed by a carrier is a contract in writing to which the four-year statute of limitation applies. *Missouri, K. & T. Ry. Co. v. Hunter* (Civ. App.) 216 S. W. 1107.

A cause of action for actual damages for a carrier's refusal to transport a passenger pursuant to her ticket was within this article. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

A bill of lading is a "contract in writing" and an action by a carrier to recover unpaid freight is not barred until expiration of four years; for failure on the part of a carrier to collect or a shipper to pay the stipulated rate is a breach of a contractual obligation, and not merely of a legal duty, although the rate stipulated is the only lawful rate. *St. Louis Southwestern Ry. Co. of Texas v. Shields Grain & Coal Co.* (Civ. App.) 220 S. W. 183.

The four-year statute of limitation, and not the two-year statute, applies to an action to recover for deficiency in land conveyed resulting from mutual mistake of the parties as to the quantity of land. *Hohertz v. Durham* (Civ. App.) 224 S. W. 549.

After a judgment has been entered on a note, secured by a trust deed and foreclosure thereof ordered, the four-year statute of limitations no longer applies, even in favor of subsequent lien claimants who were not parties to the foreclosure suit. *Shaw v. Jackson* (Civ. App.) 227 S. W. 520.

The collection and retention by the county treasurer of commissions to which he is not entitled constitutes official malfeasance, giving rise to an action on his bond to which the four, and not the two, years' statute of limitations would apply. *Charlton v. Harris County* (Civ. App.) 228 S. W. 969.

The recitals in deed of public school lands on which there was due the state a certain sum per acre that, as part of the consideration for the deed, the grantees assumed the obligation and debt, including principal and interest, payable to the state, constituted an express agreement by the grantees to pay their grantor's obligation to the state, including each installment of interest, and their grantor's cause of action against them for breach of such agreement by failure to pay such interest installments was one for debt evidenced by and founded upon a contract in writing, to which the four-year statute of limitations was applicable, and not a cause of action to be reimbursed money paid as surety, to which the two-year statute would apply; for, although the grantor had paid the interest installments before suit, his right of action did not arise from defendants' duty or implied promise to reimburse him, but from breach of their duty themselves to pay the installments. *Smith v. Nesbitt* (Sup.) 230 S. W. 976.

**Subdivision 3.**—Where transactions consisted entirely of sales by plaintiff to defendant, held, that there was no mutual and current account between merchant and merchant. *Neal Commission Co. v. Golston* (Civ. App.) 197 S. W. 1124.

Action on mutual and current account between merchant and merchant being barred in four years, plaintiff's reply setting up that the account was one between merchant and merchant was proper. *Cameron Automobile Co. v. Berry* (Civ. App.) 198 S. W. 411.

Where items of goods sold, for defects in which set-off was claimed, were sold at one time, a bill rendered when the goods were shipped, and payment demanded by draft, the transaction was not a portion of a mutual account under the four-year statute; but the two-year statute applied. *Caffarelli Bros. v. Lyons Bros. Co.* (Civ. App.) 199 S. W. 685.

Where defendant gave notes to his partner, and they agreed that on dissolution of the partnership the amount due him should be remitted from the notes, and more than four years after dissolution suit was brought on the notes, the agreement was no defense, but in the nature of a set-off, and barred. *Cameron v. Williams* (Civ. App.) 203 S. W. 928.

A watch, watch fob, and pistol turned over to his creditor by a proprietor of a chili parlor held not "merchandise" since chili parlor proprietor was not dealing in such articles, but merely gave them as his personal possessions to his creditor toward payment of his account. *Dillard v. Dugger Grocery Co.* (Civ. App.) 232 S. W. 360.

That chili parlor proprietor was given credit for near beer bottles and cases delivered by him to his creditor on two separate occasions did not make the creditor's action against him one on a "mutual and current account concerning the trade of merchandise" there being in such case but one account, and the delivery of the bottles and cases being merely payments thereon. *Id.*

Proprietor of chili parlor who also sold water and near beer in connection with his chili business held not a "merchant." *Id.*

**Art. 5690. [3358] All other actions barred, when.**

See *Johnson v. Johnson* (Civ. App.) 206 S. W. 369.

Cited, *Connor v. Hawkins*, 71 Tex. 582, 9 S. W. 684.

**In general.**—In an action by a national bank against its former vice president and director, under U. S. Rev. St. § 5239 (U. S. Comp. St. § 9831), to recover damages for an excessive loan made by defendant director in violation of section 5200 (U. S. Comp. St. § 9761), the two-year limitation of *Vernon's Sayles' Civ. St. Tex. 1914, art. 5687*, was inapplicable; the action being within the general description of this article, and subject only to the limitation of four years thereby prescribed. *Corsicana Nat. Bank of Corsicana v. Johnson*, 251 U. S. 68, 40 Sup. Ct. 82, 64 L. Ed. 141.

A mortgage was foreclosed, and the premises bid in by the mortgagee. One who had purchased after the execution of the mortgage, and whose deed was duly recorded, was not made a party to the foreclosure. The mortgagee took possession of the premises within four years after the sale on foreclosure. Held, that after the expiration of the four years the mortgage could be foreclosed against the purchaser, and that the right to a foreclosure was not barred by this article. *King v. Brown*, 80 Tex. 276, 16 S. W. 39.

The statute of limitations of four years, or any other period, unaccompanied by adverse possession, is without application in trespass to try title. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

Where, in a suit to establish plaintiff's rights in the waters of a stream and enjoin diversion, there was evidence that defendants and their predecessors in title had remained in the adverse, peaceable, uninterrupted, notorious, and exclusive use of the water for irrigation and the operation of railroad locomotives for more than 10 years, there was a question for the jury whether the action was barred by the limitation of 4 years. *Martin v. Burr* (Sup.) 228 S. W. 543.

The act of 1895 relative to the diversion of water from streams does not repeal the statute of limitations of four years as applied to suits involving the rights of private riparian owners. *Id.*

The four-year statute of limitations applies to a purchaser's equitable action against a vendor for misrepresentation of the quantity of land purchased at a fixed price per acre. *Gillespie v. Gray* (Civ. App.) 230 S. W. 1027.

**Cause of action.**—A claim by a judgment debtor that creditors had purchased property at a prior execution sale for much less than its value is a claim by way of set-off against the creditors' demand for satisfaction from other property, constituting a cross-action and not a mere defense, and was barred by the four-year statute. *Nelson v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 214 S. W. 366.

**Actions for recovery of real estate.**—In suit in trespass to try title, where no equity suit was necessary to set aside a deed as a condition precedent to recovery of land, general statute of limitations which apply to suits for the recovery of real estate, and not four-year statute of limitations, is applicable. *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

The four-year statute of limitation, and not the two-year statute, is applicable to a suit for shortage in acreage by the purchaser of land. *Gillispie v. Gray* (Civ. App.) 214 S. W. 730.

A suit to quiet the right of riparian proprietors to the water of a stream and to enjoin diversion is not an "action for the recovery of land," and is within this article. *Martin v. Burr* (Sup.) 228 S. W. 543.

**Rescission or cancellation.**—Held that, though this article includes an action to set aside a deed conveying land, it cannot be invoked as a bar to such a proceeding when brought by a married woman, when it appears that she was under coverture when the right of action accrued. *Storer v. Lane*, 1 Civ. App. 250, 20 S. W. 852.

Where subscriber to corporation stock set up fraud inducing his subscription, his action would be barred by statutes applicable to rescission and cancellation, and not those applicable to suits to remove clouds from titles. *Loñe Star Life Ins. Co. v. Pierce* (Civ. App.) 200 S. W. 1104.

An action for the rescission of a contract to purchase corporate stock on the ground of fraud is governed by the four-year statute, but an action for damages by reason of fraud in the sale of corporate stock is governed by the two-year statute. *Texas Co-op. Inv. Co. v. Clark* (Civ. App.) 212 S. W. 245.

A suit to set aside a deed procured by fraud is barred by the four-year statute of limitations. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

**Vacation and reformation of judgments.**—The statute of limitations of four years applied to a suit to vacate a judgment for want of service of process. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

A suit, in so far as it is one to set aside a judgment, is barred in 4 years after the judgment was obtained. *Kirtley v. Spencer* (Civ. App.) 222 S. W. 328.

An action to reform a judgment which misdescribed land through mistake comes within the statute of limitation of four years, and is barred after such time unless facts pleaded are sufficient to toll the statute. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

**Art. 5691. [3359] Actions on foreign judgments barred, when.**

**In general.**—This article applies to a judgment of a federal court for another state. *Collin County Nat. Bank v. Hughes*, 110 Tex. 362, 220 S. W. 767, affirming judgment (Civ. App.) 154 S. W. 1181.

**Art. 5692. [3360] Actions for specific performance.**

Cited, *Peterson v. McCauley* (Civ. App.) 25 S. W. 826.

**In general.**—In an action for specific performance of a contract, to sell land, where defendant neither pleaded nor attempted to prove a demand for the purchase money, and did not allege that the contract had been rescinded, a demurrer to a plea setting up laches on part of plaintiff for a shorter period than that prescribed, as a bar to the action, and the increased value of the land, was properly sustained. *Riley v. McNamara*, 83 Tex. 11, 18 S. W. 141.

**Art. 5693. Time in which power of sale may be exercised.**

See *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84; *Clark v. Mussman* (Civ. App.) 203 S. W. 380; *Frederick v. House* (Civ. App.) 220 S. W. 607; *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

Cited, *Ater v. Knight* (Civ. App.) 218 S. W. 648; *Smith v. Tipps* (Com. App.) 229 S. W. 307; *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

**Construction and application in general.**—Rights of grantee of trust deed to exercise power of sale having become completely barred under this article, four years after the debt matured and before enactment of article 5695, providing for extension of time did not extend his time; the rights of the grantor having become vested. *Turner v. Gregory* (Civ. App.) 263 S. W. 615.

Where note secured by trust deed with power of sale matured in July, 1908, right to a sale was barred after July, 1912, statute having been passed in 1911, so that holder of trust deed had a reasonable time to exercise power of sale. *Id.*

Where notes secured by a deed of trust matured January 1, 1913, the authority of the trustee to transfer the property under the deed of trust expired absolutely on January 1, 1917, under this article, although such statute, as amended, did not go into effect until November 17, 1913. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

A purchaser of land from a trustee under a deed of trust at a sale, void by reason of this article, was entitled under the doctrine of subrogation to the debt and the right to sue on the notes, if they were not barred by the provisions of arts. 5694, 5695. *Id.*

Letters acknowledging the justness of debts evidenced by notes secured by a mortgage held, under Rev. St. 1911, art. 5705, to stop the running of limitations against the notes as personal obligations of the makers; the provision of that article not being affected by arts. 5693-5695, as amended, in which the Legislature was dealing with liens. *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

Actions on improvement certificates are not governed by the four-year statute of limitations, relating to vendor's and deed of trust liens. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933.

**Art. 5694. Rights under vendor's lien barred, when.**

See *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84; *Clark v. Mussman* (Civ. App.) 203 S. W. 380; *Howell v. Townsend* (Civ. App.) 217 S. W. 975; *Allison-Richey Gulf Coast Home Co. v. Welder* (Civ. App.) 220 S. W. 392; *Frederick v. House* (Civ. App.) 220 S. W. 607; *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336

Cited, *Howard v. Stahl* (Civ. App.) 211 S. W. 826; *Smith v. Tipps* (Com. App.) 229 S. W. 307; *Sewell v. Walton* (Civ. App.) 204 S. W. 371.

**Constitutionality.**—See *Quick v. Anderson* (Civ. App.) 232 S. W. 536.

**Construction and application.**—**In general.**—This article should be construed as remedial. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

The rule that a vendor's lien is preserved from the bar of limitations on the purchase-money note if personal judgment is had on such note, so that after expiration of the period of limitation on the note a proceeding may be commenced to revive the judgment and enforce the vendor's lien as an incident to the debt evidenced by the judgment, is not changed by the passage of this article. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

Letters acknowledging the justness of debts evidenced by notes secured by a mortgage held, under art. 5705, to stop the running of limitations against the notes as personal obligations of the makers; the provision of that article not being affected by this article, in which the Legislature was dealing with liens. *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

The provision relating to period of limitations for enforcement of vendor's lien and for recovery of land by a vendor who has reserved title, did not repeal article 593, providing for three days of grace on all notes negotiable or assignable by law, or affect the applicability of such statute to notes secured by deeds of trust and mortgages. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

Where vendor's lien notes executed in 1910, and due, respectively, in 1911 and 1912, did not pass to plaintiff until 1920, action thereon and upon vendor's lien reserved was barred for the act which gave 12 months in which to institute suit on the superior title went into effect July 1, 1913. *Quick v. Anderson* (Civ. App.) 232 S. W. 536.

**Remedies barred.**—Where deed reserving vendor's lien for purchase-money note was recorded, and such lien assigned by unrecorded instrument, the original deed was notice to vendor's creditors only until purchase money note was outlawed, and liens of judgments against vendor secured after note was barred by statute of limitations are superior to assignee's rights under vendor's lien. *Price v. Traders' Nat. Bank* (Civ. App.) 195 S. W. 934.

This article does not apply to an action, begun in 1914, to foreclose a vendor's lien note due in 1909, which a grantee of the land in 1912, assumed and expressly agreed

to pay, and for personal judgment against the grantee. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 198 S. W. 170.

Contract for sale or lease, whereby seller promised he would make deed only on buyer's making specified payments, which in fact were never made, was not "deed of conveyance," and conditional obligations of buyer to pay sums mentioned were not "vendor's lien notes." *Bailey v. Burkitt* (Civ. App.) 201 S. W. 725.

Regardless of this article, where vendor's right to rescind matured February 23, 1881, a petition filed November 16, 1914, held within time, in view of art. 5695, extending time. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

This article applies to an action to recover land by the owner of a purchase-money note and the vendor's superior title. *R. B. Godley Lumber Co. v. C. C. Slaughter Co.* (Civ. App.) 202 S. W. 801.

This article has no application to contracts giving power to forfeit for nonpayment, but only bar enforcement of a superior title, or the foreclosure of vendor's lien. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

This article applies to vendor's lien evidencing indebtedness due for the purchase money, and not to a judgment based on such indebtedness. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

Actions on improvement certificates are not governed by the four-year statute of limitations, relating to vendor's and deed of trust liens. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933.

**Suspension of limitations.**—The running of this statute is not suspended by a suit by the vendor to recover the amount of the notes, and precludes recovery of the land by suit brought more than four years after maturity of the notes, though recovery on the notes was denied because of illegality of the contract. *Stone v. Robinson* (Civ. App.) 218 S. W. 5.

### Art. 5695. Contracts of extension, how made and construed; proviso.

See *Price v. Traders' Nat. Bank* (Civ. App.) 195 S. W. 934; *Bailey v. Burkitt* (Civ. App.) 201 S. W. 725; *R. B. Godley Lumber Co. v. C. C. Slaughter Co.* (Civ. App.) 202 S. W. 801.

Cited, *Howard v. Stahl* (Civ. App.) 211 S. W. 826; *Smith v. Tipps* (Com. App.) 229 S. W. 307; *Sewell v. Walton* (Civ. App.) 204 S. W. 371.

**Constitutionality.**—Const. art. 1, § 16, forbidding retroactive laws, or laws impairing obligation of contracts, contemplates only that a statute shortening the period within which an action may be brought shall allow a reasonable time within which to assert rights. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

This article is valid in so far as it provided for extension of period of limitations in which to enforce vendor's lien by filing of acknowledged contract of extension, even though proviso relating to revival of remedies already barred should be held unconstitutional. *Baxter v. Baxter* (Civ. App.) 225 S. W. 204.

The Legislature was empowered to extend an existing vendor's lien for additional four-year period. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

The provision giving the vendor who has reserved superior legal title the right (if exercised within four years from November 18, 1913, the date of taking effect of the amendment) to enforce claim against the land on purchaser's default by judicial foreclosure proceedings, although the right to foreclose vendor's lien on the land had on November 18, 1913, been lost by limitation, held valid. *Id.*

The provision shortening the time for action on existing vendor's lien note, is valid, and not unconstitutional as being retroactive. *Quick v. Anderson* (Civ. App.) 232 S. W. 536.

**Construction and operation in general.**—Vendor's attempt to recover land in trespass to try title after action was barred held not election of remedies preventing enforcement of lien. *Tullo v. Mayfield* (Civ. App.) 198 S. W. 1073.

This article does not apply to a paving certificate, in view of Const. art. 3, § 35. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

A recorded mortgage to secure future indebtedness is valid, not only between the parties, but as to subsequent purchasers from the mortgagor, and, as to such subsequent purchasers any advances made or indebtedness incurred in pursuance to the mortgage contract, whether before or after the subsequent sale or incumbrance, are protected by a prior and superior lien, upon the property, this article does not affect the validity of such a future indebtedness clause. *Poole v. Cage* (Civ. App.) 214 S. W. 500.

Extension of vendor's lien note, not recorded as required by statute, would vitalize the debt for four years beyond the four limited by this article, but would not authorize foreclosure of lien, which had ceased to exist. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

Letters acknowledging the justness of debts evidenced by notes secured by a mortgage held, under art. 5705, to stop the running of limitations against the notes as personal obligations of the makers; the provision of that article not being affected by arts. 5693-5695, as amended, in which the Legislature was dealing with liens. *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

Vendor's attempt to recover land by virtue of his superior title, in an action of trespass to try title, after such action was barred, was an election of remedies preventing an action on vendor's lien notes and to foreclose the lien. *Marshall v. Mayfield* (Com. App.) 227 S. W. 1097.

Where a landowner made an executory contract to convey, retaining a vendor's lien in the purchase-money notes, but failed to sue to foreclose the lien, or otherwise to

take steps to recover the land, until limitations barred his right to recover, the superior title then vested in the grantee. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

**Existing liens.**—This article does not apply to an action begun in 1914 to foreclose a vendor's lien note due in 1909 which a grantee of the land assumed and expressly agreed to pay in 1912, and for personal judgment against the grantee. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 198 S. W. 170.

Vendor's lien note due November 15, 1909, held not barred on November 18, 1913, when the amendment by Acts 33d Leg. c. 123, took effect, in view of article 593, giving 3 days' grace. *Tullos v. Mayfield* (Civ. App.) 198 S. W. 1073.

Regardless of art. 5694, where vendor's right to rescind matured February 23, 1881, a petition filed November 16, 1914, held within time, in view of this article. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Rights of grantee of trust deed to exercise power of sale having become completely barred under art. 5693, four years after the debt matured and before enactment of art. 5695, providing for extension of time, did not extend his time; the rights of the grantor having become vested. *Turner v. Gregory* (Civ. App.) 203 S. W. 615.

As limitation laws relate to remedy only, and Legislature may increase or diminish the period of limitation, provided such change is made before the right has become barred under the pre-existing statute, the proviso to this article prevented bar of vendor's lien notes executed subsequent to July 14, 1905, and maturing August 10, 1912, until four years after enactment of statute. *Henson v. C. C. Slaughter Co.* (Civ. App.) 206 S. W. 375.

Relative to bar of suit to foreclose a mortgage executed after July 14, 1905, and securing a note maturing before, but less than four years before, the taking effect of Acts 1913, c. 123, embodied in this article, right to renew and extend the note and mortgage is not limited to four years after maturity of the note, but to four years after the taking effect of the legislative acts. *Frederick v. House* (Civ. App.) 220 S. W. 607.

Where notes secured by a mortgage on real estate, though due, were not barred by limitations, when this article was amended by Acts 33d Leg. 1st Called Sess. (1913) c. 27, the holder of the notes had four years after the last amendment took effect within which to commence foreclosure suit, and such period could not be shortened on the theory that the four-year period should be counted from the first amendment. *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

**Subsequent purchasers.**—Where maker of note representing vendor's lien sold property to defendants, who assumed payment of note, but executed no new note, their contracts of assumption were as binding as if new notes had been executed, and were not barred where suit was brought within four years from the date of such assumption contract, though more than four years after maturity of the note; but payee could not have personal judgment against maker in suit brought more than four years after note was due, where he had not executed extension contract. *L. C. Denman Co. v. Standard Savings & Loan Ass'n* (Civ. App.) 200 S. W. 1109.

An extension contract between the vendor and vendee extends the time for recovery under the lien, though a purchaser from the vendee is not a party thereto. *Howell v. Townsend* (Civ. App.) 217 S. W. 975.

Purchaser in 1916 of a lot against which there was, as shown by the deed records, a vendor's lien for the purchase-money debt, evidenced by a note due in 1910, could not be an innocent purchaser as to such lien, since, it was enforceable until July, 1917; it being immaterial that such purchaser had no notice that the note and lien had, prior to such purchase, been merged in a judgment, to which the 10 years' statute applies, and that suit was not brought on such judgment and to foreclose the vendor's lien as incident thereto, until 1919, as bringing suit dispensed with necessity of extending the note under art. 5595. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

**Extension.**—This article does not require record at any particular time, and an extension filed some years after its execution, but before renewed obligation was barred, held sufficient. *Clark v. Mussman* (Civ. App.) 203 S. W. 380.

Extension by buyer of land of vendor's lien notes and lien made when neither the original debt nor lien was barred, and when notes were in hands of transferee, held to have kept lien alive and enforceable against his own vendee until four years after new maturity date, though his vendee had bought land before contract of extension, and had then assumed of record payment of notes against it, payment of which was subsequently extended. *Allison-Richey Gulf Coast Home Co. v. Welder* (Civ. App.) 220 S. W. 392.

Note and deed of trust constituting renewal of note of previous year, and continuation of lien securing it, held a renewal of the note and a continuation of the lien under this article, every requirement of which was met and complied with, such renewal and continuation of lien being binding on a subsequent purchaser from the mortgagor, so that the mortgagees' claim, suit having been instituted within less than four years after maturity of the renewed note, was not barred by limitations. *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293.

### Art. 5696. [3361] Judgment shall be revived, when.

**In general.**—The fact that a claim for a teacher's salary has been audited and allowed by the commissioners' court of a county does not render it a "judgment" enforceable within 10 years, but where it is afterwards repudiated, and payment refused, the 4-years statute of limitation applies. *Fruitt v. Durant*, 84 Tex. 8, 19 S. W. 281.

**Foreign judgment.**—Where scire facias proceeding to revive a personal judgment is, as in the federal courts, but a continuance of the original suit, the judgment of revivor does not become the judgment, and action on the revived judgment is on the original judgment, so that bar of that action by limitations must be determined, relative to

action on foreign judgment, according to the judgment's original date. *Collin County Nat. Bank v. Hughes*, 110 Tex. 362, 220 S. W. 767, affirming judgment (Civ. App.) 154 S. W. 1181.

**Revival of Judgment.**—In debt on a dormant judgment, and for costs paid out by plaintiffs in the original suit, it is proper to render judgment for the amount of the original judgment, with interest and the costs, and to make the last judgment bear interest from its date. *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539.

A proceeding to revive a judgment against a city may be joined with an application for a mandamus to enforce its collection. *City of Houston v. Emery*, 76 Tex. 232, 13 S. W. 264.

Under arts. 2430, 3443, 3449, and 3450, providing that judgments on claims disallowed by administrators shall be filed with the county court and have same effect as if they had been allowed, such judgments are not enforceable by execution, and cannot become dormant and be revived by scire facias under arts. 3717 and 5696. *Farmers' Nat. Bank v. Crumley* (Civ. App.) 204 S. W. 358.

While the technical judgment on scire facias to revive a judgment is ordinarily that execution issue, yet, as the judgment was a debt, the proceeding to revive is nothing more or less than a suit for debt. *Ater v. Knight* (Civ. App.) 213 S. W. 648.

### Art. 5699. [3364] On actions to contest a will.

See *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664.

**Construction and operation in general.**—This article does not, in view of Const. art. 5, § 16, give district courts jurisdiction to annul by original proceeding the action of a county court in probating a will. *Minor v. Hall* (Civ. App.) 225 S. W. 784.

## CHAPTER THREE

### GENERAL PROVISIONS

Art.		Art.	
5701.	Suspension during late war.	5707.	Presumption of death, when, etc.
5702.	Time of temporary absence not counted.	5708.	No limitation against infants.
5703.	Death of owner, etc., shall stop limitation, until, etc.	5711.	One disability not tacked to another.
5704.	Death of person, etc., against whom, etc.	5712.	Claims barred under pre-existing laws, etc.
5705.	Acknowledgment must be in writing.	5713.	No agreement to shorten period of limitation valid.
5706.	Limitation must be pleaded, etc.	5714.	Notice of claims for damages; rule as to.

### Article 5701. [3366] Suspension during late war.

Cited, *Smith v. Perkins*, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794; *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799.

### Art. 5702. [3367] Time of temporary absence not counted.

**Construction and application in general.**—This article has no application, where defendant was without the state when the cause of action accrued and did not return within the period of limitations. *Alley v. Bessemer Gas Engine Co.* (C. C. A.) 262 Fed. 94.

The question of the defendant's residence in the state is immaterial in determining the application of the statute, but its applicability depends on the presence of the defendant in the state, either at the time the cause of action accrued or the right arose out of which the cause of action grew. *Graham v. Englemann* (D. C.) 263 Fed. 166.

This article applies to one who at time of accrual of cause of action had a "residence" as distinguished from a "domicile" within the state. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

**Nonresidence.**—If subsequent grantee from common source, claiming title by adverse possession under five-year statute, was a nonresident at time his deed was recorded, mere visits to the state on business or pleasure would not bring the suspensory statute into operation. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

If subsequent grantee from common source, claiming title by adverse possession under five-year statute, was a resident at time deed to him was recorded, the operation of the statute would be suspended during his absence from the state, although during such time grantee became a nonresident. *Id.*

**Absence.**—Defendant foreign corporation was, for purpose of citation on it, not only within the state when plaintiff's cause of action for personal injury accrued, but also never without it during the two years thereafter, so that under art. 5687, subd. 6, and art. 5702, action was barred; it at all times having local soliciting agents; on whose orders, when approved at the home office, it shipped, art. 1861 allowing it to be served by citation on any local agent within the state. *Alley v. Bessemer Gas Engine Co.* (C. C. A.) 262 Fed. 94.

An action commenced June 24, 1889, on an account due plaintiff in April, 1887, where defendant was out of the state from April until October in 1887, was not barred by the two-years limitation. *Watkins v. Junker* (Sup.) 19 S. W. 390.

**Pleading.**—In suit to recover on sworn account, defendant setting up statute of limitations, court erred in sustaining exception to paragraph of plaintiff's pleading alleging defendant was out of state some of time during which cause might have been maintained. *Cameron Automobile Co. v. Berry* (Civ. App.) 198 S. W. 411.

**Evidence.**—In trespass to try title, the principal issue being whether deceased grantee was at time of accrual of cause of action a resident, so that his absence from the state would suspend statute of limitations, a statement of said grantee in an affidavit that his post office address was a named place within the state was admissible as a circumstance tending to establish residence. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

#### Art. 5703. [3368] Death of owner, etc., shall stop limitation until, etc.

**In general.**—Death suspends limitation period for year, unless administrator or executor has sooner qualified. *Coleman v. Texas Produce Co.* (Civ. App.) 204 S. W. 382.

Under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), cause of action in case of death does not accrue until appointment of a personal representative of deceased, and, where deceased's wife filed petition within two years after she was appointed administratrix, action was not barred. *Bird v. Ft. Worth & R. G. Ry. Co.*, 109 Tex. 323, 207 S. W. 518.

Limitation would be suspended as to a debt owing to a community only until such time as surviving spouse qualified as community administrator under the provisions of art. 3592 et seq. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

#### Art. 5704. [3369] Death of person, etc., against whom, etc.

**In general.**—Where an administrator of an estate is not appointed until more than 2½ years after the death of his intestate, a claim consisting of a note and mortgage, filed against the estate 4 years and 3 months after its maturity, is not barred by the statute of limitations, since the statute of limitations was suspended for one year after intestate's death. *Kiobassa v. Raley*, 1 Civ. App. 165, 23 S. W. 253.

**"Administratrix."**—The qualification of a surviving wife as community administratrix, under the provisions of art. 3592 et seq., is an "administration," which will put such statute of limitation in motion after its suspension by reason of the death of the husband, at least so far as actions to subject community property to community debts are concerned. *Clark v. First Nat. Bank* (Com. App.) 210 S. W. 677.

#### Art. 5705. [3370] Acknowledgment must be in writing.

**Extension of note.**—Mere extension of past-due note is only an acknowledgment of justness of claims which must be in writing to toll the running of the statute. *Poythress v. Ivey* (Civ. App.) 203 S. W. 103.

Extension of vendor's lien note, not recorded as required by statute, would vitalize the debt for four years beyond the four limited by arts. 5694, 5695. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

Where a husband and wife borrowed money from intervener to buy lots and construct buildings thereon, and gave notes therefor prior to moving onto the property, and subsequently the husband alone by agreement extended the time of payment he could not renew the wife's indebtedness which had become barred by the four-year statute (art. 5688), so as to defeat her homestead rights. *Benavides v. Houston Ice & Brewing Ass'n* (Civ. App.) 224 S. W. 385.

**New promise.**—Promise by administratrix to pay claim not then presented to her for allowance or rejection held not to prevent running of limitations especially in view of this article. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

The original barred debt, not being satisfied or discharged but merely unenforceable, is sufficient consideration for the new promise to pay. *Frederick v. House* (Civ. App.) 220 S. W. 607.

**Action upon new contract.**—A new consideration is essential to a parol agreement, extending the date of payment of a note in order to postpone the beginning of the period of limitation. *First State Bank of Eustace v. Bowman* (Civ. App.) 203 S. W. 75.

This article has no application, where payee of a note by parol agreement, has extended the date of payment in consideration of the payment of interest to extended date; this being a new contract superseding note. *Id.*

Where a new promise or acknowledgment is pleaded by amendment to take a claim out of the statute, limitations will run against such new promise until the filing of the amendment. *Cozier v. Andrews* (Civ. App.) 206 S. W. 975.

**Sufficiency of acknowledgment.**—After the statute of limitations had run, the creditor drew on the debtor. The latter wrote: "When I last saw you I explained to you that everything I had was tied up, and that the first debt I paid would be yours." "By doing the way you have it seems to me you desire to advertise the fact that I am in debt." "I wish to say to you plainly that drawing on me is not making your claim better. If you are not satisfied with delay and my excuses sue me as a man, but cease persecuting me. I am good for any judgment obtained against me." Held, that the letter was sufficient to remove the bar of the statute. *Russ v. Cunningham* (Sup.) 16 S. W. 446.

Letter from debtor to creditor, making proposition looking toward settlement in corporate stock, held to have renewed debt and prevented bar by running of four-year

limitation. *Emerson-Brantingham Implement Co. v. Hickman* (Civ. App.) 193 S. W. 412.

Defendant's letter, in answer to request for payment of agent's commission, stating his impression that claim had been paid, promising to search his records and get the matter straightened out and requesting agent to think the matter over, was not such acknowledgment of indebtedness or new promise to pay as to lift the bar of limitations. *Campbell v. Wyatt* (Civ. App.) 217 S. W. 743.

Where defendant, who had cleared land for plaintiff, demanded an additional sum, and the demand, which was written by defendant's agent, adverted to plaintiff's claim, which was supposed to be a small one, and the letter showed that defendant did not know the amount of plaintiff's claim, there was no acknowledgment of plaintiff's claim so as to take the same out of the limitation statute. *Powers v. Schubert* (Civ. App.) 220 S. W. 120.

Letters acknowledging the justness of debts evidenced by notes secured by a mortgage held to stop the running of limitations against the notes as personal obligations of the makers; the provision of that article not being affected by arts. 5693-5695, as amended, in which the Legislature was dealing with liens. *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

An acknowledgment of indebtedness sufficient to remove the bar of the statute, must acknowledge the existence of liability at the time of the acknowledgment and express a willingness to pay; it being insufficient that it acknowledges the justice of the original claim so that in an action to recover an attorney's fee barred by the two-year statute of limitation, a letter written by the client to the attorney admitting that he owed the attorney something, but objecting to the amount of the claim and requesting a reduction, is not sufficient. *Wade v. Sheehan* (Civ. App.) 226 S. W. 444.

### Art. 5706. [3371] Limitation must be pleaded, etc.

See *Gathright v. Wheat*, 70 Tex. 740, 9 S. W. 76.

**Pleading statute as defense.**—Statutes of limitation must be pleaded, in order to obtain any relief under them. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336; *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675; *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

Claimant of land under chain of title from persons who merely occupied and claimed adversely must specially plead the limitation of ten years. *Luttrell v. Click* (Civ. App.) 200 S. W. 255.

A first amended abandoned petition being no part of a second amended petition, that the second alleges a different cause of action can be raised only by plea and proof. *Corpus Christi Street & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 201 S. W. 1032.

In trespass to try title, defendant, claiming by limitations, cannot show that the title was in a third person by limitation, not having so pleaded. *Campbell v. Castle* (Civ. App.) 204 S. W. 484.

San Antonio City Charter, § 123, barring delinquent taxes after 10 years, fixes a limitation period, and is not available to taxpayer unless pleaded. *Garza v. City of San Antonio* (Civ. App.) 214 S. W. 488.

**Demurrer or exception as raising defense.**—An objection that an amended pleading presents a new cause of action barred by limitations can be reached only by a plea, and not by an exception, which requires consideration of the former pleadings. *Pyle v. Park* (Civ. App.) 196 S. W. 243.

No special form is prescribed for a plea of limitations, and in case the petition on its face discloses the accrual of the statutory period, defense may be made by special exception. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

A cause of action is not shown by the petition to have been barred by limitation, so as to be subject to special exception, where petition alleges, as the date of conversion, a date less than two years prior to the bringing of the action. *Robbins v. Winters* (Civ. App.) 203 S. W. 149.

Where petition does not show on its face that cause of action is barred by limitation, the defense of limitation cannot be maintained by exceptions, but must be specially pleaded. *Hamilton v. Wm. H. Swanson Film Co.* (Civ. App.) 206 S. W. 574.

In suit to establish plaintiff's and interveners' interest in a note, exception to the effect that cause of action asserted by plaintiff creditor showed that cause of action was barred, was properly overruled, where claims of interveners, other creditors, were not barred. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

The defense of limitation may, where the facts appear upon the face of the pleadings, be taken advantage of by special exceptions. *Garcia v. Yzaguirre* (Com. App.) 213 S. W. 236.

Plaintiff could not avail himself of defense of limitation to note set up in defendant's cross-action without having pleaded limitation in his reply, though he had raised such defense by special exception, where court had not acted upon the exception, and judgment of the court thereon had not been invoked by plaintiff; the exception having been waived. *Id.*

**Pleading avoidance of limitation.**—In action against county judge and sureties on his bond to recover money due plaintiff county, a demurrer to petition because action was barred by limitations was properly sustained, where supplemental petition in avoidance failed to show defendant's fraudulent concealment of cause of action preventing bringing of an action, in view of arts. 1427, 1453, relating to judge's statements, report to county clerk, and examinations. *Marion County v. Rowell* (Civ. App.) 207 S. W. 983.

Where defendant by exception and plea urged limitations, it was incumbent upon plaintiff to file an amended petition or replication setting up such facts as he depended on to show that the cause of action should be considered for purpose of limitation as having accrued at a time within two years preceding the filing of the suit. *Powers v. Schubert* (Civ. App.) 220 S. W. 120.



Plaintiff in an action on a series of notes providing that all payments should mature upon default in payment of installment cannot contend that the parties waived the provision as to accelerated maturity in the absence of an allegation as to such waiver in avoidance of defendant's plea of limitation. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933.

**Sufficiency of pleading.**—No special form is prescribed for a plea of limitations, and such defense may be made by plea. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

In trespass to try title, allegations by defendant that he and those under whom he "holds by priority of contract in interest claiming to have good and perfect right and title thereto, has had and held peaceably said lands and adverse possession of same \* \* \* for a period of more than 10 years," amounted to no more than an assertion that defendant had perfected title by his own occupancy or use in privity with others, and not that title stood in a third person by virtue of the statute of limitations. *Campbell v. Castle* (Civ. App.) 204 S. W. 484.

Under the statute making possession of land under certain circumstances a perfect defense to trespass to try title if pleaded and proved, such possession is a defense, though not pleaded by way of confession and avoidance. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

In a suit to establish plaintiff's rights in the waters of a stream and enjoin diversion, an answer alleging that defendants and their predecessors in title had the adverse, peaceable, and continuous use of the waters for irrigation of certain lands by means of dams and ditches for more than 10 years, and, in the case of one defendant, for its locomotives by means of pumping plants and tanks for more than 30 years, it sufficiently presented the defense of limitation of 4 years where no special exceptions were urged. *Martin v. Burr* (Sup.) 228 S. W. 543.

In trespass to try title, where defendant relied on adverse possession, pleadings held to present the issue whether he recognized plaintiff's paramount title. *Collins v. Megason* (Civ. App.) 228 S. W. 533.

In an action on notes containing provision that the whole debt would mature on failure to pay installment, defendant's plea "that plaintiff's debt \* \* \* is barred by the two-year statute of limitation, plaintiffs' said cause of action, if any they have or had, having accrued more than two years before their suit was filed, and defendant pleads the two-year statute of limitations in bar of any recovery herein," was sufficient as against an objection that it did not set forth the facts upon which defendant relied, since plaintiff was charged with knowledge that the statute of limitation began to run against the whole debt from the maturity of the installment upon which default was made. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933, affirming judgment (Civ. App.) 203 S. W. 84.

### Art. 5707. [3372] Presumption of death when, etc.

See *Moser v. Tucker* (Civ. App.) 195 S. W. 259.

**Presumption of death—What raises.**—A charge, where the death of plaintiffs' ancestor is in issue, that if he "had absented himself beyond the sea, or elsewhere, for seven successive years, and if the evidence does not show that he was alive within that time," he shall be presumed to be dead, is sufficient without any qualification as to whether he has been heard from during the seven years, or whether the absence was from his home. *French v. McGinnis*, 69 Tex. 19, 9 S. W. 323.

Where the evidence shows that a man was unmarried and had removed from the state many years ago and has not been heard from for 15 years, such facts are insufficient to raise presumption of death. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

Where a member of a mutual benefit society, of happy disposition, fond of wife and children, left home to go to his work and was never seen again, an irresistible presumption arises that he died shortly after leaving home, so that a subsequent forfeiture of his policy for nonpayment of dues was ineffectual. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

— **Construction and operation of statute.**—Presumption of death arising from seven years' absence is not absolute. *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

**Provisions in insurance policies or certificates.**—Act Cong. June 29, 1894, c. 119, § 4, provides that Knights of Pythias shall have power to amend their Constitution, provided they do not conflict with laws of United States, or any state. Held, that a by-law, to the effect that disappearance shall not be regarded as evidence of death until full term of life expectancy of assured has expired, cannot be given effect. *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891.

Provisions in the by-laws of a mutual benefit society against absence or disappearance of a member from his residence unheard of for any length of time, being held to be evidence of the death of such member, are null and void. *Sovereign Camp, Woodmen of the World, v. Piper* (Civ. App.) 222 S. W. 649.

— **Accrual of cause of action.**—A by-law of a fraternal insurance company, providing that no action can be brought on a policy unless proof of death be furnished within one year, nor unless action is commenced within two years, does not apply, where plaintiff must rely upon this article to establish death. *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891.

Under fraternal insurance certificate payable only "upon satisfactory proof of death," where it was impossible to establish death until after expiration of seven-year period creating presumption of death, cause of action on policy did not accrue until then. *Id.*

**Art. 5708. [3373] Limitation shall not run against infants, etc.**

Cited, *Davis v. Laning*, 85 Tex. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. Rep. 734.

**In general.**—Infancy and coverture as an avoidance of the bar of limitations are personal privileges which are waived by a failure to plead them. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

If legal title is in administrator, he holds it in trust for the heirs subject to rights of creditors of decedent's estate, and in such event, irrespective of disability, the cestui que trust is barred when the trustee is barred; but the statute of limitations will not run against a cestui que trust laboring under a statutory disability, such as coverture, where the legal title is not in the trustee, until such disability is removed. *Smith v. Price* (Civ. App.) 230 S. W. 836.

**Minors.**—Limitations held not to run during the minority of legatees claiming under the will of a grantor, who during life retained control, etc., of the deed under which the grantee therein named claimed. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

Under arts. 3595, 3598, 3601, 3612, limitations began to run against all adult heirs of a married woman on their cause of action against the sureties on the bond given by their father as community survivor one year after the filing of the bond, and, as to a minor son, limitations began to run against him when he reached 21, and his cause of action would be barred 4 years after such date. *Simons v. Ware* (Civ. App.) 219 S. W. 858.

**Married women.**—Wife is not barred by limitations from bringing action against husband to cancel deed to husband, since, being under coverture, there were no limitations running against her. *Moore v. Moore* (Civ. App.) 225 S. W. 78.

**Persons of unsound mind.**—Limitations did not run against the right of a grantor of unsound mind or her heirs to set aside the deeds until her death, the heirs having until then no right to sue. *Sherwood v. Sherwood* (Civ. App.) 225 S. W. 555.

**Art. 5711. [3376] One disability not tacked to another.**

See *Warren v. Frederichs*, 83 Tex. 380, 18 S. W. 750.

**In general.**—Where limitation began to run before a married woman acquired title to the land, it would continue to run, notwithstanding the disability arising subsequently by reason of the title being vested in her as her separate property. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

**Art. 5712. [3377] Claims barred under pre-existing laws, etc.**

See *St. Louis, B. & M. Ry. Co. v. Marcofich* (Com. App.) 221 S. W. 532.

Cited, *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

**In general.**—Where a law of limitation not in force before was created by the Revised Statutes, in computing the time of the statutory bar the time already elapsed when the trouble took effect should be added to that subsequently elapsed. *Boon v. Chamberlain*, 82 Tex. 480, 18 S. W. 655.

**Art. 5713. [3378] No agreement shortening period of limitation valid.**

See *Independent Order of Puritans v. Lockhart* (Civ. App.) 212 S. W. 559.

**Insurance policy.**—Provision of employer's liability insurance policy against action, unless brought within 90 days, held not to prevent bringing of action after 90 days because invalid. *Home Life & Accident Co. v. General Bonding & Casualty Ins. Co.* (Civ. App.) 198 S. W. 1064.

The provision in an insurance policy for shortening the period of limitation, being one for the benefit of the insurer, may be waived, and will be construed strictly against the insurer and liberally in favor of the beneficiary. *Simmons v. Western Indemnity Co.* (Civ. App.) 210 S. W. 713.

**Art. 5714. [3379] Notice of claims for damages; rule as to.**

**In general.**—The act from which this article was taken did not violate article 3, § 35, of the Constitution. *Western Union Tel. Co. v. Jobe*, 6 Civ. App. 403, 25 S. W. 168.

This article applies to claims for delay in delivery of dispatches. *Western Union Tel. Co. v. Jobe*, 6 Civ. App. 403, 25 S. W. 1036.

A contract between a sender of a telegram and a telegraph company to the effect that the company shall not be liable for damages or statutory penalties where the claim is not presented in writing within 95 days after the cause of action shall have arisen is valid, and is binding on the parties thereto and their principals, unless procured by fraud, or unless unreasonable under the facts and circumstances of the particular case. *Western Union Telegraph Co. v. Janko* (Civ. App.) 212 S. W. 243.

A shipper of live stock is bound by provision of the contract, signed by him with the second carrier, requiring notice of injury to stock, if he had opportunity to read the contract before signing it, though he testified he had a previous oral contract with the initial carrier for the shipment to final destination. *San Antonio & A. P. Ry. Co. v. Miller* (Civ. App.) 213 S. W. 734.

This article is restrictive and in derogation of the common-law right to freely contract, and therefore is to be strictly construed. *Travelers' Ins. Co. of Hartford, Conn. v. Scott* (Civ. App.) 218 S. W. 53.

Art. 708, first enacted in 1863, prohibiting carriers from limiting or restricting their common-law liability, was not repealed by implication by this article, which, without

special reference to carriers, prohibits stipulations requiring notice of any claim for damages within a less period than 90 days. *St. Louis, B. & M. Ry. Co. v. Marcofich* (Com. App.) 221 S. W. 582, affirming judgment (Civ. App.) 185 S. W. 51.

**Time for giving notice.**—This article does not prohibit notice after 90 days when circumstances show that delay was not unreasonable, and does not show that insurer was injured by reason of delay. *Fidelity & Casualty Ins. Co. of New York v. Mountcastle* (Civ. App.) 200 S. W. 862.

Filing suit and service of citation in less than 91 days complied with requirement of notice within such time in live stock shipping contract. *Galveston, H. & S. A. Ry. Co. v. Gibbons* (Civ. App.) 202 S. W. 352.

This article does not make invalid a stipulation in a contract to transmit a telegram requiring notice of claim for damages to be presented within 95 days after the cause of action arises, if such a stipulation is reasonable. *Western Union Telegraph Co. v. Verhalen* (Civ. App.) 204 S. W. 240.

**Interstate commerce.**—This article does not apply to interstate shipments, but in such cases it is for the carrier to satisfy the jury that the notice required was reasonable. *Galveston, H. & S. A. Ry. Co. v. Williams* (Civ. App.) 25 S. W. 311.

In absence of rules of Interstate Commerce Commission or federal statute providing when suit must be commenced by railroad to recover unpaid freight on interstate shipment, the statutes of limitations of the state govern. *St. Louis Southwestern Ry. Co. of Texas v. Shields Grain & Coal Co.* (Civ. App.) 220 S. W. 183.

**Insurance companies.**—An action by the obligee on a bond indemnifying it against default of its treasurer, for the amount of a defalcation, is a claim for damages so that a condition of the policy requiring immediate notice was void. *Western Indemnity Co. v. Free and Accepted Masons of Texas* (Civ. App.) 198 S. W. 1092.

A by-law of a fraternal insurance company, providing that no action can be brought on a policy unless proof of death be furnished within one year, nor unless action is commenced within two years, does not apply, where plaintiff must rely upon art. 5707, relating to presumption of death, to establish death. *Supreme Lodge, Knights of Pythias, v. Wilson* (Civ. App.) 204 S. W. 891.

This article applies to notice and proofs of loss under a hail insurance policy. *St. Paul Fire & Marine Ins. Co. v. Pipkin* (Civ. App.) 207 S. W. 360.

This article applies to fraternal benefit associations, art. 4830, enacted in 1913, providing that no insurance law thereafter enacted shall apply to them, being inapplicable as art. 5714 is a prior existing statute and not an insurance law. *Independent Order of Puritans v. Lockhart* (Civ. App.) 212 S. W. 559.

Stipulation in employers' liability policy requiring that immediate written notice of accident be given to insurer is not void, this statute having no application to such stipulation as to notice of an accident. *Travelers' Ins. Co. of Hartford, Conn., v. Scott* (Civ. App.) 218 S. W. 53.

This article held not applicable to provision in indemnity policy, requiring insured to give insurer notice of accident immediately on occurrence thereof. *Texas Glass & Paint Co. v. Fidelity & Deposit Co. of Maryland* (Civ. App.) 226 S. W. 811.

**Pleading, evidence and burden of proof.**—It will be presumed that a requirement of a telegraph company that notice of claim be made within a specified time has been complied with, unless failure to do so is specially pleaded. *Western Union Telegraph Co. v. Love & Walters* (Civ. App.) 200 S. W. 889.

In an action against a telegraph company for failing to deliver a message, where a plea that notice of damages had not been made within 95 days as required by contract was stricken, judgment for defendant could not be entered on appeal on the ground that the undisputed evidence showed that the stipulation for notice was reasonable. *Western Union Telegraph Co. v. Verhalen* (Civ. App.) 204 S. W. 240.

A plea, setting up that a shipper of live stock failed to give notice of claim within a day after delivery at destination, etc., must be verified, and, if not verified, raises no such issue. *Mexico Northwestern Ry. Co. v. Williams* (Civ. App.) 208 S. W. 712.

In action on employers' liability policy, where answer set up failure of insured to give insurer notice of the accident as required by the policy, defendant's failure to verify answer was waived by plaintiff by failure to object to evidence as to such want of notice. *Travelers' Ins. Co. of Hartford, Conn., v. Scott* (Civ. App.) 218 S. W. 53.

In an action on a life insurance policy, where insurer has not pleaded failure to give notice of death of insured, it will be presumed that such notice was given. *Illinois Bankers' Life Ass'n v. Floyd* (Com. App.) 222 S. W. 967, reversing judgment (Civ. App.) *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.*, 192 S. W. 607.

**Construction and performance of stipulation.**—Under live stock shipping contract providing for notice only to agent of initial carrier, notice to the initial carrier was notice to connecting carriers. *Galveston, H. & S. A. Ry. Co. v. Gibbons* (Civ. App.) 202 S. W. 352.

An insurer of property which was not totally destroyed by fire, the policy providing that the loss should not become payable until 60 days after notice, ascertainment, and proof of loss, in the absence of denial of liability, was not liable for interest from the date of the loss. *Delaware Underwriters v. Brock*, 109 Tex. 425, 211 S. W. 779.

## DECISIONS RELATING TO SUBJECT IN GENERAL

### I. NATURE, VALIDITY AND CONSTRUCTION OF LIMITATIONS IN GENERAL

**½. Construction in general.**—Statutes of limitation being in the nature of statutes of repose, requiring diligence in enforcing rights and putting a period to litigation, are regarded with favor, as based upon considerations of sound public policy, and are to be

construed in like manner as other statutes, and their application not evaded by implied exceptions. *Davis v. Howe* (Com. App.) 213 S. W. 609.

1½. **Power of legislature to enact laws.**—A statute shortening the period within which an action may be brought need only allow a reasonable time within which to assert rights. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

The Legislature may provide a shorter period of limitation for existing causes of action, and may create a statute of limitations, where none existed before; but it cannot, by so abbreviating the time within which suit must be brought, take away the right of action altogether, and must allow a reasonable time after the law goes into effect to bring suits on actions not already barred. *Bean v. J. I. Case Threshing Mach. Co.* (Civ. App.) 221 S. W. 634.

As to causes of action not already barred, the Legislature may extend the period of limitation or remove the bar altogether. *Id.*

When a vested right has been lost by limitation, the Legislature has no power to restore it. *Hoard v. McFarland* (Civ. App.) 229 S. W. 687.

2. **Limitation as against state or municipality.**—A city cannot plead the two-year statute of limitations in an action by a school district against it to recover penalty moneys collected on school taxes by the city, such school officers exercising a portion of the sovereign powers of the state. *American Surety Co. of New York v. Board of Trustees of Independent School Dist. of Ft. Worth* (Civ. App.) 224 S. W. 292; *City of Ft. Worth v. Same* (Civ. App.) 224 S. W. 294.

5. **Estoppel to rely on limitation.**—Statement of attorney for administratrix that he thought she would pay claim when she got the money held not to bind her, or estop her from pleading limitations against the claim. *Butler v. Fechner* (Civ. App.) 200 S. W. 1126.

Parties by their acts, not evidenced by any writing, may estop themselves from setting up the statute of limitations. *City of Ft. Worth v. Rosen* (Civ. App.) 203 S. W. 84.

6½. **Defense or cross-action.**—In a suit by the vendor for specific performance of the contract and to foreclose vendor's lien, the right of the purchaser to a reduction of the purchase price because of a misrepresentation by the vendor's agent on which the purchaser relied is a purely defensive plea, and not a defense in the nature of a cross-action, as in the case where the purchaser seeks to recover the purchase money paid, and therefore the statute of limitations is not available to defeat the defense of partial failure of consideration. *Mason v. Peterson* (Civ. App.) 232 S. W. 567.

## II. COMPUTATION OF PERIOD OF LIMITATION

### (A) *Accrual of Right of Action or Defense*

7. **Causes of action in general.**—A husband, having given bond as community survivor to account to the heirs of his deceased wife for their interest in the community property, and having sold it, became liable on the bond, in an action by the heirs for their interest, for the proceeds, and limitations then began to run in favor of him and his sureties against such action. *Simons v. Ware* (Civ. App.) 219 S. W. 853.

Statutes of limitations did not start to run against cause of action for recovery of salary paid defendant during occupancy of office to which plaintiff had been elected until final decision in quo warranto proceeding holding that defendant had not been entitled to the office, plaintiff's cause of action not having accrued until such final determination. *Pease v. State* (Civ. App.) 228 S. W. 269.

8. **Title to or possession of real property.**—Where wife dies, and husband takes possession of community property, after the expiration of a reasonable time for payment of community debts an action may be brought by the heirs of the deceased wife for their interest, and limitations then begin to run without the surviving husband's expressly repudiating any claim on the part of the heirs. *Williford v. Simpson* (Civ. App.) 217 S. W. 191.

A life tenant's acquiescence in a boundary did not bar the remainderman during the existence of the life estate. *Daugherty v. Manning* (Civ. App.) 221 S. W. 933.

The right of action in favor of riparian owners to quiet their riparian rights and prevent wrongful interference by upper proprietors accrues when the upper proprietors divert water to such an extent as to deprive the lower proprietors of water for domestic use to their substantial injury. *Martin v. Burr* (Sup.) 228 S. W. 543.

Limitations do not begin to run against remainderman until the death of the life tenant, in favor of persons not strangers to the life estate. *Olsen v. Grelle* (Com. App.) 228 S. W. 927.

9. **Title to or possession of personal property.**—Where plaintiff lent sawmill machinery to defendant, limitations did not begin to run in defendant's favor until he repudiated plaintiff's title and notice of the repudiation was brought home to plaintiff, and the mere fact that defendant gave a chattel mortgage on all of his sawmill machinery, which included that lent, was not notice to plaintiff of defendant's repudiation of his title so as to start the running of limitations, though the mortgage was filed for record, for plaintiff was not bound to make periodic searches of the records to discover whether defendant had repudiated. *Williams v. Davenport* (Civ. App.) 212 S. W. 675.

Where personal property owned by plaintiff was on a farm when purchased by defendant from a third party, but it was not near his residence or barn, and he did and said nothing tending to show that he was exercising dominion over it, or claimed any right to it prior to his use of the property, he did not have adverse possession until he first used the property. *McGlasson v. Fiorella* (Civ. App.) 228 S. W. 254.

10. **Contracts in general.**—Under party wall agreement, limitation as to adjoining owner's right to recover upon other's use of wall held to run only from actual use of wall. *McCormick v. Stoneheart* (Civ. App.) 195 S. W. 883.

A parol agreement by payee, extending date of payment in consideration of the payment of interest to extended date, is a new contract, and limitation for such contract is not that for note, but that for parol agreements. *First State Bank of Eustace v. Bowman* (Civ. App.) 203 S. W. 75.

Where an oil company borrowed certain casing under a contract to pull it from the well if oil were not found, a cause of action for the casing accrued when the company notified the owner that it had abandoned the well and left part of the casing therein. *Canadian Oil & Gas Co. v. Webb* (Civ. App.) 203 S. W. 135.

Upon breach of contract, injured party's cause of action at once accrues. *Lamar v. Hildreth* (Civ. App.) 209 S. W. 167.

In absence of actual knowledge that carrier of shipment of cotton would not or could not deliver part of shipment, or of facts and circumstances which would charge consignee with notice, statute of limitations would not begin to run against consignee's cause of action until reasonable time had elapsed within which cotton should have been delivered. *Texas & P. Ry. Co. v. R. W. Williamson & Co.* (Com. App.) 221 S. W. 571, affirming judgment (Civ. App.) 187 S. W. 354.

If there had been an express contract on the part of testatrix to bequeath property to her nephew to pay for his services, the statute of limitations would not begin to run against the nephew's claim until after testatrix's death. *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

In the case of an agreement to pay or a covenant to do a certain act, a recovery may be had as soon as there is a breach of the contract, whereas in the case of a covenant of indemnity, strictly, that is of indemnity against loss, no right of action accrues until the indemnitee has suffered a loss against which the covenant runs. *St. Paul Fire & Marine Ins. Co. v. Charlton* (Civ. App.) 231 S. W. 862.

Where purchaser of a half interest in a sawmill verbally assumed half of the seller's mortgage indebtedness, and later bought the other half of the sawmill and verbally assumed all the mortgage indebtedness, the cause of action in the mortgagee's favor for the part of the indebtedness due when the buyer assumed the payment thereof arose at the time the agreement to assume was made, and the cause of action for the part not then due arose when that part became due. *McCaslin v. Pittsburg Foundry & Machine Co.* (Civ. App.) 232 S. W. 887.

12. **Instruments for payment of money.**—Express assumption in a deed by grantee of payment of vendor's lien note given by grantor is a contract in writing, limitations against action on which by holder of note begins to run only from date of such deed. *Gilles v. Miners' Bank of Cartersville, Mo.* (Civ. App.) 198 S. W. 170.

Cause of action against bank on certificate of deposit payable to order of depositor "six months after date in current funds on return of this certificate properly indorsed, with interest at the rate of 4 per cent. per annum. No interest after maturity," accrued upon expiration of the six months' period and was barred by limitations upon failure to bring action within the prescribed period thereafter, not being a general deposit and being in the nature of a promissory note maturing six months after date. *Rodriguez v. First State Bank & Trust Co.* (Civ. App.) 213 S. W. 357.

13. **Implied contracts.**—Where plaintiff, who had engaged an agent to clear land under an arrangement that the agent should give orders for merchandise, sought to recover from the agent, on the theory that the orders exceeded the compensation agreed, the cause of action, whether deemed one arising out of misappropriation by an agent or an implied promise, accrued at the time the agent should have made settlement. *Powers v. Schubert* (Civ. App.) 220 S. W. 120.

If there had been an express contract on the part of testatrix to bequeath property to her nephew to pay for his services, the statute of limitations would not begin to run against the nephew's claim until after testatrix's death, but if there was only an implied contract, limitations would begin to run from time of performance of the services. *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

15. **Severable contracts and installments.**—The effect of a provision in a series of installment notes that a failure to pay any installment when due shall mature all deferred payments matures all the installments without reference to the intention of the holder, and limitations begin to run from the date of the maturity of the installment thus permitted to pass maturity. *City of Ft. Worth v. Rosen* (Com. App.) 228 S. W. 933; affirming judgment (Civ. App.) 203 S. W. 84.

16. **Accounts.**—Where an agent contracted to sell books for his principal, reporting by the fifth of each month, and all books which formed basis of account on which principal's suit against sureties on agent's bond was based were disposed of by the agent before March 1, 1910, to the knowledge of the principal, his suit against the sureties, filed April 22, 1914, was barred by the four-years statute of limitations. *Ferry v. Bedford* (Civ. App.) 211 S. W. 839.

17. **Torts.**—Where the defendant railroad company's construction of a bridge as built was not unlawful and plaintiff's rights were not invaded by its building, but the bridge was as an impediment to the stream, causing or increasing an overflow of plaintiff's land during heavy rains, the statute limiting actions therefor ran from the date of the flood. *Ft. Worth & D. C. Ry. Co. v. Speer* (Civ. App.) 212 S. W. 762.

Where a nuisance is permanent, and continuing resulting damages should all be litigated in one suit, but when not permanent and dependent upon accidents or contingencies successive actions may be brought for injury as it occurs, and an action for such injury would not be barred by the statute of limitations, unless the full period of the statute had run against the special injury before suit was brought. *Id.*

In trespass a right of action arises when the cause is created, and the statute of limitations is put into operation when plaintiff's inclosure is invaded. *Trinity Portland Cement Co. v. Horton* (Civ. App.) 214 S. W. 510.

In action in the nature of a nuisance in which there has been no actual invasion of plaintiff's land, the first right of action does not arise until some injury has been suffered, no matter when the cause of injury occurred. *Id.*

Though plaintiffs delayed for ten years in suing for damages caused by dust which, when the wind was in certain directions, was carried from defendant's cement plant onto their premises, held, that the nuisance could not be considered a permanent one because the structure was permanent, so as to bar plaintiff's right of action by limitations. *Id.*

A cause of action for negligence by or for misappropriation by an agent accrues at the time of the wrongful act, and the statute commences to run at that time, and not at the time of ascertaining damages. *Powers v. Schubert* (Civ. App.) 220 S. W. 120.

Where the injury to plaintiff's land from a septic tank operated by a town resulted, not from the construction of the tank, but from the mode of operation, the statute of limitations did not begin to run against plaintiff's right to recover the depreciation in the value of his land resulting from the nuisance at the time of the construction of the tank, but only when the consequential damages resulting from its operation occurred. *Town of Jacksonville v. McCracken* (Com. App.) 232 S. W. 294, reversing judgment (Civ. App.) 197 S. W. 309.

18. **Reimbursement or indemnity from person ultimately liable.**—Where, under contract providing that defendant should pay for materials, plaintiff paid therefor, a suit for money paid was barred within two years subsequent to date of purchase and appropriation by defendant. *Palo Pinto County v. Beene* (Civ. App.) 199 S. W. 866.

Enforceable cause of action did not arise in favor of bank against vendors of land, who had deposited \$1,000 of price, to be repaid to them when they should obtain release of mortgage, until bank parted with its money in obedience to judgment against it in suit of buyer of land to recover special deposit of \$1,000, vendors having represented to bank release of mortgage had been obtained, and bank having applied deposit to payment of vendors' note. *Bank of Snyder v. Howell* (Com. App.) 208 S. W. 908.

A right of action by M., an intermediate covenantee, against S., his covenantor, for breach of covenant in a warranty deed, does not accrue so as to set in motion the statute of limitations, until he has paid the amount of a judgment recovered against him by G., a subsequent covenantee, though M. was made a party in a suit to try title by G. against adverse claimants, but was dismissed as a party thereto before judgment was rendered. *McPike v. Smith* (Civ. App.) 209 S. W. 815.

19. **Liabilities created by statute of constitution.**—Since right of city to enforce assessment depends on performance of statutory steps to fix lien against property and personal judgment against owner, cause of action for that purpose does not accrue till those necessary steps are taken. *Texas Bitulithic Co. v. Henry* (Civ. App.) 197 S. W. 221.

*(B) Performance of Condition, Demand and Notice*

21. **Conditions precedent in general.**—Where decedent had deeded realty to plaintiff by absolute deed intended as security for past, present, and future advances, and it appeared from undisputed evidence that the claim sued on by plaintiff was to be paid from moneys derived from royalties and leases of the land and from the proceeds of a sale thereof whenever such sale should take place, the claim was not barred by limitations, since the contingency which would set in motion the statute had not happened. *Ewing v. Schultz* (Civ. App.) 220 S. W. 625.

22. **Demand.**—The rule that limitation runs against a demand obligation from its date does not apply to bank deposits. *Sam v. Ludtke* (Civ. App.) 203 S. W. 98.

Where a sum of money is deposited with an individual for safekeeping with understanding that it is to be returned at any time, and that individual is to pay interest, no demand is necessary to start running of statute of limitations. *Id.*

The period of limitations does not begin to run against general deposits in banks represented either by passbooks or other evidences of deposits in contradistinction to deposits under certificate of deposits, payable at specified time, until demand. *Rodriguez v. First State Bank & Trust Co.* (Civ. App.) 213 S. W. 357.

That certificate of deposit payable six months after date was made payable in Mexican money did not postpone accrual of action thereon until demand. *Id.*

23. **Notice.**—Where one partner had loaned casings to an oil company and had been notified about four years before the suit that the casing had been abandoned, such notice, being notice to the partnership, barred an action for conversion by another partner under the two-year statute of limitations. *Canadian Oil & Gas Co. v. Webb* (Civ. App.) 203 S. W. 135.

24. **Leave to sue.**—As a state cannot be sued without permission, limitations against an action by employé on a state railroad, who was injured by those having the management of the road, do not begin to run until permission to sue is granted. *State v. Elliott* (Civ. App.) 212 S. W. 695.

*(C) Ignorance, Mistake, Trust, Fraud and Concealment of Cause of Action*

25. **Ignorance of cause of action.**—Assignee of judgment being subrogated to the original debt in case the judgment, which was based on a record showing proper service, were invalid, the statute of limitations would not run against him, as to the original debt, until he had knowledge of invalidity of the judgment because a judgment debtor had not been served with citation. *Miller v. Guaranty Trust & Banking Co.* (Civ. App.) 207 S. W. 642.

Where plaintiff engaged defendant to clear land, arranging that orders of defendant for merchandise should be honored, and after learning that the work had stopped plaintiff several times wrote defendant for settlement, and defendant did not by any fraud prevent plaintiff from ascertaining the amount of land cleared, held that, where plaintiff used no diligence to discover his claim which arose, out of the fact that the orders for merchandise exceeded the value of the clearing, plaintiff cannot escape the running of limitations. *Powers v. Schubert* (Civ. App.) 220 S. W. 120.

Bare fact of knowledge by consignee of cotton, on November 16th, that only 74 bales of consignment of 104 had been delivered by carrier to Atlantic steamship line, and that latter, on December 7th, delivered to consignee at Liverpool, England, only what it had received from carrier at New Orleans, was insufficient to impute notice to consignee that carrier could not or would not comply with contract, to institute running of statute of limitations against consignee's cause of action. *Texas & P. Ry. Co. v. R. W. Williamson & Co.* (Com. App.) 221 S. W. 571, affirming judgment (Civ. App.) 187 S. W. 354.

**26. Mistake as ground for relief.**—A mistake in description of land in a judgment only prevents the running of the statute of limitations until the mistake is discovered, or, by the use of reasonable diligence, it might have been discovered. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017; *Hohertz v. Durham* (Civ. App.) 224 S. W. 549; *Gillespie v. Gray* (Civ. App.) 230 S. W. 1027.

That member of fraternal insurance association did not know his contract prohibited his engaging in saloon business was not mistake of fact suspending operation of statute of limitations against his cause of action to recover premium payments. *Grand Lodge, A. O. U. W., v. Schwartz* (Civ. App.) 205 S. W. 156.

Statements made by the county surveyor to the purchaser after the transaction was completed, and which were not binding on the vendor, may nevertheless be sufficient to excuse the purchaser's failure to discover mistake in the quantity of land purchased so that his right to such recovery will not be barred by limitations. *Hohertz v. Durham* (Civ. App.) 224 S. W. 549.

Where a party to an action involving title to land procured a compromise and settlement, and there was nothing about the entry of the judgment to deceive him or lull him into false security, and no confidential relations existed between him and his adversary's counsel, and he went with counsel to the court where the compromise was stated and judgment entered, and without fraud on the part of any one, but in an honest effort to enter the judgment, a mistake was made in the description of the land he must take notice of such mistake from its date. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

**27. Fraud as a ground for relief—In general.**—Fraud alone will not prevent the running of the five-year statute of limitations, though the party invoking the statute has put it in motion by his own wrong through participation in the fraud. *Davis v. Howe* (Com. App.) 213 S. W. 609.

Where insured upon delivery of policy signed receipt stating he had examined the policy, and found it as represented, the cause of action, if any, for reformation of the policy on ground of fraud accrued at time of delivery of policy, in absence of evidence that he did not examine policy and of some reasonable excuse for his not doing so. *Northwestern Nat. Life Ins. Co. v. Evans* (Civ. App.) 214 S. W. 598.

Fraud in procuring judgment against defendants who were not served and did not appear, notwithstanding recital in the judgment of service and appearance, and though an attorney unauthorized to do so appeared for them, prevents the statute running before discovery of the fraud, even against adult defendants. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

**28. Discovery of fraud.**—Limitation against a suit to secure relief from a deed procured by fraud begins to run when the fraud becomes known, and knowledge of a fact which would induce, by a prudent person, inquiry which would lead to discovery of fraud, is in law a knowledge of the fraud. *Dean v. Dean* (Civ. App.) 214 S. W. 505; *Texas Co-op. Inv. Co. v. Clark* (Civ. App.) 212 S. W. 245.

In suits for relief against fraud and deceit, the statute of limitation does not begin to run until complainant discovers the fraud, or has learned facts sufficient to put a person of ordinary prudence on inquiry which, if pursued, would have led to a discovery of the fraud. *Gillispie v. Gray* (Civ. App.) 214 S. W. 730; *Binder v. Millikin* (Civ. App.) 201 S. W. 239.

Where vendors represented that lands had been surveyed and stepped off and that they were positive that it contained 326 acres, statute held not to run against action for fraud until some circumstance aroused the purchaser's suspicion. *Stone v. Burns* (Civ. App.) 200 S. W. 1121.

Suit to cancel oil lease on the ground of fraud was barred by limitations, where the false representations and the fraudulent acts relied upon were well known to plaintiffs, or could have been ascertained by the exercise of the slightest diligence more than two years before the action was commenced. *McEntire v. Thomason* (Civ. App.) 210 S. W. 563.

Cause of action for fraud of buyer of peanut threshers was not barred by the two-year statute of limitations, where falsity of original representations of seller's agent was concealed by further misrepresentations, whose falsity was not discovered until within two years of suit brought. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

The rule requiring diligence to discover fraud does not apply where a father defrauded his child, in which case the child can rely on the parent's representations until facts showing fraud come to knowledge. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

Fraud alleged in petition in suit by one partner was notice to the other, not made a party. *Morris v. Gwaltney* (Civ. App.) 215 S. W. 473.

A cause of action for fraudulent misrepresentations, inducing the purchase of oil stock in January and March, 1913, the buyer having discovered the fraud within a few months by working for the company, was barred, on December 20, 1915, by the two-year statute of limitations, which begins to run when the fraud is discovered. *Bain v. Lovejoy* (Civ. App.) 215 S. W. 984.

**29. Existence of trust—In general.**—A deposit of money with an individual for safe-keeping, with understanding that he is to pay interest and return deposit on demand, does not create such trust relation as will prevent running of statute of limitations. *Sam v. Ludtke* (Civ. App.) 203 S. W. 98.

If a father recognized the interest of his children in land purchased with community property, and there was no repudiation of such interest, the statutes of limitation did not begin to operate until his death, nor was the suit to establish a trust in the land a stale demand when brought within a very few years after the father's death. *Thomas v. Wilson* (Civ. App.) 204 S. W. 1010.

In an action by heirs against the husband of deceased to recover an interest in community property, a finding that defendant had not held the property in question under an express trust thereby preventing limitations from running held supported by the evidence. *Williford v. Simpson* (Civ. App.) 217 S. W. 191.

The statute begins to run against a suit to enforce right under constructive trust from time trust is imposed, except when it is ingrafted on account of fraud, or there is a fraudulent concealment of the facts, and then from the time when the fraud is discovered, or when such knowledge is acquired as will enable the beneficiary, by the exercise of proper diligence and discretion, to discover the facts. *McCord v. Bass* (Com. App.) 223 S. W. 192, reversing judgment (Civ. App.) *Bass v. McCord*, 178 S. W. 998.

If legal title is in administrator, he holds it in trust for the heirs subject to rights of creditors of decedent's estate, and in such event, irrespective of disability, the cestui que trust is barred when the trustee is barred; but the statute of limitations will not run against a cestui que trust laboring under a statutory disability, such as coverture, where the legal title is not in the trustee, until such disability is removed. *Smith v. Price* (Civ. App.) 230 S. W. 836.

**30. Repudiation or violation of trust.**—Limitations do not run against an express trust until the trustee repudiates the trust by word or acts which will bring knowledge thereof to the beneficiary. *McBride v. Briggs* (Civ. App.) 199 S. W. 341; *Home Inv. Co. v. Strange*, 195 S. W. 849; *St. Louis Union Trust Co. v. Harbaugh* (Civ. App.) 205 S. W. 496; *Graves v. Graves* (Civ. App.) 232 S. W. 543.

Where defendant, holding plaintiff's stock pursuant to oral agreement to reconvey, was trustee, limitation did not begin to run in his favor until repudiation of relationship and until cestui que trust had, in exercise of due diligence, or by constructive notice, discovered such repudiation. *Stuart v. Meyer* (Civ. App.) 196 S. W. 615.

Though judgment creditors had by their agreement become trustees for the judgment debtor, they repudiated such trust by purchasing the property at execution sale, and the statute of limitation against any right to relief against such purchase begins to run from that date. *Nelson v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 214 S. W. 366.

If, when wife died, husband took possession of community property and held it under an express trust, limitations did not begin to run as against the heirs of the deceased until there was an express repudiation of interest or claim in the heirs. *Williford v. Simpson* (Civ. App.) 217 S. W. 191.

Right of action of assignors for benefit of creditors to have relief in protection of their right to any surplus against fraudulent disposition of the property by the assignees, accrued when they knew of the fraud or of conditions charging them with knowledge, and this though it could not then be said that there would be a surplus, and though creditors were proceeding against the assignees. *McCord v. Bass* (Com. App.) 223 S. W. 192, reversing judgment (Civ. App.) *Bass v. McCord*, 178 S. W. 998.

Where son did not bring action to have trust declared in land by reason of talks with his father with reference to his interest in the land, when father stated that he only refused to divide the land because he was not ready to quit and wanted to handle it as a whole, and did not repudiate the trust until just four years before the action, held, that the action was not a stale demand under the ten-year statute of limitations. *Graves v. Graves* (Civ. App.) 232 S. W. 543.

**31. Concealment of cause of action.**—Evidence held insufficient to show such a fraudulent concealment by the grantor of land who had not recorded his conveyance as to prevent the running of limitations in his favor as against one holding a vendor's lien note executed by a prior grantor. *Raley v. D. Sullivan & Co.* (Com. App.) 207 S. W. 906.

Evidence held sufficient to sustain plaintiff's plea that defendant concealed fraud in sale of machines until within two years of suit brought, by further misrepresentations and that plaintiff was not negligent in being misled by such representations. *Texas Harvester Co. v. Wilson-Whaley Co.* (Civ. App.) 210 S. W. 574.

A cause of action for fraudulent misrepresentations, inducing the purchase of oil stock in January and March, 1913, the buyer having discovered the fraud within a few months by working for the company, was barred, on December 20, 1915, by the two-year statute of limitations, which begins to run when the fraud is discovered, though the president of the company by words or acts induced the buyer to postpone bringing action, for such words and acts are not the same as a fraudulent concealment of the cause of action, which means that the defendant has by some fraud concealed from the plaintiff that he has a cause of action at all. *Bain v. Lovejoy* (Civ. App.) 215 S. W. 984.

In action by assignee for agent's commission where defendant set up limitations and that he had assumed agent's indebtedness to bank in equal amount, there was no mistake or fraudulent concealment avoiding plea of limitations, where there was no diligence on part of plaintiff or his assignor to learn whether latter's indebtedness to



bank had been credited with amount of commission. *Campbell v. Wyatt* (Civ. App.) 217 S. W. 743.

Where a party went with his antagonist's attorney before the court, and had a judgment entered in accordance with a compromise and settlement, which judgment erroneously described the land the title to which was involved, evidence held to show that the party either actually knew of the terms of the settlement, as stated to the court, or in the exercise of due care should have known them. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

(D) *Pendency of Legal Proceedings or Stay*

**33. Pendency of action or other proceeding.**—Where an agent to sell books, who had given a bond with sureties, became insolvent and went into bankruptcy, and his sureties tried to get the principal's claim against the agent allowed and paid out of the estate, but did nothing that legally excused or misled the principal from bringing suit against them on the agent's bond at any time after the date when the cause of action matured, the proceedings in bankruptcy and the acts of the sureties did not toll the four-years statute of limitations. *Perry v. Bedford* (Civ. App.) 211 S. W. 839.

The running of the statute against vendor's suit to recover the land, is not suspended by a suit by the vendor to recover the amount of the notes. *Stone v. Robinson* (Civ. App.) 218 S. W. 5.

**36. Suspension of statute of limitations.**—Evidence of the possession of plaintiff's predecessors, which continued under color of title for five years prior to the suspension of the statute on January 28, 1861, having been accompanied by payment of taxes on the land, held to show adverse possession. *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49.

(E) *Commencement of Action or Other Proceedings*

**37. Mode of computation of time limited.**—In computing the time by which an action is barred, the day on which a cause of action accrues is not counted. *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049.

**38. Proceedings constituting commencement of action**—In general.—Merely filing suit did not arrest the running of the statute, where the suit was practically abandoned by failure to prosecute. *Raley v. D. Sullivan & Co.* (Com. App.) 207 S. W. 906.

Where an employé on a state railroad was injured, and his petition to the Legislature for privilege of entering the courts with his cause of action, of which, under Const. art. 3, § 57, he was required to give advance notice of 30 days, was presented within two years after injury, the running of limitations against an action for such injuries was tolled. *State v. Elliott* (Civ. App.) 212 S. W. 695.

The filing of a paper designated an amended petition stating a cause of action within the jurisdiction of the court was the commencement of a suit and interrupted the running of limitations, though the original petition stated a cause of action in excess of the court's jurisdiction. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

**39. Issuance and service of process.**—Where the petition is filed within the year, but no citation issued until nearly two years thereafter, because no cost-bond was given, nor affidavit made of inability to pay or secure costs, the delay will not be excused, and the action is barred. *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645.

Under art. 1812, where petition was filed within period of limitation, delay in issuance and service of citation held to raise no presumption of laches making limitations applicable. *Godshalk v. Martin* (Civ. App.) 200 S. W. 535.

Filing a petition with instructions not to issue citation thereon until further instructed, or until some future time, does not suspend the running of the statute of limitations. *Hughitt v. Trent* (Civ. App.) 209 S. W. 445.

The running of limitations is not interrupted by the mere filing of the petition with the clerk, for not only must this initial step be taken, but there must be a bona fide intention that the process be served at once upon the defendant, so, where citations were prepared by the clerk but were never issued, and neither plaintiffs nor their counsel showed any excuse for failure to obtain service during a period of more than a year, the filing of the petition will not be deemed to have interrupted the running of limitations. *Ferguson v. Estes & Alexander* (Civ. App.) 214 S. W. 465.

Where citations on petition filed by plaintiffs' attorney were not issued and no service was had for more than a year thereafter, plaintiffs cannot escape the effect of the continued running of limitations on the ground that the fault was that of their attorney. *Id.*

If a suit is filed and the clerk is directed by the plaintiff not to issue process, limitations will not be arrested by the filing of the petition, and it was no excuse for delay in issuing citations that service could not have been completed by publication in time for trial at the next term of court; defendants' addresses being unknown. *Phillips v. Wilson* (Civ. App.) 225 S. W. 406.

Where a petition in equity was filed in the federal court, and a subpoena returned unserved in 1912, when limitations had almost run, and no further attempt at service was made until 1913, when the case was transferred to the law docket, though the service finally made was authorized by Clayton Act Oct. 15, 1914, the running of limitations was not stopped by the filing of the petition under the law of Texas. *Ben C. Jones & Co. v. West Pub. Co.* (C. C. A.) 270 Fed. 563.

**40. Want of jurisdiction.**—The filing of a petition claiming an amount in excess of the court's jurisdiction was not the commencement and prosecution of a suit, and did not interrupt the running of limitations. *Gulf, C. & S. F. Ry. Co. v. Gordon* (Civ. App.) 218 S. W. 74.

42. **Defects or Irregularities in pleadings or other proceedings.**—A cause of action is not barred by the statute of limitations where a judgment had been rendered thereon which is later set aside on direct attack because rendered on an amended petition stating a new cause of action which was not served on defendant, since the suit to recover on such cause of action is left still pending, and the filing of the suit originally stopped the running of limitations. *Young v. City Nat. Bank* (Civ. App.) 223 S. W. 340.

A pleading not skillfully drawn and not sufficient to support the judgment obtained thereon held sufficient to stop the running of the statute of limitations. *Smith v. Tipps* (Com. App.) 229 S. W. 307.

43. **Intervention or bringing in new parties.**—Defendant, member of firm which damaged plaintiff's land, becoming such subsequent to damage, who was not made party to plaintiff's suit against firm until more than two years after cause of action arose, and did not enter appearance until after he was made party, could rely on the two-year statute of limitations. *Wooster v. Hoecker* (Civ. App.) 195 S. W. 332.

Commencement of suit to recover land stops the running of limitations in favor of defendant as against the interest of one who intervenes therein under a power of attorney given by plaintiff to prosecute such suit, coupled with an interest in the land, since a judgment would be binding upon the intervener as well as the plaintiff. *Bryan v. Ross* (Civ. App.) 214 S. W. 524.

Fraud alleged in petition in suit by one partner was notice to the other, not made a party, and where more than two years intervened between the time suit was brought and the time such other was made a party, suit was barred as to the other, as his was a new cause of action. *Morris v. Gwaltney* (Civ. App.) 215 S. W. 473.

Since one partner could not recover in the original suit for fraud where the other partner was not an original party, the children of the first partner, who, with the other partner, were made plaintiffs in the suit after first partner's death, were barred; more than two years having elapsed after suit was brought before they and the other partner were made parties plaintiff. *Id.*

45. **Amendment of pleadings—In general.**—Where a new promise or acknowledgment is pleaded by amendment to take a claim out of the statute, limitations will run against such new promise until the filing of the amendment. *Cozier v. Andrews* (Civ. App.) 206 S. W. 975.

A petition which as against a general demurrer is insufficient to state a cause of action is sufficient to stop the running of limitations if the defects therein are afterwards cured by an amended pleading, even though such pleading is filed after limitations have run. *Henderson v. Beggs* (Civ. App.) 207 S. W. 565.

Where description of land sued for in original petition does not identify the grant in which it is situated, and the first and second amendments describe a different tract of land and embrace no part of the land described in trial amendment, except a small triangular tract, limitation continued to run in favor of defendants until filing of trial amendment. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

Where the facts pleaded in the original petition and in the amended petition are substantially the same and set up the same cause of action, the cause of action is not barred by limitations, where the original petition has been filed within the statutory period. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

46. **Amendment restating original cause of action.**—Where petition against a railway company and receiver for maintenance of a side track in front of plaintiff's residence was amended, complaining of same actions but against company alone, a new cause of action was not set up making applicable plea of limitation. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

In an action by a former lessee against his lessor for conversion of personal property alleged to have been committed by lessor, an amendment to the complaint that the acts were committed by lessor's agent was not barred by limitations, although the statutory period had elapsed at time of amendment. *Henderson v. Beggs* (Civ. App.) 207 S. W. 565.

Where the original parties plaintiff suing as heirs of the original payee of notes amend and sue as the heirs of the heir of the original payee, such amendment does not change the claim or cause of action, but relates back to the commencement of the suit and stops the running of the statute of limitations at that point. *McCreight v. Sumner* (Civ. App.) 208 S. W. 545.

In action for balance due on cotton, amended petition held not barred, being merely an amplification of original pleadings; both original and amended petitions asking for same amount and alleging such amount to be the balance due. *Weld-Neville Cotton Co. v. Lewis* (Civ. App.) 208 S. W. 731.

Where action was brought in name of one having no interest in subject-matter and no authority to file same in his name, and the court allowed real party in interest to file an amended petition and plea of intervention wherein same cause of action was set up, the filing of the first petition in the name of the party having no interest being a mistake on the part of attorneys, there was no new cause of action as far as limitations was concerned. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

Petition, alleging that defendant for a valuable consideration assumed payment of note executed by son, held to save from limitations amended petition alleging that son turned over to defendant practically all of his property in consideration of defendant's assumption to pay son's debts, that land was conveyed to defendant with the agreement that defendant would use either the land or the proceeds to pay son's debts, and that defendant expressly agreed to pay note on plaintiff's agreement not to sue son thereon. *Bell v. Swim* (Com. App.) 229 S. W. 470.

47. **Amendment introducing new cause of action.**—See *Moore v. Chamberlain*, 109 Tex. 64, 195 S. W. 1135.

In action by widow for herself and children to recover for negligent death of her husband, amendment in behalf of a personal representative of deceased, alleging that deceased met his death while engaged in interstate commerce, would not introduce a new or different cause of action barred by limitations, since amendment would relate back to original action, which was not barred. *Pope v. Kansas City, M. & O. Ry. Co. of Texas*, 109 Tex. 311, 207 S. W. 514; *Bird v. Ft. Worth & R. G. Ry. Co.*, 109 Tex. 323, 207 S. W. 518.

Where an original petition was for false and fraudulent representations which constituted plaintiff's right to cancel note and recover money paid, and the allegations of the amended petition were in effect the same amplified, there was no new cause of action, and the amendment relates back to filing original petition in so far as the statute of limitations is concerned. *Bankers' Trust Co. v. Calhoun (Civ. App.)* 209 S. W. 826; *Same v. James (Civ. App.)* 209 S. W. 830.

Amendment in action for establishment of trust and recovery of lots so held, which asked for personal judgment in alternative, did not set up new cause of action within statute of limitations. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849, 204 S. W. 314, 207 S. W. 307.

In action under Texas statute for death of railroad employé, trial amendment seeking to recover under federal Employers' Liability Act held to state new cause of action barred by two-year statute of limitation. *Ft. Worth & R. G. Ry. Co. v. Bird (Civ. App.)* 196 S. W. 597.

Where plaintiff's original petition alleged that defendant agreed to accept care for, and keep cotton delivered by plaintiff, and compress it within a reasonable time, trial amendment alleging that defendant agreed to open bales and separate good cotton from the damaged set up new cause of action. *Jackson v. Greenville Compress Co. (Civ. App.)* 202 S. W. 324.

A petition setting up payee's execution of notes and liability of indorser, but not excusing failure to sue maker before second court term after maturity, as required by art. 579, stops the running of the statute of limitations, and an amended petition supplying the allegations does not set up a new cause of action. *McCamant v. McCamant (Civ. App.)* 203 S. W. 118.

Change in cause of action from joint to individual one, made by amendment of petition, is not filing of new suit, and to determine whether cause is barred by statute of limitations it will be considered as filed on date of original petition. *International & G. N. Ry. Co. v. Reed (Civ. App.)* 203 S. W. 410.

In suit for conversion based on contract to store and return cotton on demand, and refusal on ground cotton had been destroyed by fire, amendment alleging loss occurred through defendant's negligence, filed more than two years after accrual of cause of action, did not state new cause of action, barred by statute of limitations. *Exporters' & Traders' Compress & Warehouse Co. v. Wills (Civ. App.)* 204 S. W. 1056.

Where husband and wife, suing railroad and receiver for injuries to wife, originally alleged actual damages of \$140, and exemplary damages of \$300, amended petition, after court struck claim for exemplary damages, claiming \$290 as actual damages filed more than two years after cause of action accrued, set up new cause of action for actual damages in excess of \$140, barred by two years' statute of limitations. *Cozier v. Andrews (Civ. App.)* 206 S. W. 975.

Where suit for injuries was brought against railroad's receiver alone, but amended cause of action was based on joint negligence of receiver and railroad, such cause of action, so far as against railroad, was distinct from previous cause of action, and barred by two years' statute of limitations. *Id.*

Where the petition contained a declaration only upon an express contract, with a mere plea in the prayer in the alternative for recovery on quantum meruit, the court properly sustained an exception to an amended petition pleading a quantum meruit in the alternative, filed more than two years after the cause of action accrued. *Thames v. Clesi (Civ. App.)* 208 S. W. 195.

Where the substantial facts in the petition and in each amended petition were that defendant had obtained money from plaintiff under contract to make a loan on plaintiff's land, and to issue a life insurance policy, which contract defendant had breached and refused to return the money, a recovery under either of the petitions would bar recovery under the others or either of them, and there was no change of cause of action to subject it to operation of statute of limitations. *Trammell v. San Antonio Life Ins. Co. (Civ. App.)* 209 S. W. 786.

Where plaintiff, in petition and amended petitions, prayed judgment for himself for rescission of contract and for money paid, and in amended petition asked the same for the use and benefit of plaintiff bank, there was not such a change in the names of the parties as to set up a new cause of action and subject it to the operation of the statute of limitations. *Id.*

In an action for personal injuries sustained when plaintiff's team became frightened by defendant's train, while travelling on a neighborhood road, an amendment, filed more than two years from the date of the injury, alleging that the road was a public road, did not set up a new cause of action, so as to be barred by the two-year statute of limitations. *Baker v. Galbreath (Civ. App.)* 211 S. W. 626.

Where petition for loss of barges, filed within two years of the loss, alleged that defendant was in their possession "without hire," an allegation contradicted by the specific facts recite another amended petition filed more than two years after the loss, and eliminating the improper allegation that the barges were in defendant's possession without hire, did not change the cause of action, and was not barred by the two-year statute of limitations. *Freeport Town-Site Co. v. S. H. Hudgins & Sons (Civ. App.)* 212 S. W. 287.

Amended petition suing on same life policies, for same amount of insurance and upon same risk, as original petition, merely amplifying and stating in different form the same cause of action as alleged in original petition, did not set up new cause of action so as to be barred by limitations. *Northwestern Nat. Life Ins. Co. v. Evans* (Civ. App.) 214 S. W. 598.

The safest test of whether an amended petition introduces a new cause of action, relative to bar of limitations, is whether the same evidence would support both pleadings, and whether the allegations are subject to the same defenses. *El Paso Times Co. v. Fuller* (Civ. App.) 215 S. W. 113.

Oral contract as to taking charge of circulation of newspaper, set up in third amended petition, held to so materially vary from that in first amended petition as to introduce a new cause of action, barred by limitations. *Id.*

In an action on a contract, an amendment by plaintiff to the pleadings, setting up a mistake in the contract and asking that the same be corrected, was not a new cause of action as respects the statute of limitations. *Benson v. Ashford* (Civ. App.) 216 S. W. 283.

Where a lessee of a horse sued for injuries to the horse, and, without his consent, made the lessor a joint plaintiff, but on the owner's protest filed another petition and sued in his own name, the amended petition did not set up a new cause of action to which limitations would apply. *Missouri, K. & T. Ry. Co. v. Hunter* (Civ. App.) 216 S. W. 1107.

In action by two joint lessees, amended petition naming only one of the lessees as plaintiff, and alleging that such plaintiff had purchased the interest of the other lessee in the lease, was not barred by limitations, though filed after period of limitations had expired; the amended petition not stating a new cause of action. *Gulf, C. & S. F. Ry. Co. v. Baker* (Civ. App.) 218 S. W. 7.

In action against railroad for loss of cattle and damage to pasturage because of openings made in plaintiff's fences during construction of road, where original petition charged that defendant, its agents, and employes broke fences in not less than eight different places, and that "people grading the road for defendant" tore down fences and left them down, without specifying parts of fences where openings were made, amended petition, alleging openings to have been made by servants of independent contractor on the right of way held not to state new cause of action so as to be barred by limitations; the amended petition merely making more specific the allegations of original petition. *Id.*

In suit in statutory form of trespass to try title, for the recovery of land and for damages, plaintiff suing as heir of her mother, who had conveyed the land to defendant, partly for cash and partly for other land, which, unknown to plaintiff's mother, was mortgaged, which mortgage was subsequently foreclosed, second amended petition, whereby plaintiff sought recovery of the land conveyed by her mother or in the alternative, the value of the land conveyed by defendant, lost by the foreclosure, and a foreclosure of her equitable lien therefor upon the land conveyed by her mother, held to state a new cause of action. *Smith v. Price* (Civ. App.) 230 S. W. 836.

48. **Amendment affecting form of action or relief.**—While pleadings in justice court may be informal, and great liberality is indulged both in substance and form, held that, where plaintiff's claim, filed in justice court, based on the refusal of a conductor of a train to stop at the station at which he desired to alight, was founded on an action ex contractu, an amendment, claiming damages for the conductor's insulting words and conduct, which sounded in tort, introduced a new cause of action, and was barred, where the amendment was not filed until more than five years after the cause of action accrued. *Gulf, C. & S. F. Ry. Co. v. Sanderson* (Civ. App.) 216 S. W. 286.

Where shipment of goods was sold under conditional contract reserving title, which by statute was a chattel mortgage, and seller brought action against the buyer and its assignee to recover title and possession, an amendment by plaintiff to the petition on reversal of judgment in its favor, so as to only recover possession as mortgagee, did not change the cause of action so as to affect the statute of limitation. *Moore-Hustead Co. v. Joseph W. Moon Buggy Co.* (Civ. App.) 221 S. W. 1032.

Where the original petition stated a cause of action on express contract, plaintiff could not recover on an implied contract and quantum meruit set up in an amended petition which was not filed until more than two years after the accrual of the cause of action upon quantum meruit. *Kuhn v. Shaw* (Civ. App.) 223 S. W. 343.

50. **Set-offs and counterclaims.**—Where defendant set up counterclaim for breach of contract, and subsequently filed supplemental answer alleging different contract and breach thereof more than four years prior to the filing of such answer, its cause of action on such breach was barred by limitations, though the original answer setting up counterclaim was filed within the four-year period of limitations. *Mann v. Southland Life Ins. Co.* (Civ. App.) 209 S. W. 191.

In action by seller of gas engine for balance of purchase price, buyer could not, in answer, set up claim for damages for personal injury sustained as the result of a defect in the engine more than two years before the commencement of the action, such claim being barred by limitations, even though set up in answer, since such claim does not go to the validity of plaintiff's demand in its inception, or show its performance, but is based on a cause of action separate from the cause of action stated by plaintiff. *Alley v. Bessemer Gas Engine Co.* (Civ. App.) 228 S. W. 963.

## III. OPERATION AND EFFECT OF BAR BY LIMITATION

53. **Nature and extent of bar.**—See *Henson v. C. C. Slaughter Co.* (Civ. App.) 206 S. W. 375.

Statutes of limitations are curative, and confer rights of property, which are as fully entitled to protection as any other legal right. *Fogle v. Baker* (Civ. App.) 205 S. W. 752.

Where there was no substantial compliance with a contract to lay tile floors in a neat and workmanlike manner, and any cause of action on quantum meruit or an implied contract having been barred by the two-year statute of limitations, plaintiff could not recover. *Thames v. Clesi* (Civ. App.) 208 S. W. 195.

54. **Bar of debt as affecting security.**—The debt secured being barred by limitations, action to foreclose mortgage is barred. *Poythress v. Ivey* (Civ. App.) 203 S. W. 103.

Note, together with contract of sale, whereby sellers warranted title and agreed that proceeds of note received from buyers should be applied to any and all debts against property, amounted to an assignment of note to sellers' creditors, and suit by a creditor was not barred, although he could not maintain suit on debt; a bar by statute not paying the debt. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

A pledgee of property may sell or sue for conversion, although debt which it was given to secure is barred. *Id.*

Even if plaintiff had pleaded title by limitations and even if defendant's right to enforce superior title or foreclose its vendor's lien was barred by arts. 5694, 5695, where plaintiff's deed showed that he held title in subordination to the right of defendant city he could not recover without proving that debt had been paid. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

Where plaintiff, the manager of a corporation, on leaving its employment, was paid an amount supposed to be the balance due him on the account between him and the corporation, and, on the corporation auditor's later claiming that there had been a mistake in accounts and an overpayment of \$1,041, plaintiff deposited such amount in a bank to protect the company, such deposit was made in contemplation of a speedy statement as to the account, and when the company failed to render a statement or make claim until after the account had become barred by limitations, the company's right to the deposit was also barred. *Mexican Coal & Coke Co. v. Ruckman* (Civ. App.) 229 S. W. 347.

56. **Persons to whom bar is available.**—A subsequent purchaser of part of the land covered by trust deed cannot rely upon the statutes of limitations to bar foreclosure of the trust deed, where the original debtor treated the debt secured by the trust deed as continuing, and did not raise the issue of limitations by exception or other pleading. *Poythress v. Ivey* (Com. App.) 228 S. W. 157.

58. **Waiver of bar.**—Limitations being purely a personal defense, a defendant may waive it. *Howard v. Stahl* (Civ. App.) 211 S. W. 826.

As there is no constitutional provision requiring the state to plead limitations in an action against it, the Legislature, on passing an act allowing an employé of a state railroad who was injured to sue, may waive limitations, and provide that limitations should not begin to run until the passage of the act. *State v. Elliott* (Civ. App.) 212 S. W. 695.

## TITLE 88

## LOCAL OPTION

## Articles 5715-5730. [3384-3399] [Superseded.]

**Explanatory.**—These articles are superseded by the amendment of art. 16, § 20 of the state Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, Penal Code, arts. 588¼-588½tt, and also by the Prohibition amendment to the Constitution of the United States, and the National Prohibition Act (the Volstead Act).

## ARTICLE 5715

See *Ezzell v. State*, 29 Tex. App. 521, 16 S. W. 782; *Dillard v. State*, 31 Cr. R. 470, 20 S. W. 1106; *Sullivan v. State*, 83 Cr. R. 477, 204 S. W. 1169.

Cited, *Carnes v. State*, 23 Tex. App. 449, 5 S. W. 133; *Gilbert v. State*, 32 Cr. R. 596, 25 S. W. 632.

1. **Validity of local option laws.**—After the local option prohibition law has been adopted in a given locality by a vote of the people, its abrogation in that locality is not within the power of the Legislature, but its repeal rests with the people, by their vote expressed at an election. *White v. State*, 84 Cr. R. 545, 210 S. W. 200.

2. **Relation to other laws.**—The state-wide statutory prohibition did not repeal the local option law. *Jarrott v. State*, 84 Cr. R. 544, 209 S. W. 663; *White v. State*, 84 Cr. R. 545, 210 S. W. 200.

The act of the Legislature establishing the 10-mile zone law did not repeal or suspend the prohibition of the sale of intoxicating liquor in local option territory. *White v. State*, 84 Cr. R. 545, 210 S. W. 200; *Jarrott v. State*, 84 Cr. R. 544, 209 S. W. 663.

3. **Where local option elections may be held.**—This article refers only to incorporated towns with defined limits. *Ex parte Tummins*, 32 Cr. R. 117, 22 S. W. 409.

13. **Order for election—in general.**—Decision under prior law, see *Ex parte Sublett*, 23 Tex. App. 309, 4 S. W. 894.

— **Description of territory.**—A petition was signed by 230 names, and specified the limits of the proposed subdivision. The commissioners' court, in acting thereon, and ordering the election, found that petitioners were all voters living in the proposed subdivision. Their order set forth the metes and bounds of the subdivision and the time and places of voting. Held, that the subdivision was sufficiently designated as against one charged with unlawful sale therein. *Ex parte Segars*, 32 Cr. R. 553, 25 S. W. 26.

18. **Qualified voters.**—Right of electors to vote upon question of local option depends on whether they reside within county where election is held. *Garvey v. Cain* (Civ. App.) 197 S. W. 765.

## ARTICLE 5717

See *Curry v. State*, 28 Tex. App. 475, 13 S. W. 752; *Dillard v. State*, 31 Cr. R. 470, 20 S. W. 1106.

**Date of election.**—An election ordered on November 10th can be legally held on November 25th. *Winston v. State*, 32 Cr. R. 59, 22 S. W. 133.

## ARTICLE 5718

See *Gilbert v. State*, 32 Cr. R. 596, 25 S. W. 632.

Cited, *Ex parte Tummins*, 32 Cr. R. 117, 22 S. W. 409.

**Posting notices.**—Where it appears, on a trial for violating the local option law, that the clerk did not post the notices, but issued them, and placed them in the hands of "good men" to be posted, there is no presumption that such men posted the notices. *James v. State*, 21 Tex. App. 189, 17 S. W. 143.

## ARTICLE 5719

See *Dillard v. State*, 31 Cr. R. 470, 20 S. W. 1106.

## ARTICLE 5721

See *Curry v. State*, 28 Tex. App. 475, 13 S. W. 752; *Dillard v. State*, 31 Cr. R. 470, 20 S. W. 1106.

3. **Strict compliance with statutes.**—The order of the court declaring the result of the election, and prohibiting the sale, need not be in the words and form required by this article, but a substantial compliance with that section is sufficient. *James v. State*, 21 Tex. App. 353, 17 S. W. 422.

7. **Order declaring result of election.**—Declaring result of local option election and issuance of order prohibiting the sale of intoxicants by the commissioners' court, are merely ministerial, and not judicial acts. *Hines v. State*, 83 Cr. R. 195, 202 S. W. 91.

Even if Legislature did not have power to authorize commissioners' court to issue order prohibiting sale of intoxicants, it is immaterial, as the mere declaration by such body that the results of an election were in favor of local option would put the law in effect. *Id.*

8. — **Time of making order.**—A delay on the part of the court in making the order would not invalidate the election. *Ex parte Burge*, 32 Cr. R. 459, 24 S. W. 289.

9. — **Sufficiency in general.**—The order need not state the date the election was ordered. *McDaniel v. State*, 32 Cr. R. 16, 21 S. W. 684.

Where a local option election is ordered on November 9th, the election is not void because the proclamation and order of court declaring the result both recited that the election was ordered on November 10th, since such order need not state the date the election was ordered. (*McDaniel v. State*, 32 Cr. R. 16, 21 S. W. 684, followed.) *Winston v. State*, 32 Cr. R. 59, 22 S. W. 138.

Though nine days elapsed between an election and canvass, and there was error in the date in the certificate of publication of the result of a prohibition election, there was no error in allowing their admission in evidence, in a prosecution thereunder, where the election had not been contested in the time required by law. *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

11. — **Need not recite statutory exceptions.**—An election was not void because, in entering the order which declared the result and prohibited the sale of intoxicating liquors, the county commissioners' court failed to add the words "except for the purposes and under the regulations specified in this title," the order in other respects being a literal compliance with the statute. *Gilbert v. State*, 32 Cr. R. 596, 25 S. W. 632.

17. — **Operation and effect in general.**—Record of commissioners' court, declaring result of an election and entering order putting local option into effect was conclusive, in absence of contest, that election was regular. *Matheny v. State*, 82 Cr. R. 47, 198 S. W. 312.

Where the local option law has been placed in effect by a vote of the people, it must so remain until the people of the same territory repeal it by a vote at another election, and the Legislature has no power to do so. *Reed v. State*, 84 Cr. R. 335, 206 S. W. 937.

#### ARTICLE 5722

See *Ezzell v. State*, 29 Tex. App. 521, 16 S. W. 732; *Dillard v. State*, 31 Cr. R. 470, 20 S. W. 1106; *Smith v. State*, 81 Cr. R. 446, 196 S. W. 519.

**Evidence.**—That nine days elapsed between an election and canvass, and there was error in the date in the certificate of publication of the result of a prohibition election, there was no error in allowing their admission in evidence, in a prosecution thereunder, where the election had not been contested in the time required by law. *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

#### ARTICLE 5724

See *Ex parte Cox*, 28 Tex. App. 537, 13 S. W. 862.

**In general.**—This article applies only to those localities thereafter adopting the law, and does not nullify a county election repealing the law, held one year after its adoption, which occurred before the passage of this act. *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820.

#### ARTICLE 5726

See *Ex parte Cox*, 28 Tex. App. 537, 13 S. W. 862.

#### ARTICLE 5727

See *Dillard v. State*, 31 Cr. R. 470, 20 S. W. 1106.

**In general.**—Under Act March 3, 1917, c. 162, § 5, 39 Stat. 1069 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), declaring that whoever shall cause intoxicating liquors to be transported in interstate commerce except for scientific purposes, etc., into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished, it is unlawful for an interstate carrier to transport for beverage purposes intoxicating liquors from without the state into a Texas county which had adopted prohibition, this article, declaring the sale, etc., within prohibition territory of intoxicating liquors with intent to violate the law, to be an offense. *McAdams v. Wells Fargo & Co. Express (D. C.)* 249 Fed. 175.

This article sufficiently prescribes penalties for its violation, by referring to such as are prescribed by the Penal Code. *Ex parte Segars*, 32 Cr. R. 553, 25 S. W. 26.

#### ARTICLE 5728

See *Wright v. State*, 83 Cr. R. 415, 203 S. W. 775.

1. **Validity of statute.**—This article is binding on all courts and all persons. *Wright v. State*, 83 Cr. R. 415, 203 S. W. 775.

12. **Procedure in general—Scope of inquiry.**—In local option election contest where boundary line had never been established as required by Rev. St. 1911, art. 1400, court properly determined boundary, for purpose of ascertaining whether certain parties who voted resided within commissioner's district in which election was held. *Garvey v. Cain (Civ. App.)* 197 S. W. 765.

13. — **Evidence.**—In local option election contest, evidence held sufficient to support court's finding that certain named persons were not legal voters, and that there was no intimidation of voters calculated to change result. *Garvey v. Cain (Civ. App.)* 197 S. W. 765.

In local option election contest, evidence held insufficient to show that a boundary involved had been recognized and established within Rev. St. 1911, art. 1400, adopting such boundaries as true boundaries. *Id.*

23. **Presumption where election not contested.**—The declaration of the commissioners' court upon the adoption of county local option is conclusive unless contested within 30 days. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

A local option election will be held valid in absence of a contest within the time prescribed by statute and a finding of court upon that contest that election was illegal. *Jarrott v. State*, 84 Cr. R. 544, 209 S. W. 663.

24. **Statutory contest only way to attack election.**—This article does not prevent one accused of violating the order of prohibition from showing at a later time that it is void. *Curry v. State*, 28 Tex. App. 475, 13 S. W. 752.

There is no force in a collateral objection to a local option election, made after the 30 days, that the voting place of one ward (which gave a majority against prohibition) was two blocks away from the place designated, there being no proof that such change was made corruptly or fraudulently or with the effect of depriving any one of his suffrage. *Ex parte Segars*, 32 Cr. R. 553, 25 S. W. 26.

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## TITLE 89

### MANDAMUS

#### Article 5731. [1450] No mandamus on ex parte hearing.

**In general.**—It is error to grant a peremptory mandamus on an ex parte hearing without notice. *Crumley v. McKinney* (Sup.) 9 S. W. 157.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

##### 1. NATURE AND GROUNDS IN GENERAL

2. **Existence and adequacy of other remedy in general.**—Mandamus will not lie where the petitioners have another plain and adequate remedy. *Cobb & Gregory v. Dies* (Civ. App.) 203 S. W. 433; *Wells v. Commissioners' Court of Presidio County* (Civ. App.) 195 S. W. 608.

Where contestants alleged that the election officers wrongfully refused to count the ballots in a certain precinct, declared the offices in such precinct vacant, and appointed the defeated candidates thereto, their remedy held not by mandamus to compel issuance of the certificate of election, but by quo warranto. *Wells v. Commissioners' Court of Presidio County* (Civ. App.) 195 S. W. 608.

One injured in New Mexico suing railroad in Texas could not by mandamus compel immediate trial of his action contrary to general orders Nos. 18, 18a, and 26 of the Director General of the Railways, in the absence of compliance with No. 26, permitting application to the Director General for relief in event of unnecessary hardship by postponement according to those orders. *Rhodes v. Tatum* (Civ. App.) 206 S. W. 114.

Relators who sought no relief in trial court are not entitled to mandamus in Supreme Court to compel trial court to vacate its judgment, permit them to intervene, and grant certain other relief. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

3. **Remedy by appeal, writ of error or certiorari.**—Writs of mandamus will not be issued where there is a clear legal remedy, as by certiorari, by which the statute authorizes a cause to be removed from justice court to the county court. *Hardin v. Hamilton* (Civ. App.) 204 S. W. 679.

The right to have a judgment reinstated and enforced by mandamus is not affected by the fact that an appeal from such judgment can be taken or a writ of error to review judgment secured on a retrial. *Gulf, C. & S. F. Ry. Co. v. Muse*, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613.

Remedy of interveners being by appeal to Court of Civil Appeals from order dismissing intervention and refusing leave to amend, such order or judgment will not be reviewed by Supreme Court in original application for mandamus to control district court. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

Mandamus from Supreme Court to trial court cannot be used as substitute for appeal provided by law, by relator aggrieved by judgment or order. *Id.*

3½. **Resort to other remedies.**—Where a contract for roadwork between county and plaintiffs was in indivisible contract, although providing for estimates as the work progressed and for the issuance of time warrants upon such estimates, plaintiffs, by presenting a claim for the final and full amount due under the contract and obtaining action thereon by certain commissioners, acting as the county court or attempting to so act, allowing a certain amount as balance due settlement in full, and subsequently instituting and prosecuting to judgment a claim for this particular amount as the balance due under the contract, whether they had success in recovering such amount or not, made an election to claim such sum as the balance due, and they cannot again sue to compel the county court to issue warrants applied for upon certain estimates made as the work progressed. *Cobb & Gregory v. Parker* (Civ. App.) 216 S. W. 214.

Where relators gave notice of appeal from an order of the trial judge disqualifying himself and executed a supersedeas bond, etc., such proceeding will not preclude mandamus to compel the trial judge, who was not disqualified, to proceed, for his order was purely interlocutory and did not dispose of the case. *Montfort v. Daviss* (Civ. App.) 218 S. W. 806.



Where a judge erroneously deemed himself disqualified and refused to act, whereupon an application for injunction was made to another judge and acted upon, held that, in view of art. 4643, the injunction proceeding will not prevent mandamus compelling the original trial judge to proceed with the cause. *Id.*

4. **Nature and existence of rights to be protected or enforced.**—A candidate for nomination at a party primary who pledged support to the primary nominee as required by statutes commits an act violative of conscience by thereafter accepting an independent nomination so that petitioners for such nomination are not entitled to mandamus to compel the secretary of state to certify the nomination. *Westerman v. Mims (Sup.) 227 S. W. 178.*

5. **Nature of act to be commanded.**—Though arts. 3164-3166, have been strictly complied with in nominating an independent candidate, the secretary of state will not be compelled by mandamus to certify his name to be placed on the ballot if it is not entitled to be placed thereon because of any provision of the law, no matter where embodied. *Westerman v. Mims (Sup.) 227 S. W. 178.*

7. **Mandamus ineffectual or not beneficial.**—The court will not grant the mandamus sought by relator, where the writ would be unavailing and useless. *Pollard v. Speer (Civ. App.) 207 S. W. 620.*

Where county treasurer, seeking mandamus to revoke vacation order requiring transfer of county funds from one bank to another bank held to be legal depository, gave his check to latter bank drawn on first bank for the funds, he did all that was required to comply with order, regardless of fact that draft accepted in payment of check was not paid, and mandamus proceedings will be dismissed. *Hammonds v. Ward (Civ. App.) 213 S. W. 334.*

Original application for mandamus by S. Bank to vacate order of judge in vacation compelling transfer of county funds to M. Bank as legal depository will be dismissed as moot, where S. Bank honored check by county treasurer for the funds by giving draft therefor which was credited by M. Bank, though S. bank afterwards attempted to rescind the transaction. *State Nat. Bank of Mt. Pleasant v. Ward (Civ. App.) 213 S. W. 338.*

Upon appeal from an order refusing mandamus to compel a court stenographer to prepare a statement of facts in an appeal in a habeas corpus case, where, on the same day that this proceeding was filed, the record on appeal in habeas corpus was filed, as was the statement of facts a few days later, it may be inferred that the stenographer complied with appellant's request, and that, even if entitled to mandamus, it would not be necessary. *Collins v. State (Cr. App.) 230 S. W. 1005.*

8. **Persons entitled to relief.**—Petitioners for independent nomination of a candidate who was under obligation to support a nominee of the party primary invited a breach of that obligation, and therefore cannot maintain mandamus to compel certification of the nomination if the obligation was such that it would prevent resort to mandamus by the nominee, though they could maintain such proceedings if the candidate himself could have done so. *Westerman v. Mims (Sup.) 227 S. W. 178.*

## II. SUBJECTS AND PURPOSES OF RELIEF

9. **In what cases mandamus will issue in general.**—Under art. 1526, empowering the Supreme Court to issue mandamus agreeable to the principles of law regulating such writ, mandamus, while a strictly legal remedy, will be refused, by analogy to the principles of equity, in aid of those who do not come into court with clean hands; that is, those who have violated conscience or good faith or other equitable principles in their prior conduct connected with the controversy. *Westerman v. Mims (Sup.) 227 S. W. 178.*

A writ of mandamus is a discretionary writ, and not a writ of right. *Id.*

12. **Acts and proceedings of courts, judges and judicial officers—Specific acts.**—Mandamus will not lie to compel the district judge to hold a special term of court under art. 1720, since the statute clearly leaves the matter of calling such sessions to the discretion of the district judge. *Pollard v. Speer (Civ. App.) 207 S. W. 620.*

The district clerk, being clothed with discretion in passing upon the financial worth of the sureties upon a supersedeas bond and in entering his approval thereon, will not be required by writ of mandamus to approve the bond unless the relator shows that the clerk had arbitrarily and without exercising discretion refused to approve the bond. *Bean v. Polk (Civ. App.) 226 S. W. 1106.*

13. — **Entertaining and proceeding with cause.**—That the regular judge for a personal reason does not desire to try a particular case gives him no right to decline to do so; and, if he does decline, he may be compelled, by mandamus, to try the case. *Texas & Pacific Coal Co. v. Ready (Civ. App.) 198 S. W. 1034.*

Since under art. 1714, the judges of the district courts are empowered but not required to make orders in vacation, where a judge in vacation set down habeas corpus proceeding for hearing the respondents, who filed a plea of privilege to be sued in their own county, could not, by mandamus, compel the judge to hear and pass upon their plea when he preferred to continue the cause until term time. *Lucid v. McDowell (Civ. App.) 206 S. W. 203.*

Where trial judge deemed himself disqualified and certified the facts to the Governor, who appointed another judge, such appointment, where the facts were insufficient to disqualify, is not effective, and the trial judge may by mandamus be compelled to proceed. *Montfort v. Daviss (Civ. App.) 218 S. W. 806.*

18. — **Vacation of judgment or order.**—Supreme Court will not by mandamus direct district court to vacate or set aside judgment, though on proper showing it might re-

quire such court to file, hear, and determine petition for such relief. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

19. — **Proceedings for review.**—Mandamus does not lie to compel trial court to correct record to show real date of adjournment and of filing of findings of fact and conclusions of law, where application to court to correct such record has been made, entertained, and overruled. *Eustis v. Frey* (Civ. App.) 204 S. W. 117.

The question for the county court on hearing of petition for mandamus to a justice of the peace to allow appeal in forma pauperis is, not whether the justice erred in refusing such appeal on the evidence before him, but whether on the further evidence before the court there is a right thereto. *Hardin v. Hamilton* (Civ. App.) 204 S. W. 679.

The trial court will not be required by mandamus to include certain facts in bill of exception complaining of court's ruling on motion for new trial on ground of insufficiency of evidence, since the facts proved should be brought up by a statement of facts, and not by the bill of exception, and since, if facts had been stated in the bill, the court could not have considered them. *Rhoades v. El Paso & S. W. Ry. Co.* (Civ. App.) 230 S. W. 481.

Where there is a conflict between decisions of the Courts of Civil Appeals, mandamus to compel certification of the question to the Supreme Court will be issued; the Court of Civil Appeals having final jurisdiction over the case. *Fruit Dispatch Co. v. Rainey* (Sup.) 232 S. W. 281.

23. **Acts and proceedings of public officers or boards and municipalities—Ministerial acts in general.**—Writ of mandamus will not lie except where the acts sought to be performed are purely ministerial. Trustees of Independent School Dist. No. 57 v. *Elbon* (Civ. App.) 223 S. W. 1039.

24. — **Matters of discretion.**—Mandamus is never available against an officer to compel performance of any act involving the exercise of official discretion. *Tippett v. Gates* (Civ. App.) 223 S. W. 702; *Donna Independent School Dist. v. First State Bank of Donna* (Civ. App.) 227 S. W. 974.

Mandamus will not issue against a public officer save to compel performance of a ministerial duty, neither involving discretion nor leaving any alternative. *Hardin v. Hamilton* (Civ. App.) 204 S. W. 679.

Supreme Court will not issue mandamus against any public officer except to enforce performance of a clear, legal duty not involving exercise of discretion conferred upon him by law. *Matthaei v. Clark*, 110 Tex. 114, 216 S. W. 856.

25. — **Specific acts.**—Since art. 3125, provides that all persons holding a possessory right to land adjoining an irrigation plant can compel the furnishing of water to irrigate crops, the duty to furnish water is statutory and can be enforced by mandamus. *Dunbar v. Texas Irr. Co.* (Civ. App.) 195 S. W. 614.

27. — **Matters relating to public schools.**—In view of the record, showing non-compliance with the requirements of arts. 2886, 2889, 3024, relative to election of trustees for an independent school district, petitioners for mandamus held not entitled to the writ to compel trustees of the district to declare the results of an election for school trustees, and to issue certificates therefor to the parties receiving majority of votes. Trustees of Independent School Dist. No. 57 v. *Elbon* (Civ. App.) 223 S. W. 1039.

28. — **Proceedings relating to public lands.**—Since the land commissioner has no authority to determine the legality of a patent previously issued, mandamus will not lie to compel him to issue a permit to prospect on land for which the state had previously issued a patent, which it had never attempted to set aside, the remedy for wrongful patent being by action by the Attorney General under art. 5468. *Fitzgerald v. Robison*, 110 Tex. 468, 220 S. W. 768.

29. — **Issuance of certificates and licenses.**—If action of city manager in refusing retail liquor dealer's license is arbitrary and unreasonable, courts will review and control such action by mandamus. *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

30. — **Establishment of roads and issuance of road bonds.**—Where after district road bonds had been issued, under arts. 628, 631, 632, the commissioners' court, on voter's petition, made order determining that the bonds could not be sold at par, repealing the order authorizing their issuance and canceling the bonds, mandamus would not lie, nearly five years thereafter, to compel reissuance of the bonds. *Jackson v. McAllister* (Civ. App.) 196 S. W. 671.

Even if commissioners' court abused discretion in using proceeds of county bonds to improve a certain road, they cannot by mandamus be forced to improve another road. *Grayson County v. Harrell* (Civ. App.) 202 S. W. 160.

31. — **Issuance of warrants and payment of claims.**—See *Martin v. Alexander* (Civ. App.) 218 S. W. 653.

Where a county treasurer defaulted, and it is impossible to ascertain which funds were depleted, his successor cannot be compelled by mandamus to pay the full amount of funds due to a drainage district, although he may have wrongfully paid orders from other funds; arts. 700, 2608, being inapplicable. *Nueces County Drainage Dist. No. 2 v. Garrett* (Civ. App.) 202 S. W. 1000.

Where defendants as school trustees contracted to pay plaintiff a salary for teaching school but refused to sign or approve his voucher for the last month, plaintiff could not have mandamus to compel the signing of the voucher, since the approval thereof was discretionary with the trustees. *Wells v. Bruner* (Civ. App.) 204 S. W. 363.

## III. JURISDICTION, PROCEEDINGS AND RELIEF

40. **Parties.**—In mandamus to compel clerk of court to issue writ of possession, petition was demurrable, where it showed upon its face a controversy between plaintiff and others over title and none of such persons were made parties. *Fain v. McCain* (Civ. App.) 199 S. W. 889.

Owners of three surveys abutting on river bed were necessary parties to mandamus proceeding against county surveyor to compel him to survey river bed, as appropriated to public free school fund, that plaintiff might purchase it. *Siddall v. Hudson* (Civ. App.) 201 S. W. 1029.

The city was not a necessary party in madamus by district attorney to compel judge and clerk of corporation court to permit petitioner to prosecute all criminal cases, and to tax costs in such cases in his favor, although city ordinances attempting to deny him such right were involved. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

Where a railroad, with permission of the authorities, the Railroad Commission and the Attorney General, abandoned a portion of its track, and sold its right of way to a company, which sold to residents of the city, who built thereon, a company aggrieved by the abandonment cannot secure mandamus to compel replacement without making the city and present holders of the title to the abandoned right of way parties to the suit. *Jeff Bland Lumber & Building Co. v. Galveston, H. & S. A. R. Co.* (Civ. App.) 212 S. W. 750.

The various litigants who might be adversely affected by the district judge's approval of a supersedeas bond for an appeal are not necessary parties to an application for mandamus to compel him to fix the amount thereof, where the right to the writ depends on whether the law allowed supersedeas. *Blankenship v. Little Motor Kar Co.* (Civ. App.) 224 S. W. 210.

42. **Pleading.**—In a proceeding in which an injunction and mandamus is sought, submitted on bill and answer, allegations of the bill not specially denied under oath must be taken as true. *Houston Electric Co. v. City of Houston* (Civ. App.) 212 S. W. 198.

42½. **Hearing.**—In mandamus a party who did not object to the court's deciding the case on the evidence before it, and did not offer any further evidence, cannot complain that there should have been a further hearing on the facts, if the facts before the court were sufficient to sustain the judgment. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

43. **Scope of inquiry.**—On mandamus to compel judge of district court to vacate receivership as to property of decedent and order delivery to relator as administrator, sole question was relator's right to vacation and order for delivery, and whether court had authority to sell property was immaterial. *Lauraine v. Ashe*, 109 Tex. 69, 196 S. W. 501.

48. **Disobedience of writ.**—Where applicant for habeas corpus disobeyed mandamus judgment with knowledge of its terms, he cannot complain that mandamus writ was not actually served on him. *Ex parte Smith*, 110 Tex. 55, 214 S. W. 320.

## TITLE 89½

## MATERNITY HOMES

## Art.

5732½. Persons conducting maternity homes shall procure license.

5732½a. Notice of license to local health officer.

## Art.

5732½b. Licensee shall report births.

5732½c. Revocation of license.

**Article 5732½.** Persons conducting maternity homes shall procure license.—Every individual, firm, association, or corporation, owning, keeping, conducting or managing an institution or home for the boarding or sheltering of infant children, or so-called "Baby Farm", or any lying-in hospital, hospital ward, maternity home or other place for the reception, care and treatment of pregnant women, and charging a fee or receiving or expecting compensation in the way of room rent or board, shall obtain an annual license which shall be issued by the State Board of Health without fee, shall not be transferable to other persons or other premises, and shall expire on the thirty-first day of December next following the issuance. The application for such license shall state the name and address of the licensee, the specific location of the building used, and the number of inmates which may be boarded there at one time, and shall be approved by the local health officer. No greater

number of inmates shall be housed at one time in the building than is authorized by the license, and no pregnant woman or infant shall be kept in a building or place not designated in the license. A record of licenses issued shall be kept by the State Board of Health. [Acts 1921, 37th Leg., ch. 76, § 1.]

**Explanatory.**—Sec. 4 of the act imposes a criminal penalty, and is set forth, post, as art. 513c, Penal Code. The act took effect 90 days after March 12, 1921, date of adjournment.

**Art. 5732½a. Notice of license to local health officer.**—Whenever any such license is issued, the board shall forthwith give notice of the granting and terms to the local health officer, who shall keep informed of the nature and reputation of every such institution in his jurisdiction, and shall visit and inspect the same from time to time, and for such purposes shall at all reasonable hours be given free and unrestricted access to such institution. [Id., § 2.]

**Art. 5732½b. Licensee shall report births.**—Every such licensee shall report to the local health officer, within twenty-four hours next after it occurs, the birth of any child, including stillborn or prematurely born children at such institution; the arrival of any child, stating the name, sex, age, color, and from whom received; and the removal of any child, stating its name, age, and disposition made of it. [Id., § 3.]

**Art. 5732½c. Revocation of license.**—Whenever a keeper, manager or owner of any such institution as is defined in Section 1 of this Bill shall be convicted of keeping or conducting a "disorderly house" as that term is defined by the criminal laws of this State, the State Board of Health shall forthwith revoke the license theretofore issued authorizing the keeping of such house; and should any such manager, keeper or owner refuse to permit any person authorized by this Bill to inspect such house at any reasonable hour, or should they fail to make such reports to the local health officer within the time and in the manner required by this Bill, then said State Board of Health may suspend said license for any period of time not to exceed six months, and upon any subsequent failure to permit such visits of inspection or to make said reports, said State Board of Health is authorized to revoke the license theretofore issued for the conducting of such house. [Id., § 5.]

## TITLE 90

## MEDICINE—PRACTICE OF

Chap.

1. Physicians and surgeons.
2. Nurses.

Chap.

3. Anatomical board.
4. Optometry.

## CHAPTER ONE

## PHYSICIANS AND SURGEONS

Art.

5733. Medical board established.  
 5736. Physicians required to register.  
 5741. Examination, how conducted, and to include what.  
 5742. Does not apply to whom.

Art.

- 5744a. Cancellation of license on conviction of crime.  
 5745. Who regarded as practicing medicine.  
 5747. Malpractice, cause for revoking license.

**Article 5733. Medical board established.**Cited, *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

**Constitutionality of prior act.**—The prior act, relating to the qualifications of physicians, and requiring the board of examiners to be “graduates of some medical college recognized by the American Medical Association,” is not in conflict with Const. art. 16, § 31, declaring that the legislature may pass laws prescribing the qualifications of physicians, “but no preference shall ever be given by law to any schools of medicine.” *Kenedy v. Schultz*, 6 Civ. App. 461, 25 S. W. 667.

**Art. 5736. Physicians required to register.**See *Home Life & Accident Co. v. Cobb* (Civ. App.) 220 S. W. 131.

**Validity of act.**—A license to practice medicine is a privilege or franchise granted by the government. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

The practice of medicine in all its phases as a public business is within the legitimate police powers of the state for regulation. *Hicks v. State* (Cr. App.) 227 S. W. 302.

**Prosecutions for unlawfully practicing.**—Defendant chiropractor, who, before practicing medicine, did not register with the district court of the county of his residence the certificate of some authorized board of medical examiners, evidencing his authority to practice medicine, violated such article, though the remainder of its requirements, with regard to stating under oath his age, etc., were complied with. *Hicks v. State* (Cr. App.) 227 S. W. 302.

**Unlicensed practitioner's right to recover fees.**—A person serving as a physician without having a certificate of qualification, cannot recover for such services. *Kenedy v. Schultz*, 6 Civ. App. 461, 25 S. W. 667.

A physician to recover for services must show compliance with Vernon's Sayles' Ann. Civ. St. 1914, art. 5736, regulating the practice of medicine. *Faine v. Eckhardt* (Civ. App.) 203 S. W. 459.

**Art. 5741. Examination, how conducted, and to include what.**Cited, *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

**Validity.**—This article is not violative of Const. art. 16, § 31, commanding laws prescribing the qualifications of physicians and forbidding preference by law to any school of medicine; the statute not being discriminatory and does not conflict with art. 5742. *Hicks v. State* (Cr. App.) 227 S. W. 302.

**Art. 5742. Does not apply to whom.**Cited, *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

**Construction and operation in general.**—Art. 5741 and this article, are not in conflict with each other. *Hicks v. State* (Cr. App.) 227 S. W. 302.

**Art. 5744a. Cancellation of license on conviction of crime.**—When the facts are made known to the State Board of Medical Examiners of this State that any licensed “practitioner of Medicine” has been convicted, either in a State or Federal Court, of the crime of the grade of a felony, or one which involves moral turpitude or procuring or aiding or abetting the procuring of a criminal abortion, said board is hereby authorized and empowered, and it is made its duty to immediately inves-

tigate said facts, and said Board is hereby authorized and empowered to immediately cancel the license of such licensed "practitioner of medicine." [Acts 1919, 36th Leg., ch. 129, § 1; Acts 1921, 37th Leg., ch. 75, § 1.]

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

#### Art. 5745. Who regarded as practicing medicine.

Cited, *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

#### Art. 5747. Malpractice cause for revoking license.

**Negligence or malpractice.**—A physician is not liable for injury to patient in using X-ray, if the cause of the injury was the abnormal hypersensitiveness of the patient's skin, which could not have been discovered prior to the treatment. *Hamilton v. Harris* (Civ. App.) 204 S. W. 450.

If defendant, who had contracted to personally attend plaintiff's wife during approaching confinement, but who was unable to do so, used ordinary care in selecting a substitute when requested by defendant to speedily dispatch another physician, he owed duty to exercise ordinary care in the selection of the substitute, but if he did so he would not be liable for negligence or lack of skill of substitute in the absence of facts showing that the substitute was acting as his agent. *Moore v. Lee*, 109 Tex. 591, 211 S. W. 214; 4 A. L. R. 185.

A physician is not liable for injuries resulting from use of X-ray where he exercises such reasonable care and skill as is ordinarily exercised by reputable physicians in the locality, and he is not expected to look for unexpected results from treatment of his patients, and is not expected to anticipate results arising from peculiar characteristics and conditions of a patient. *Hamilton v. Harris* (Civ. App.) 223 S. W. 533.

— **Evidence.**—In action against physician for malpractice, wherein plaintiff introduced no evidence of general ability, physician could not introduce testimony as to it. *Hackler v. Ingram* (Civ. App.) 196 S. W. 279.

In an action for damages for alleged negligent X-ray burn, whether plaintiff had a hypersensitive skin, or whether burn was the result of negligence on the part of defendant physician held for the jury. *Hamilton v. Harris* (Civ. App.) 223 S. W. 533.

— **Charge.**—Where defendant, when called to attend plaintiff's wife pursuant to contract, stated that he would be unable to attend, and plaintiff asked him to speedily dispatch another physician which defendant did, court properly refused to charge that any negligence or lack of skill of physician dispatched was chargeable to defendant, regardless of the care exercised in selection. *Moore v. Lee*, 109 Tex. 391, 211 S. W. 214, 4 A. L. R. 185.

— **Damages.**—Verdict of \$1,000 against physician for alleged malpractice held not excessive. *Hackler v. Ingram* (Civ. App.) 196 S. W. 279.

In action for physician's negligence, loss of business is a remote consequence for which the physician is not liable. *Hamilton v. Harris* (Civ. App.) 204 S. W. 450.

A verdict of \$3,500 was not excessive for an X-ray burn between the legs of a merchant, resulting in an operation, great suffering, permanent inconvenience by reason of grafting of pig skin, and lessening of power to attend to his business. *Hamilton v. Harris* (Civ. App.) 223 S. W. 533.

**Employment and compensation.**—Complaint, in suit by physicians to recover for attendance, medicine, etc., should itemize amount charged for medicine, amount charged for examination, that charged for visit, charge for prescription, etc.; no further itemization being necessary. *Willet Bros. v. Western Naval Stores Co.* (Civ. App.) 198 S. W. 352.

Where it was a long-established custom among doctors where the parties resided for a doctor to send another to those patients whom he was unable to attend, defendant's statement to a physician selected by him to attend to a case that it would be a partnership case cannot be construed otherwise than as meaning that defendant expected to resume charge when his other engagements would permit, and that each for his services would be entitled to compensation. *Moore v. Lee*, 109 Tex. 391, 211 S. W. 214, 4 A. L. R. 185.

**Relation to patient in general.**—Before performing an operation, a physician must obtain the consent of his patient if competent to give it, or, if not, of some one under the circumstances who would legally be authorized to give the requisite consent, though, of course, if a person be injured to the extent that he is unconscious and his injuries require prompt surgical attention, a physician may be justified in applying such treatment as is reasonably necessary for the preservation of life or limb, and consent will be implied. *Moss v. Rishworth* (Com. App.) 222 S. W. 225, affirming judgment (Civ. App.) *Rishworth v. Moss*, 191 S. W. 843.

## CHAPTER TWO

## NURSES

Art.  
5755a. Lecturing nurses; employment.

Art.  
5755b. Same; compensation.

**Article 5755a. Lecturing nurses; employment.**—That the Board of Nurse Examiners for the State of Texas, be and it is hereby authorized to employ at least three lecturers from among the registered nurses of this State to visit and lecture to the young women students of the high schools, colleges and Universities of the State, those supported by public as well as by private patronage or endowment, with the view of securing volunteers from among the young women of the State willing to begin at once to take training for service as professional nurses to meet the demands for trained nurses to care for our sick and wounded in the war, as well as to properly serve the civilian population in the meantime. [Acts 1918, 35th Leg. 4th C. S., ch. 51, § 1.]

Took effect April 2, 1918.

**Art. 5755b. Same; compensation.**—That the said Board be and it is hereby authorized to fix the salary or compensation for said lecturers, to agree upon the term of service and pay the same from the accumulated fees now on hand and under the control of said Board amounting to something over three thousand dollars, to be vouchered and paid as is provided in Section 6 of the Act of 1909 creating the Board of Nurse Examiners, as amended by the Act of 1911 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5754]. [Id., § 2.]

## CHAPTER THREE

## ANATOMICAL BOARD

**Article 5757. Regulations for delivering dead bodies.**

See *Brown v. Bonough* (Sup.) 232 S. W. 490.

## CHAPTER FOUR

## OPTOMETRY

Art.  
5763½. Practice of optometry defined.  
5763½a. Expense of board to be derived from license fees; surplus.  
5763½b. Board of Examiners created.  
5763½c. Tenure of members of Board; vacancies; eligibility of members.  
5763½d. Qualification and organization of Board; meetings; rules, etc.; administration of oaths.  
5763½e. Records.  
5763½f. Examination of practitioners; declaration of intention to continue practice.  
5763½g. Registration of declaration; regarded as certificate.

Art.  
5763½h. Registration of license.  
5763½i. County clerk to keep register; fees; entry of revocations of licenses; annual list of optometrists.  
5763½j. Application for license; examination; licensee; fee; disposition of fund.  
5763½k. Examinations how conducted; disqualification for license.  
5763½l. District court may revoke licenses.  
5763½m. Display of license.  
5763½n. Sellers of spectacles as merchandise not within act.  
5763½o. Scope of license.  
5763½p. Partial invalidity.

**Article 5763½. Practice of optometry defined.**—The practice of optometry is hereby defined to be the employment of objective or subjec-

tive means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Provided that nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer any drug or drugs externally or internally, nor to prescribe drug or drugs or physical treatment whatsoever, unless such optometrist is a regular licensed physician or surgeon under the laws of this State. [Acts 1921, 37th Leg. 1st C. S., ch. 51, § 1.]

Took effect Nov. 15, 1921.

**Art. 5763 $\frac{1}{2}$ a. Expense of board to be derived from license fees; surplus.**—The "Texas State Board of Examiners in Optometry," hereinafter provided for, shall defray all expenses under this Act from fees provided in this Act, and no part of same shall be paid from the State Treasury, nor shall any appropriation ever be made from the State Treasury for any expenditures made necessary by this Act, and all fees remaining in the hands of the State Board of Examiners in Optometry at the end of any fiscal year in excess of five thousand (\$5,000.00) dollars shall be paid into the general fund of the State of Texas. [Id., § 2.]

**Art. 5763 $\frac{1}{2}$ b. Board of Examiners created.**—That a Board to be known as "The Texas State Board of Examiners in Optometry," for the State of Texas, named in Section 2 of this Act [Art. 5763 $\frac{1}{2}$ a], is hereby created. Said Texas State Board of Examiners in Optometry, which hereinafter may be referred to as the Board, shall be composed of five members, whose duty it shall be to carry out the purposes and enforce the provisions of this Act, and the Governor of Texas shall within ninety (90) days after the passage of this Act, appoint five persons to constitute such Texas State Board of Examiners in Optometry, who shall possess the necessary qualifications to practice optometry and who shall have been residents of this State actually engaged in the practice of optometry within the meaning of this Act, for at least five years immediately preceding the passage of this Act. The Texas State Board of Examiners in Optometry thus appointed, or a quorum thereof, shall, by virtue of such appointment, issue licenses to themselves. Three members of the Board shall constitute a quorum. [Id., § 3.]

**Art. 5763 $\frac{1}{2}$ c. Tenure of members of Board; vacancies; eligibility of members.**—The members of the said Texas State Board of Examiners in Optometry shall be divided into three classes; one, two and three, and their terms of office shall be determined by lot at the first meeting of the Board. Two members shall hold their offices for two years, two members four years, and one member six years, respectively, from the time of their appointment, and until their successors are duly appointed and qualified, and the members of one of the above classes of said Board shall thereafter be appointed every two years, by the Governor, to supply vacancies made by provisions of this Act, who shall hold office for six years and until their successors are duly appointed and qualified. In case of death or resignation of a member of the Board, the Governor shall appoint another to take his place for the unexpired term only. After the first Board has been appointed, only licensed optometrists under the laws of the State of Texas and actively engaged in the practice of optometry shall be eligible for appointment on said Board. [Id., § 4.]

**Art. 5763 $\frac{1}{2}$ d. Qualification and organization of Board; meetings; rules, etc.; administration of oaths.**—The members of said Texas State



Board of Examiners in Optometry shall qualify by taking the oath of office, the same as prescribed by the Constitution for State officials. At the first meeting of said Board after each appointment the Board shall elect a president, a vice-president, and secretary-treasurer. Regular meetings shall be held at least twice a year, at such time and place as shall be deemed most convenient for applicants for license. Not less than ten days notice of such meeting shall be given by publication in at least three daily newspapers of general circulation as may be selected by the Board. Special meetings may be held upon call of three members of the Board. The Board may prescribe rules, regulations and by-laws in harmony with the provisions of the Act, for its own proceedings and government for the examination of applicants for license to practice optometry. Any member of said Board shall have the power to administer oaths for all purposes required in the discharge of its duties and shall adopt a seal to be affixed to its official documents. [Id., § 5.]

**Art. 5763½e. Records.**—The Board shall preserve a record of its proceedings in a book or register kept for that purpose, showing name, age, place and present residence of each applicant, the name and location of any school or schools of optometry from which he holds credentials, and the time devoted to the study and practice of same, together with such other information as the Board may desire to record. Said register shall also show whether applicants were rejected or licensed and shall be prima facie evidence of all matters contained therein. The secretary of the Board shall on March 1st of each year transmit a certified copy of said register to the Secretary of State for permanent record a certified copy of which, with hand and seal of the secretary of said Board, or Secretary of State, shall be admitted as evidence in all courts. [Id., § 6.]

**Art. 5763½f. Examination of practitioners; declaration of intention to continue practice.**—All those engaged in the practice of optometry in this State at the time of the passage of this Act shall have one hundred and twenty (120) days after the appointment of the Board by the Governor of Texas in which to make declaration to the secretary of said Board on blank forms furnished by the Board, their intention to continue the practice of optometry in the State of Texas and their intention and purpose to take such examination in optometry as the Board may prescribe. Such examination to cover the following subjects only:

- (a) The limitations of the sphere of optometry.
- (b) The necessary scientific instruments used.
- (c) The form and power of lenses used.
- (d) A correct method of measuring presbyopia, hypermetropia, myopia and astigmatism.
- (e) The writing of formulas and prescriptions for the adaptation of lenses in aid of vision.

Provided that those making this declaration shall on or before January 1st, 1923, secure a license from the Board as hereinafter provided. Those engaged in the practice of optometry in this State at the time of the passage of this Act who fail to make such declaration, notifying the secretary of the Board as specified, shall be deemed to have waived their rights under the provisions of this Act. Those referred to as privileged to make declaration to the secretary of said Board on blank forms furnished by the Board of their intention to continue the practice of optometry in the State of Texas are hereinafter referred to as declarants. [Id., § 7.]

**Art. 5763 1/2g. Registration of declaration; regarded as certificate.**—Declarants, who filed with the Secretary of the Texas State Board of Examiners in Optometry a declaration of their intention to continue the practice of optometry in this State as provided in this Act, shall be given by the Board a certified copy of the declaration so filed, bearing the seal of the Board, and this certified copy shall be filed for record in the county clerk's office of the declarant's home county within thirty days of its date of certification by the Texas State Board of Examiners in Optometry, and thereafter declarant shall not begin or continue the practice of optometry in any county in this State without having first filed for record with the county clerk of such county the certified copy of his declaration issued him by the Texas State Board of Examiners in Optometry, and the failure to file same for record in the office of the county clerk shall be regarded as prima facie evidence of the lack of such document. Said certified copy so issued to him, or her, by the Board of declarant's declaration of intention to continue the practice of optometry in this State, as provided in this Act, may hereinafter in this Act be called a certificate. [Id., § 8.]

**Art. 5763 1/2h. Registration of license.**—After the passage of this Act it shall be unlawful for any person to begin to practice optometry within the limits of this State who has not registered in the county clerk's office of the county in which he resides, and in each county in which he practices, his license for so practicing as herein prescribed, together with his age, post-office address, place of birth, subscribed and verified by his oath. The fact of such oath and record shall be endorsed by the county clerk upon the license. The absence of record of such license in the county clerk's office shall be prima facie evidence of the lack of possession of such license to practice optometry. [Id., § 9.]

**Art. 5763 1/2i. County clerk to keep register; fees; entry of revocations of licenses; annual list of optometrists.**—It is hereby made the duty of the county clerk of each county in the State to purchase a book of suitable size to be known as the "Optometry Register" of such county and set apart at least one full page for the registration of each optometrist, and to record in said Optometry Register the name and record of each optometrist who presents for record a license or certificate issued under this Act by the State Board of Examiners in Optometry. The county clerk shall receive the sum of one dollar for each document registered under this Act, which shall be his full compensation for all duties required under this Act. When an optometrist shall have his license revoked, it shall be the duty of said county clerk, upon being notified by the Board, to make a note of the fact beneath the record in the Optometry Register, which entry shall close the record. On the first day of January in each year, said county clerk, shall, upon request of the Board, certify to the secretary of the Board a correct list of the optometrists then registered in the county, together with such other information as said Board may require. [Id., § 10.]

**Art. 5763 1/2j. Application for license; examination; license; fee; disposition of fund.**—Every person desiring to begin the practice of optometry after the passage of this Act shall make application for license by presenting to the secretary of the Board, on blank forms furnished by the Board, satisfactory evidence, verified by oath, that he or she has attained the age of twenty-one years, is of good moral character, has the necessary preliminary education and has graduated from a school of optometry maintaining a standard which meets with the requirements

of said Board, or has studied optometry in Texas not less than two years in the office of an optometrist licensed under this Act, before taking the examination which shall be prescribed by the Board. Said examinations shall consist of tests in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in the anatomy, physiology, and pathology of the eye as applied to optometry. Every candidate successfully passing examination shall be registered by the Board as possessing the qualifications required by this Act, and shall receive from said Board a license which, when registered with the county clerk, as provided, shall entitle the person so examined and licensed to practice optometry in this State; provided that the Board shall have authority, at its discretion to recognize the license which as been issued, after full examination, by State Board of Examiners in Optometry of other states having a standard of education in optometry satisfactory to the Texas State Board of Examiners in Optometry and may issue to such persons a license to practice optometry in Texas, or in its discretion, may admit for full examination any person presenting an unrevoked certificate of examination from the Board of Examiners of any other State.

When a license or certificate is issued it shall be numbered and recorded in a book kept by the secretary of the Board and its number shall be noted upon the respective documents. The Board shall charge a fee of \$15.00 for examining an applicant for license, which fee must accompany the application for examination. Such applicant shall be given due notice of the date and place of examination. In case an applicant, because of failure to pass examination, be refused a license, such applicant shall, after six months, be permitted to take a second examination without additional fee. The fee for issuing a license or certificate shall be \$5.00, to be paid to the secretary of the Board. The fund realized from the aforesaid fees shall first be applied to the payment of all necessary expenses of the Board and remaining fund shall be applied, by order of the Board, to compensating members of the Board in proportion to their labors, provided said compensation shall in no case exceed \$20.00 per day for the time occupied. [Id., § 11.]

**Art. 5763½k. Examinations how conducted; disqualification for license.**—All examinations shall be conducted in writing and by such other means as the Board shall determine adequate for the ascertainment of the qualifications of applicants and in such manner as shall be entirely fair and impartial to all individuals and every recognized school of optometry. All applicants examined at the same time shall be given identical questions. No person taking the examination contemplated herein shall be approved by the Board until the Board is satisfied that the applicant has the necessary knowledge to practice optometry. The Board may refuse to admit persons to its examination or to issue licenses provided for in this Act for any of the following reasons:

First. The presentation to the Board of any untrue statement or any document or testimony which was illegally or fraudulently obtained, or when fraud or deceit has been practiced in passing the examination.

Second. Conviction of a crime of the grade of felony, or one which involves moral turpitude.

Third. Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public; or for habits of intemperance or drug addiction, provided any applicant who may be refused admittance to examination before said Board or be refused a license, after legal notice and a full and impartial hearing, shall have his right of

action to have such issue tried in the district court of any county in which one of the members of the Board shall reside. [Id., § 12.]

**Art. 5763 $\frac{1}{2}$ l. District Court may revoke licenses.**—The right herein to practice optometry in this State may be revoked by any district court upon proof of the violation of the law in any respect in regard thereto, or for any cause for which the State Board of Examiners in Optometry is authorized to refuse to admit persons to examination or to issue licenses as provided in Section 12 of this Act [Art. 5763 $\frac{1}{2}$ k], and it shall be the duty of the several district and county attorneys of this State to file and prosecute proceedings in the name of the State upon request of any member of said Board. [Id., § 13.]

**Art. 5763 $\frac{1}{2}$ m. Display of license.**—Every person practicing optometry in this State shall display his license or certificate in a conspicuous place in the principal office where he practices optometry, and, whenever required, exhibit such license or certificate to said Board of Examiners, or its authorized representative, and whenever practicing said profession of optometry outside of, or away from said office, or place of business, he shall deliver to each client or person fitted with glasses a bill of purchase, or sale, which shall contain his signature, post-office address, and number of his license, or certificate, together with a specification of the lenses and material furnished and the prices charged for such lenses and material respectively. [Id., § 14.]

**Explanatory.**—Sec. 15 imposes a criminal penalty and is set forth, post, as art. 770 $\frac{1}{2}$ , Penal Code.

**Art. 5763 $\frac{1}{2}$ n. Sellers of spectacles as merchandise not within act.**—Nothing in this Act shall be construed to apply to persons who sell spectacles and eye-glasses as merchandise and those who fit glasses for their customers; officers or agents of the United States or the State of Texas in the discharge of their official duties. [Id., § 16.]

**Art. 5763 $\frac{1}{2}$ o. Scope of license.**—Nothing in this Act shall be construed as giving authority to use, prescribe, sell or offer for sale any eye lotions, salves, or medicines of any kind or description, practice medicine and surgery within the provisions of Chapter XCCIII, Acts of the Thirtieth Texas Legislature [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5733–5747; Vernon's Ann. Pen. Code, 1916, arts. 750–756], or as conferring any title or appellation in a sense to indicate the practice of medicine and providing that the title of Optometrist or practice, as defined in Section 1 of this Act [Art. 5763 $\frac{1}{2}$ ], shall not be construed as practicing medicine or surgery or indicating the practice of medicine or surgery. [Id., § 17.]

Sec. 18 repeals all laws in conflict.

**Art. 5763 $\frac{1}{2}$ p. Partial invalidity.**—That if any of the provisions of this Act shall be held to be unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the constitutionality or validity of any portion of this Act which may be given reasonable effect without the provisions so declared unconstitutional or invalid. [Id., § 19.]

**TITLE 91****MILITIA**

Chap.

2. Reserve militia.

Chap.

3. National guard.

**CHAPTER TWO****RESERVE MILITIA****Article 5776. Power of governor to call out militia.**

**Review by courts.**—Under the authority conferred on the Governor by Const. Tex. art. 4, §§ 7, 10, and this article, to call out the militia to enforce the laws in case of riot, or breach of the peace, or imminent danger thereof, the determination of whether such conditions exist is solely for the Governor, and his decision is not reviewable by the courts. *United States v. Wolters* (D. C.) 268 Fed. 69.

**CHAPTER THREE****NATIONAL GUARD****ADJUTANT GENERAL****Article 5787.**

**Explanatory.**—This article is superseded as to the salary of the Adjutant General by art. 7054, post.

**TITLE 92****MILL PRODUCTS****Article 5894. Packages, how marked; standard weights.**

**Express warranty.**—Notwithstanding the provisions of these and the following articles, the seller of cotton seed meal for stock feed is liable on an express warranty of soundness and prime quality. *Kincannon & Gaines v. Independent Cotton Oil Co.* (Civ. App.) 196 S. W. 378.

## TITLE 93

## MINES AND MINING

## CHAPTER ONE

## MINING CLAIMS, PERMITS AND LEASES

- Art.**  
**5904.** Lands open to prospecting for minerals.  
**5904a.** Persons entitled to prospect for minerals; rules.  
**5904b.** Application for right to prospect for petroleum oil and natural gas in surveyed lands; amount and location of lands.  
**5904c.** Permit to prospect for petroleum and gas in unsurveyed lands; number of acres.  
**5904d.** Issuance of permit to prospect for oil and gas.  
**5904dd.** Revival and extension of permits on lands owned by the state.  
**5904ddd.** Same; annual payments to state; offset wells; resumption of drilling.  
**5904dddd.** Same; forfeiture of permit.  
**5904e.** Development work for petroleum and gas; filing statement in General Land Office; forfeiture; removal of product before obtaining lease, prohibited.  
**5904f.** [Repealed.]  
**5904f1.** Permits on school and university lands revived and extended.  
**5904f2.** Same; annual payments to state; offset wells; resumption of drilling.  
**5904f3.** Same; forfeiture.  
**5904f4.** Same; application for lease; terms of lease.  
**5904f5.** Affidavit by owner of expired permit.  
**5904f6.** Same; not applicable to land sold.  
**5904g-5904k.** [Repealed.]  
**5904k1.** Lands included; oil, natural gas, coal, and lignite excluded.  
**5904k2.** Extent and shape of claims; superficial areas.  
**5904k3.** Location notice; posting; temporary monuments; permanent monuments; interference with notice or monuments.  
**5904k4.** Application for survey of claim; contents; filing fee; award for claim; monuments.  
**5904k5.** Survey of claim; boundaries; location and marking of corners; field notes and plat; compensation of surveyor.  
**5904k6.** Rights of locator; assessment work.  
**5904k7.** Separate or joint locations; rights and liabilities of co-owners.  
**5904k8.** Forfeiture of claim; relocation.  
**5904k9.** Purchase price; assessment work; royalties.  
**5904k10.** Other lands included.  
**5904k11.** Surface rights of locator; rights of way.  
**5904k12.** Sale of land without minerals; discovery of other minerals.  
**5904k13.** Partial invalidity of act.  
**5904k14.** Repeal.
- LEASE OF LANDS FOR PRODUCTION OF OIL AND NATURAL GAS**  
**Art.**  
**5904o1.** Lands included.  
**5904o2.** Rental and royalties; amount.  
**5904o3.** Advertisement of areas.  
**5904o4.** Applications for separate areas; lease; term.  
**5904o5.** Surveyed and unsurveyed areas.  
**5904o6.** Royalties; payment; books and accounts.  
**5904o7.** Royalties and other sums due; where and to whom paid; disposition of.  
**5904o8.** Lien of state for royalties, etc.  
**5904o9.** Offset wells.  
**5904o10.** Pollution of waters.  
**5904o11.** Transfer or relinquishment of lease.  
**5904o12.** Forfeiture of lease.  
**5904o13.** Right of way for entry, etc., onto land.  
**5904o14.** Prior rights.  
**5904o15.** Repeal.
- OIL AND NATURAL GAS ON SURVEYED FREE SCHOOL AND ASYLUM LANDS**  
**5904o16.** Owners of soil constituted agents of state; relinquishment to owners of undivided part of oil and gas; remainder reserved for public free school fund and asylum funds.  
**5904o17.** Sale or lease of oil or gas by owners of land; terms and conditions; minimum price and royalties; rentals; payments to state.  
**5904o18.** Offset wells on lands not included in act; requirements as to drilling.  
**5904o19.** Same; failure or refusal to drill or develop such wells; relinquishment forfeited.  
**5904o20.** Same; sale of oil and gas on forfeiture of relinquishment; price, etc.  
**5904o21.** Payments of value of gross production of oil and gas to state and owners of soil; books, accounts, etc.  
**5904o22.** Amounts due state, where and to whom paid.  
**5904o23.** Lien of state on wells to secure payment of amounts due.  
**5904o24.** Failure or refusal to pay amounts due; false returns or reports; refusal of or giving false information; forfeiture of rights acquired under permit or lease.  
**5904o25.** Relinquishments to owners of soil subject to rights under permits to prospect for oil and gas already existing or hereafter granted.

Art.  
5904o26. Subsequent purchasers of unsold public free school or asylum lands for which prospecting permits have issued.

5904o27. Permits; assignment; record of.

5904o28. Permittees to begin drilling well, when; limitation of time for completing development of wells.

5904o29. Report of development of well by permittee; application for lease: log of well or wells; issue of lease.

5904o30. Royalties payable by permittee to state and owners of soil.

5904o31. Relinquishment of permits.

5904o32. Retroactive operation of act.

5904o33. Damage to soil.

5904o34. Laws relating to permits continued in force.

## DEVELOPMENT AREAS

Art.  
5904o35. Designation of development areas.

5904o36. Designation shall continue permits in force; development.

5904o37. Lease issued in case oil or gas is discovered; relinquishments.

5904o38. Does not apply to school land.

## GENERAL PROVISIONS

5904p. Definitions and requirements; abandonment or relinquishment.

5904q. Disposition of proceeds.

5904qq. Transfer of moneys in game, fish and oyster fund to school fund.

5904s. Forfeiture of rights under permit or lease.

**Article 5904. [3498a] Lands open to prospecting for minerals.**

**Explanatory.**—Acts 1917, 35th Leg., ch. 83, is repealed by Acts 1919, 36th Leg., 2d C. S., ch. 19, § 15, in so far as the former act relates to "islands, salt water lakes, bays, inlets, marshes, and reefs owned by the state within tidewater limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, and the unsurveyed public free school lands." See arts. 5904o1 to 5904o15, post.

See *Prairie Oil & Gas Co. v. State* (Civ. App.) 214 S. W. 363; *Fox v. Robinson* (Sup.) 229 S. W. 456, 458.

**Construction and operation in general.**—This act does not ipso facto work forfeiture of mineral rights in school lands, and other applicants cannot file until Commissioner of General Land Office has indorsed termination upon duplicate of permit retained in his office. *Underwood v. Robison*, 109 Tex. 228, 204 S. W. 314.

A purchaser from the state of school land, not known to contain minerals, but fairly and in good faith classified and sold without reservation as agricultural land by the duly authorized state authorities, acquired title to minerals which might be thereafter discovered, and relator is not entitled to a permit to prospect on the land for oil and gas, in view of art. 4041, validating title to minerals. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

Oil produced from wells is a "mineral" substance. *Texas Pacific Coal & Oil Co. v. Howard* (Civ. App.) 212 S. W. 735.

**Art. 5904a. Persons entitled to prospect for minerals; rules.**

See note under art. 5904, as to partial repeal.  
Cited, *Fox v. Robinson* (Sup.) 229 S. W. 456.

**Art. 5904b. Application for right to prospect for petroleum oil and natural gas in surveyed lands; amount and location of lands.**

See note under art. 5904, as to partial repeal.  
Cited, *Fox v. Robinson* (Sup.) 229 S. W. 456.

**Construction and operation in general.**—The report of the board of appraisers as authorized by arts. 5423a-5423c, that the proper classification of certain school land was grazing land, was not record evidence that the land was ever classified and sold as grazing land, so that it was not within the provisions of this article. *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

**Right to permit.**—Proper filing, under this or the following article in accord with the character of the land, is essential to the right to a permit. *Wagner v. Robison*, 109 Tex. 114, 201 S. W. 171.

Where a certain area had been lawfully surveyed in virtue of an application made under the act, but upon which no permit issued, the field notes being approved by the commissioner and filed in the land office, the commissioner was authorized to treat the area, as respects a later application, as "surveyed land" within the meaning of the act. *Sibley v. Robison*, 110 Tex. 1, 212 S. W. 932.

The actual survey of the bed of a navigable stream by county surveyor under application for the right to prospect and develop petroleum in such land, did not make such land "surveyed land," since the survey, having been made under former statute which did not open up such land to prospecting for petroleum, was void. *Landry v. Robison*, 110 Tex. 295, 219 S. W. 819.

Where school land was awarded to a private purchaser, whose application represented that he was buying it for agricultural or grazing purposes only, and that, if it was classed as mineral, the sale was on the express condition the minerals should be reserved to the school fund, the state had authority to grant a permit to prospect for oil and gas thereon to one other than such purchaser's successor. *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

**Application.**—Separate applications for oil and mineral permits for state lands may be filed simultaneously. *Jones v. MacCorquodale* (Civ. App.) 218 S. W. 59, 62; *Same v. Maes* (Civ. App.) 218 S. W. 62.

An application to the Land Commissioner for a permit to prospect for oil and gas which describes the land by section number, block number, and township, found in the county to the clerk of which the application is addressed, is sufficient to identify the land. *Johnson v. Sunshine Oil Corporation* (Civ. App.) 227 S. W. 698.

**Art. 5904c. Permit to prospect for petroleum and gas in unsurveyed lands; number of acres.**

See note under art. 5904, as to partial repeal.

See *Redus v. Blucher* (Civ. App.) 207 S. W. 613

**Right to permit.**—Proper filing, under this or the preceding article in accord with the character of the land, is essential to the right to a permit. *Wagner v. Robison*, 109 Tex. 114, 201 S. W. 171.

**Art. 5904d. Issuance of permit to prospect for oil and gas.**

See note under art. 5904, as to partial repeal.

**Art. 5904dd. Revival and extension of permits on lands owned by the state.**—That all permits to prospect for oil and gas heretofore issued under the Mineral Act of 1917 on islands, salt water lakes, bays, inlets, marshes and reefs owned by the State of Texas within tide water limits and that portion of the Gulf of Mexico within the jurisdiction of Texas and which permits have not been canceled and on which as many as two annual payments of rental have been made to the State be and they are hereby revived and extended so that they shall remain in full force and effect for a period of five years from the date of the issuance of the permits conditioned only upon compliance with the terms of this Act. [Acts 1921, 37th Leg., ch. 58, § 1; Acts 1921, 37th Leg., 1st C. S., ch. 24, § 1.]

Took effect Nov. 15, 1921.

**Art. 5904ddd. Same; annual payments to state; offset wells; resumption of drilling.**—The owner of a permit included in this Act shall pay to the State annually in advance during the life of the permit, ten cents for each acre included therein, and if there should be any payments past due under the terms of the original permit, such sum shall be paid within sixty days after this Act becomes effective and if not so paid, the term of such permit shall not be extended herein. The Commissioner of the General Land Office may, when necessity occasions, direct the owner of a permit included in this Act to drill such offset well or wells as may be necessary for the protection of the State's interest in the area included herein. The owner of a permit revived and extended herein on which the drilling of a well had been begun, shall resume such drilling in good faith within such reasonable time after the taking effect of this Act as may be fixed by the Commissioner of the General Land Office and continue same diligently and in good faith. [Acts 1921, 37th Leg., ch. 58, § 2.]

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

**Art. 5904dddd. Same; forfeiture of permit.**—The failure to make the payment of the ten cents per acre within the time prescribed herein for past due payments or the failure to make future annual payments within thirty days after same becomes due, or the failure to drill such offset well or wells as may be directed by the Commissioner of the General Land Office, and when sufficiently informed of the facts which render the permit subject to forfeiture the said Commissioner shall forfeit such permit by an endorsement upon the wrapper in the General Land Office containing the papers relating thereto and sign it officially. A notice of such forfeiture shall be mailed to the clerk of the county in which such area is situated and when such notice has been received by said clerk, the area shall again be subject to be acquired in the manner then provided by the law relating to such area. [Id., § 3.]



**Art. 5904e. Development work for petroleum and gas; filing statement in General Land Office; forfeiture; removal of product before obtaining lease, prohibited.**

See note under art. 5904, as to partial repeal.

**Relinquishment.**—Where one has been granted a two-year permit to develop an area for oil and gas, a relinquishment filed by him is equivalent to an abandonment and refusal to proceed with reasonable diligence and he cannot immediately refile on the land, notwithstanding art. 5920c. *Fox v. Robinson* (Sup.) 229 S. W. 456.

**Art. 5904f.**

See note under art. 5904, as to partial repeal.

**Art. 5904f1. Permits on school and university lands revived and extended.**—That all permits to prospect for oil and gas, heretofore issued on University land, and Public School land which is unsold at the time this Act goes into effect, river beds or channels and fresh water lakes and islands therein, and which have not expired, be and they are hereby extended so that they shall remain in full force and effect for a period of five years from the date of the issuance of the permit, conditioned only upon compliance with the terms of this Act. And that all permits to prospect for oil and gas, heretofore issued on said land and areas and all permits heretofore issued after the Mineral Act of 1917 went into effect on salt water lakes, bays, inlets, marshes, reefs, and islands owned by the State within tide water limits and that portion of the Gulf of Mexico within the jurisdiction of Texas, which have expired at the time this Act goes into effect, but on which the drilling of a well or wells, has been begun in good faith, or with reference to which permits and the right of the owner of the same to the possession of the area included therein bona fide litigation has existed during the whole or a part of the term of the permit, be and the same are hereby revived and extended so that they shall remain in full force and effect for a period of five years from the date of the issuance of the permit, conditioned only upon compliance with the terms of this Act. [Acts 1921, 37th Leg., ch. 6, § 1.]

**Art. 5904f2. Same; annual payments to state; offset wells; resumption of drilling.**—The owner of a permit included in this Act shall pay to the State annually in advance during the life of the permit ten cents for each acre included therein and if there should be any payments past due under the terms of the original permit such sum shall be paid within sixty days after this Act becomes effective and if not so paid the term of such permit shall not be extended herein. The Commissioner of the General Land Office may, when necessity occasions, direct the owner of a permit included in this Act to drill such offset well or wells as may be necessary for the protection of the State's interest in the area included herein. The owner of a permit revived and extended herein on which the drilling of a well had been begun shall resume such drilling in good faith within such reasonable time after the taking effect of this Act as may be fixed by the Commissioner of the General Land Office and continue same diligently and in good faith. [Id., § 2.]

**Art. 5904f3. Same; forfeiture.**—The failure to make the payment of the ten cents per acre within the time prescribed herein for past due payments or the failure to make future annual payments within thirty days after same become due or the failure to drill such offset well or wells as may be directed by the Commissioner of the General Land Office or the failure to resume drilling in good faith on expired permits which are received and extended herein within such reasonable time as may be fixed by the said Commissioner or the failure to continue such drilling diligently and in good faith, shall subject the permit to for-

feiture by the Commissioner of the General Land Office and when sufficiently informed of the facts which render the permit subject to forfeiture the said commissioner shall forfeit such permit by an endorsement upon the wrapper in the General Land Office containing the papers relating thereto and sign it officially. A notice of such forfeiture shall be mailed to the clerk of the county in which such area is situated, and when such notice has been received by said clerk, the area shall again be subject to be acquired in the manner then provided by the law relating to such area. [Id., § 3.]

**Art. 5904f4. Same; application for lease; terms of lease.**—If oil or gas should be produced in paying quantities upon the area included in any of the permits included in this Act, the owner of the permit shall report the development to the Commissioner of the General Land Office within thirty days thereafter, and apply for a lease, accompanying the application with a correct log of the well or wells, and thereupon a lease shall be issued without the payment of any additional sum of money and for a period not to exceed ten years, subject to renewal or renewals. [Id., § 4.]

**Art. 5904f5. Affidavit by owner of expired permit.**—The owner of a permit which has expired at the time this Act goes into effect shall file in the General Land Office, within sixty days after this Act goes into effect, his affidavit showing the facts with reference to the beginning of the drilling of a well or the pendency of litigation, and in event such owner fails to file such affidavit within said time he shall not be entitled to the benefits of this Act. [Id., § 5.]

**Art. 5904f6. Same; not applicable to land sold.**—Nothing in this Act shall be construed to apply to permits heretofore issued upon any public free school land that has heretofore been sold and which sales are now in force. [Id., § 6.]

**Arts. 5904g–5904k.**

See note under art. 5904, as to partial repeal.

**Art. 5904k1. Lands included; oil, natural gas, coal, and lignite excluded.**—All valuable mineral bearing deposits, placers, veins, lodes and rock carrying metallic or non-metallic substances of value except oil, natural gas, coal and lignite that may be in any public free school land, University land, Asylum land, which has heretofore been sold with a reservation of mineral therein and all of said substances that may be in or upon said land that was purchased with the relinquishment of the mineral therein, and all lands of which the mineral rights therein have reverted to the State of Texas as the Sovereign Government and all of said substances that may be in or upon any other public land including islands and river beds and channels, which belong to the State shall be included in this Act and subject to sale as provided herein, together with such rules as the commissioner of the General Land Office may prescribe not inconsistent with the provision hereof. [Acts 1919, 36th Leg. 2d C. S., ch. 79, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5904k2. Extent and shape of claims; superficial areas.**—A mining claim upon mineral lands as described under Section 1 of this Act [Art. 5904k1] may equal, but shall not exceed 1500 feet in length and 600 feet in width. Such claims may be of unlimited depth, but shall be bounded by four vertical planes from the side and end lines. All claims shall be in the form of a parallelogram unless such form is

prevented by adjoining rights and the locator shall be entitled to the use of all superficial area bounded by the enclosed lines of the claim and to all minerals therein except coal, natural gas, oil and lignite, upon the terms hereinafter provided. [Id., § 2.]

**Art. 5904k3. Location notice; posting; temporary monuments; permanent monuments; interference with notice or monuments.**—The locator of any mining claim as described under the preceding section of this Act shall post up at the center of one of the end lines of the claim a written notice giving the name of the locator and of the claim, and date of posting and shall describe the claim by giving the number of feet in length, width and approximate directions the claim lies in length from the notice, together with the section number, if known, and the county, and shall place temporary posts, or stone markers at the four approximate corners of the claim at the time of making the location. The temporary monuments shall be replaced by permanent monuments at the four corners as given by the county surveyor within one hundred days after the issue of award to said claim. These permanent monuments shall be of timber posts four inches, or equivalent, or of stone or concrete and shall be not less than three feet high. The location notice shall be posted in a conspicuous manner so that it can be easily seen. In all conflicts, priority of location shall decide. Anyone interfering with, removing or destroying any monument, post or notice of any locator shall be subject to a fine of not to exceed \$100 or 30 days in jail, either or both, and it shall be the duty of the district judges in the respective judicial districts of Texas, to charge the grand juries with an investigation of such offenses. [Id., § 3.]

**Art. 5904k4. Application for survey of claim; contents; filing fee; award for claim; monuments.**—The locator shall within thirty days after posting the required notice, file with the county surveyor of the county in which the land or a part thereof is situated an application in writing for the survey of the claim. Such application shall be accompanied by One Dollar (\$1.00) as a filing fee, and the application shall be recorded by the surveyor. The application shall give the name of the claim and the locator and such description of the boundary and location as will enable the surveyor to identify the area of the land. Within one hundred days after the application has been filed with the surveyor the application and field notes for the area applied for shall be filed in the General Land Office accompanied by One Dollar (\$1.00) as a filing fee. When the application has been considered and all things have been in compliance with the Law, the Commissioner shall issue to the applicant an award for the area, and within one hundred days thereafter the owner shall erect the monuments provided for in Section 3 [Art. 5904k3]. Nothing in this Section shall be construed to interfere with the right of the locator to proceed with the development and operation of the property from and after the posting of the location, provided such operation does not conflict with the mineral rights of a prior locator or owner. [Id., § 4.]

**Art. 5904k5. Survey of claim; boundaries; location and marking of corners; field notes and plat; compensation of surveyor.**—In making the survey, it shall be obligatory on the surveyor that he locate and mark the corners of the claim on the ground as described in the location notice and that he shall determine the direction and distance to a corner of a section on which the claim is located, that he shall also determine the direction and distance to some prominent and permanent land mark other than a section corner which may serve as a mineral monument or

marker and in the event of any conflict, this direction and distance to said prominent and permanent land mark shall have priority over all other distances and directions in serving to locate the mining claim. In making a record on the field notes and plat of the survey the directions and distances herein required shall be incorporated in and made a part of the record. For services rendered under this Act a surveyor shall not charge exceeding Ten (\$10.00) Dollars per day. [Id., § 5.]

**Art. 5904k6. Rights of locator; assessment work.**—After the date of an award the owner shall have the exclusive right to the possession and use of the minerals within the area of the claim so long as he shall continue to do the annual assessment work or cause it to be done consisting of excavation in the form of a shaft or a tunnel or an open cut to the extent of ten feet in depth or length and at least four feet by five feet for the other dimensions for each claim. If an award shall be issued prior to the first day of October of any year the first annual assessment work shall be done before the end of that calendar year and during the month of January following, such owner shall file in the General Land Office his affidavit that such work has been done and shall state of what it consisted. Such owner of the minerals in such area shall during the next calendar year beginning January 1st, next after the date of such award, perform or cause to be performed, the required annual assessment work and file an affidavit thereof as in the first instance in the General Land Office during January of each succeeding year. All the assessment work for a group of claims may be done on one claim if such claims be contiguous. [Id., § 6.]

**Art. 5904k7. Separate or joint locations; rights and liabilities of co-owners.**—Said mining claim or claims may be filed upon by one or more persons as provided for herein, separately or jointly, and if any mining claim of any character shall be filed upon jointly by two or more locators and any one or more them shall fail to pay his part of the annual rentals when due, or fail to contribute his proportion of any expenses or assessment work required in this Act within the required time, the co-owners paying their proportional part of said rentals, expenses and assessment work shall not be prejudiced thereby in their interest or title in said claim, but the right, interest, title and claim of such co-owner so defaulting shall ipso facto cease and terminate, and the same shall revert thereupon to the State or the fund to which it originally belonged. The co-owners so paying as required herein shall after such forfeitures, have the prior and preference right for ninety days thereafter, to make the delinquent payments of rentals and expenses and to do the required assessment work required of said delinquent co-owner, or finish making the payment and doing such assessment work, if any had been previously done by said delinquent co-owner, upon making of payment and doing said work as required herein by said co-owners within said ninety days, he or they shall have thirty days, after the expiration of said ninety days, within which to make affidavit to the Commissioner of the General Land Office to the effect that all of said provisions had been carried out and said work done within said time, and for the location thereon by said co-owner or co-owners of his or their mining claim covering the interest so forfeited in the same manner as if no location had ever been made by said forfeiting owner thereon. [Id., § 7.]

**Art. 5904k8. Forfeiture of claim; relocation.**—Failure of the locator or owner of any claim or claims to comply with any provisions of this Act prior to receiving patent thereto, shall constitute an ipso facto for-

feiture of all his rights in the claim, and the claim shall be open to location by others as prescribed in this Act, the same as if no location had ever been made. Any claim which shall have been forfeited by any locator or locators, owner or owners, shall not be relocated either in whole or in part by such forfeiting locator or owner within a period of six months from time of forfeiture. [Id., § 8.]

**Art. 5904k9. Purchase price; assessment work; royalties.**—All sales under this Act shall be upon the further condition that the applicant for the minerals in any claim shall pay the sum of fifty cents per acre, which sum shall be paid annually in advance after the award of the area and during the month of each succeeding January of each year thereafter, also upon the condition that the owner shall perform or cause to be performed the annual assessment work as provided for, and in addition thereto, pay 2 per cent royalty upon the production of such claim as shown by the net smelter, mill, mint, or refinery returns or of the sums arising from the sale of the ore or products from the claim, and received by the owner. Royalty payments arising from the sale of ores, mineral, or other products, shall be due quarterly in January, April, July and October for the quarters preceding the months and shall be accompanied by affidavit of owners, showing amounts of money received during the quarter from the sale of ore or other products and accompanied by copies of smelter or mint, mill or refinery returns or other documents setting forth the amounts received by the owner. The royalties and annual payments shall be paid to the State through the Commissioner of the General Land Office at Austin. The annual payments of 50 cents per acre shall apply on the purchase price of the claim. The owner shall have the right at any time after five years from the date of the award, to pay the balance due on the purchase price of the claim and obtain a patent thereto and after the issuance of the patent no further assessment work shall be required. The purchase price shall be Ten (\$10.00) Dollars per acre. [Id., § 9.]

**Art. 5904k10. Other lands included.**—All State land belonging to or under the jurisdiction and control of the Prison Commission of this State, or the Board of Trustees for the State Institution for the Training of Juveniles, and all other farms belonging to the State and administered by other Boards, shall become subject to the provisions of this Act; but with the express reservation that in sales of the mineral rights in or under such farms, the annual payments and the royalties shall be made so long as the purchasers of said rights shall desire to operate their respective claims; and in no event shall a patent issue upon any claim filed upon any such farms belonging to the State, and all rights of the claimant to any land or filings hereunder, shall terminate upon permanent cessation by such claimant of operation under such claim. [Id., § 9a.]

**Art. 5904k11. Surface rights of locator; rights of way.**—The locator or owner of a mining claim shall have the right to occupy within the limits of his claim so much of the surface ground as is strictly necessary for the use and exploration of the mineral deposits and for the building and works necessary for mining operations and for the treating and smelting of the ore produced on such claims and to occupy within and without the limits of his claim the necessary land for right of way, for ingress and egress to and from his claim, for roadways or railways; provided that if the locator or owner of the mineral right cannot agree with the owner or lessee of the surface right in regard to the acquiring of same and in regard to the compensation for the injury

incident to the opening and the working of such mine and the access thereto, he may apply to the judge of the county court of the County in which such mining claim is located by filing a written petition setting forth with a sufficient description the property and surface right sought to be taken and the purpose for which the same is to be taken and it shall be the duty of such County Judge of such County to appoint three disinterested freeholders to examine, pass upon and determine the damages and compensation to be paid to the owner of such surface right or other property necessary to be taken, and the proceedings for acquiring or condemning such surface right or other property shall, at all times, so far as possible, be covered by the laws relating to the condemnation of rights of way for railway companies, locator or owner of such mining claim, occupying the position of the railway company, and an appeal may be taken from the decision of the Commissioners upon the same terms and conditions and subject to the same regulations and qualifications prescribed by law for the condemnation of right-of-way for railways. Nothing in this section shall be construed as giving the prospector, or locator any grazing right or rights to any surface or well water in use for livestock or to any timber rights either on or off the claim located to the detriment of the surface owner or lessee. In case minerals are produced upon the claim or claims provided for herein, then whether same be worked as a claim or sold and patented to the purchaser thereof, said 2 per cent royalty upon the production of such claim shall be perpetual, and payable as provided for herein. [Id., § 10.]

**Art. 5904k12. Sale of land without minerals; discovery of other minerals.**—The issuance of an award of the filing of a prospector's location on unsold land included within this Act, shall not prevent the sale of the land without minerals on which such mineral or mining claim may be located under the laws applicable to such land, but in case of such sale after an application has been filed with the Commissioner of the Land Office as herein provided the purchaser of such land shall not be entitled to any part of the proceeds of such minerals or mining location nor other compensation, nor shall such purchaser have any action for damages done to such land by or resulting from the proper working of or operation under such award of prospector's location. Should any mineral or substance within the provisions of this Act, other than those included in the permit or lease, under which one is operating be discovered while the area is being worked, for the mineral and substances embraced in such permit or lease, the owner thereof shall have a preference right for 60 (sixty) days after such discovery in which to file on the area allowed one for such minerals or other substances by complying with the provisions of this Act, relating to the mineral or substances discovered. [Id., § 11.]

**Art. 5904k13. Partial invalidity of act.**—If any provisions of this bill be held to be unconstitutional either as applied to any character of land described in Section 1 [art. 5904k1] or in any other respect, such decision shall not be construed to invalidate the provision of this Act with regard to any other character of land described in Section 1 or any other provision of this Act. [Id., § 12.]

**Art. 5904k14. Repeal.**—All laws and parts of laws in conflict with this Act are hereby repealed. [Id., § 13.]

## LEASE OF LANDS FOR PRODUCTION OF OIL AND NATURAL GAS

**Art. 590401. Lands included.**—All islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, and the unsurveyed public free school lands shall be included herein and shall be subject to lease by the Commissioner of the General Land Office to any person, firm, or corporation for the production of oil and natural gas that may be therein or thereunder in accordance with the provisions of this Act, and such rules and regulations as may be adopted by said Commissioners as being necessary to the proper execution of its purposes. [Acts 1919, 36th Leg., 2d C. S., ch. ~~16~~ § 1.]

Took effect July 23, 1919.

**Art. 590402. Rental and royalties; amount.**—The areas included herein shall be leased for one-eighth of the gross production of oil, or the value of same, that may be produced and saved and one-eighth of the gross production of gas, or the value of same, that may be produced and sold off of the area, and ten cents per acre in advance for the first year and thereafter in advance an additional sum of twenty-five cents per acre for the second year, and fifty cents per acre for the third year and one dollar per acre for each and every year thereafter, not to exceed ten years, that the owner of the lease shall desire to hold the rights granted therein, and until production is secured in commercial quantities, and in addition thereto such sum of money, if any, that one may pay therefor; provided, whenever production shall have been secured in commercial quantities, and the payment of royalty begins and continues to be paid, as provided herein, the owner shall be exempt from further annual payments on the acreage. If production should cease and royalty not be paid, the owner of the lease shall, at the end of the lease year in which royalty ceased to be paid, and annually thereafter in advance pay one dollar per acre so long as such owner may desire to maintain the rights acquired under the lease not to exceed ten years from the date of said lease. [Id., § 2.]

**Art. 590403. Advertisement of areas.**—The Commissioner of the General Land Office shall fix the day and hour when an area or areas will be subject to lease and he shall advertise or readvertise such area or areas at least thirty days before such lease date, except as elsewhere provided in the event of tie bids. If there should be no other sufficient means for giving the necessary publicity as to what areas will be subject to lease and the time when applications may be filed the Commissioner shall have lists of such areas printed for free distribution at the expense of the State which expense shall be paid out of the appropriation for public printing. Such lists shall contain a brief designation of the areas subject to lease and the terms upon which they may be leased and the time when applications therefor may be filed in the General Land Office. [Id., § 3.]

**Art. 590404. Applications for separate areas; lease; term.**—Applications for separate areas and the first payment of ten cents per acre and the sum offered in addition thereto, if any, for any area shall be delivered into the General Land Office on or before the day and hour on which the area will be subject to lease in sealed envelopes on which shall be endorsed in substance "Application to lease Minerals," and in addition thereto the date the area will be subject to lease. All envelopes so endorsed shall be securely kept by the Commissioner or his Chief Clerk unopened until the date on which applications are to be

opened and at said hour either or both of them shall begin to open the envelopes in the presence of such persons as may desire to be present. All applications received up to the opening hour whether open or sealed, endorsed or not endorsed, shall be considered as properly delivered into the General Land Office. An application which includes two or more areas or is for a price less than the fixed royalty and price per acre shall be void. When an application shall have been filed and considered and the area found to be subject to lease, the lease shall be issued for a term not to exceed twenty-five years to the applicant that pays the most, if any sum, for the area in addition to the fixed price per acre and the stipulated royalty. If production should not be secured in ten years the lease shall terminate and the area again be subject to lease as in the first instance. A duplicate of the lease shall be kept on file in the General Land Office. If two or more persons should offer the same price for the same area and the same should be the highest price offered, all shall be rejected and a date fixed within the discretion of the Commissioner, but not later than the fifteenth day of the following month, when the area will be subject to lease as in the first instance; provided, if the time so fixed should be a date prior to the said fifteenth day of the next month an application at a price less than the former sum offered shall not be considered. All sums paid upon rejected applications shall be returned by the State Treasurer. [Id., § 4.]

**Art. 5904o5. Surveyed and unsurveyed areas.**—For the purpose of executing the provisions of this Act to the best interest of the State the Commissioner of the General Land Office may recognize or decline to recognize any survey or surveys heretofore made of any area included herein. Such survey as may be so recognized shall be advertised and shall be subject to lease as a whole. Such surveys as may not be so recognized shall be deemed, together with all adjacent unsurveyed areas, as one unsurveyed area, and the said Commissioner shall advertise the whole or designated portions thereof for lease, and such whole area or designated portions thereof as may be so advertised shall be subject to lease as a whole according to the advertisement; provided, field notes for such unsurveyed area may, in the discretion of the Commissioner, be required before a lease is issued therefor. [Id., § 5.]

**Art. 5904o6. Royalties; payment; books and accounts.**—Royalty equal to one-eighth of the value of the gross production, as herein, provided, shall be paid to the State on or before the twentieth day of each month for the preceding month during the life of the lease, and it shall be accompanied by the sworn statement of the owner, manager, or other authorized agent, showing the gross amount of oil produced and saved since the last report, and the amount of gas produced and sold off the area, and the market value of the oil and gas together with a copy of all daily guages of tanks, gas meter readings, if any, pipe line receipts, gas line receipts and other checks or memoranda of amount produced and put into pipe lines, tanks, or pools, and gas lines or gas storage. The books and accounts, the receipts and discharges of all lines, tanks, pools and meters, and all contracts and other records pertaining to the production, transportation, sale and marketing of the oil and gas shall at all times be subject to inspection and examination by the Commissioner of the General Land Office, the Attorney General, the Governor, or the representative of either. [Id., § 6.]

**Art. 5904o7. Royalties and other sums due; where and to whom paid; disposition of.**—Royalty and all other sums shall be due and pay-



able to the State at Austin, Texas, and shall be paid to the Commissioner of the General Land Office and he shall transmit all remittances in the form received to the State Treasurer who shall credit the permanent free school fund with all amounts received from the unsurveyed school lands and with two-thirds of the amount so received from other areas and shall credit the general revenue fund with the remaining one-third from said other areas. All payments shall be in the form of cash, bank draft on some State or National Bank in Texas, or Post-Office or Express money order, or such other form as may be prescribed by law, for making remittances to the State Treasury. [Id., § 7.]

**Art. 5904o8. Lien of state for royalties, etc.**—The State shall have a first lien upon all oil and gas produced upon any lease area to secure the payment of all unpaid royalty and other sum or sums of money that may be due and become due under the provisions of this Act. -[Id., § 8.]

**Art. 5904o9. Offset wells.**—If oil or gas should be produced in commercial quantities in a well on an area privately owned which well should be within one thousand feet of an area leased under this Act, the owner of the lease on such State area shall, within sixty days after the initial production on such privately owned area, begin in good faith and prosecute diligently the drilling of an offset well or wells on the area so leased from the State and such offset well or wells shall be drilled to such depth and use such means as may be necessary to prevent the undue drainage of oil or gas from beneath such State area. A log of each well, whether producer or non-producer, shall be filed in the General Land Office within thirty days after the well has been completed or abandoned. [Id., § 9.]

**Art. 5904o10. Pollution of waters.**—The development of wells and the development and operation upon the areas included herein shall be done so far as practicable in such manner as to prevent such pollution of the water as will destroy fish, oysters and other sea food and it shall be the duty of the Game, Fish & Oyster Commissioner to enforce such rules and regulations as may be prescribed for that purpose by the Commissioner of the General Land Office. [Id., § 10.]

**Art. 5904o11. Transfer or relinquishment of lease.**—One may transfer his lease at any time and such transfer shall be recorded in the County or counties in which the area or part thereof is situated and within ninety days after the date of its execution the recorded transfer or certified copy of same shall be filed in the General Land Office accompanied by one dollar as filing fee, and thereby the assignee shall succeed to all the rights and be subject to all the obligations and penalties of the original lessee. An owner may relinquish his lease to the State at any time by having the relinquishment recorded in the county or counties in which the area or part thereof is situated and within ninety days after the date of its execution the recorded relinquishment or certified copy of same shall be filed in the General Land Office accompanied by one dollar as filing fee, and thereby the owner of such lease shall be relieved of any further obligations to the State, but such relinquishment shall not have the effect to release the owner from any obligations or liabilities theretofore accrued in favor of the State. [Id., § 11.]

**Art. 5904o12. Forfeiture of lease.**—If the owner of a lease should fail or refuse to make the payment of any sum due either on an area or royalty on the production within thirty days after same shall become due, or if such owner or his authorized agent should knowingly make any false return or false report concerning production, royalty, or drilling, or

if such owner should fail or refuse to drill any offset well or wells in good faith as required by this Act and the rules and regulations adopted by the Commissioner of the General Land Office, or if such owner or his agent should refuse the proper authority access to the records pertaining to the operations under this Act, or if such owner or his authorized agent should knowingly fail or refuse to give correct information to the proper authority, or fail or refuse to furnish the log of any well as provided herein, such lease shall be subject to forfeiture by the Commissioner of the General Land Office and when sufficiently informed of the facts which authorize a forfeiture, the Commissioner of the General Land Office shall forfeit same, and the area shall be subject to lease again to another than to such forfeiting owner after due advertisement; provided, such forfeiture may be set aside and the lease and all rights thereunder reinstated before the rights of another intervene upon satisfactory evidence of future compliance with the provisions of this Act and the rules and regulations authorized to be adopted for the purpose of executing its provisions. [Id., § 12.]

**Art. 5904013. Right of way for entry, etc., onto land.**—Whenever it may be necessary for the owner of a lease acquired under this Act to enter the enclosed land of another for the purpose of ingress and egress to and from the area so leased from the State and such lessee and owner of enclosure or agent of such owner cannot agree upon the place of such entry, nor the conditions of such entry, the lessee or his agent may petition the Commissioners Court of the County or Counties in which such enclosure may be situated in whole or in part for the opening of such way of ingress and egress aforesaid as may be necessary. Upon the filing of such petition it shall be the duty of said Court or Courts to proceed to lay out and establish in the manner provided for the laying out of third class public roads, such road or roads as may be necessary for the purposes named herein. [Id., § 13.]

**Art. 5904014. Prior rights.**—Nothing in this Act shall be construed to affect or impair valid rights that may have been acquired by virtue of any valid application heretofore filed nor any valid permit or lease heretofore issued upon any area included in this Act, but such rights, obligations, and penalties attaching thereto shall remain in full force and effect so far as it may relate to the areas included herein. [Id., § 14.]

**Art. 5904015. Repeal.**—So much of Chapter 83, of an Act approved March 16, 1917, as relates to the leasing of the areas included in this Act is hereby repealed so far as it includes and provides for the leasing of said areas. [Id., § 15.]

#### OIL AND NATURAL GAS ON SURVEYED FREE SCHOOL AND ASYLUM LANDS

**Art. 5904016. Owners of soil constituted agents of state; relinquishment to owners of undivided part of oil and gas; remainder reserved for public free school fund and asylum funds.**—To promote the active cooperation of the owner of the soil and to facilitate the development of its oil and gas resources the State hereby constitutes the owner of the soil its agent for the purpose herein named, and in consideration thereof, relinquishes to and vests in the owner of the soil and undivided fifteen-sixteenths of all oil and gas and the value of the same that may be upon or within the surveyed and unsurveyed public free school land and the asylum lands and portions of such surveys that have heretofore been sold with a mineral classification or mineral reservation and that which

may hereafter be sold with a mineral classification or mineral reservation, subject to the terms and conditions of this Act; and the remaining undivided portion of said oil and gas and the value of same is hereby reserved for the use and benefit of the public free school fund and the several asylum funds; provided, the relinquishment herein relating to unsurveyed school land shall not in any manner apply to nor affect any oil and gas permit or lease heretofore issued on any unsurveyed school land, but said relinquishment shall become effective as to such land and the oil and gas therein when the existing permit or lease shall be terminated according to law. [Acts 1919, 36th Leg. 2d C. S., ch. 81, § 1; Acts 1921, 37th Leg., 1st C. S., ch. 38, § 1.]

Took effect Nov. 15, 1921.

**Art. 5904o17. Sale or lease of oil or gas by owners of land; terms and conditions; minimum price and royalties; rentals; payments to state.**—The owner of said land is hereby authorized to sell or lease to any person, firm or corporation the oil and gas that may be thereon or therein upon such terms and conditions as such owner may deem best, subject only to the provisions of this Act and the reservations herein, for the benefit of the school and asylum funds. All leases and sales so made shall be assignable; provided that no oil or gas rights shall be sold or leased hereunder for less than ten cents per acre per year, plus royalty, and the lessee or purchaser shall in every case pay to the State ten cents per acre per year of sales and rentals, and, in case of production, shall pay to the State the undivided one-sixteenth of the value of the oil and gas as reserved in Section 1 of this Act [Art. 5904o15];—it being expressly provided that all sales or leases of the land made by the owner under this Section of the Act shall, as respects the rental to be paid, be made for and inure to the benefit of the State to the extent herein provided. [Acts 1919, 36th Leg., 2d C. S., ch. 81, § 2.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 5904o18. Offset wells on lands not included in act; requirements as to drilling.**—If oil or gas should be discovered in paying quantities on land that is not included in this Act and within one thousand feet of land that is so included, the owner, lessee, sub-lessee or receiver or other agent in control of such land as is included herein, shall in good faith begin the drilling of an offset well or wells upon such land as is included herein within one hundred days after the first discover, and prosecute same with diligence to completion. Every offset well shall be drilled to the depth necessary for effective protection against undue drainage by other wells on other lands in that locality. [Id., § 3.]

**Art. 5904o19. Same; failure or refusal to drill or develop such wells; relinquishment forfeited.**—If the persons aforesaid, who own or control land included in this Act, should fail or refuse to begin such drilling of offset wells thereon within the time required or fail or refuse to drill such well or wells diligently and in good faith or fail or refuse to drill such well or wells to the depth necessary for the purpose intended, or fail or refuse to use the means necessary to the development of any well or wells thereon within the time required or fail or refuse to drill such well drilled thereon thereupon the relinquishment herein granted shall ipso facto terminate and the rights acquired thereunder shall likewise terminate, and the oil and gas relinquished herein shall revert to and become the property of the State's General Revenue Fund and when the Commissioner of the General Land Office is sufficiently informed of the facts which so terminate such rights, he shall indorse on the wrapper contain-

ing the papers relating to the sale of the land words indicating such termination and sign it officially. [Id., § 4.]

**Art. 5904o20. Same; sale of oil and gas on forfeiture of relinquishment; price, etc.**—When the relinquishment granted herein and the rights acquired thereunder shall have been terminated as provided in the preceding section, the Commissioner shall take possession of the land and advertise the oil and gas therein for sale. All such sales shall be made at such times as the Commissioner may determine and in the same manner as is now provided for the sale of public free school land. The sale shall be made to the person, firm or corporation that will pay the highest price therefor in addition to one-eighth of the oil and gas produced or the value of same, which shall be reserved to the public free school fund. The sum received in addition to the reserved one-eighth shall be divided equally between the General Revenue Fund of the State and the owner of the soil after deducting the expenses incident to the advertisement and sale. Purchasers at such sales shall begin the drilling of the necessary off-set wells within sixty days after the acceptance of their offer and the failure to do so and the failure to comply with the provisions of this Act relating to the drilling of offset wells shall likewise operate as a termination of the right acquired thereunder and the substances therein shall be subject to sale as herein provided. [Id., § 5.]

**Art. 5904o21. Payments of value of gross production of oil and gas to state and owners of soil; books, accounts, etc.**—One-sixteenth of the value of the gross production of oil saved and one-sixteenth of the gross production of gas saved and sold off the premises shall be paid to the State and like amounts to the owner of the soil on or before the twentieth day of each month for the preceding months and it shall be accompanied by a sworn statement of the owner, manager, or other authorized agent, showing the gross amount of oil produced and saved since the last report and the gross amount of gas produced and sold off the premises, and the market value of same, together with a copy of all daily gauges of tanks, gas meter readings, if any, pipe line receipts, gas line receipts and other checks or memoranda of amount produced and put into the pipe lines, tanks or pools and gas lines or gas storage. The books and accounts, the receipts and discharges of all lines, tanks, pools and meters, and all contracts and other records pertaining to production, sale and marketing of oil or gas shall at all times be subject to inspection and examination by the Commissioner of the General Land Office, the Attorney General, the Governor, or the representative of either. [Id., § 6.]

**Art. 5904o22. Amounts due state, where and to whom paid.**—All sums due the State under the operations of this Act, shall be due and payable at Austin, Travis County, and shall be paid to the Commissioner of the General Land Office and he shall transmit all remittances in the form received to the State Treasurer, who shall credit the fund to which the land originally belonged with the amount paid upon production. [Id., § 7.]

**Art. 5904o23. Lien of state on wells to secure payment of amounts due.**—The State shall have a first lien upon all oil and gas produced upon the land to secure the payment of all sums of money that may be due or become due under the provisions of this Act; and the owner of the soil shall have a second lien thereon to secure the payment of any sum that may be due him. [Id., § 8.]

**Art. 5904o24. Failure or refusal to pay amounts due; false returns or reports; refusal of or giving false information; forfeiture of rights acquired under permit or lease.**—If any person, firm or corporation, operating under this Act should fail or refuse to make the payment of any sum of money due within thirty days after it becomes due, or if such one or an authorized agent should knowingly make any false return or false report concerning production or drilling, or if such one should fail or refuse the proper authority access to the records pertaining to the operations, or if such one or an authorized agent should knowingly fail or refuse to give correct information to the proper authority, or knowingly fail or refuse to furnish to the General Land Office a correct log of any well, the rights acquired under the permit or lease shall be subject to forfeiture by the Commissioner of the General Land Office, and when sufficiently informed of the facts which authorize a forfeiture, he shall forfeit same, and the oil and gas shall be subject to sale in the manner as provided in Section five of this Act; except the owner of the soil shall not thereby forfeit his interest in the oil and gas; provided such forfeiture may be set aside and all rights theretofore existing shall be reinstated at any time before the rights of another intervene upon satisfactory evidence of future compliance with the provisions of this Act. [Id., § 9.]

**Art. 5904o25. Relinquishments to owners of soil subject to rights under permits to prospect for oil and gas already existing or hereafter granted.**—The provisions of this Act relinquishing to the owner of the soil fifteen-sixteenths of the oil and gas in or under such soil is made subject to the rights now existing under valid permits to prospect for oil and gas that have heretofore been issued or which may hereafter be issued upon valid application now on file for such permit; and the rights secured under such permits or applications for permits shall be terminated in the manner provided by the law under which such rights were secured or under the provisions of this Act, but when such rights shall be so terminated, such relinquishments shall be fully effective; provided a relinquishment to the State of a lease that may be producing oil or gas in paying quantities shall not operate to relinquish or convey to the owner of the soil any interest whatever in the oil and gas that may be in the land included in such lease. [Id., § 10.]

**Art. 5904o26. Subsequent purchasers of unsold public free school or asylum lands for which prospecting permits have issued.**—If one has heretofore or should hereafter acquire any valid right to the oil and gas in any unsold public free school or asylum land under any other law, a subsequent purchaser of such land shall not acquire any rights to any of the oil and gas that may be therein, but when such rights shall be terminated in the manner provided in the law under which such rights were obtained, then the owner of the soil shall become the owner of that portion of the oil and gas herein relinquished and shall be thereafter subject to the provisions of this Act. A forfeiture of the purchase of any survey or tract for any cause shall operate as a forfeiture of the minerals therein to the State. [Id., § 11.]

**Art. 5904o27. Permits; assignment; record of.**—Permits issued, or to be issued upon applications heretofore filed, or hereafter filed upon any land included in this Act may be assigned as a whole into one ownership or may be grouped or combined into one organization, upon such terms as the owners may agree, and in one or more groups or combinations not to exceed sixteen sections of 640 acres each, more or less, in

one group, for the purpose of developing oil and gas. All such assignments and agreements shall be recorded in the county or counties in which the land or part thereof is situated and shall be filed in the General Land Office within sixty days after the execution of the same, accompanied by one dollar as a filing fee. [Id., § 12.]

**Art. 5904028. Permittees to begin drilling well, when; limitation of time for completing development of wells.**—The owner of a permit issued upon applications heretofore or hereafter filed shall have eighteen months from the date thereof in which to begin the drilling of a well for oil and gas on some portion of the land included therein. The owner or owners of a combination of permits, held by assignment or agreement shall have a like period of eighteen months from the average date of the permits included therein in which to begin the drilling of a well for oil and gas on some portion of the land included therein, and the drilling on one permit shall be sufficient for the protection against forfeiture of all the permits included in such combination. Owners of permits included herein shall have three years after the date of the permit and the same time after the average date of the permits placed in a combination of permits in which to complete the development of oil and gas thereon, and if oil and gas should not be found in paying quantities and a lease applied for within said time, all rights in such permit or combination of permits shall terminate, and the oil and gas in such land shall become subject to the provisions of this Act relating to the relinquishment of oil and gas to the owner of the soil. [Id., § 13.]

**Art. 5904029. Report of development of well by permittee; application for lease; log of well or wells; issue of lease.**—If oil or gas should be produced in paying quantities upon any land included in this Act, the owner of the permit shall report the development to the Commissioner of the General Land Office within thirty days thereafter and apply for a lease upon such whole surveys or tracts in each permit as the owner or owners of a combination of permits may desire to be leased and accompany the application with a log of the well or wells, and the correctness of the log shall be sworn to by the owner, manager or driller, and thereupon a lease shall be issued without the payment of any additional sum of money and for a period not to exceed ten years, subject to renewal or renewals. [Id., § 14.]

**Art. 5904030. Royalties payable by permittee to state and owners of soil.**—The owner of a permit or combination of permits that desire to avail themselves of the terms of this Act shall pay to the State ten cents per acre, annually in advance, for the second and third years and shall likewise pay to the owner of the soil ten cents per acre for the first year of such permit before availing himself of the privileges of this Act, and a like sum thereafter annually in advance. A failure to make either of said payments shall subject the permit or permits to forfeiture by the Commissioner of the General Land Office, and when sufficiently informed of the facts which subjects the permit or permits to forfeiture the said Commissioner shall forfeit the permit or permits by an endorsement of forfeiture upon the wrapper containing the papers relating to the permit or permits and sign it officially. The payment of the ten cents per acre to the owner of the soil may be made in person or by payment to the County Clerk of the county in which the land is situated, and the said clerk shall deposit such payment in some bank at the county seat to the credit of the record owner of such land. If the owner of the soil should refuse to accept such payment, the said clerk shall withdraw such deposit and return same to the owner of the permit or permits. The

payment, or the tender of payment, shall be evidenced by the receipt of the owner or part owner or County Clerk filed among the papers in the General Land Office relating to such permit or permits. [Id., § 15.]

**Art. 5904o31. Relinquishment of permits.**—The owner of a permit or combination of permits may relinquish to the State a permit or combination of permits or any whole survey or whole tract included in a permit at any time before obtaining a lease therefor by having such relinquishment recorded in the county or counties in which the land or a part thereof is situated and file it in the General Land Office within sixty days after its execution, accompanied by one dollar as a filing fee. [Id., § 16.]

**Art. 5904o32. Retroactive operation of act.**—The provisions of this Act, so far as they relate to a combination of permits and extensions of time for beginning development and time for development, shall apply to permits heretofore issued and those hereafter issued upon University land. [Id., § 17.]

**Art. 5904o33. Damage to soil.**—The payment of the ten cents per acre and the obligation to pay the owner of the soil one-sixteenth of the production and the payment of same when produced and the acceptance of same by the owner, shall be in lieu of all damages to the soil. [Id., § 18.]

**Art. 5904o34. Laws relating to permits continued in force.**—All the terms, conditions, limitations and obligations provided in the law under which permits included herein have been or may be issued and rights secured therein shall continue and remain in full force and effect except as changed or modified by this Act. [Id., § 19.]

Sec. 20 of this act repeals all conflicting laws.

#### DEVELOPMENT AREAS

**Art. 5904o35. Designation of development areas.**—The owner or owners of a permit heretofore issued by the State of Texas permitting the holder or holders to prospect for oil and gas on University land under the provisions of the existing laws, who, at the time this Act takes effect, individually or in co-operation with the holders of permits covering other University land, at some point upon the land covered by such permit, has or have drilled a well to a depth of at least two thousand feet, shall have the privilege of filing with the Commissioner of the General Land Office, within sixty days from the date on which this Act goes into effect, an instrument in writing designating what shall be called a University land oil and gas development area, which area shall consist of not to exceed six contiguous blocks of University land; provided that the holders of the permits covering land included in such development area, prior to the designation thereof, shall have directly or indirectly contributed to the expense of, or co-operated in the drilling of the above mentioned well, or an additional well or wells located or to be located within said area. Said instrument shall be signed and acknowledged by the owner or owners of the permit covering the land on which said well has been drilled, and a filing fee of one dollar shall be paid the Commissioner of the General Land Office for filing the same. There shall be included in such instrument, or attached thereto, an affidavit of at least three credible persons, citizens of the State of Texas, showing the existence of the facts required for the designation of such development area. [Acts 1920, 36th Leg. 4th C. S., ch. 4, § 1.]

Took effect Oct. 2, 1920.

**Art. 5904o36. Designation shall continue permits in force; development.**—From and after the designation of any such University land oil and gas development area, all permits covering land therein which at the time of such designation are still in force, upon the payment in advance of the ten cents per acre per annum as now provided by law, may continue in force for a term not to exceed five years from the date of the last permit issued on any of the land included in any such development area, and all development work may be commenced and completed within the said period of five years; provided, if such payment should not be so made on any permit included in such area, such permit in arrears shall be cancelled by the Commissioner of the General Land Office. [Id., § 2.]

**Art. 5904o37. Lease issued in case oil or gas is discovered; relinquishments.**—Should oil or gas in commercial quantities be discovered during the life of such development area or a portion thereof, a lease may be issued on one or more contiguous permits not to exceed sixteen sections, for each discovery well as now provided by law. The owner or owners of a permit or permits within such development area may relinquish one or more whole sections or the equivalent thereof, in a solid body of regular form at any time before applying for a lease by having the relinquishment recorded in the county where the land is located and filed in the General Land Office accompanied by a filing fee of one dollar. [Id., § 3.]

**Art. 5904o38. Does not apply to school land.**—This Act is not intended to and shall not be construed to apply to public free school land. [Id., § 4.]

Sec. 5 of the act repeals all laws in conflict.

#### GENERAL PROVISIONS.

**Art. 5904p. Definitions and requirements; abandonment or relinquishment.**

**"Surveyed land."**—Where a certain area had been lawfully surveyed in virtue of an application made under the act, but upon which no permit issued, the field notes being approved by the commissioner and filed in the land office, the commissioner was authorized to treat the area, as respects a later application, as "surveyed land" within the meaning of the act. *Sibley v. Robison*, 110 Tex. 1, 212 S. W. 932.

**Art. 5904q. Disposition of proceeds.**—The proceeds arising from activities under this Act which affect lands belonging to the public free school fund and the permanent fund of the several asylums shall be credited to the permanent funds of said institutions. All proceeds heretofore or hereafter paid or collected, from activities under this Act affecting the lands belonging to the permanent fund of the University of Texas, save and except the royalties provided by this Act, shall be credited to the available fund of said Institution, and the State Treasurer is hereby directed to credit all such funds to the available fund of such Institution, provided, however, that all such funds shall be held by the Board of Regents of the University of Texas in a special building fund, and shall be expended only for the erection of buildings or for other permanent improvements. All royalties collected under the terms of this Act from lands belonging to the University of Texas, shall be credited to the permanent fund of the University. All proceeds arising from the activities affecting lands other than those belonging to the public free school fund, the University and the several asylums, shall be credited to the Game, Fish, and Oyster fund. [Acts 1917, 35th Leg.,



ch. 83, § 17; Acts 1917, 35th Leg. 3d C. S., ch. 21, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 58, § 1 (§ 17).]

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

**Art. 5904qq. Transfer of moneys in game, fish and oyster fund to school fund.**—All money now in the State Treasury to the credit of the Game, Fish and Oyster fund and unexpended which was received from royalty on oil and gas leases issued upon river beds and channels, fresh-water lakes, and islands therein and saltwater lakes, islands, bays, inlets, marshes and reefs owned by the State within tide water limits and that portion of the Gulf of Mexico within the jurisdiction of Texas, is hereby transferred to the available public free school fund and the State Treasurer shall so credit said sums. All sums of money hereafter received as royalty upon oil and gas from the areas aforesaid and all sums hereafter received as payment upon the acreage of said areas shall likewise be credited to the available public free school fund. [Acts 1921, 37th Leg., ch. 55, § 1.]

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

### Art. 5904s. Forfeiture of rights under permit or lease.

**Abandonment.**—Intention of oil lessees to forfeit grants by voluntary abandonment is to be found from consideration of nature and extent of undertaking, conduct of parties, and what they did or failed to do. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

**Relocation.**—Where, at the time notice of forfeiture of an oil and mineral lease had time to reach the county clerk's office and did reach such office, a number of applicants for permits to prospect were waiting at the filing window, having deposited their applications on the counter, and a number of other applications were received in the same mail as the notice, all were entitled to be filed simultaneously. *Jones v. Mac-Corquodale* (Civ. App.) 218 S. W. 59, 62; *Same v. Maes* (Civ. App.) 218 S. W. 62.

An attempted relocation of a mining claim, which was void because the claim was then held under a valid location by others, who had done all assessment work thereon, does not entitle the relocators to the ore taken by them from the claim, though they were in actual possession of it. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

## DECISIONS RELATING TO SUBJECT IN GENERAL

### I. TITLE, CONVEYANCES AND LEASES IN GENERAL

**Title in general.**—Notwithstanding the fugitive nature of oil and that, like water in the earth, it belongs to the owner of the land under which it is found, a landowner who sinks a well on his land may acquire title to all the oil produced therefrom, regardless of the fact that it may be drawn from under the lands of adjoining owners. *Gillette v. Mitchell* (Civ. App.) 214 S. W. 619.

**Nature of property in minerals.**—Minerals, being tangible substances, may be treated in law as corporeal property, and, until separated from the soil, are part of the realty within which they lie. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867; *Canon v. Scott* (Civ. App.) 217 S. W. 429; *Hynson v. Gulf Production Co.* (Civ. App.) 232 S. W. 873.

Petroleum oil, like water, is not subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil, or of anything for which ejectment will lie. *Prairie Oil & Gas Co. v. State* (Com. App.) 231 S. W. 1088.

**Adverse possession.**—Assuming that the grantees had the duty of reasonable protective and continued development should the land be shown to be oil land, the failure to comply with such implied condition did not defeat the rights under the grant where at the time the contingency actually arose by the discovery of oil upon a contiguous tract those claiming under subsequent conveyances from the grantors were in the possession of the land and drilling thereon to the exclusion of those claiming under the oil grant. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

The rights under an oil and mineral grant passing the legal title were not barred by limitations where there was no adverse possession, cultivation, use, or enjoyment of the subsurface land for the required length of time, but only possession of the surface for farming and grazing purposes, as possession of the outer surface is not that of the minerals beneath. *Id.*

**Recovery of possession of lands or mines.**—A judgment, decreeing plaintiff a half undivided interest in the minerals and the entire surface, and defendants' predecessor the remaining half undivided interest in the minerals, effected a severance of the surface and mineral estates, and the result was the same as if the judgment had awarded plaintiff all the surface and defendants' predecessor all the minerals and mineral rights. *Henderson v. Chesley* (Civ. App.) 229 S. W. 573.

**Recovery for trespass or conversion.**—In an action for the conversion of ore removed from a mining claim by trespassers, the trespassers are not entitled to compensation for the expense of removing and shipping the ore. *Kelvin Lumber & Supply Co. v. Copper State Mining Co.* (Civ. App.) 232 S. W. 858.

**Grants and reservations of minerals and mining rights—Requisites and validity.**—Where the minerals in certain land were sold to a group of associates, of whom plaintiff was one and a defendant another, and such defendant and a third person by misrepresentations procured deed of his interest from plaintiff, and subsequently made to the original seller the payments due to keep plaintiff's rights alive, the seller's receipt obtained through such fraudulent transaction could not inure to nor confer benefits on defendant and the third person, though it purported to assign the seller's rights to them. *Holland v. De Walt* (Civ. App.) 225 S. W. 216.

Owner of land may convey an indefeasible legal title to the minerals under the soil separate and distinct from the surface rights. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

**Construction and operation in general.**—An instrument which granted, bargained, sold, and conveyed all the oil and other minerals in a described tract of land, held so explicit as to preclude the arising of any other conditions by implication except, perhaps, an obligation to protect the land from drainage and further reasonably develop it after it had been proven to be oil-bearing territory, under the rule that additional terms may be read into written contracts only when they are silent about, and not inconsistent with, what is sought to be so interpolated. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

Where an oil and mineral grant, which passed the legal title to the minerals subject to a reserved royalty, provided that it should be void if drilling should not be commenced and prosecuted with due diligence within two years, but that a forfeiture might be prevented by the payment of \$10 a year until a well was commenced, a further provision that the completion of a well should operate as a full liquidation of all rentals under this provision during the remainder of the term was a condition subsequent. *Id.*

**Distinction between conveyance or sale and license or lease.**—Instrument executed by the owner of supposed oil land and designated as an oil lease held a conveyance of the mineral rights in the land subject to defeasance for failure to pay the rentals as stipulated, and subject to the further contingency of termination after the expiration of a five-year period by failure to discover the minerals mentioned in paying quantities, and failure to exercise ordinary diligence after discovery to mine same. *Key v. Big Sandy Oil & Gas Development Co.* (Civ. App.) 212 S. W. 300.

Oil lease held to have conferred upon the lessee, not an estate in land, but only a license or option to enter upon and develop it for oil and other minerals. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

An instrument which, for a nominal consideration (presumably paid), "granted, bargained, sold, and conveyed \* \* \* all the oil, gas, and coal and other minerals" in a described tract of land with usual surface privileges, to have and to hold to the grantee, his heirs and assigns, on specified conditions, and stated that the grant was not intended as a mere franchise, but as a conveyance of the property for the purpose mentioned, when followed by a substantial performance of the drilling terms with the knowledge and approval of the grantors at a considerable expenditure of money, vested in the grantee and his assigns the legal title to nine-tenths of the minerals subject to the reserved royalty for the specified period, and not a mere leasehold right or option to prospect. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

"Lease" whereby owner "sold and conveyed" the minerals in described land in consideration of a nominal cash payment and the agreement of grantee to sink a designated number of wells within a stipulated time, and whereby it was agreed that, in case the grantee "is unwilling to bore said wells, the said party of the first part shall have the right to bore same, provided there shall be preserved to each well then bored by said S. [grantee] a surrounding territory of not less than seven acres of land," held not to convey an indefeasible legal title to the minerals, but merely to give grantee the right to explore for the minerals and bring them to the surface. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

Contract whereby owner "granted, bargained, sold, and conveyed" specified minerals "in and under" described land to another, "to have and to hold forever," in consideration of the sum of \$250 and a certain portion of the royalties, and wherein it was agreed that the instrument should have the effect "to sever all the minerals in or under said lands from the surface thereof and to sell and convey all such minerals," held not merely a lease, but a conveyance of an indefeasible legal title to the minerals, if any, in or under the land. *Hynson v. Gulf Production Co.* (Civ. App.) 232 S. W. 873.

**Nature of estate granted or reserved.**—A contract conveying minerals therein named, in place, is in its nature a conveyance of an interest in the land described; such minerals being a part of the realty. *Thomason v. Upshur County* (Civ. App.) 211 S. W. 325.

A conveyance of an interest in the oil, gas, and minerals in and under a tract of land is a conveyance of an "interest in the land." *Crabb v. Bell* (Civ. App.) 220 S. W. 623.

**Kind, quantity and location of minerals granted or reserved.**—Reservation in deed of all the "coal and mineral," with the right to enter and "to mine and remove the same," held to include oil and gas, oil and gas being minerals, and the term "mine" being broad enough for the purpose of reaching and extracting oil or gas, regardless of means to be used. *Luse v. Boatman* (Civ. App.) 217 S. W. 1096.

**Conveyance or abandonment of rights granted or reserved.**—Abandonment, in the absence of some act or deed legally sufficient to divest the title, is inapplicable to a

legal title to land, and hence could not defeat the legal title under an oil and mineral grant which conveyed title to the oil and minerals, and not a mere leasehold. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549; *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

If husband and wife conveyed minerals in their homestead to a corporation, the minerals were no longer subject to lawful disposition by the husband and wife, and if the corporation's lease was invalid and failed to operate as a conveyance, the minerals necessarily remained part of the homestead of the husband and wife, and if thereafter they again separated and segregated the minerals from their homestead and the conveyance was abandoned, set aside, and rescinded, the minerals again resumed their original status. *Maynard v. Gilliam* (Civ. App.) 225 S. W. 818.

An instrument declaring null and void a so-called oil lease conveying oil, gas, coal, and other minerals, and purporting to discharge and release the land thereby covered from its provisions, executed by the owner of an undivided two-thirds interest in the so-called oil lease, could not affect the other one-third interest. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549. See, also, notes under art. 1103 et seq.

— **Remedies.**—An implied undertaking on the part of grantee to whom minerals had been conveyed to discover and develop minerals within a reasonable time would be a covenant, a breach of which would entitle the grantor to recover damages merely, and not a condition subsequent entitling grantor, on noncompliance therewith, to a cancellation of the contract. *Hynson v. Gulf Production Co.* (Civ. App.) 232 S. W. 873; *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

A grantor of an undivided half interest in minerals in land, who had a right to a return of the land if mineral was not shown to exist in paying quantities within a year, waived his right to re-entry or forfeiture by expressing his satisfaction as to what was done and minerals shown to exist, being present and having knowledge of the extent of the grantee's performance. *Tickner v. Luse* (Civ. App.) 220 S. W. 578.

Assuming that under an oil grant providing that the completion of a well should operate as a full liquidation of all rental during the remainder of the term it was an implied covenant that the grantee should continue drilling to meet the development of contiguous lands, the facts held not to authorize an action for violation of the covenant. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

**Nature of mining leases and agreements.**—An oil lease is a conveyance of an interest in land. *McEntire v. Thomason* (Civ. App.) 210 S. W. 563.

An oil lease, giving lessee the right to enter and drill for oil, lay pipes, and erect structures, etc., on the land for five years, and so much longer as oil was produced thereon, is more than a mere license, which is a personal privilege to do some act on the land, without passing any estate therein, and which is revoked by a conveyance by either lessor or lessee. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Oil and gas lease, providing that it should become void on lessee's failure to commence and prosecute with due diligence drilling operation within 6 months, but that lessee could prevent forfeiture from year to year for specified number of years by paying a specified sum per acre to lessor for each year thereafter until well was completed, did not convey title to the oil and gas in the lands described, though lease contained words of grant, but was merely an option to explore the same; no title vesting until the gas or oil was produced. *Bailey v. Williams* (Civ. App.) 223 S. W. 311.

**Agreements for leases.**—Where an oil prospector agreed to accept an oil lease in terms fully set forth as a part of the contract within 5 days after releases were procured from one who held prior oil leases on the land, and such releases were obtained, the contract became executed under the maxim that, Equity regards as done that which ought to be done, though the new lease was not formally executed. *Haynie v. Stovall* (Civ. App.) 212 S. W. 792.

Where grantee, who received lands in exchange for an interest in an oil and gas lease, refused to execute in favor of the grantor an oil and gas lease on the property received, according to the agreement, such refusal does not after conveyance warrant the grantor in rescinding unless the promise was made without intention to perform. *Long v. Calloway* (Civ. App.) 220 S. W. 414.

Instrument executed by plaintiffs, oil and gas lessors, in favor of defendant, whereby plaintiffs agreed to execute and deliver to defendant an oil and gas lease if his suit to invalidate the prior lease by plaintiffs to a company was successful held dependent on a future contingency and not construable as a conveyance of the minerals in present, but merely as a contract to convey them on happening of the contingency. *Maynard v. Gilliam* (Civ. App.) 225 S. W. 818.

**Requisites and validity of leases and agreements.**—Oil lease, giving lessee right to at any time surrender lease and be relieved from obligations thereunder remaining unfulfilled at such time, where lessors in consideration of lease received a large amount of stock of company to which lease was assigned, was not void for want of mutuality. *McEntire v. Thomason* (Civ. App.) 210 S. W. 563.

The objection that an oil and gas lease is void for want of mutuality because lessees are not bound to proceed with development is untenable, where lessees have paid an independent consideration. *Aycock v. Reliance Oil Co.* (Civ. App.) 210 S. W. 848.

That an oil and gas lease failed to stipulate a time in which lessees should proceed with development would not render it unilateral, since, where a contract fixes no time for performance, the law presumes the parties intended a reasonable time. *Id.*

In an action to set aside the transfer of a part interest in an oil and gas lease, made on representations that a well in the process of being sunk in the neighborhood would be a dry hole when, as a matter of fact, the purchaser knew it was producing, bad faith on the part of the purchaser being material, knowledge on the seller's part

as to such bad faith was also material in determining whether he had waived the fraud, by executing the transfer. *Zundelowitz v. Waggoner* (Civ. App.) 211 S. W. 598.

That plaintiff had agreed to give gas and oil lease to a person to be furnished by one D., and that she executed a lease to defendant lessee thinking she was dealing with D.'s prospective lessee, was a unilateral mistake, affording no ground for cancellation; there having been no misrepresentation, the contract terms having been fully agreed upon, and the identity of the lessee not being of the essence of the contract. *Price v. Biggs* (Civ. App.) 217 S. W. 236.

In gas and oil lease, an agreement that diligent operations by lessee looking towards discovery of gas and oil "in the immediate vicinity, by which is meant within fifteen miles of some portion of the land," shall operate as a substitute for operation on the leased land, held not so contradictory of a covenant to put down a well in the immediate vicinity as to render the lease void for uncertainty. *Id.*

Covenant to begin operation in drilling on the land leased or the community lands in the immediate vicinity by April 1, 1919, held not so inconsistent with clause providing that consideration for lease and for all common leases is the covenant to begin actual development on some part of the premises within 12 months, as to require a holding that lease is void. *Id.*

Where plaintiffs by false representations of defendant and notary who took acknowledgment to lease sought to be canceled were induced to sign a contract which in fact they never made, that plaintiffs, who relied upon the integrity of defendant and notary, signed lease without reading it, is not such negligence as will deprive them of equitable relief. *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

Oil lease granting rights to lessee, requiring him within a fixed time to begin operations or to pay the rentals, grants an estate on condition subsequent and is valid. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Statement of agent procuring oil and gas lease that refusal to sign would bring about a lawsuit held not unlawful or amounting to "duress," within the meaning of the law to authorize the lessors to have cancellation of the lease; it not appearing the assertion was not made in good faith. *Turner v. Robertson* (Civ. App.) 224 S. W. 252.

Contract executed by husband and wife, obligating themselves to convey minerals in their homestead land to defendant if he were successful in attacking prior oil and gas lease executed by such husband and wife to a corporation, held not sufficiently definite and specific within itself to operate as a lease or conveyance of the minerals to defendant, in the absence of actual removal of the minerals from the homestead of which they were legally a part, precluding valid disposition by mere contract to separate in futuro. *Maynard v. Gilliam* (Civ. App.) 225 S. W. 818.

Oil and gas lease reading that it was made and entered into on a specified date "between Mrs. M. C. P. et al.," etc., "first parties," etc., mentioning the lessors as "first parties" in several places, but naming no other than Mrs. M. C. P., held invalid as to lessors not named. *Patton v. Texas Pac. Coal & Oil Co.* (Civ. App.) 225 S. W. 857.

Where two disinterested witnesses testified that the blanks in the clause of an oil lease providing for extension of the time for completing the well were not filled in when the lease was executed, and the lessor testified he had given the lessee no authority to fill in those blanks, the evidence was sufficient to sustain a finding that the filling in of the blanks was an alteration subsequent to the execution of the lease. *Fleming v. Head* (Civ. App.) 228 S. W. 302.

Where the clause in an oil lease providing for payment to extend the time for completing the well had unfilled blanks for designating the place and amount of the payments and the extension thereby secured when the lease was executed, the unauthorized filling of those blanks by the lessee was a material alteration of the lease, which was not binding on the lessors. *Id.*

The definite and unambiguous terms of an oil and gas lease, respecting the time of its continuance, held to refute the contention that it was void for uncertainty in that respect. *Morris v. Texas Pacific Coal & Oil Co.* (Civ. App.) 228 S. W. 981.

City ordinance, which merely regulated drilling of oil wells and did not absolutely prohibit drilling for oil, but contemplated that drilling might be in such manner or under such conditions as to receive approval of city's building inspector, did not invalidate oil lease, though building inspector testified that he could not grant permission to drill well on land covered by such lease, since it cannot be said as a matter of law that the ordinance will continue for full term of oil lease, or that such building inspector will continue in office, or that his successor will view condition with like effect. *Brie v. Porter* (Civ. App.) 228 S. W. 999.

Where lessee drew up an oil and gas lease, and lessors relied on his statement as to the time the lease would run, and believed that the lease was written for only six months instead of ten years, and, to induce that belief, lessee pointed out a six months' clause in the lease as the term for which it was to run and remarked, "I will make it for six months so you will understand it," and lessors believed the six months' time had reference to the time that lease was to run and acted upon it, but in truth it had reference instead to the payment of rentals, and not to the time the lease was to run, and though lessor might have ascertained by the exercise of ordinary care the application of the six months' clause, such representation would be sufficient ground if promptly acted upon to avoid the lease. *Smith v. Fleming* (Civ. App.) 231 S. W. 136.

**Modification or cancellation.**—Where defendants acquired from plaintiffs for cash option to develop land for oil without intention to drill themselves for oil but to sell privilege, not binding themselves to sink wells, that they acquired option without intention to drill is no ground for cancellation. *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

A failure to make tender of consideration paid will not necessarily defeat rescission of an oil lease, but requires the cost to be charged to plaintiff up to the time of the tender. *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

Where plaintiff did not read an oil lease, but was not prevented from so doing by any trick or device on the part of the defendant, plaintiff cannot obtain rescission of the lease on the ground that it was not as advantageous as he expected it to be. *Texas Co. v. Keeter* (Civ. App.) 219 S. W. 521.

Where plaintiffs sought to have an oil lease canceled on the ground that it provided for payment of rent in April instead of January, and the only loss which plaintiffs would suffer was the loss of the use of the money for the three-month period, plaintiffs are not entitled to rescission of the lease which they failed to read before signing; the alleged change not working any substantial difference in the situation of the parties. *Id.*

In an action to cancel an oil lease on the ground that rental for an extension had not been paid in time, evidence held sufficient to sustain a finding in favor of defendant on such issue. *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

If an oil and gas lease was obtained by fraud, plaintiff lessor should not have been required to pay anything to defendant lessee in order to have the lease canceled, though it was worth at the time more than the amount plaintiff lessor paid defendant lessee for a reconveyance. *Ware v. Campbell* (Civ. App.) 229 S. W. 593.

Where a landowner conveyed an undivided interest by executory contract retaining a vendor's lien, but failed to enforce his rights thereunder until barred by limitations, so that the superior title vested in the grantee, and the grantee thereupon executed an oil and gas lease to a third person, held that the interest acquired by such third person, while only a right to develop the mineral, was a present vested right to enter and produce minerals, and that such interest was not revoked by lessor in a subsequent deed of the land to his grantor. *Canon v. Scott* (Civ. App.) 230 S. W. 1042.

## II. CONSTRUCTION OF OIL AND GAS LEASES

**In general.**—Leases for oil and gas are to be construed most favorably to the lessor. *Bailey v. Williams* (Civ. App.) 223 S. W. 311; *Aycock v. Reliance Oil Co.* (Civ. App.) 210 S. W. 848; *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Under oil and gas lease provisions that lessor was to be at no expense arising from the operation or development, that lessees were authorized to partition the land, and that the drilling obligation was not to be binding until partition, the burden of partitioning rested upon the lessees and not upon the lessor. *Aycock v. Reliance Oil Co.* (Civ. App.) 210 S. W. 848.

Oil and gas lease, granting described premises "for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks," etc., designating the right of the lessee as a "privilege," and providing that lessee's rights should terminate on failure to drill within one year or make payment of specified amount on or before certain date, held a mere right, franchise, or privilege to enter on the land, and to appropriate a portion of oil and gas discovered therein, and not a conveyance of the oil and gas as a present interest in the land, the commencement of a well, or payment of rental on or before specified date, being a condition precedent to the continuation or extension of the lessee's privileges after such date. *Young v. Jones* (Civ. App.) 222 S. W. 691.

In oil and gas leases, time is regarded as the essence of the contract, and the rule that a lease is construed most strongly against the lessor does not apply. *Id.*

Oil and gas leases and a contract executed contemporaneously therewith between the same parties and with reference to the same subject-matter constituted one contract and must be construed together. *Huber v. Smith* (Civ. App.) 228 S. W. 339.

The covenant of quiet enjoyment which is implied in case of an ordinary lease should be implied with respect to an oil and gas lease. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

Where a mother, who gave an oil and gas lease on which her son had an undivided interest, executed a confirmation of the lease after the son's conveyance of his interest to her, such confirmation being executed before execution of reconveyance to the son, the first deed of reconveyance being destroyed without delivery, the confirmation of the lease passed title to the son's undivided interest. *Id.*

An oil and gas lease giving the lessee power to take and remove oil and like minerals conveys an interest in the land. *Smith v. Womack* (Civ. App.) 231 S. W. 840.

**Consideration and mutuality.**—See notes under art. 589.

**Term.**—Where landowners conveyed oil, gas, coal, and other minerals on condition subsequent as to locating and bringing up oil, on compliance with condition grants became absolute for 20 years, or as long as oil in paying quantities could be produced, as provided. *Munsey v. Marnet Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

**Covenants implied.**—See notes under art. 1112.

**Assignment or sale of lease or reversion.**—Where one purchases an oil lease with knowledge that his vendor has contracted that the oil produced on the property shall be sold and delivered to a pipe line company at a price named in the sale contract, he is bound by such contract. *Simms v. Southern Pipe Line Co.* (Civ. App.) 195 S. W. 283.

In an action for inducing a part owner of an oil and gas lease to sell to another part owner by falsely representing that a well dug in the neighborhood would be a dry hole, although the purchaser knew that the well was then producing, such statement although in the form of an opinion, being made for the purpose of deceit as to a matter within the knowledge of the person expressing it, was sufficient to form a predicate for actionable fraud. *Zundelowitz v. Waggoner* (Civ. App.) 211 S. W. 598.

The agreement by the lessor of supposed oil land that the well drilled by the lessee company to a depth of 2,000 feet was a complete well within the meaning of the lease was binding upon her and upon the buyer from her, who bought the land with full notice of the construction of the lease, and also upon the buyer's lessee, who took his lease

with notice of the same fact. *Key v. Big Sandy Oil & Gas Development Co.* (Civ. App.) 212 S. W. 300.

Where oil lease provided that lessors "do hereby grant, sell, convey, and lease unto the lessee all the oil and gas in and under the following described tract of land, and also the tract of land itself, and the possession thereof for the purpose of entering and operating thereon and removing therefrom said oil and gas," and provided further that "all covenants and agreements herein set forth between the parties hereto, shall extend to their respective heirs, legal representatives and assigns," lessee could assign lease without lessor's consent; an interest in the land itself having been conveyed subject to a defeasance of the title upon lessee's failure to comply with the covenants on his part required to be performed. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

Where a landowner gave an oil company a 25-day written option to lease her land, and subsequently, though before expiration of such 25 days, wrote that she could wait no longer for her money, asking return of her lease and abstract, stating that she did not see proper to accept payment, such letter was an absolute revocation of the option or offer to lease, which was not supported by consideration. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 300.

Sublessees of parts of an oil lease were affected with notice of the form and legal effect of the original lease to their assignor. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Where an oil lease calling for drilling of a well by the lessee within six months, or payment of certain rentals, provided expressly that the lessee might assign all or any part of the land, any assignee of part of the original lease was entitled to protect his own lease by paying his proportionate part of the rentals of the rate per acre specified in the original lease; the lessors not being entitled to have rental installments, after assignments by the lessee, paid as a whole. *Id.*

Where a contract for the transfer of an oil lease was deposited in escrow until the payment of the balance of the purchase price after examination of the title, no estate or interest vests in the purchaser until the performance of the condition. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

Where defendant exchanged an interest in an oil and gas lease for plaintiff's land, and on suit by the other lessees for partition the leasehold interest was sold by judicial decree, defendant being made a party to the suit for partition, defendant cannot prevent plaintiff's rescission on account of his fraud, on the theory that plaintiff could not restore the status quo. *Long v. Calloway* (Civ. App.) 220 S. W. 414.

In an action for specific performance of a contract to convey an oil lease, defendants cannot escape liability because of plaintiff's mere nonperformance of an oral promise to perform an act in the future unless the promise was made without intention of performance and was relied on by defendants; hence an answer merely setting up nonperformance is open to demurrer. *Greenmeyer v. McFarlane* (Civ. App.) 220 S. W. 613.

Where defendant wired he would sell an oil lease at \$50 an acre, with direction to wire immediately if interested, and plaintiff inquired as to the length of lease, rentals, and whether defendant could furnish abstract, etc., whereupon defendant advised as to the length of lease, and that he had abstract, and plaintiff wired in return that he would take the lease, directing defendant to draw through a bank for the full amount, giving reasonable time for examination of abstract, no complete contract to convey the lease to plaintiff resulted, as defendant's offer contemplated immediate acceptance, and he could not be required to wait for examination of the abstract by plaintiff's counsel, nor forced to appoint the bank as his agent to deliver assignment and receive consideration; the purported acceptance by plaintiff constituting a counter proposition, prohibiting formation of contract until acceptance. *Langford v. Bivins* (Civ. App.) 225 S. W. 867.

There is no implied obligation resting on the vendor of an oil lease to furnish abstract of title. *Id.*

Time is of the essence of contracts for the sale of mineral leases and lands. *Id.*

Lessee's appropriation of money to assist parties to whom he contracted to assign in performing acts which were to be the consideration for the assignment, cannot be construed into a waiver or an estoppel to claim a forfeiture of the right to acquire the lease as against a purchaser from the latter, because in no sense indicating that lessee would not insist on the provisions of his written assignment, and neither could such estoppel result if it were construed as a completed partnership between them. *Atlantic Oil Producing Co. v. Dawkins* (Civ. App.) 230 S. W. 525.

Where defendant agreed to drill two oil wells and was to pay plaintiff one-sixth of the oil produced as a royalty and was assigned oil leases, and after having drilled one well abandoned the contract, the plaintiff was not entitled to recover as damages the market value of such leases merely because defendant did not "return" them to the plaintiff, in the absence of evidence showing that the leases lapsed, the effect of the abandonment of the contract being to divest defendant of the rights conferred by the leases and revest them in plaintiff, who could at once have exercised the right conferred by the leases or again assigned such rights to another. *Southwestern Oil Corporation v. Bois D'Arc Creek Oil & Gas Co.* (Civ. App.) 230 S. W. 821.

Falsity of an opinion representation that a nearby well looked like a dry hole, made to obtain an option on an interest in an oil lease, was not material as affecting right to rescind the transfer of such interest, where nothing was done to prevent a fair test of the well, and the assignor did nothing to inform himself in relation thereto. *Waggoner v. Zundelowitz* (Com. App.) 231 S. W. 721.

Where the title tendered by executors contracting to grant an oil and gas lease on the lands of the testatrix was at best so doubtful that it was not a merchantable title, the purchaser is entitled to refuse and performance will not be enforced. *Smith v. Womack* (Civ. App.) 231 S. W. 840.

A contract for the sale of an oil and gas lease, which described the instrument as a commercial lease, providing for one-eighth of the royalty to be paid to the landowner, is sufficiently definite to sustain an action for breach; it appearing that the land had been leased on the ordinary producer's form, it being immaterial in such case that the contract did not contain provisions as to the terms, such as would be necessary if there was no existing lease. *Garrard v. Cantrell* (Civ. App.) 232 S. W. 911.

Though plaintiff was not the owner of an oil and gas lease at the time when he contracted for its sale, yet, where he had a contract with the owner for the sale thereof, he was such a bona fide contractor as would entitle him to insist on his rights under the contract for the sale of the lease. *Id.*

**Assignee as bona fide purchaser.**—See notes under art. 6824.

**Extension or renewal.**—A sum paid plaintiffs by defendants in advance for option to develop oil lands held not only consideration for privilege extending over first term of six months, but for all rights, conditional and unconditional, conferred, including conditional right to claim extension of option. *Griffin v. Bell* (Civ. App.) 202 S. W. 1034.

The \$500 paid by the lessee of supposed oil land in addition to a full performance by his assignee of the drilling contract stipulated in the lease held a full payment of the consideration required for continuation of the lease for the five-year period stipulated in it. *Key v. Big Sandy Oil & Gas Development Co.* (Civ. App.) 212 S. W. 300.

Where mineral lease provided for extension of lease upon lessee's payment of certain amount by certain date to lessor's credit in designated bank, lessee's deposit of required amount during specified time to designated bank was sufficient to extend lease, notwithstanding bank's failure, through negligence of employé, to credit lessor with such amount during such period; the dereliction of the bank not being chargeable to the lessee. *Tatum v. Fulton* (Civ. App.) 218 S. W. 1033.

Under oil lease providing that, if operations for drilling a well were not commenced on or before a certain day, the lease should terminate, unless lessee on or before such day should pay or tender a specified amount, which payment should operate as a renewal, time was of the essence of the option to continue lease; and where defendant, lessee's assignee, did not pay specified amount until two days after option had expired, lessors, who declined to receive the amount, were entitled to decree canceling lease and removing same as a cloud on their title, though they were not damaged by delay of two days and failed to declare a forfeiture prior to deposit. *Weiss v. Claborn* (Civ. App.) 219 S. W. 384.

Under oil lease providing that rentals for extensions should be paid to the lessor, or deposited to his credit in a certain bank, notice by the lessor to the bank of his intention to revoke the offer of an extension was ineffective, where not communicated to the lessee; the bank being the agent of the lessor. *McKay v. Tally* (Civ. App.) 220 S. W. 167; *Same v. Fulgham* (Civ. App.) 220 S. W. 171.

If a lessor under an oil lease has the right to withdraw his offer to extend the time for drilling a well, he must give some notice of his intention to withdraw the offer before acceptance, and such revocation of the offer must be communicated to the lessee. *Id.*

An oil lease or option, providing that the lessee could extend the time for drilling by the payment of a certain amount at the beginning of each year, was a continuing offer by the lessor to extend the time, and after acceptance of such amount, it became a binding and valid contract for the period of extension. *Id.*

Proof that a landowner who had executed an oil and gas lease finally returned a check for rent which was to extend the period of the lease marked "refused" will establish a tender. *Lone Star Gas Co. v. McCullough* (Civ. App.) 220 S. W. 1114.

Where a lease was in wild-cat territory, a provision for extension of the lease for a term of five years on payment of small rents is valid and enforceable, even though the lessee had made no attempt to drill, the rule that in proven territory the lessee cannot by paying rentals unduly delay development of the property, but that such matters is in the nature of a privilege enabling the lessee to save forfeiture, not being applicable to wild-cat territory. *Id.*

In view of provisions of oil and gas lease reciting a consideration of \$50 for the first term and for the lessee's option of extending the period, time for payment of the rental of \$25 for the extension of the lease beyond January 1, 1919, held of the essence of the contract. *McLaughlin v. Brock* (Civ. App.) 225 S. W. 575.

Where an oil and gas lease made time for payment of an extension rental of the essence of the contract, the lessee's failure to make such payment when due terminated the lease ipso facto according to the terms of its stipulation. *Id.*

Where a tender of rentals required to renew a lease for six months was refused by lessor, lessee is thereby excused from making further tenders, though he is not relieved of liability therefor in case the lease is held valid. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

**Surrender, abandonment or forfeiture.**—To establish abandonment of lease on the part of the lessee, both an intention and the act must be shown. *Hall v. McClesky* (Civ. App.) 228 S. W. 1004; *Hall v. Roberts* (Civ. App.) 228 S. W. 1008.

Lessee of oil lands for 20 years held to have abandoned his rights under the lease in having drilled as required by the lease and struck oil and then having removed his machinery when the well ceased to flow without expectation of resumption of operations. *Grubb v. McAfee*, 109 Tex. 527, 212 S. W. 464.

Where an oil lease provided that the lessee would bring in a producing well within 11 months, and that within 30 days thereafter he should bring in another well and proceed with the same diligence until there should be at least five wells on the property, and that failure to prosecute the drilling should be construed as an abandonment of the lease other than as to producing wells, no judicial forfeiture was necessary where

the lessee, after bringing in three producing wells, abandoned further operations. *Gillette v. Mitchell* (Civ. App.) 214 S. W. 619.

An oil lease, providing that if oil is found in paying quantities in the first well the lessee will in 30 days begin boring a second well on some other acre of the tract and continue to bore as developments may justify, until at least five or six wells have been completed, or the acre on which lessee has failed to drill a well reverts to lessor, is ambiguous, and will not sustain a forfeiture because of failure to bore all of five wells upon different acres. *Decker v. Kirlicks*, 110 Tex. 90, 216 S. W. 385.

Contrary to the general rule that forfeitures are not favored in law, the forfeiture of oil and gas lease is so favored, and the lease will be strictly construed against the lessee. *Cockrum v. Christy* (Civ. App.) 223 S. W. 308.

Where oil and gas lease provided for forfeiture only on failure to pay the annual cash considerations on a fixed date, breaches of covenants will not forfeit the right of possession; there being a fair consideration for the lease. *Pierce v. Texas Pacific Coal & Oil Co.* (Civ. App.) 225 S. W. 193.

Rights of lessee under an oil and gas lease may be lost by abandonment, and abandonment is a question of intention, which may be established by circumstantial evidence, such as the removal of machinery, quitting the premises, and other circumstances showing an intention to relinquish all rights and interests in the leased premises. *Hall v. McClesky* (Civ. App.) 228 S. W. 1004.

In a suit by a landowner to cancel an oil and gas lease on the ground of abandonment, evidence held insufficient to show abandonment by lessee. *Id.*

In a suit to cancel an oil and gas lease for abandonment by lessee, evidence held insufficient to establish such ground. *Hall v. Roberts* (Civ. App.) 228 S. W. 1008.

Oil and gas lessors, who expressly repudiated the lease and forbade any development of the tract, are not in a position to invoke against the lessee as ground for cancellation the theory of abandonment by lessee. *Texas Co. v. Curry* (Civ. App.) 229 S. W. 643.

Oil and gas lessors invoking against lessee the harsh remedy of forfeiture to obtain relief must show their right thereto plainly from the express terms of the lease itself, and not by implication or strained construction. *Id.*

Lessee's failure to operate wells during 2-year period after having drilled 21 wells on the land and after operating the wells apparently to the satisfaction of the parties for about 15 years, was not an abandonment entitling lessors to claim a forfeiture by reason of nonuser, where they had been operating at a loss, were involved in financial difficulties, and where they did not remove machinery from the premises, since in such case it did not appear that they intended permanently to relinquish their rights; abandonment being the intentional relinquishment of a vested right. *Marnett Oil & Gas Co. v. Munsey* (Civ. App.) 232 S. W. 867.

Where oil lease entitled lessees to explore for oil and operate oil wells on payment of royalty to lessor, without authorizing lessor to claim a forfeiture by reason of nonuser for any period of time, the only way lessees could be divested was by a voluntary conveyance or a permanent abandonment of the leases. *Id.*

**Testing or working—Construction, breach and penalties.**—Where only consideration, moving to grantors of minerals, other than eighth interest in oil produced, was \$5, real consideration was eighth portion of oil reserved, and it was duty of grantees by implication continuously to operate wells as contemplated. *Munsey v. Marnett Oil & Gas Co.* (Civ. App.) 199 S. W. 686.

Where oil wells were seized by bankruptcy court, lessees of lands, on showing they made effort to secure possession, or to operate under court's direction, could not be held liable in damages to lessors' successors during period for failure to operate under leases. *Id.*

In an oil and gas lease providing that, "when a well is once begun, the drilling thereof shall be prosecuted with due diligence until same is completed," word "completed" means finished, or sunk to the depth necessary to find oil or gas in paying quantities or to such a depth as would reasonably preclude probability of finding it at further depth. *Frost v. Martin* (Civ. App.) 203 S. W. 72.

An oil and gas lease providing for forfeiture for suspension of drilling under certain conditions, held not to become absolute after the drilling of the first well, but that drilling of subsequent wells was to be prosecuted under the same conditions as the first. *Stine v. Producers' Oil Co.* (Civ. App.) 203 S. W. 126.

Where an oil and gas lease provided that forfeiture might be avoided by payment of stipulated sum in cash every six months, an absolute obligation on part of the lessee to prosecute the drilling or to pay the stipulated amount was not imposed. *Id.*

Under oil lease conveying all oil under all the land for fixed payment and royalties, giving lessee right to subdivide and sell, and inhibiting drilling well within 300 feet of residence, except with consent of "both parties hereto, their heirs and assigns," assignee of part of excepted circle may drill thereon, lessor consenting, without consent of assignees of other parts. *McFarlane v. Gulf Production Co.* (Civ. App.) 204 S. W. 460.

The payment by lessee of a valuable consideration for his oil and gas lease does not relieve him of his obligation to proceed with diligence in the performance of his part of the contract. *Aycock v. Reliance Oil Co.* (Civ. App.) 210 S. W. 848.

The definition of "oil in paying quantities" as not including, but, excluding the cost of drilling, is applicable, where the lessee has drilled the well and is operating it under the contract, and the lessor is seeking to take the premises from the lessee's possession on the ground that the well is not producing oil in paying quantities, but is not applicable where the lessee is required to drill a well when oil shall be found in paying quantities. *Aycock v. Paraffine Oil Co.* (Civ. App.) 210 S. W. 851.

The contractual consideration of a five-year oil lease having been fully performed by the lessee by drilling a well, the lessee was under no obligation to drill another



well in order to hold the lease for the five-year period. *Key v. Big Sandy Oil & Gas Development Co.* (Civ. App.) 212 S. W. 300.

The lessee of oil lands after oil was encountered in the first well sunk held under obligation implied by law to exercise reasonable diligence to continue drilling and mining operations on the land. *Grubb v. McAfee*, 109 Tex. 527, 212 S. W. 464.

Under written oil and gas lease between lot owners and trustees of oil company, trustee lessees held not precluded from drilling more than one well on the lots, or from drilling as many wells as appeared reasonably necessary to develop the land for oil and gas, provided the drilling of any subsequent wells would not necessitate the removal of any of the houses on the land when the lease contract was made. *Grimes v. Goodman Drilling Co.* (Civ. App.) 216 S. W. 202.

Where plaintiff purchased the surface rights of a lot burdened with the terms of an oil and gas lease, he cannot complain of conditions produced by the trustee lessees and others such as are usual and customary during the drilling of an oil well. *Id.*

Under an oil lease providing "that in case the party of the second part fails to drill said wells, \* \* \* said \$500 shall be forfeited, \* \* \* also oil leases hereby conveyed to be returned to the party of the first part," the party of the second part contracted to return or reassign the leases if the wells were not dug as contracted to be dug. *Bois D'Arc Creek Oil & Gas Co. v. Southwestern Oil Corporation* (Civ. App.) 219 S. W. 115.

Where a contract for the lease of oil lands expressly binds lessee to begin actual development of the oil property, such obligation is not discharged by making reasonable efforts to secure third parties to develop the land. *Bost v. Biggers Bros.* (Civ. App.) 222 S. W. 1112.

Where oil and gas lease required lessee to begin drilling well and prosecute the drilling with due diligence to 2,000 feet if necessary before striking oil, the fact that lessee and his driller might be mistaken in their belief that a 2,000-foot well could be sunk with the drilling outfit with which they began to drill did not warrant forfeiture, unless on ascertaining inadequacy of such outfit he failed to make diligent effort to obtain an adequate drilling outfit. *Cockrum v. Christy* (Civ. App.) 223 S. W. 308.

Where lessee selected the location of an oil well and hauled derrick timbers to the site, and selected and provided a water supply for drilling purposes, there was a "beginning of operations for the drilling of a well for oil" within the meaning of a lease requiring such operations to be begun within a certain time. *McCallister v. Texas Co.* (Civ. App.) 223 S. W. 850.

Where an oil and gas lease provided that it should terminate on March 1st, in event no well was commenced, unless the lessee should pay or tender to the lessor stipulated rental, time was of the essence of the contract, the lessee not being bound to drill the well or pay the rental, and a failure to either drill the well or pay the rental within the stipulated time terminates the contract. *Ford v. Cochran* (Civ. App.) 223 S. W. 1041.

Where an oil and gas lease was made in consideration of lessee within 270 days completing a well within one mile of lessor's tract, and provided for commencement of a well on lessor's tract within 60 days after completion of the first well, which was to be drilled to a depth of 2,000 feet, lessee agreeing to pay rent for delay in drilling the well on lessor's premises, held, that lessee, having drilled the first well to the requisite depth before expiration of the time for its completion, was under no obligation to begin another within 60 days after such completion; a completed well meaning finished or sunk to the depth necessary to find oil, or to such a depth as, in the absence of oil, precludes a probability of finding it at a further depth. *Hall v. McClesky* (Civ. App.) 228 S. W. 1004.

Lessee, by placing timbers for erection of derrick and machinery, including boiler, on the ground where oil well was to be drilled, complied with provision requiring him to "commence to drill" well within certain period; the word "commence" being defined as "to perform the first act of." *Terry v. Texas Co.* (Civ. App.) 228 S. W. 1019.

An oil and gas lessee, by its election to continue the lease in force after the stipulated seven years within which it was required to drill for oil, was under an implied obligation to exercise reasonable diligence further to develop all the different tracts whenever the conditions reasonably required development to accomplish the purpose of the lessors in executing the lease, i. e., to realize profit from any oil to be found in the land. *Texas Co. v. Curry* (Civ. App.) 229 S. W. 643.

Stipulations in an oil and gas lease relative to payment of rentals and drilling operations held not covenants by the lessee, but conditions subsequent, performance of which was optional, but nonperformance of which would result in termination of the interests conveyed, whether such rights amounted to an interest in the title to the land or merely a right to take possession for exploration or development and to own a proportion of the oil and gas produced. *Id.*

Under an oil and gas lease providing that, if the lessee sank a well and discovered oil or gas within the limits of time provided, the lease should be in effect for 20 years from discovery, the lessee owed an implied duty to exercise reasonable diligence for further development prior to expiration of the 20-year period specified, and if it failed to exercise such diligence with respect to any one of the several tracts embraced in the lease, and thus decided to abandon it as to such tract, the lease, perhaps, might be canceled, at the instance of lessors as to such tract on the theory of abandonment, but not of forfeiture. *Id.*

Contract for a lease and for development of oil land, a bond for its performance, and the lease executed in connection therewith, construed as one whole contract, held to show parties intended payment to lessor of amount of bond as liquidated damages for breach by failure to drill a well which should be begun on or before a fixed date, and that they did not intend that if the time to begin drilling was extended for one year

by paying \$1,000 therefor, as provided, lessor could also recover on the bond for failure to begin the well on or before the date fixed. *Owings v. Prideaux* (Civ. App.) 229 S. W. 903.

In action on bond for performance of oil drilling contract in connection with an oil and gas lease, held that, as to the liability of defendant and his sureties, it was immaterial whether defendant had any interest in the lease. *Id.*

An oil lease expressly authorizing an assignment, and providing for termination unless a well was commenced within 200 feet of the lands before a specified date, was complied with where a corporation to which the lessee turned over adjoining lands in payment for stock was induced by the lessee to drill within the required distance for the purpose of carrying out the contract, though the corporation was not an assignee of the lease in question. *Battle v. Adams* (Civ. App.) 229 S. W. 930.

An oil lease requiring a well to be commenced within 200 feet of the lessor's lands before a specified date was complied with if the lessee induced or procured a third party to drill a well within the required distance for the purpose of carrying out the contract, whether his contract with the third person was made before or after the execution of the lease. *Id.*

— Forfeiture for breach.—The lessee of oil lands after oil was encountered in the first well sunk held under obligation implied by law to exercise reasonable diligence to continue drilling and mining operations on the land, but the contract, which specified as the sole cause of forfeiture of the lessee's right a failure to drill a first well within time, did not make the obligation a condition subsequent, and did not authorize forfeiture of the lease for noncompliance. *Grubb v. McAfee*, 109 Tex. 527, 212 S. W. 464.

Because of the vagrant and fugitive nature of oil and gas, and the opportunity of an oil and gas lessee to injure the lessor by delaying development, the ordinary rule that equity abhors a forfeiture does not apply to an oil and gas lease under which the lessee wrongfully fails to develop. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Under an oil lease calling for drilling of a well within six months, or payment of 25 cents per acre per annum as rentals until commencement of a well, the lessee, by paying rentals, cannot unduly delay development of the property, the provision for rentals being in the nature of a privilege enabling the lessee to avoid forfeiture where drilling is delayed because of some equitable reason, the payment of the rentals merely constituting consideration for the delay during the period covered, and not supplying the place of an original consideration for the lease, the privilege being but an option which must be supported by an original consideration. *Id.*

A paragraph in an oil lease, providing that "in case the grantee \* \* \* should sink a well or shaft and discover either oil, gas or other minerals within the limits of time provided, then the conveyance should be in full force and effect for 20 years from the discovery of the product," held not to stipulate for a forfeiture, even by implication, but to refer to another paragraph of the lease, providing for forfeiture, but providing only that "operations for the drilling of a well for oil or gas" should be begun within a certain time. *McCallister v. Texas Co.* (Civ. App.) 223 S. W. 859.

Where owner of four tracts of land executed a lease to the four as an entirety, purchasers of two of the tracts could not divide the contract into separate parts, and enforce a forfeiture of the lease in part only while it was valid as to the remainder; the purchaser acquiring no better right than the vendor possessed. *Id.*

A provision in an oil lease, "After a well is begun no further payments in respect to delay shall be due, and for every well drilled there shall in all events be secure from forfeiture an area of two hundred (200) feet square, with the well in the center, together with one hundred sixty (160) acres of land adjoining," held not to provide for a forfeiture of lands not within such limits, but to be used only to remove all possible doubt of the right of the lessee to hold such amount of ground with a well in the center, etc. *Id.*

One who purchased part of a tract of land leased for oil, and denied the lessee any further rights in the tract purchased, thus put himself in default, and was therefore in no position to complain of the failure of the lessee to drill on his part of the land. *Id.*

Where an oil and gas lease provided that if a well were not drilled it should terminate, save on payment of stipulated rental, notice by lessor of intention to terminate the lease is not necessary, where the well was not commenced and the rental not paid. *Ford v. Cochran* (Civ. App.) 223 S. W. 1041.

Where lessees of an oil and gas lease failed either to sink the well or pay the rent within the time stipulated, lessor's refusal thereafter to accept the rent and suit to cancel the lease is sufficient declaration of forfeiture of the lease if any such declaration is required. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

Where a lease requiring lessee to drill a well within a year or to make specified payments to renew the lease was supported by a valuable consideration other than the promise to drill, failure of lessee to drill the well within a year would not constitute ground for cancelling the lease; there being no agreement that it should work a forfeiture thereof. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

Where oil and gas leases provided that, if no well was commenced within one year, the lease should terminate unless the lessee paid a specified rental, but a contemporaneous contract between the same parties provided that failure to begin a well within one year should terminate all rights and privileges granted the lessee and that the provisions of the contract should be superior to and control the provisions of the lease, the lessee could not get an extension of time by paying the rental specified in the lease. *Huber v. Smith* (Civ. App.) 228 S. W. 339.

A lessee cannot prolong the life of an oil lease by mere payment of rental, where the cash consideration is merely nominal, and where it is evident by terms of lease as a whole that the real consideration was development for oil. *Buie v. Porter* (Civ. App.) 228 S. W. 999.

If a lease provides that it shall be null and void, and all rights under it shall determine, if a well be not drilled within a time stated, or unless the lessee pay a stipulated rental for delay in drilling well, or until one be completed such lessee may continue lease in force during term in which it was given by payment of rental. *Id.*

An oil provision lease requiring the completion of a well within a given time, and providing that upon failure to so do the lease shall be null and void, is one of forfeiture on a condition subsequent, so that it is immaterial whether the lease was a mere option to go on the land and exploit for oil and gas or a conveyance of the oil and gas under the land. *Burnett v. Summerour (Civ. App.) 228 S. W. 1013.*

Where operations for the drilling of a well were begun by an oil and gas lessee within the seven-year period required by the lease, and the lessor specifically enjoined on the lessee the duty to continue such operations until the well was finished, the lessors could not say that the lease terminated at the end of the seven-year period, where it required until after such period to finish the well by the exercise of due diligence on the part of the lessee. *Texas Co. v. Curry (Civ. App.) 229 S. W. 643.*

A lease of oil land in proven territory, which provides for its continuance by beginning the drilling of a well or paying stipulated rentals, and which does not make the right to pay rentals instead of drilling dependent on lessee having a good reason for not drilling, or make the consideration of drilling more real than that of the rental, cannot be canceled for delay to develop because the delay was without good reason; rentals having been paid in lieu thereof. *Link v. State's Oil Corporation (Civ. App.) 229 S. W. 693.*

Lessee in an oil lease, agreeing "to drill the fourth well drilled in C. F. field on these lands or forfeit contract," would comply with his contract by completing a well on lessor's land prior to finishing a fourth one on other lands, the word "drilled" being the past participle of the verb and meaning "completed," and it would be immaterial that more than three wells had been previously started on other lands. *Texas Pac. Coal & Oil Co. v. Harris (Civ. App.) 230 S. W. 237.*

Where owner leased land as an entirety and by lease required lessees to develop the land for oil, without providing for development of any particular acre or tract thereof, the development of a portion of the land by a sublessee accrued to the benefit of the lessee, precluding the owner from declaring lease forfeited as to another portion held by lessee or successors for nondevelopment thereof. *Duke v. Stewart (Civ. App.) 230 S. W. 485.*

— **Waiver of forfeiture.**—Provision in oil lease, providing for forfeiture if well is not drilled within specified time, being for lessor's benefit, may be waived by lessor. *Von Hatzfeld v. Haubert (Civ. App.) 224 S. W. 220.*

Lessor, after having agreed from time to time to delays in drilling of well by lessee, will not be permitted to declare forfeiture for delay after lessee with lessor's acquiescence had at much expense drilled a productive well. *Id.*

Where tract of land was subject to oil and gas lease, and lessor sold a fraction thereof to one having knowledge of the existence of the lease, a waiver by grantor of lessee's failure to drill or pay a rental in lieu thereof when due did not bind grantee. *Olsen v. Erwin (Civ. App.) 229 S. W. 878.*

— **Actions.**—In action to cancel oil leases for forfeiture by abandonment in charge on damages, court improperly instructed it was defendant lessees' duty to exercise "ordinary care" in operation of wells. *Munsey v. Marnet Oil & Gas Co. (Civ. App.) 199 S. W. 686.*

In a suit to forfeit an oil and gas lease for suspension of drilling in violation of the terms thereof, held error to fail to enter judgment canceling the lease, giving the lessee an opportunity to prevent forfeiture. *Stine v. Producers' Oil Co. (Civ. App.) 203 S. W. 136.*

Where an oil and gas lease provided that forfeiture could be prevented by the payment of a stipulated sum or by resumption of drilling, the lessor was not entitled, where the lease was breached, to judgment both for cancellation, and for the cash payment. *Id.*

Evidence held insufficient to show that lessee who was required by oil and gas lease to begin drilling of well within certain period and prosecute the work with diligence to a depth of 2,000 feet if necessary, was not prosecuting the work with due diligence and in good faith with intention to sink the well begun by him to a depth of 2,000 feet if necessary. *Cockrum v. Christy (Civ. App.) 223 S. W. 308.*

In a suit to declare an optional lease terminated for nonperformance of the express conditions on which its continuation depended, the general rule that a court of equity will not enforce a forfeiture, but will often lend its aid to prevent one, does not apply. *Ford v. Cochran (Civ. App.) 223 S. W. 1041.*

In lessor's action to declare forfeiture of oil and gas lease, where original lease was modified by subsequent agreement, introduction of the original lease in evidence was not error, where lessor had made such lease an exhibit in his petition, and where consideration of such lease was necessary in determining whether its terms authorized a forfeiture. *Von Hatzfeld v. Haubert (Civ. App.) 224 S. W. 220.*

In an action to cancel an oil and gas lease on the ground of abandonment, direction of a verdict for the lessee held proper; the facts at the most showing nothing more than a lack of diligence in pursuing the work of development. *Pierce v. Texas Pacific Coal & Oil Co. (Civ. App.) 225 S. W. 193.*

Testimony merely that lessee's agent told lessor he would give him a contract to drill a well and would give a contract like a neighbor's, which did not require the drilling of the well, held not sufficient to show that the consideration for the lease which, as executed by lessor did not contain that promise, was the promise to drill the well. *Burt v. Deorsam (Civ. App.) 227 S. W. 354.*

Where a contract executed contemporaneously with oil and gas leases provided that the lessee should make a deposit to guarantee performance of the contract for the use

and benefit of the lessors who should furnish a good and merchantable title and that in no event was any lessor to have any right to the sum deposited unless he should have a good and merchantable title to the land leased, the lessors could not recover such deposit on the lessee's default, without pleading and proving that they had a good and merchantable title. *Huber v. Smith* (Civ. App.) 228 S. W. 339.

An action to cancel an oil lease, by reason of lessee's failure to comply with its agreement "to drill the fourth well drilled in C. F. field on these lands or forfeit contract," was prematurely brought, where more than three wells had been started on other lands, but not more than three of them had been completed. *Texas Pac. Coal & Oil Co. v. Harris* (Civ. App.) 230 S. W. 237.

**Rent or royalties—In general.**—Where plaintiff was entitled to one-fourth of the royalties from a well, she may adopt the arrangement made by her co-owners with the owners of another well as to the division of the proceeds of two wells, the oil from both being run into the same pipe line without being measured. *Gillette v. Mitchell* (Civ. App.) 214 S. W. 619.

Where a landowner, who had given an oil lease providing that in event the lessee failed to develop, the lease should be forfeited, but the lessee should be entitled to retain any producing well and to seven acres around the same, devised adjoining small parcels to plaintiff and defendant, and there was a producing well on the parcel devised to defendants, held that, after forfeiture of the lease, plaintiff was entitled to share in the royalties from the producing well, though it was located solely on the parcel devised to defendants; the chief value of the land being the oil thereunder. *Id.*

Stipulation in an oil and gas lease relative to payment of rentals and drilling operations held not covenants by the lessee, but conditions subsequent, performance of which was optional, but nonperformance of which would result in termination of the interests conveyed, whether such rights amounted to an interest in the title to the land or merely a right to take possession for exploration or development and to own a proportion of the oil and gas produced. *Texas Co. v. Curry* (Civ. App.) 229 S. W. 643.

— **Amount and time of payment.**—Under an oil lease providing for forfeiture if rentals were not paid within 10 days after due, rental due February 1st could be paid February 11th. *White v. Dennis* (Civ. App.) 220 S. W. 161.

Where lessee assigned his interest in oil lease in different portions of the land in severalty to different persons, who in turn assigned their interests to the same person, such person, holding the lessee's interest as to the entire land, could not extend lease as to only a portion of the land by payment of only a portion of the rental, though lease provided that, on assignment as to a part of the land, the default of assignee should not affect lease in so far as it covered other portions of the land as to which rental was duly paid; such provision being applicable only in case the rights in different portions of the land were held by different persons, the optional right to pay rental being indivisible, where rights as to all the land were vested in one person. *Young v. Jones* (Civ. App.) 222 S. W. 691.

Under a mineral lease dated December 1, 1916, providing that the lessee might prevent forfeiture by paying a specified annual rental quarterly in advance, payment of such rental on December 1 would have been in time, under the rule that the day on which a cause of action accrues is to be excluded, and, where that day was Sunday, payment on the following day was in time. *Semans v. Adams* (Civ. App.) 228 S. W. 353.

Where an oil and gas lease provided that a well should be started within 90 days and allowed a period of 270 days in which to complete it to the requisite depth, and also that lessee would begin another well within 60 days or pay a certain rental per annum until the expiration of 3 years, the 60-day period for payment of the rental began, not on expiration of the 270 days, but with the completion of the first well, which did not require the full time allowed therefor. *Hall v. Roberts* (Civ. App.) 228 S. W. 1008.

Where an oil lease provided lessee should begin drilling a well or pay rentals in quarterly installments "on or before" the beginning of each quarter, a payment for a year in advance complied with its terms. *Link v. State's Oil Corporation* (Civ. App.) 229 S. W. 693.

— **Mode of payment.**—A provision in an oil lease providing that the lessee could extend the time for drilling a well, by paying to the lessor or depositing to his credit in a certain bank a certain sum of money, made the bank the agent of the lessor, and payment to the bank had the same effect as payment to the lessor. *McKay v. Tally* (Civ. App.) 220 S. W. 167; *Same v. Fulgham* (Civ. App.) 220 S. W. 171; *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163; *Cockrum v. Christy* (Civ. App.) 223 S. W. 308.

Lessee's deposit of check in designated bank to lessor's credit for extension of lease under provision of lease providing therefor held sufficient to extend term of lease as against objection that actual money was not deposited, where lease did not require deposit to be made in coin or currency. *Jackson v. Pure Oil Operating Co.* (Civ. App.) 217 S. W. 959.

Where a bank was by the provisions of an oil lease the agent of the lessor for the receipt of moneys to be paid under the contract, instructions from the lessor to the bank not to receive a certain installment, which would by the terms of the contract protect it from cancellation for a year, of which instructions the lessee had no notice, could not affect the lessee. *McKay v. Kilcrease* (Civ. App.) 220 S. W. 177.

Where \$20 was payable quarterly as rental on an oil lease assigned by lessee to two persons, and each of the assignees gave lessee a check for \$20 to cover the rental of his undivided interest and one of the checks was dishonored, there was no default by the assignees of the lease; the assignees filing a joint answer in an action by the lessor to cancel the lease, it being immaterial to a lessor as to who pays rentals due. *Broyles v. Gilman* (Civ. App.) 222 S. W. 685.

Where an oil and gas lease provided that rentals should be deposited in a named bank to the credit of the lessor, that bank was thereby constituted an agent for the lessor for the receipt of the money, and all that was necessary for lessee to do on the day rentals were due was to deposit them in such bank to the credit of the lessor, and was not required to attempt to force lessor to go to the bank, or to receive the money, though lessor had instituted an action to cancel the lease. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

— **Forfeiture and re-entry for non-payment.**—If failure to pay rental operated to terminate oil lease, it was not a condition precedent to right of lessors to claim forfeiture to notify lessee of such claim before the rental was deposited in the bank to the lessor's credit. *Weiss v. Claborn* (Civ. App.) 219 S. W. 884.

Where by the terms of an oil lease a bank was the agent of lessor to receive rentals, no formal tender of the money was necessary to avoid a forfeiture of the lease, where the cashier of the bank refused to accept the rental when offered, especially where such refusal was induced by a statement theretofore made by the lessor to the effect that he considered the lease already forfeited. *White v. Dennis* (Civ. App.) 220 S. W. 161.

Where oil lease provided that rentals for extensions of the lease should be paid to the lessor, or deposited to his credit in a certain bank before a certain date, payment to the bank of the rentals had the same effect as payment to the lessor, and any failure of the bank to pay the money to the lessor, or to give him proper credit on its books, is not properly chargeable to the lessee. *Hunter v. Gulf Production Co.* (Civ. App.) 220 S. W. 163.

Assuming that payment of \$1, recited in oil lease, was not sufficient to support the contract, a payment of \$13.50 and its acceptance by the lessor was sufficient to maintain the contract in force during the period that such payment would by the terms of the contract protect it from cancellation; the contract providing for an annual payment of such amount to prevent forfeiture for failure to begin a well. *McKay v. Kilcrease* (Civ. App.) 220 S. W. 177.

Where oil and gas lease merely gave lessee the right to enter on land, and take a portion of the oil and gas therefrom, without conveying a present interest therein, and provided for the termination of lessee's right, on failure to drill or make specified payment on or before certain date, the failure to drill or pay the stipulated amount on or before such date, constituted a forfeiture against which equity will not give relief, though failure to make necessary payment was due to a mistake as to amount, and though an amount less than that specified was tendered prior to such date, and the full amount tendered subsequent thereto. *Young v. Jones* (Civ. App.) 222 S. W. 691.

Where oil and gas lease provided for a forfeiture of the lease on lessee's failure to commence drilling operations and prosecute the same with due diligence within six months, and further provided that lessee could prevent such forfeiture from year to year for specified number of years by payment of specified rentals to designated bank yearly during such period, there was a forfeiture of lease for lessee's failure to commence drilling operations within the 6 months, or during such time pay the specified rentals for following year, notwithstanding payment of such rental subsequent to expiration of six-month period, since such payment, in order to prevent a forfeiture, must have been made before the forfeiture occurred, and since the bank had no authority to receive the rents except in accordance with the terms of the lease. *Bailey v. Williams* (Civ. App.) 223 S. W. 311.

Delay in payment of rentals under an oil lease, with no intention of tenant to abandon lease, is no ground for forfeiture if the tenant later offers to pay all rentals due; at least where lease does not stipulate for forfeiture for failure to pay when due. *Collins v. Humble Oil & Refining Co.* (Civ. App.) 223 S. W. 696.

A tender by the assignee of an oil lease on March 7 of rent due March 1, delayed on account of illness in his family, did not prevent termination of the lease specially providing therefor unless lessee drilled a well or paid rent on or before the latter date. *Ford v. Barton* (Civ. App.) 224 S. W. 268.

In an oil and gas lease the provision for payment of a stipulated rental in case development is not begun is a condition subsequent, under which the enjoyment of the estate depends on the performance thereof, and the lease can be forfeited for non-performance, not a covenant, for breach of which the only remedy is by action for damages. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

Where a lease and option contract in the form of a usual lease provided that, if no well was commenced on or before a fixed date, the lease should terminate, unless the lessee on or before that date shall tender or pay to the lessor's credit in a named bank the sum of \$80, the contract will be forfeited, where the lessee failed to make payment or deposit within the time limited, notwithstanding he deposited the payment in the mails, directed to the bank, in sufficient time for it ordinarily to have reached the bank in time, for time was of the essence of the contract. *Appling v. Morrison* (Civ. App.) 227 S. W. 708.

Where an oil and gas lease required the lessee to begin a well within a time fixed or to pay rental by date of termination, the agreement was a mere option, and in event of the lessee's failure to begin the well or make the payment by the time fixed, forfeiture will be declared despite the rule that equity does not favor forfeitures and will ordinarily relieve against them. *Id.*

Forfeitures are not favored, and, where it is sought to forfeit an oil and gas lease for nonpayment of rent, the interpretation of the language used in refusing a tender of rent necessary to continuance of lease and the acts of the parties most reasonably suggested so as to avoid the forfeiture will be accepted. *Milner v. McGuire* (Civ. App.) 230 S. W. 421.

Where an assignee of a portion of an oil and gas lease requiring payment of rent in event a well was not drilled within specified time by check tendered rent the day

after it was due, and the tender was refused on the ground that it came too late, the lessor is restricted to the ground specified, and it, being untenable cannot justify the refusal and consequent forfeiture on the ground that the tender was not in money. *Id.*

— **Actions.**—In an action to cancel an oil, gas, and sulphur lease, evidence held insufficient to sustain the verdict of the jury to the effect that assignee of lease paid to bank rental when due. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.

### III. OPERATION OF MINES AND WELLS

**Rights and liabilities as to third persons.**—Commercial enterprise storing explosives in a public place or near a private residence is liable for damages if the enterprise is unlawfully or negligently conducted and fire results, the storing of explosives constituting in such case actionable nuisance. *McGuffey v. Pierce-Fordyce Oil Ass'n* (Civ. App.) 211 S. W. 335.

The holder of a legal title to an oil lease can defend his title against an equitable claim under a prior contract for sale by showing that the holder of the equitable claim is without equity. *Priddy v. Green* (Civ. App.) 220 S. W. 243.

**Contracts for testing or working.**—Where oil well drilling contractors abandoned contract to clean oil well, because of oil company's noncompliance with agreement to furnish them necessary tools wherewith to do the work, they were not liable to the company for advances made and used by them in part for purchase of supplies which the company had agreed to furnish, and in part as part payment on contract, where their damages exceeded such part payment in amount. *Hoppes v. Williams* (Civ. App.) 213 S. W. 328.

In action to recover for cost of boring wells under a contract with two landowners who agreed to pay plaintiff through a third party, evidence held not to sustain a verdict that defendants were jointly liable. *Harlan v. Falfurries Mercantile Co.* (Civ. App.) 214 S. W. 649.

Contractor who agreed to drill to specified depth unless owner instructed him to discontinue the drilling at a lesser depth, and who temporarily discontinued drilling and undertook to ream the well for casing, could not recover expenses of reclaiming the well after it was wrecked in the process of reaming, though the contract did not call for reaming well. *Empire Gas & Fuel Co. v. Couch* (Civ. App.) 226 S. W. 1103.

Contractor, having agreed to drill to specified number of feet unless owner instructed him to discontinue at a lesser depth, was required, in order to recover for digging a fewer number of feet, to justify his failure to dig the specified number of feet by establishing facts that the owner instructed him to cease drilling operations and assumed control of the well. *Id.*

## TITLE 94

## MINORS—REMOVAL OF DISABILITIES OF

Art. 5947. When may have disabilities removed. Art. 5949. Shall be deemed of full age.

**Article 5947. [3499] When may have disabilities removed.**

**Construction and operation in general.**—Enforcement of judgment will not be temporarily enjoined on ground that at time it was rendered debtor was minor, not represented by guardian appointed by any court, where it is not alleged that at time judgment was rendered minor's disability had not been removed by district judge, as authorized by statute. *Janks v. Herrick Hardware Co.* (Civ. App.) 197 S. W. 896.

The minor's residence is always that of his father, so that the term "reside," does not refer to the place of minor's bodily presence, but to his domicile with his parents. *Gulf, C. & S. F. Ry. Co. v. Lemons*, 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943.

To relieve a minor's disabilities with respect to choice of domicile, the statutory method for removal of disabilities must be pursued. *Id.*

**Jurisdiction.**—That a father gave a minor son the right to work in another county and to spend his earnings, did not confer upon the minor the right to choose his residence, or oust the jurisdiction of the district court of the father's residence over the minor's application for removal of disabilities. *Gulf, C. & S. F. Ry. Co. v. Lemons*, 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943.

**Art. 5949. [3501] Shall be deemed of full age.**

**Validity of acts.**—Where plaintiff, after removal of his disabilities as a minor, converted to his own use land obtained through a previous contract of settlement with defendant for plaintiff's personal injury, he ratified the settlement. *Gulf, C. & S. F. Ry. Co. v. Lemons*, 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943.

## DECISIONS RELATING TO SUBJECT IN GENERAL

4. **Emancipation by parent.**—If claimant of cotton levied on under execution against his father was emancipated at 17, and did business for himself and in his own name, and rented land and grew cotton at his own expense, cotton belonged to him, and not to his father. *Turner v. Brown* (Civ. App.) 200 S. W. 1161.

As respects stepdaughter's right to money given or paid her by her stepfather for services rendered, and by her loaned to him, it is immaterial whether she had been emancipated by him, or whether, under circumstances, he was in loco parentis to her and entitled to her services. *Youngblood v. Hoefle* (Civ. App.) 201 S. W. 1057.

Emancipation of stepdaughter by stepfather does not necessarily make her liable for board and for clothing purchased by him while she was living with him, where there was no understanding by either that a charge was to be made therefor. *Id.*

The emancipation of a minor by his parents does not remove his disabilities or affect his right to disaffirm his contract; hence, in an action for disaffirmance of an infant's contract, the question of whether he has been emancipated is immaterial. *Mast v. Strahan* (Civ. App.) 225 S. W. 790.

6. **Custody—Proceedings in which custody may be awarded.**—See Code Cr. Proc., arts. 69, 92, 160, 174, and notes.

7. — **Right to custody in general.**—The welfare and happiness of infant children is the controlling factor in determining their custody. *State v. Jackson* (Civ. App.) 212 S. W. 718; *Anderson v. Cossey* (Civ. App.) 214 S. W. 624.

Where no reasons are shown why a surviving parent should not have the custody, management, and control of his minor child, such parent is entitled to such control. *Burchard v. Woodward* (Civ. App.) 223 S. W. 707; *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

In a controversy between the mother and the paternal grandfather of the child on habeas corpus proceedings, the court will award custody for the best interest of the child, even though the mother is not an immoral person and has not transferred custody by an instrument in writing. *Radicke v. Radicke* (Civ. App.) 206 S. W. 964.

Father, who had no home, was thriftless and improvident, whose income was small and uncertain, who had been cruel to infant daughters and mother, and who had no one to care for daughters, was not entitled to their custody following death of mother, to whom the daughters had been awarded by divorce decree, as against maternal grandparents, who had supported them practically all their lives, had adopted them, had a good home, and were well able to support them. *State v. Jackson* (Civ. App.) 212 S. W. 718.

Law and best interests of society demand that natural rights of father to custody of his children be made subservient to interest and welfare of children. *Id.*

Where after the death of his wife, petitioner agreed that the maternal grandparents

of his daughter should raise and educate the child subject to his orders, and that he was to live with them, and the arrangement continued for some seven years, when petitioner remarried, his second wife being a woman of refinement, who was very fond of the child, held that as petitioner was able to give the child advantages, it appearing that he earned from \$165 to \$200 a month, he was entitled to the custody of the child, and a judgment giving the grandparents the custody during part of the year was improper. *Carter v. Lambert* (Civ. App.) 214 S. W. 566.

The sister of a minor who was intrusted with the child's temporary custody does not have authority to give consent to an operation, but only the father of the child may give consent. *Moss v. Rishworth* (Com. App.) 223 S. W. 225, affirming judgment (Civ. App.) *Rishworth v. Moss*, 191 S. W. 843.

A father is not the owner of his child in the sense of its being his personal property; his legal right to its custody arising from the law's regard for the child's welfare, and if he lacks solicitude for his child's welfare so as to indicate absence of usual natural affection, and some one else is ready and willing to give such child a suitable home, the court will, in the child's interest, award its custody to the latter. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

In an action for child's custody, its welfare is the paramount issue, and that it will be best served by committing it to the parent must appear from the evidence, and it does prima facie so appear when parentage is proven, and the law so presumes until the contrary is shown. *Id.*

Where the father of a baby on his wife's death gave her into the custody of her maternal grandmother, who cared for the infant until she was 14, the mere fact that the father, who had married again and had other children, was a proper person to have the custody of the infant, does not entitle him to its custody, regardless of the wishes of the infant, who had become estranged from her father, stepmother, and half-sisters, and the maternal grandparent should be allowed to retain custody where for the best interests of the child. *Dunn v. Jackson* (Com. App.) 231 S. W. 351, reversing judgment (Civ. App.) 212 S. W. 959.

The parent is the guardian by nature of his children, and his right to their custody is paramount, but this right may be forfeited by misconduct or lost through misfortune. *Id.*

8. — **Gift of child.**—A parent may surrender the custody of his child to a third person, and on habeas corpus proceedings by the parent to regain the custody the paramount interest of the child becomes the dominant issue. *Dunn v. Jackson* (Com. App.) 231 S. W. 351, reversing judgment (Civ. App.) 212 S. W. 959.

9. — **Evidence.**—On habeas corpus, findings as to character of child's mother, her feelings towards the child, and the circumstances and feelings of respondents held to warrant conclusion that child's best interests demanded that possession and custody remain with respondents. *Dugan v. Smith* (Civ. App.) 199 S. W. 654.

Evidence held to show that it was to the best interest of a minor child that its custody should be given to the paternal grandfather instead of the mother. *Radicke v. Radicke* (Civ. App.) 206 S. W. 964.

In father's habeas corpus proceedings to secure custody of children, whom he has never supported, and to whom he has been cruel, it will not be presumed that the best interests of the children will be subserved by placing them in father's custody. *State v. Jackson* (Civ. App.) 212 S. W. 718.

In father's habeas corpus proceeding to procure custody of children from maternal grandparents, in whose care children had been placed upon mother's death, following her divorce from father, evidence of the adoption of the children by the grandparents was admissible. *Id.*

In habeas corpus proceedings by father to recover possession of his child from its grandparents, evidence tending to show that he had once been found drunk, and that an unknown woman had at one time claimed him as her property, held insufficient to establish his unfitness to have his child's custody. *Cardenas v. Barrera* (Civ. App.) 216 S. W. 474.

In a habeas corpus proceeding to obtain the custody and control of a child, evidence held to justify the court in awarding the custody of the child to the grandparents instead of the father. *Burchard v. Burchard* (Civ. App.) 223 S. W. 707.

Comparative affection for the child and willingness and ability to administer to its present and future material and moral welfare are for the jury's consideration for what, under the evidence, they may deem them to be worth. *Clayton v. Kerbey* (Civ. App.) 226 S. W. 1117.

9½. — **Trial and determination.**—Whether it is to the interest of a minor child that its custody should be given to the mother or paternal grandfather is a question of fact in the first instance for the trial court. *Radicke v. Radicke* (Civ. App.) 206 S. W. 964.

On habeas corpus to determine the custody of children as between divorced parents, where the well-being of the children furnishes the sole occasion for the exercise of judicial power, a broad discretion is by law vested in the court which has the parties and witnesses before it, and, when on a full hearing a determination has been made, an appellate tribunal will not interfere therewith where the record fails to disclose lack of sufficient evidence or a response to other than sound judicial consideration. *Foster v. Foster* (Civ. App.) 230 S. W. 1064.

In determining the custody of a child, its wishes, where sufficiently mature to judge for itself, should be consulted, and weighed with the other testimony, but the child's choice is not necessarily a controlling factor. *Dunn v. Jackson* (Com. App.) 231 S. W. 351.



**10. Conveyances and contracts in general.**—Neither relationship of stepdaughter and stepfather nor fact that stepdaughter lived in stepfather's home and that he bought her clothing, books, and scholarship in business college, etc., would deprive her of right of ownership in money loaned him by her. *Youngblood v. Hoeffle* (Civ. App.) 201 S. W. 1057.

Deed of Indian allottee of land under the United States laws was void and conveyed no title if at the time of executing the deed the Indian was a minor. *Langford v. Newsom* (Com. App.) 220 S. W. 544, affirming judgment (Civ. App.) *Newsom v. Langford*, 174 S. W. 1036.

A minor may be charged as a trustee. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

In a minor's action to recover back money paid a college for tuition, etc., testimony that he undertook to enter the college on his own responsibility, the money to be advanced by his father and charged to his interest in his mother's estate, evidence that a catalogue, relied on as constituting a contract with the father was ordered by plaintiff and received by him and never seen by the father, and that the father did not intend to contract or pay for his son's education, supported a finding that plaintiff acted for himself and not as his father's agent. *Peacock Military College v. Hughes* (Civ. App.) 225 S. W. 221.

Where a minor was acting for himself in enrolling with a military college, the belief of the college president that he had authority to bind his father, did not establish a contract with the father, or prevent the minor from rescinding the contract in the absence of estoppel. *Id.*

The right of a tenant in common to dispose of a designated portion of the common property, and thus make partition, is not affected by the minority or other disability of his cotenant, and, where otherwise fair, will take effect. *Brown v. Brown* (Civ. App.) 230 S. W. 1058.

**10<sup>1/2</sup>. Gifts to minor.**—An infant is capable of being donee of property, and in case of gift to infant no formal acceptance is necessary, but, if gift is for his advantage, the law accepts it for him, and will hold the donor bound; while, if gift is not for infant's advantage, the law will repudiate it, at his instance, even though he in terms has accepted it. *Youngblood v. Hoeffle* (Civ. App.) 201 S. W. 1057.

**11. Necessaries.**—A minor may repudiate a contract for necessaries to be furnished in the future, but will be liable for those already furnished. *Peacock Military College v. Hughes* (Civ. App.) 225 S. W. 221.

**15. Avoidance of conveyances or contracts—in general.**—Where the money, paid by a minor to a military college, was obtained from his father pursuant to an understanding that it was to be advanced to him and charged to his share in his mother's estate, he had title to the money, entitling him to recover it on rescission of the contract. *Peacock Military College v. Hughes* (Civ. App.) 225 S. W. 221.

**16. — Who may take advantage of minority.**—Purchase of personalty by infant is voidable at his option, but the adult seller cannot avoid the transaction. *Youngblood v. Hoeffle* (Civ. App.) 201 S. W. 1057.

The right of a minor to disaffirm his deed or contract is personal, and a minor holding land in trust, in which he has no personal interest, cannot disaffirm a deed of such land. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

**17. — Time of disaffirming.**—Generally one entitled to disaffirm an act voidable because of an incapacity to perform it by reason of minority or want of disposing mind must disaffirm the voidable act within a reasonable time after the disability has been removed. *White v. Holland* (Civ. App.) 229 S. W. 611.

**19. — Restoration of consideration.**—One seeking disaffirmance of deed or contract on the ground of minority must restore the consideration, if still in his possession or within his control. *Hughes v. Hughes* (Com. App.) 221 S. W. 970, affirming judgment (Civ. App.) 191 S. W. 742.

When an infant disaffirms a contract and returns to his seller personal property bought by him, he is not liable for depreciation in the value of the property while in his possession, unless it be on the ground of tort. *Mast v. Strahan* (Civ. App.) 225 S. W. 790.

**21. Injuries to minors.**—Damages to parent for injury to child are not determined by deducting from value of his services during minority expense of feeding and clothing, since parent has to feed and clothe child anyway. *Houston & T. C. Ry. Co. v. Lawrence* (Civ. App.) 197 S. W. 1020.

\$4,500 held not excessive damages to parent for loss of arm of 13 year old boy, where suit was not brought until child was 21. *Id.*

Injured party's minority has nothing to do with amount to be awarded as damages in his action for injuries, except that damages for loss or impairment of capacity to labor and earn money is confined to time following majority. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In action by parents of boy injured at railroad crossing, mere fact boy was in good health prior to losing arm at 10 years of age, standing alone in proof, furnished no basis on which jury could fix money value of services to parents during minority. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

In father's action for personal injuries to minor daughter while boarding street car, instruction as to measure of damages failing to limit recovery for services to daughter's minority was error. *Northern Texas Traction Co. v. Crouch* (Civ. App.) 202 S. W. 781.

Where a nine year old boy was injured by the explosion of dynamite caps which he found on his father's premises, where they had been placed by the city's employés, so as to be accessible and attractive to children, the act of the employés was the proximate

mate cause of the injury, notwithstanding that the injury occurred next day, while plaintiff was attempting to solder two of the caps together. *City of Lubbock v. Bagwell* (Civ. App.) 206 S. W. 371.

Though an owner, who neither expressly nor impliedly invites public to come upon his premises, is under no obligation to keep them free from pitfalls or in a condition of safety for persons, whether adults or infants, who in pursuit of pleasure or convenience go upon or pass over such premises, if he maintains upon his premises something which, on account of its nature and surroundings, is especially and unusually calculated to attract and does attract children, invitation may be inferred, and he may be held liable, in the absence of contributory negligence for injury resulting to a child attracted thereby, this rule not being restricted to injuries resulting from turntables. *Flippen-Prather Realty Co. v. Mather* (Civ. App.) 207 S. W. 121.

A lessee of an unused open air theater attractive to children, who places a bomb containing explosives therein, so that it may be set off by electric contract on opening the door, is liable for injuries to a child caused by the explosion of the bomb, although the person injured was a trespasser. *Phelps v. Hamlett* (Civ. App.) 207 S. W. 425.

There can be no recovery in favor of a mother on account of mental suffering and anxiety caused by injuries to her child. *Chrono v. Gonzales* (Civ. App.) 215 S. W. 368.

Where surgeons, without obtaining the consent of a minor's parents, but with the consent of the sister of the child in whose custody she temporarily was, operated on the child for diseased tonsils, the failure to obtain the parents' consent cannot be justified on the ground that the operation was necessary, and that if the tonsils were not removed serious results might have followed; it not appearing that there was any emergency. *Moss v. Rishworth* (Com. App.) 222 S. W. 225, affirming judgment (Civ. App.) *Rishworth v. Moss*, 191 S. W. 843.

Where father knew of the employment of his son by defendant mill owner, and visited the mill frequently and saw the son at work and raised no objection to the employment, such knowledge and acquiescence constituted consent, and he is estopped to urge such employment as a ground of negligence. *Van Landers v. West Lumber Co.* (Civ. App.) 227 S. W. 692.

**27. Operation and effect of judgment against infant.**—In the absence of statute to the contrary, a court can execute against infants having no permanent guardian a judgment which it had jurisdiction to render, and they are subject, as other persons, to such process. *Simmons v. Arnim*, 110 Tex. 309, 220 S. W. 66, affirming judgment (Civ. App.) 172 S. W. 184.

Judgment against infant defendants, who were not served, is void or at least voidable. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

**28. Setting aside or enjoining judgment against minor.**—Enforcement of judgment will not be temporarily enjoined on ground that at time it was rendered debtor was minor, not represented by guardian appointed by any court, where it is not shown that plaintiff now or ever owned any property. *Janks v. Herrick Hardware Co.* (Civ. App.) 197 S. W. 896.

## TITLE 94 1/2

### NAME—ASSUMED

Art. 5950 1/2. Persons conducting business in assumed name shall file certificate.	Art. 5950 1/2 c. Index to be kept; fee; certified copy.
5950 1/2 a. Time for filing certificate.	5950 1/2 d. Does not apply to corporations.
5950 1/2 b. Filing certificate on change as to persons transacting business.	

**Article 5950 1/2. Person conducting business in assumed name shall file certificate.**—No person or persons shall hereafter carry on or conduct or transact business in this State under any assumed name or under any designation, name, style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct, or transact or intend to conduct or transact such business, a certificate setting forth the name under which such business is or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the postoffice address or the addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting or intending to conduct said business in the manner now provid-

ed for acknowledgment of conveyance of real estate. [Acts 1921, 37th Leg., ch 73, § 1.]

**Art. 5950½a. Time for filing certificate.**—Persons now owning or conducting such business under an assumed name or under any such designation referred to in Section one, shall file such certificate as hereinbefore prescribed, within thirty days after this Act shall take effect, and persons hereinafter owning, conducting or transacting business aforesaid shall before commencing said business file such certificate in the manner hereinbefore prescribed. [Id., § 2.]

**Art. 5950½b. Filing certificate on change as to persons transacting business.**—Whenever there is a change in ownership of any business operated under any such assumed name as set out in Section 1 hereof [Art. 5950½], the person or persons withdrawing from said business or disposing of their interest therein, shall file in the office of the clerk of the county or counties in which such business is being conducted and has a place or places of business, a certificate setting forth the fact of such withdrawal from or disposition of interest in such business; and until he has filed such certificate he shall remain liable for all debts incurred in the operation of said business, which certificate shall be executed and duly acknowledged by the person or persons so withdrawing from or selling their interest in said business in the manner now provided for acknowledgment of conveyance of real estate. [Id., § 3.]

**Art. 5950½c. Index to be kept; fee; certified copy.**—The several county clerks of this State shall keep an alphabetical index of all persons filing certificates, provided for herein, and for the indexing and filing of such certificates they shall receive a fee of one dollar. A copy of such certificates duly certified to by the county clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this State of the facts therein contained. [Id., § 4.]

**Art. 5950½d. Does not apply to corporations.**—This section shall in no way affect or apply to any corporation duly organized under the laws of this State or to any corporation organized under the laws of any other State and lawfully doing business in this State. [Id., § 5.]

**Explanatory.**—Sec. 6 is penal in its nature, and is set forth post, as art. 1007c of Penal Code. The act took effect 90 days after March 12, 1921, date of adjournment.

**TITLE 96**  
**NAVIGATION DISTRICT**

Art.  
5955. Districts may include, what.  
5956. Application to commissioners' court to contain what; notice given.  
5960. Duties imposed without compensation.  
5963. Election; form of ballot.  
5964. Election notice.  
5967. Commissioners' court to canvass returns; declare result.  
5969. Oath of commissioners.  
5970. Bond of commissioners.  
5972. Engineers appointed, etc., U. S. government aid, etc.  
5973. Commissioners' court to issue bonds, when and how.  
5975. Bonds, form of; denominations, term.  
5978. Record books for bonds to be kept; duties and fees of clerk.  
5982. Tax to pay interest and create sinking fund; maintenance tax.  
5984. Tax proceedings; compensation of assessor.  
5985. Compensation of tax collector; additional bond required.  
5987. County treasurer; duties.  
5988. County treasurer to give special bond; additional bond.  
5992. Work, how done; contracts, how let when U. S. government fails to act.  
6000. Unlawful for officers to be interested in contracts.

Art.

## INCIDENTAL FACILITIES

6001a. Navigation districts may construct or acquire incidental facilities; issuance of bonds.  
6001aa. Petition for election.  
6001b. Hearing of petition; contest.  
6001bb. Order for election; mode of submission.  
6001c. Notice of election.  
6001cc. General election laws to apply.  
6001d. Qualifications of voters.  
6001dd. Return of election; canvass; declaration of result.  
6001e. Powers of district.  
6001ee. Regulation of wharfage; charges.  
6001f. Power of eminent domain; leasing of facilities; consent of municipalities.  
6001ff. Lease or condemnation of unimproved lands.  
6001g. Navigation and canal commissioners.  
6001gg. Employés.  
6001h. Letting of contracts.  
6001hh. Grant of franchises; licenses or permits.  
6001i. Same; submission to vote.  
6001ii. Same; ballots; result.  
6001j. Protest of voters shall suspend franchise; election.  
6001jj. Handling and deposit of funds.  
6001k. Navigation and canal commissioners subject to supervision of Navigation Board.  
6001kk. Additional powers of districts.  
6001l. Partial invalidity.  
6001ll. Powers of municipalities preserved.

**Article 5955. Districts may include, what.**—There may be created within this State districts to be known as Navigation Districts, in the manner hereinafter provided; and such districts may or may not include within their boundaries and limits villages, towns, and municipal corporations, or any part thereof. Such navigation districts, when so established, may make improvement of rivers, bays, creeks, streams and canals running or flowing through such districts, or any part thereof, or adjacent thereto, and may construct and maintain canals and waterways to permit of navigation or in aid thereof, and may issue bonds in payment therefor as hereinafter provided: provided that such district shall not include therein the territory of more than two counties, or parts of two counties. [Acts 1909, p. 32, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 1, amending art. 5955, Rev. Civ. St. 1911.]

Took effect Nov. 15, 1921.

**Art. 5956. Application to Commissioners' Court to contain what; notice given.**—When it is proposed to create a navigation district wholly within one county, there shall be presented to the County Commissioners' Court of the county in which the lands to be included in such district are located a petition accompanied by the deposit provided for in Article 5981 of this Chapter, signed by twenty-five of the resident property taxpayers, or in the event there are less than seventy-five resident property taxpayers in the proposed district then by one-third of such resident property taxpayers in the proposed district, praying for the establishment of a navigation district, and setting forth the boundaries of the

proposed district, accompanied by a map thereof, the general nature of the improvement or improvements proposed, and an estimate of the probable cost thereof, and praying for the issuance of bonds and levy of tax in payment thereof, and designating a name for such navigation district, which name shall include the name of the county, said petitioners shall make affidavit to accompany said petition of their said qualifications; and when it is proposed to create such a district to be composed of lands in two counties, then a petition of the nature above indicated, signed by twenty-five of the property taxpayers residing in the territory of each county to be included in such proposed district, or in the event there are less than seventy-five property taxpayers residing in said territory, then by one-third of such resident property taxpayers, accompanied by the deposit provided for in Article 5981 of this Chapter; which petition shall be presented to the Commissioners' Court of the county in which is located the greater amount of acreage of such proposed district, which shall be the county of jurisdiction in respect to all matters concerning said district, and the name of which county shall be included in the name of such district and, upon presentation of such petition the said Commissioners' Court shall, at the same session when said petition is presented set down for hearing at some regular term of said court, or at some special session of said court called for the purpose, not less than thirty nor more than sixty days from the presentation of said petition and shall order the clerk of said court to give notice of the date and the place of said hearing, by posting a copy of said petition, and the order of the court thereon, in five public places in said county, one of which shall be the court house door of said county and four of which shall be within the limits of said proposed navigation district; and if the district be composed of more than one county, then there shall be posted a copy of said petition and the order of the court thereon, at the door of the court house of each county in which any portion of the proposed district is located, and four copies in four different places within each county in which any portion of the proposed district is located, and within the boundaries of said district. Said notices shall be posted not less than twenty days prior to the time set for the hearing. The said clerk shall receive as compensation for such service one dollar for each such notice and five cents per mile for each mile necessarily traveled in posting such notices. Provided, that no such navigation district including within its boundaries all or parts of two counties shall include any part of any defined or special road district heretofore defined and within which bonds have been voted for the construction of public roads, except upon petition signed by a majority of the property taxpayers residing in such defined or special road district or part thereof so included, "unless the whole county containing such road district be included in said navigation district, when the above provision covering defined or special road district or parts thereof, shall not apply." [Acts 1909, p. 32, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 2, amending art. 5956, Rev. Civ. St. 1911.]

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

#### **Art. 5960. Duties imposed without compensation.**

See *Charlton v. Harris County* (Civ. App.) 228 S. W. 969.

**Art. 5963. Election; form of ballot.**—After the hearing upon the petition, as herein provided, if the court, or navigation board, as the case may be, shall find in favor of the petitioners for the establishment of a navigation district according to the boundaries as set out in said petition, or as changed or modified as above provided by the said court,

or navigation board, the commissioners' court of jurisdiction shall order an election, in which order provision shall be made for submitting to the qualified property taxpaying voters residing in said district whether or not such navigation district shall be created, and whether or not a tax shall be levied sufficient to pay the interest and provide a sinking fund sufficient to redeem said bonds at maturity, said order specifying the amount of bonds to be issued, together with the length of time the bonds shall run and the rate of interest said bonds shall bear, as said matters have been determined by the commissioners' court or navigation board, as the case may be, under the provisions of Article 5962 of this Chapter. Said election to be held within such proposed navigation district at the earliest legal time, at which election there shall be submitted the following proposition, and none other: "For the navigation district, and the issuance of bonds and the levy of tax in payment thereof;" "Against the navigation district and the issuance of bonds and levy of tax in payment thereof." Provided, that said bonds shall not exceed in amount one-fourth of the assessed valuation of the real property of such district as made by the last annual assessment thereof for State and county taxation. [Acts 1909, p. 32, § 4; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 3, amending art. 5963, Rev. Civ. St. 1911.]

**Art. 5964. Election notice.**—Notice of such election, stating the time and place of holding the same, shall be given by the clerk of the said court by posting notices thereof in four public places in such proposed navigation district, and one at the court house door of the county in which such district is located, and if the district be composed of more than one county, then there shall be posted a copy of said notice at the door of the court house of each county in which any portion of the proposed district is located, and four copies in four public places within each county in which any of the proposed district is located, and within the boundaries of said district; said notices shall be posted for thirty days prior to the date set for the election. Such notices shall contain the proposition to be voted upon as set forth in Article 5963 of this Chapter, and shall also specify the purpose for which said bonds are to be issued, and the amount of said bonds, and shall contain a copy of the order of the court ordering the election. [Acts 1909, p. 32, § 6; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 4, amending art. 5964, Rev. Civ. St. 1911.]

See 1918 Supp. arts. 6016½-6016½c, as to publication in newspaper instead of posting.

**Art. 5967. Commissioners' court to canvass returns; declare result.**—Immediately after said election, the officers holding the same shall make returns of the result thereof to the Commissioners' court having jurisdiction, and return the ballot boxes to the clerk of said court, who shall safely keep the same and deliver them, together with the returns of the election, to the commissioners' court of jurisdiction at its next regular or special session, and the said court at such session shall canvass the vote and returns; and if it be found that a two-thirds majority of those voting at such election shall have been cast in favor of the navigation district and the issuance of bonds and levy of a tax then the court shall declare the result of said election to be in favor of said navigation district, and shall enter same in the minutes of the court as follows:

Commissioners' Court of ——— County, Texas, ——— term, A. D. ——— in the matter of the petition of ——— and ——— others praying for the establishment of a navigation district, and issuance of bonds and levy of taxes in said petition described and designated by the name of ——— Navigation District. Be it known that at an election called

for that purpose in said district, held on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_ a two-thirds majority of the resident property taxpayers voting thereon voted in favor of the creation of said navigation district, and the issuance of bonds and levy of a tax. Now, therefore, it is considered and ordered by the court that said navigation district be, and the same is hereby established by the name of \_\_\_\_\_ Navigation District, and that bonds of said district in the amount of \_\_\_\_\_ dollars be issued, and a tax of \_\_\_\_\_ cents on the one hundred dollars valuation, or so much thereof as may be necessary be levied upon all property within said navigation district, whether real, personal, mixed or otherwise, sufficient in amount to pay the interest on such bonds and provide a sinking fund to redeem them at maturity, and that if said tax shall at any time become insufficient for such purposes same shall be increased until same is sufficient. The metes and bounds of said district being as follows: (Giving metes and bounds). [Acts 1909, p. 32, § 9; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 5, amending art. 5967, Rev. Civ. St. 1911.]

**Art. 5969. Oath of commissioners.**—Before entering upon their duties, all navigation and canal commissioners shall take and subscribe before the county judge of the county having jurisdiction an oath faithfully to discharge the duties of their office without favor or partiality, and to render a true account of their doings to the commissioners' court having jurisdiction, or navigation board, by which they are appointed whenever required to do so, which oath shall be filed by the clerk of said court and preserved as part of the records of said navigation district. [Acts 1909, c. 32, § 11; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 6, amending art. 5969, Rev. Civ. St. 1911.]

**Art. 5970. Bond of commissioners.**—Before entering upon their duties, each of the navigation and canal commissioners shall make and enter into a good and sufficient bond in the sum of one thousand (\$1,000.00) dollars payable to the county judge of the county having jurisdiction for the use and benefit of said navigation district, and conditioned upon the faithful performance of their duties. [Acts 1909, p. 32, § 12; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 7, amending art. 5970, Rev. Civ. St. 1911.]

**Art. 5972. Engineers appointed, etc.; U. S. government aid, etc.**

See *Hunter v. Whiteaker & Washington* (Civ. App.) 230 S. W. 1096.

**Art. 5973. Commissioners' court to issue bonds, when and how.**—When said commissioners shall have determined the cost of the proposed improvement or improvements, all of the expenses incident thereto and cost of maintenance thereof, they shall certify to the commissioners' court having jurisdiction the amount of bonds necessary to be issued, and thereupon the said court, at a regular or special meeting, shall make an order directing the issuance of navigation bonds for such navigation district in the amount so certified; provided that the amount of bonds shall not exceed the amount authorized by the election therefore held. In the event the proceeds of bonds issued by such navigation district should be insufficient to complete the proposed improvement or construction, or in the event said commissioners shall determine to make other and further construction or improvements, or shall require additional funds with which to maintain the improvements made, they shall certify to said commissioners' court the necessity for an additional bond issue, stating the amount required, the purpose of the same, the rate of interest of said bonds, and the time for which they are to run, whereupon

said commissioners' court shall issue such bonds, unless the amount previously authorized shall have been exhausted, in which case said commissioners' court shall order an election on the issuance of said bonds to be held within such navigation district at the earliest possible legal time and in the manner hereinbefore provided for the original issue of bonds, at which election there shall be submitted the following proposition, and none other: "For the issuance of bonds and levy of tax in payment thereof"; "Against the issuance of bonds and levy of tax in payment thereof"; notices of said election shall be given as provided in Article 5964 of this chapter; and the election shall be held and conducted in the manner provided in Articles 5965 and 5966 of this chapter. Only those who are qualified property taxpaying voters as provided in this chapter shall vote at such election, and the returns of such election shall be canvassed as provided in Article 5964 of this chapter. [Acts 1909, p. 32, § 15; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 7a, amending art. 5973, Rev. Civ. St. 1911.]

**Art. 5975. Bonds, form of; denominations, term.**—All bonds issued under the provisions of this chapter shall be issued in the name of the navigation district, shall be signed by the county judge of the county whose commissioners' court has jurisdiction of said district, shall be attested by the county clerk, and the seal of the commissioners' court of such county shall be affixed to each; they shall be issued in such denominations and payable at such time, or times, not exceeding forty years from their date, as may be deemed most expedient by said commissioners' court, and said bonds shall bear interest not to exceed six per cent per annum. [Acts 1909, p. 32, § 16; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 8, amending art. 5975, Rev. Civ. St. 1911.]

**Art. 5978. Record of bonds to be kept; duties and fees of clerk.**—When bonds shall have been issued under the provisions of this chapter, the navigation board of said district shall procure and deliver to the treasurer of the county whose commissioners' court has jurisdiction, a well bound book in which a record shall be kept of all such bonds, with their numbers, amount, rate of interest, date of issuance, when due, where payable, amount received for same, the tax levy to pay interest on and to provide sinking funds for their payment. And said book shall at all times be open to the inspection of the parties interested in said district, either as taxpayers, or bondholders or otherwise; and upon payment of any bond, an entry thereof shall be made in said book. The county treasurer shall receive for his services in recording these matters the same fees as may be allowed by law to the county clerk for other like records. [Acts 1909, p. 32, § 19; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 9, amending art. 5978, Rev. Civ. St. 1911.]

**Art. 5982. Tax to pay interest and create sinking fund; maintenance tax.**

**Construction and operation in general.**—The grant of taxing power to any county or district by the Legislature should be construed with strictness, the presumption being that the Legislature has granted in clear terms all it intended to grant. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

The "Harris County Ship Channel Navigation District of Harris County," though having the same boundaries as Harris county, has no power of taxation, except such as is expressly conferred upon it by the law of its creation. *Id.*

**Property subject to taxation.**—In view of Const. art. 8, § 8, and Rev. St. art. 7525, Legislature might empower navigation district to tax rolling stock and intangible property of railroad, notwithstanding Const. art. 8, § 11, providing that property shall be assessed "in the county where situated," such property having no actual situs, but this article giving navigation district power to tax property "within said \* \* \* district" gives no power to tax rolling stock and intangible assets of railroad, such property not being within said district, and being property of such character that it has no actual



situs, and not being physically within such district. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 320.

Navigation district's power to "tax property within said navigation district, whether real, personal, mixed, or otherwise," gives district no power to tax intangible assets and rolling stock of railroad upon theory that the term "mixed or otherwise" gives such authority, for such words relate back to, and are qualified by, the words "property within said navigation district." *Id.*

**Art. 5984. Tax proceedings; compensation of assessor.**—The Navigation Board of said district shall provide all necessary additional books for the use of assessors and collectors of taxes and the clerk of the commissioners' court of jurisdiction for said navigation districts. The tax assessors of each county in said navigation district, when ordered to do so by the commissioners' court having jurisdiction of said district, shall assess all property within said navigation district which is located in his county and list the same for taxation in the books or rolls furnished him for said purpose, and return said books or rolls at the same time when he returns the other books or rolls of the State and county taxes for correction and approval to the commissioners' court of his county, and if said court shall find said books or rolls correct they shall approve the same, and in all matters pertaining to the assessment of property for taxation in said district, the tax assessors and boards of equalization of the counties in which said district is located shall be authorized to act and shall be governed by the laws of Texas for assessing and equalizing property for State and county taxes, except as herein provided. All taxes authorized to be levied by this chapter shall be a lien upon the property upon which said taxes are assessed, and said taxes may be paid and shall mature and be paid at the time provided by the laws of this State for the payment of State and county taxes; and all the penalties provided by the laws of this State for the non-payment of State and county taxes shall apply to all taxes authorized to be levied by this chapter. The tax assessors shall receive for such services such compensation as the said navigation and canal commissioners shall deem proper; provided that said county assessors shall in no event be allowed more than they are now allowed for like services. Should any tax assessor fail or refuse to comply with the orders of said commissioners' court requiring him to assess and list for taxation all the property in such navigation district, as herein provided, he shall be suspended from the further discharge of his duties by the commissioners' court of his county, and he shall be removed from office in the mode prescribed by law for the removal of county officers. [Acts 1909, p. 32, § 24; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 10, amending art. 5984, Rev. Civ. St. 1911.]

**Art. 5985. Compensation of tax collector; additional bond required.**—That tax collectors of the several counties in said navigation district shall be charged with the assessment rolls of navigation districts, and are required to make collection of all taxes levied and assessed against the property in their county within such district and promptly pay over the same to the treasurer of the county the commissioners' court of which has jurisdiction of said district; and said tax collectors shall be allowed no more compensation for the collection of said taxes than is now allowed for collection of other taxes, same to be fixed by the navigation and canal commissioners. The bonds of such collectors shall stand as security for the proper performance of their duties as tax collectors of such navigation districts; or, if in the judgment of the navigation and canal commissioners of such districts it be necessary, additional bonds, payable to such districts, may be required, and in all matters pertaining to the collection of taxes levied under the provisions of this chapter,

the tax collectors shall be authorized to act and shall be governed by the laws of the State of Texas for the collection of State and county taxes, except as herein provided; and suits may be brought for the collection of said taxes and the enforcement of the tax liens created by this chapter. Should any collector of taxes fail or refuse to give such additional bond or security as herein provided, when requested to do so by said navigation and canal commissioners, within the time prescribed by law for such purposes, he shall be suspended from office by the commissioners' court of his county, and immediately thereafter be removed from office in the mode prescribed by law. [Acts 1909, p. 32, § 25; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 11, amending art. 5985, Rev. Civ. St. 1911.]

**Explanatory.**—The title of the act, in enumerating the articles of the statute amended, omits art. 5985.

**Art. 5987. County treasurer; duties.**—The county treasurer of the county, the commissioners' court of which has jurisdiction of said district, shall be treasurer of said navigation district, and it shall be his duty to open an account of all monies received by him belonging to such district and all amounts paid out by him. He shall pay out no money except upon a voucher signed by the chairman or any two of said navigation and canal commissioners, or the said commissioners' court, and he shall carefully preserve on file all orders for the payment of money; and, as often as required by the said commissioners, or the said commissioners' court, he shall render a correct account to them of all matters pertaining to the financial condition of such district. [Acts 1909, p. 32, § 27; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 12, amending art. 5987, Rev. Civ. St. 1911.]

**Art. 5988. County Treasurer to give special bond; additional bond.**

See *Charlton v. Harris County* (Civ. App.) 228 S. W. 969.

**Art. 5992. Work, how done; contracts, how let when U. S. Government fails to act.**—If the improvement or improvements be not carried out and performed by the Government of the United States, as herein provided, the contract or contracts for such improvement or improvements shall be let by the navigation and canal commissioners, and the same shall be awarded to the lowest and best responsible bidder, after giving notice by advertising the same in one or more newspapers of general circulation in the State of Texas once a week for four consecutive weeks, and by posting notices for at least thirty days in five public places in the county of jurisdiction, one of which shall be at the court house door, and at least two of which shall be within said district. Nothing herein contained shall prevent the making of more than one improvement, and where more than one improvement is to be made, the contract may be let separately for each or one contract for all such improvements. [Acts 1909, p. 32, § 32; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 13, amending art. 5992, Rev. Civ. St. 1911.]

**Art. 6000. Unlawful for officers to be interested in contracts.**—Neither the county judge of any county in said navigation district, nor any county commissioner of said counties, nor members of the navigation board or engineer shall be directly or indirectly interested for themselves, or as agents for any one else, in the contract for the construction of any work to be performed by such navigation district. [Acts 1909, p. 32, § 40; Acts 1921, 37th Leg. 1st C. S., ch. 39, § 14, amending art. 6000, Rev. Civ. St. 1911.]

## INCIDENTAL FACILITIES

**Art. 6001a. Navigation districts may construct or acquire incidental facilities; issuance of bonds.**—Navigation Districts provided for in Title 96, of the Revised Statutes of the State of Texas, 1911, which have been or may be created for the development of deep water navigation, having a municipality containing or hereafter containing one hundred thousand population or more as determined by the last preceding census, are, hereby granted, in addition to the powers already conferred by Title 96 of the Revised Statutes of Texas of 1911, the right, power and authority to acquire, purchase, take over, construct, maintain, operate, develop and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lightering, lands, towing facilities, and any and all other facilities or aids incident to or necessary to the operation or development of a port, ports, waterways, within the district and extending to the Gulf of Mexico; and to issue bonds at any time in the future, in payment therefor, upon compliance with the provisions hereinafter set forth, and as now prescribed in Title 96 of the Revised Statutes of Texas, 1911; provided that not less than two-thirds of the qualified voters of said district voting at an election called therefor, in the manner provided in Title 96 of the Revised Statutes of Texas, 1911, must have voted in favor of the issuance of said bonds before the same shall be issued and before the same shall constitute a valid obligation of said district; provided, however, that the outstanding bonds and the additional bonds so ordered, said additional bonds to be issued in manner now prescribed by Title 96 of Revised Statutes of Texas, 1911, shall not exceed in amount ten per cent of the assessed value of the real property in such district as shown by the last annual assessment thereof made for State and county. Provided that bonds so issued may bear interest at a rate not to exceed six per cent (6%) per annum. [Acts 1921, 37th Leg. 1st C. S., ch. 30, § 1.]

Took effect Aug. 21, 1921.

**Art. 6001aa. Petition for election.**—When in the opinion of the Navigation Board of a Navigation District coming within the provisions of this Act, it shall be deemed advisable for said navigation district to avail itself of the rights, powers and authority provided herein, said Navigation Board shall so certify to the Commissioners' Court of the county wherein said district is situated, petitioning the holding of an election therefor, whereupon the Commissioners' Court shall set a day for public hearing for the consideration of said petition, said hearing to be held at such place as may be designated by the said court, and to be held not less than thirty nor more than sixty days from the presentation of said petition. [Id., § 2.]

**Art. 6001b. Hearing of petition; contest.**—Upon the day set by said Commissioners' Court for the hearing of said petition any person who has taxable property within the proposed district or who may be affected thereby may appear before said Navigation Board and contest the necessity, advisability or practicability of said election, and may offer testimony in favor of or against said election. [Id., § 3.]

**Art. 6001bb. Order for election; mode of submission.**—After the hearing upon the petition as herein provided if the Navigation Board shall still be of the opinion said election should be held the Commissioners' Court of said county shall order an election, in which order provision shall be made for submitting to the qualified property tax paying voters

resident in said district whether or not the said district should avail itself of the rights, powers and authority provided for herein, said order shall state the day upon which said election shall be held, said day to be at the earliest legal time. At said election there shall be submitted the following propositions:

“For the development of the port by the Navigation District.”

“Against the development of the port by the Navigation District.”

[Id., § 4.]

**Art. 6001c. Notice of election.**—Notice of such election stating the time and place of holding the same shall be given by the Clerk of the County Court by posting notices thereof in four public places in such proposed Navigation District and one at the court house door of the county in which said district is situated for thirty days prior to the day set for the election, such notices shall contain the propositions to be voted upon as set forth in Section 4 (four) hereof, and shall also contain a copy of the order of the court ordering the election. [Id., § 5.]

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posted notice.

**Art. 6001cc. General election laws to apply.**—The manner of conducting said election shall be governed by the election laws of the State of Texas, except as herein otherwise provided. None but resident property tax payers who are qualified voters of said district shall be entitled to vote at such election. The County Commissioners' Court of the county in which said election is being held shall select and appoint judges and other necessary officers of the election and shall provide one and one-half times as many ballots as there are qualified resident property tax paying voters within such district, said ballots shall have printed thereon the words and none others: “For the development of the port by the Navigation District.” “Against the development of the port by the Navigation District.” The expense of said election shall be borne by the Navigation District. [Id., § 6.]

**Art. 6001d. Qualifications of voters.**—Every person who offers to vote in any election held under the provisions of this Act shall possess the qualifications hereinbefore set forth and shall take the oath as prescribed in Article 5966 of the Revised Statutes of Texas of 1911. [Id., § 7.]

**Art. 6001dd. Return of election; canvass; declaration of result.**—Immediately after the election the presiding judge at each polling place shall make return of the result in the same manner as provided for in elections for State and county officers and return the ballot boxes to the county clerk who shall keep same in a safe place and deliver them together with the returns from the several polling places to the Commissioners' Court at its next regular session or special session called for the purpose of canvassing the votes, and the County Commissioners shall at such session canvass the vote; and if it be found that two-thirds majority of the votes cast at said election shall have been cast in favor of the development of the port by the Navigation District then the court shall declare the result of said election to be in favor of the development of the port by said Navigation District and enter same in the minutes of the court as follows:

“Commissioners' Court of \_\_\_\_\_ County, Texas, \_\_\_\_\_ Term A. D. \_\_\_\_\_, in the matter of the petition of the Navigation Board of the \_\_\_\_\_ County \_\_\_\_\_ Navigation District, praying that the right, power and authority be granted said Navigation District to develop the port

of \_\_\_\_\_ (here enter the name of said municipality of one hundred thousand population or more). BE IT KNOWN, That an election called for that purpose in said District, held on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_, a two-thirds majority of the resident property tax payers voting thereon voted in favor of the development of said port by said Navigation District.

“NOW THEREFORE, it is considered and ordered by the Court that said Navigation District be and is hereby authorized to proceed with the development of said port as authorized by law.” [Id., § 8.]

**Art. 6001e. Powers of district.**—If at said election two-thirds of the qualified property tax paying voters in said district and voting at said election shall have declared themselves in favor of: “The development of the port by the Navigation District” said district shall thereafter have the right, power and authority, subject to the terms and provisions hereof, to acquire, purchase, take over, construct, maintain, operate, develop and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, lands, towage facilities, and any and all other facilities or aids incident to or necessary to the operation or development of a port, ports, waterways and the Navigation District, and to issue bonds in payment therefor and to do any and all other acts and things herein provided. [Id., § 9.]

**Art. 6001ee. Regulation of wharfage; charges.**—Navigation districts empowered as herein provided to develop ports, waterways and navigation aids, within the limits of such navigation districts, shall in addition to the powers herein enumerated have the fullest powers consistent with the Constitution of this State for the regulation of wharfage and of all facilities of or pertaining to the said port, waterways and navigation district, and shall have a right to assess and collect charges for the use of all facilities acquired or constructed in accordance with the provisions of this Act. [Id., § 10.]

**Art. 6001f. Power of eminent domain; leasing of facilities; consent of municipalities.**—Navigation districts empowered as herein provided may exercise the right of eminent domain as heretofore granted or as may hereafter by law be granted navigation districts and may also acquire, and take over, by lease or rental agreements, the docks, wharves, buildings, railroads, lands, improvements and other facilities already provided, constructed or owned by any incorporated municipality situated within such district, for a period of not less than twenty-five (25) years; provided that such property or facilities owned, controlled or constructed by such incorporated municipality may be taken over, leased and operated by said Navigation District only with the consent of the lawful authorities of such municipality, and upon such terms as may be mutually agreed upon by the Navigation District and the said municipality, provided further; that no agreement for the use, acquisition or operation of such property or facilities of such municipality by the Navigation District shall be for a lease or rental value thereof, which shall exceed the annual net revenues derived or to be derived by the Navigation District, after payment of the expenses of operation and maintenance of said property and facilities; provided still further; that the Navigation District shall have no supervision or control over such property or facilities owned, controlled or constructed by any municipality, until agreement for the lease and rental thereof by the Navigation District has been reached and made in the manner herein provided. [Id., § 11.]

**Art. 600iff. Lease or condemnation of unimproved lands.**—Navigation Districts acquiring, leasing and taking over unimproved lands owned or controlled by any such incorporated municipality, may pay for the use, rent and hire of such unimproved lands, a price or rental value to be fixed by the Navigation and Canal Commissioners; provided that should such Navigation and Canal Commissioners fail or be unable to agree upon terms and conditions for the use and rental of such unimproved lands, then the Navigation District, under its right of eminent domain, shall be and is authorized to condemn such lands or parts thereof, as in its discretion the interest of the Navigation District requires in manner and form as by law provided for other condemnation proceedings. [Id., § 12.]

**Art. 6001g. Navigation and canal commissioners.**—After any navigation district has availed itself of the provisions of this Act, and has by a two-thirds majority of the resident property owning tax paying voters voting at said election voted in favor of the development of the port in the manner herein provided, it shall thereafter be managed, governed and controlled by five (5) Navigation and Canal Commissioners, who shall be appointed as follows: Two of said commissioners shall be selected by a majority of the city council of the municipality having a population of one hundred thousand or more situated in said district, which said commissioners shall serve for a term of one and two years respectively. At the expiration of the term of office of said commissioners the city council shall select their successors annually to serve for two years. Two Navigation and Canal Commissioners and their successors, shall be selected by the Commissioners' Court of the county wherein the navigation district is situated, in like manner and for like terms. One Navigation and Canal Commissioner shall be selected by a majority vote of the city council of said municipality and by the County Commissioners' Court of said county in joint session called by the county judge of said county, which commissioner shall be chairman and serve for two years and his or her successor shall be selected in the same manner and for a like term. Each and all said commissioners shall be freehold property tax-payers and legal voters in said navigation district and shall give the bond and take the oath required by Title 96 of the Revised Statutes of Texas of 1911 and shall serve until their successors are qualified. Their duties shall be as prescribed in Title 96 and as provided in this Act, and they shall receive such compensation as may be fixed by the Navigation Board. A majority of said Commissioners shall have power to act. Said Navigation and Canal Commissioners may be removed for malfeasance, nonfeasance in office, inefficiency or other cause deemed sufficient by a majority of the City Council or a majority of the Commissioners' Court, as the case may be, the City Council having the right to so remove a commissioner or commissioners appointed by it, and the Commissioners' Court shall have the power to so remove a commissioner or commissioners that it has selected, and the City Council and Commissioners' Court shall have the right jointly to remove the commissioner so appointed by them jointly. Should any vacancy occur through the death, resignation or otherwise of any commissioner, the same shall be filled for the unexpired term by the City Council or Commissioners' Court as the case may be, the City Council having the authority hereunder to fill the vacancies of its appointees, and the Commissioners' Court of its appointees. [Id., § 13.]

**Art. 6001gg. Employés.**—The Navigation and Canal Commissioners of such navigation district shall have full authority to employ such

persons as they may deem necessary for the construction, maintenance, operation and development of the navigation district, its business and facilities, prescribe their duties and to determine the amount of their compensation. [Id., § 14.]

**Art. 6001h. Letting of contracts.**—The provisions heretofore provided for letting of contracts for navigation districts shall apply in all cases consistent with the provisions of this Act; provided, that in case of emergency contracts may be let by Navigation and Canal Commissioners not exceeding One Thousand (\$1,000.00) dollars without advertisement for bids; provided further that in case of urgent necessity or present calamity, advertisement for bids may be waived. [Id., § 15.]

**Art. 6001hh. Grant of franchises; licenses or permits.**—Navigation districts empowered as herein provided shall have power, subject to the terms and provisions hereof, to grant franchises to persons or corporations on property owned or controlled by the navigation districts, provided said franchises are granted for purposes consistent with the provisions of this Act, but no franchise shall be granted for a longer period than thirty years. No franchise shall be granted hereunder except upon the affirmative vote of at least three of the Navigation and Canal Commissioners at three separate meetings of said Navigation and Canal Commissioners, said meetings to be not closer together than one week, and no franchise shall be granted until after the same as finally proposed to be passed shall be published in full once a week for three consecutive weeks in some daily newspaper of general circulation published within said district, which publication shall be made at the expense of the applicant or person or persons desiring said grant and said franchise shall require the grantee therein to file his or their written acceptance thereof within thirty days from the time of the final passage of said franchise; provided that nothing herein contained shall be construed as preventing said navigation district from granting revocable licenses or permits for the use of limited portions of water front or facilities for the purposes consistent with the provisions of this Act. [Id., § 16.]

**Art. 6001i. Same; submission to vote.**—If in the opinion of the Navigation and Canal Commissioners any proposed franchise should be submitted to a vote of the people they shall so certify to the Commissioners' Court of the county in which said navigation district is located, whereupon said court shall order an election thereon at the earliest legal time, and the same rules with regard to notice of election, holding of the election, etc., shall apply as prescribed heretofore in this Act for the election on the proposition of the development of the port. At said election any resident of said district qualified under the constitution and laws of the State of Texas to vote for Governor in a general election shall be qualified to vote. [Id., § 17.]

**Art. 6001ii. Same; ballots; result.**—The ballots used for voting upon such proposed franchise shall set forth the nature of said franchise sufficiently to identify it, and shall also set forth upon separate lines the words "For the franchise" and "Against the franchise." If at said election a majority of those voting shall vote in favor of the franchise, the same shall be granted; otherwise said franchise shall be of no force and effect. [Id., § 18.]

**Art. 6001j. Protest of voters shall suspend franchise; election.**—If prior to the date when any franchise shall have been granted by the Navigation and Canal Commissioners a petition signed by qualified

voters of said district equal in number to ten per cent. of the total vote cast at the last general election for State officers, shall be presented to the Commissioners' Court protesting against the enactment or granting of said franchise it shall be suspended from taking effect and immediately upon the filing of such petition the Commissioners' Court shall order an election upon said proposed franchise, which said election shall be governed by the provisions of Sections 17 and 18 [Arts. 6001i, 6001ii] hereof. [Id., § 19.]

**Art. 6001jj. Handling and deposit of funds.**—The funds of Navigation Districts empowered and operating as herein provided shall be handled in the same manner as heretofore provided for Navigation Districts by Titles 96 and 29. The Canal Commissioners shall provide for a depository for all of the funds of said District, by complying in all respects with the laws of the designation of county depositories. When the depository shall have given bond and the same has been approved, the county treasurer shall be required to give only such bond as may be required by the Navigation and Canal Commissioners. [Id., § 20.]

**Art. 6001k. Navigation and Canal Commissioners subject to supervision of Navigation Board.**—All acts of the Navigation and Canal Commissioners shall be subject to the supervision and control of the Navigation Board, composed of the Mayor and City Council and the County Judge and County Commissioners of the county within which said district is located. [Id., § 21.]

**Art. 6001kk. Additional powers of districts.**—Navigation districts empowered in operating as herein provided shall have, in addition to powers herein conferred, all the authority heretofore vested in Navigation districts as prescribed by Title 96 of the Revised Statutes of the State of Texas of 1911, or as provided in the general or special laws of this State, including right to issue bonds, save wherein same shall conflict with this Act. [Id., § 22.]

**Art. 6001l. Partial invalidity.**—If any part of this Act shall be held to be unconstitutional or void, it shall not affect the other portions of this law. [Id., § 23.]

**Art. 6001ll. Powers of municipalities preserved.**—Nothing herein shall repeal or affect the police powers of any municipality within the Navigation District, or the laws, ordinances or regulations now existing or hereafter adopted or enacted, authorizing and empowering such municipality to exercise such powers as to any navigable stream or aids to navigation and facilities therefor, in a Navigation District not in conflict with this Act. [Id., § 24.]

Sec. 25 repeals all laws in conflict.



## TITLE 96½

## NEGOTIABLE INSTRUMENTS ACT

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## TITLE I. NEGOTIABLE INSTRUMENTS IN GENERAL

## ARTICLE I. FORM AND INTERPRETATION

**Article 6001—1. Instruments negotiable.**—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. It must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. [Acts 1919, 36th Leg., ch. 123, § 1.]

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

**Art. 6001—2. Sum certain.**—The sum payable is a sum certain with the meaning of this Act, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [Id., § 2.]

**Art. 6001—3. Unconditional order or promise to pay.**—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument, But an order or promise to pay out of a particular fund is not unconditional. [Id., § 3.]

**Art. 6001—4. Payable at determinable future time.**—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. [Id., § 4.]

**Art. 6001—5. Provisions affecting negotiability.**—An instrument which contains an order or promise to do any act in addition to the pay-

ment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. [Id., § 5.]

**Art. 6001—6. Provisions affecting validity or negotiability.**—The validity and negotiable character of an instrument are not affected by the fact that;

1. It is not dated; or

2. Does not specify the value given, or that any value has been given therefor; or

3. Does not specify the place where it is drawn or the place where it is payable; or

4. Bears a seal; or

5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. [Id., § 6.]

**Art. 6001—7. Payable on demand.**—An instrument is payable on demand;

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand. [Id., § 7.]

**Art. 6001—8. Payable to order.**—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of;

1. A payee who is not maker, drawer, or drawee; or

2. The drawer or maker; or

3. The drawee; or

4. Two or more payees jointly; or

5. One or some of several payees; or

6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty. [Id., § 8.]

**Art. 6001—9. Payable to bearer.**—The instrument is payable to bearer;

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank. [Id., § 9.]

**Art. 6001—10. Sufficiency of form.**—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof. [Id., § 10.]

**Art. 6001—11. Date of instrument.**—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be. [Id., § 11.]

**Art. 6001—12. Ante-dating or post-dating.**—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. [Id., § 12.]

**Art. 6001—13. Undated instrument.**—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. [Id., § 13.]

**Art. 6001—14. Blanks; filling in.**—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [Id., § 14.]

**Art. 6001—15. Incomplete instrument.**—Where an incomplete instrument has not been delivered, it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. [Id., § 15.]

**Art. 6001—16. Effect of delivery of instrument.**—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid

and intentional delivery by him is presumed until the contrary is proved. [Id., § 16.]

**Art. 6001—17. Construction of ambiguities or omissions.**—Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. [Id., § 17.]

**Art. 6001—18. Persons not signing instrument.**—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. [Id., § 18.]

**Art. 6001—19. Signature by agent.**—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. [Id., § 19.]

**Art. 6001—20. Signature in representative capacity.**—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability. [Id., § 20.]

**Art. 6001—21. Signature by procuration.**—A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [Id., § 21.]

**Art. 6001—22. Indorsement or assignment by infant or corporation.**—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. [Id., § 22.]

**Art. 6001—23. Forged or unauthorized signature.**—When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain

the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority. [Id., § 23.]

## ARTICLE II. CONSIDERATION

**Art. 6001—24. Valuable consideration.**—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value. [Acts 1919, 36th Leg., ch. 123, § 24.]

**Art. 6001—25. Presumption of consideration.**—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time. [Id., § 25.]

**Art. 6001—26. Holder for value.**—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. [Id., § 26.]

**Art. 6001—27. Holder with lien deemed holder for value.**—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [Id., § 27.]

**Art. 6001—28. Absence or failure of consideration as defense.**—Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. [Id., § 28.]

**Art. 6001—29. Accommodation party; liability to holder for value.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. [Id., § 29.]

## ARTICLE III. NEGOTIATION

**Art. 6001—30. When instrument is negotiated.**—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery. [Acts 1919, 36th Leg., ch. 123, § 30.]

**Art. 6001—31. Sufficiency of indorsement.**—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. [Id., § 31.]

**Art. 6001—32. Indorsement of entire instrument.**—The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But

where the instrument has been paid in part, it may be indorsed as to the residue. [Id., § 32.]

**Art. 6001—33. Kinds of indorsement.**—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional. [Id., § 33.]

**Art. 6001—34. Special indorsement; indorsement in blank.**—A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. [Id., § 34.]

**Art. 6001—35. Changing blank into special indorsement.**—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. [Id., § 35.]

**Art. 6001—36. Restrictive indorsement.**—An indorsement is restrictive, which either;

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive. [Id., § 36.]

**Art. 6001—37. Same; rights of indorsee.**—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. [Id., § 37.]

**Art. 6001—38. Qualified indorsement.**—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. [Id., § 38.]

**Art. 6001—39. Conditional indorsement.**—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [Id., § 39.]

**Art. 6001—40. Negotiation of instrument payable to bearer indorsed specially.**—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery, but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement. [Id., § 40.]

**Art. 6001—41. Indorsement by several payees or indorsees.**—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others. [Id., § 41.]



**Art. 6001—42. Instrument drawn or indorsed to person in official capacity.**—Where an instrument is drawn or indorsed to a person as “Cashier” or other fiscal officer of a bank or corporation, it is deemed prima facia to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. [Id., § 42.]

**Art. 6001—43. Indorsement when name wrongly designated or misspelled.**—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature. [Id., § 43.]

**Art. 6001—44. Indorsement in representative capacity.**—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. [Id., § 44.]

**Art. 6001—45. Time of indorsement.**—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facia to have been effected before the instrument was overdue. [Id., § 45.]

**Art. 6001—46. Place of indorsement.**—Except where the contrary appears, every indorsement is presumed prima facia to have been made at the place where the instrument is dated. [Id., § 46.]

**Art. 6001—47. Continuation of negotiability.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [Id., § 47.]

**Art. 6001—48. Striking indorsements.**—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [Id., § 48.]

**Art. 6001—49. Transfer without indorsement.**—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [Id., § 49.]

**Art. 6001—50. Negotiation by prior party.**—Where an instrument is negotiated back to a prior party; such party may, subject to the provisions of this Act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. [Id., § 50.]

#### ARTICLE IV. RIGHTS OF THE HOLDER

**Art. 6001—51. Suit by and payment to holder.**—The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument. [Acts 1919, 36th Leg., ch. 123, § 51.]

**Art. 6001—52. Holder in due course; who is.**—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

3. That he took it in good faith and for value;

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. [Id., § 52.]

**Art. 6001—53. Same; who is not.**—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. [Id., § 53.]

**Art. 6001—54. Same; notice of infirmity.**—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. [Id., § 54.]

**Art. 6001—55. Defective title to instrument.**—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [Id., § 55.]

**Art. 6001—56. Notice of infirmity or defect.**—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. [Id., § 56.]

**Art. 6001—57. Rights of holder in due course.**—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. [Id., § 57.]

**Art. 6001—58. Defenses against holder other than holder in due course.**—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. [Id., § 58.]

**Art. 6001—59. Holder in due course; presumption and burden of proof.**—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. [Id., § 59.]

#### ARTICLE V. LIABILITIES OF PARTIES

**Art. 6001—60. Liability of maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse. [Acts 1919, 36th Leg., ch. 123, § 60.]

**Art. 6001—61. Liability of drawer.**—The drawer by drawing the instrument admits the existence of the payee and his then capacity to endorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder. [Id., § 61.]

**Art. 6001—62. Liability of acceptor.**—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits;

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to endorse. [Id., § 62.]

**Art. 6001—63. Indorser; who is.**—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. [Id., § 63.]

**Art. 6001—64. Liability of indorser in blank.**—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. [Id., § 64.]

**Art. 6001—65. Warranties; instrument negotiated by delivery or qualified indorsement.**—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be:

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes. [Id., § 65.]

**Art. 6001—66. Same; indorsement without qualification.**—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivision one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and

that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. [Id., § 66.]

**Art. 6001—67. Liability of indorser of instrument negotiable by delivery.**—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. [Id., § 67.]

**Art. 6001—68. Order of liability of indorsers.**—As respects one another indorsers are liable prima facia in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. [Id., § 68.]

**Art. 6001—69. Liability of broker or agent.**—Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent. [Id., § 69.]

#### ARTICLE VI. PRESENTMENT FOR PAYMENT

**Art. 6001—70. Presentment to charge person primarily liable.**—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. [Acts 1919, 36th Leg., ch. 123, § 70.]

**Art. 6001—71. Presentment of instrument not payable on demand.**—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. [Id., § 71.]

**Art. 6001—72. Sufficiency of presentment.**—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made. [Id., § 72.]

**Art. 6001—73. Place of presentment.**—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [Id., § 73.]

**Art. 6001—74. Exhibit of instrument; delivery on payment.**—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. [Id., § 74.]

**Art. 6001—75. Presentment of instrument payable at bank.**—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. [Id., § 75.]

**Art. 6001—76. Presentment where principal debtor is dead.**—Where a person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be found. [Id., § 76.]

**Art. 6001—77. Presentment to partners.**—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them even though there has been a dissolution of the firm. [Id., § 77.]

**Art. 6001—78. Presentment to joint debtors.**—Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. [Id., § 78.]

**Art. 6001—79. Presentment to charge drawer.**—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require the drawee or acceptor will pay the instrument. [Id., § 79.]

**Art. 6001—80. Presentment to charge indorser.**—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented. [Id., § 80.]

**Art. 6001—81. Excuse for delay in presentment.**—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. [Id., § 81.]

**Art. 6001—82. Presentment for payment dispensed with.**—Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied. [Id., § 82.]

**Art. 6001—83. Dishonor by nonpayment.**—The instrument is dishonored by nonpayment when:

1. When it is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid. [Id., § 83.]

**Art. 6001—84. Liability of parties secondarily liable on dishonor.**—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. [Id., § 84.]

**Art. 6001—85. Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due (or becoming payable) on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday. [Id., § 85.]

See notes under art. 593.

**Art. 6001—86. Same; computation.**—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. [Id., § 86.]

**Art. 6001—87. Instrument payable at bank.**—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. [Id., § 87.]

**Art. 6001—88. Payment in due course.**—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. [Id., § 88.]

#### ARTICLE VII. NOTICE OF DISHONOR

**Art. 6001—89. To whom given.**—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. [Acts 1919, 36th Leg., ch. 123, § 89.]

**Art. 6001—90. By whom given.**—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given. [Id., § 90.]

**Art. 6001—91. Same; by agent.**—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. [Id., § 91.]

**Art. 6001—92. Effect of notice given by or in behalf of holders.**—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. [Id., § 92.]

**Art. 6001—93. Effect of notice given by or on behalf of party entitled to give.**—Where notice is given by or on behalf of a party entitled

to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given. [Id., § 93.]

**Art. 6001—94. Notice of instrument dishonored in hands of agent.**—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice himself the same time for giving notice as if the agent had been an independent holder. [Id., § 94.]

**Art. 6001—95. Written notice; sufficiency.**—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. [Id., § 95.]

**Art. 6001—96. Form of notice.**—The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate, that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails. [Id., § 96.]

**Art. 6001—97. Notice to party or agent.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf. [Id., § 97.]

**Art. 6001—98. Notice where party is dead.**—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. [Id., § 98.]

**Art. 6001—99. Notice to partners.**—Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution. [Id., § 99.]

**Art. 6001—100. Notice to parties jointly liable.**—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. [Id., § 100.]

**Art. 6001—101. Notice to bankrupt or assignor for creditors.**—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. [Id., § 101.]

**Art. 6001—102. Time for giving notice.**—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the time fixed by this act. [Id., § 102.]

**Art. 6001—103. Place of giving notice; parties residing in same place.**—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following. [Id., § 103.]

**Art. 6001—104. Same; parties residing in different places.**—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter

2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision. [Id., § 104.]

**Art. 6001—105. Sender deemed to have given due notice.**—Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. [Id., § 105.]

**Art. 6001—106. Deposit of notice in post office.**—Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department. [Id., § 106.]

**Art. 6001—107. Notice to antecedent parties; time for.**—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. [Id., § 107.]

**Art. 6001—108. Place for sending notice.**—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section. [Id., § 108.]

**Art. 6001—109. Waiver of notice.**—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied. [Id., § 109.]

**Art. 6001—110. Same; effect.**—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. [Id., § 110.]

**Art. 6001—111. Waiver of protest.**—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor. [Id., § 111.]

**Art. 6001—112. Notice of dishonor dispensed with.**—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged. [Id., § 112.]

**Art. 6001—113. Delay in giving notice; excused, when.**—Delay in giving notice of dishonor is excused when the delay is caused by circum-



stances beyond the control of the holder, and not imputable to this default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. [Id., § 113.]

**Art. 6001—114. Notice to drawer.**—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. When the drawee is a fictitious person or person not having capacity to contract;
3. When the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment. [Id., § 114.]

**Art. 6001—115. Notice to indorser.**—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation. [Id., § 115.]

**Art. 6001—116. Notice of dishonor by nonpayment of instrument not accepted.**—Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted. [Id., § 116.]

**Art. 6001—117. Omission to give notice of dishonor by non-acceptance.**—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission. [Id., § 117.]

**Art. 6001—118. Protest; when necessary.**—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange. [Id., § 118.]

#### ARTICLE VIII. DISCHARGE OF NEGOTIABLE INSTRUMENTS

**Art. 6001—119. What constitutes discharge.**—A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. [Acts 1919, 36th Leg., ch. 123, § 119.]

**Art. 6001—120. Discharge of person secondarily liable.**—A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. [Id., § 120.]

**Art. 6001—121. Right of party secondarily liable paying instrument.**—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. [Id., § 121.]

**Art. 6001—122. Renunciation of rights by holder.**—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. [Id., § 122.]

**Art. 6001—123. Unintentional cancellation.**—A cancellation made unintentionally, or under mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake without authority. [Id., § 123.]

**Art. 6001—124. Material alteration; effect.**—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. [Id., § 124.]

**Art. 6001—125. Same; what constitutes.**—Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium of currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. [Id., § 125.]

## TITLE II. BILLS OF EXCHANGE

### ARTICLE I. FORM AND INTERPRETATION

**Art. 6001—126. Bill of exchange defined.**—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum

certain in money to order or to bearer. [Acts 1919, 36th Leg., ch. 123, § 126.]

**Art. 6001—127. Not an assignment of funds in hands of drawee.**—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. [Id., § 127.]

**Art. 6001—128. Address to more than one drawee.**—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession. [Id., § 128.]

**Art. 6001—129. Inland and foreign bills.**—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. [Id., § 129.]

**Art. 6001—130. Bill as promissory note.**—Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. [Id., § 130.]

**Art. 6001—131. Referee in case of need.**—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit. [Id., § 131.]

## ARTICLE II. ACCEPTANCE

**Art. 6001—132. How made.**—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. [Acts 1919, 36th Leg., ch. 123, § 132.]

**Necessity of writing.**—An acceptance of a draft must be in writing. *First Nat. Bank v. Sanford* (Civ. App.) 228 S. W. 650.

**Art. 6001—133. Acceptance written on bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored. [Id., § 133.]

**Art. 6001—134. Acceptance on separate paper.**—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. [Id., § 134.]

**Art. 6001—135. Promise to accept.**—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who upon the faith thereof, receives the bill for value. [Id., § 135.]

**Necessity of writing.**—An acceptance of a draft must be in writing. *First Nat. Bank v. Sanford* (Civ. App.) 228 S. W. 650.

**Art. 6001—136. Time allowed drawee to accept.**—The drawee is allowed twenty-four hours after presentment, in which to decide whether

or not he will accept the bill; but the acceptance if given, dates as of the day of presentation. [Id., § 136.]

**Art. 6001—137. Drawee retaining or destroying bill.**—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same. [Id., § 137.]

**Art. 6001—138. Acceptance of incomplete bill.**—A bill may be accepted before it has been signed by the drawee, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. [Id., § 138.]

**Art. 6001—139. Kinds of acceptances.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. [Id., § 139.]

**Art. 6001—140. General acceptance.**—An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere. [Id., § 140.]

**Art. 6001—141. Qualified acceptance.**—An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all. [Id., § 141.]

**Art. 6001—142. Same; rights of parties as to.**—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto. [Id., § 142.]

### ARTICLE III. PRESENTMENT FOR ACCEPTANCE .

**Art. 6001—143. When necessary.**—Presentment for acceptance must be made;

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. [Acts 1919, 36th Leg., ch. 123, § 143.]

**Art. 6001—144. Release of drawer and indorsers by failure to present.**—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged. [Id., § 144.]

**Art. 6001—145. Manner of making presentment.**—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf, and;

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. [Id., § 145.]

**Art. 6001—146. Days for making presentment.**—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day. [Id., § 146.]

**Art. 6001—147. Excuse for delay in presentment.**—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. [Id., § 147.]

**Art. 6001—148. Same.**—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases;

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some other ground. [Id., § 148.]

**Art. 6001—149. Dishonor by non-acceptance.**—A bill is dishonored by non-acceptance;

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted. [Id., § 149.]

**Art. 6001—150. Duty of holder on non-acceptance.**—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers. [Id., § 150.]

**Art. 6001—151. Rights of holder on non-acceptance.**—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. [Id., § 151.]

#### ARTICLE IV. PROTEST

**Art. 6001—152. When protest is necessary.**—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. [Acts 1919, 36th Leg., ch. 123, § 152.]

**Art. 6001—153. Manner of making protest.**—The protest must be annexed to the bill, or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify;

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. [Id., § 153.]

**Art. 6001—154. By whom made.**—Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. [Id., § 154.]

**Art. 6001—155. When made.**—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [Id., § 155.]

**Art. 6001—156. Where made.**—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. [Id., § 156.]

**Art. 6001—157. Protest for non-acceptance and for non-payment.**—A bill which has been protested for non-acceptance may be subsequently protested for non-payment. [Id., § 157.]

**Art. 6001—158. Protest before maturity.**—Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. [Id., § 158.]

**Art. 6001—159. When dispensed with.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor.

Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. [Id., § 159.]

**Art. 6001—160. Protest on copy.**—When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. [Id., § 160.]

#### ARTICLE V. ACCEPTANCE FOR HONOR

**Art. 6001—161. Acceptance supra protest for honor.**—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for the part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. [Acts 1919, 36th Leg., ch. 123, § 161.]

**Art. 6001—162. Same; writing.**—An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. [Id., § 162.]

**Art. 6001—163. Same; for drawer.**—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. [Id., § 163.]

**Art. 6001—164. Liability of acceptor for honor.**—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. [Id., § 164.]

**Art. 6001—165. Same.**—The acceptor for honor, by such acceptance engages that he will on due presentation pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given him. [Id., § 165.]

**Art. 6001—166. Maturity of bill payable after sight accepted for honor.**—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor. [Id., § 166.]

**Art. 6001—167. Protest for non-payment of bill accepted for honor or containing referee in case of need.**—Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need. [Id., § 167.]

**Art. 6001—168. Presentment for payment to acceptor for honor.**—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four. [Id., § 168.]

**Art. 6001—169. Delay in presentment to acceptor for honor, or referee in case of need.**—The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need. [Id., § 169.]

**Art. 6001—170. Dishonor of bill by acceptor for honor.**—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him. [Id., § 170.]

#### ARTICLE VI. PAYMENT FOR HONOR

**Art. 6001—171. Who may make.**—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [Acts 1919, 36th Leg., ch. 123, § 171.]

**Art. 6001—172. How made.**—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. [Id., § 172.]

**Art. 6001—173. Declaration before making.**—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [Id., § 173.]

**Art. 6001—174. Preference to parties offering to make.**—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. [Id., § 174.]

**Art. 6001—175. Effect on subsequent parties.**—Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. [Id., § 175.]

**Art. 6001—176. Holder refusing to receive.**—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment. [Id., § 176.]

**Art. 6001—177. Rights of payer for honor.**—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. [Id., § 177.]

#### ARTICLE VII. BILLS IN A SET

**Art. 6001—178. Parts to constitute one bill.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill. [Acts 1919, 36th Leg., ch. 123, § 178.]

**Art. 6001—179. Rights of holders of different parts.**—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true



owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. [Id., § 179.]

**Art. 6001—180. Liability of holder indorsing two or more parts to different persons.**—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. [Id., § 180.]

**Art. 6001—181. Acceptance.**—The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. [Id., § 181.]

**Art. 6001—182. Payment by acceptor.**—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. [Id., § 182.]

**Art. 6001—183. Discharge of one part.**—Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged. [Id., § 183.]

### TITLE III. PROMISSORY NOTES AND CHECKS

#### ARTICLE I

**Art. 6001—184. Promissory note defined.**—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. [Acts 1919, 36th Leg., ch. 123, § 184.]

**Art. 6001—185. Check defined.**—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check. [Id., § 185.]

**Art. 6001—186. Time for presenting check for payment.**—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. [Id., § 186.]

**Art. 6001—187. Certification of check.**—Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. [Id., § 187.]

**Art. 6001—188. Effect of acceptance or certification.**—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon. [Id., § 188.]

**Art. 6001—189. Check as assignment.**—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. [Id., § 189.]

## TITLE IV. GENERAL PROVISIONS

## ARTICLE I

**Art. 6001—190. Citation of act.**—This act may be cited as the Uniform Negotiable Instruments Act. [Acts 1919, 36th Leg., ch. 123, § 190.]

**Art. 6001—191. Definitions.**—In this Act, unless the context otherwise requires,—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “Writing” includes print. [Id., § 191.]

**Art. 6001—192. Same.**—The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are “secondarily” liable. [Id., § 192.]

**Art. 6001—193. Reasonable time or unreasonable time.**—In determining what is a “reasonable time” or an “unreasonable time,” regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. [Id., § 193.]

**Art. 6001—194. Computation of time.**—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [Id., § 194.]

**Art. 6001—195. Retroactive effect of act.**—The provisions of this act do not apply to negotiable instruments made and delivered prior to the (taking effect) hereof. [Id., § 195.]

**Art. 6001—196. Law merchant to govern.**—In any case not provided for in this act the rules of (law and equity including) the law merchant shall govern. [Id., § 196.]

**Art. 6001—197. Repeal.**—All acts and parts of acts inconsistent with this act are hereby repealed. [Id., § 197.]

## TITLE 97

## NOTARIES PUBLIC

<p>Art. 6002. Governor shall appoint; tenure; ad- ditional notaries; proviso. 6003. Bond and oath.</p>	<p>Art. 6006. Seal, and what it shall contain. 6008. Their powers. 6011. Shall keep a well bound book.</p>
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**Article 6002. Governor shall appoint; tenure; additional notaries; proviso.**

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Art. 6003. [3504] Bond and oath.**

**Liability on bond.**—Notary's liability to buyer of land for mistake in certifying to identity of person acknowledging deed is greater than that of indemnitor, and recovery can be had against notary without showing reason for not suing party who impersonated another in making acknowledgment. *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Actions on bond.**—In action by buyer of land against notary public and sureties on her bond for damages resulting from false certificate of acknowledgment to deed made by notary and relied upon by buyer, court properly rendered judgment against defendants, though plaintiff buyer was not party to deed acknowledged before notary and alleged to have been forged. *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Art. 6006. [3507] Seal, and what it shall contain.**

**Mode of affixing.**—The seal may be impressed either on the paper, or on some substance, such as sealing wax, attached to the paper, and susceptible of a definite, uniform impression. *Stooksberry v. Swan* (Civ. App.) 21 S. W. 694.

**Evidence.**—Attached to a notary's certificate in a deed introduced in evidence, in the spot where the notarial seal is usually found, was a circle, defined by a reddish discoloration of the paper. About the center and along the line of the circle, small particles of red sealing wax adhered, but there was no impression of any star or letters. A witness identified the signature of the notary, and testified that the latter used a seal having a star in the center, and letters around the edge, and that in using the seal the notary put molten wax on the paper, and pressed the seal on it. Held, that it was a question for the jury whether the notary had used a seal such as was required. *Stooksberry v. Swan* (Civ. App.) 21 S. W. 694.

**Art. 6008. [3509] Their powers.**

**Disqualification by interest.**—The act of taking and certifying acknowledgments cannot be performed by a notary public financially or beneficially interested in the transaction, but the fact that a paving company paid the fees of a notary who was taking and certifying acknowledgments to statutory mechanics' liens on abutting property did not alone disqualify him. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

A grantee directly interested in the deed was not competent to take the acknowledgments of either of the grantors, husband and wife; and acknowledgments taken by him were invalid, and gave no force whatever to the instrument. *Vauter v. Greenwood* (Civ. App.) 212 S. W. 269.

Acknowledgment of deed in trust executed by surviving wife to secure note to third party who had taken over purchase-money notes from vendor, taken by agent of surviving wife and vendor, who had no interest in the instrument or its consideration, but only in the transaction by way of commission from the vendor for negotiating the notes, was not void. *W. C. Belcher Land Mortgage Co. v. Taylor* (Com. App.) 212 S. W. 647.

**Evidence.**—Evidence held insufficient to show that a notary was financially interested in a transaction so as to be disqualified to take an acknowledgment. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

**Art. 6011. [3512] Shall keep a well bound book.**

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

## TITLE 98

## OFFICERS—REMOVAL OF

Chap.	Chap.
2. Removal of county and certain district officers.	4. Removal of mayors and aldermen.

## CHAPTER TWO

## REMOVAL OF COUNTY AND CERTAIN DISTRICT OFFICERS

Art.	Art.
6028. Certain convictions work a removal from office.	6042. Requisites of petition.
6030. Officers removable by the district judge.	6044. Citation, how and when to issue.
6033. "Official misconduct," what is.	6045. Application made in vacation.
6037. "Drunkenness not habitual," defined.	6048. How trial shall be conducted.
	6055. Not to be removed for acts done prior to his election.

**Article 6028. [3529] Certain convictions work a removal from office.**

Cited, *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

**In general.**—An officer who is his own successor, and committed the unlawful act after re-election, and while performing the functions of office, but before he had qualified, should be removed. *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

Arts. 6028, 6033, do not extend to cases of drunkenness, so as to require actions therefor to be brought under Const. art. 5, § 8, in the district court, but such offenses may be tried in the county court. *Craig v. State*, 31 Cr. R. 29, 19 S. W. 504.

**Art. 6030. [3531] Officers removable by the district judge.**

Cited, *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

**Authority to remove.**—Under Const. art. 5, § 24, only the district court, and not the commissioners' court, may remove the county attorney from office or declare a vacancy in his office, although under section 21 the commissioners' court may fill a vacancy existing in such office pending next general election. *Hamilton v. King* (Civ. App.) 206 S. W. 953.

A director of an irrigation district can be removed only as prescribed in arts. 6030, 6042, 6398. *J. C. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.

**Art. 6033. [3534] "Official misconduct" what is.**

**"Official misconduct."**—The demand of illegal fees by the county judge was such "official misconduct," and subjected him to removal from office. *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

This article does not extend to cases of drunkenness, so as to require actions therefor to be brought under Const. art. 5, § 8, in the district court, but such offenses may be tried in the county court. *Craig v. State*, 31 Cr. R. 29, 19 S. W. 504.

**Art. 6037. [3538] "Drunkenness not habitual" defined.**

Cited, *Craig v. State*, 31 Cr. R. 29, 19 S. W. 504.

**Art. 6042. [3543] Requisites of the petition.**

**In general.**—A director of an irrigation district can be removed only in a proceeding conducted in the name of the state, as prescribed in arts. 6030, 6042, 6398. *J. C. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.

**Art. 6044. [3545] Citation, how and when to issue.**

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 103 Tex. 434, 196 S. W. 1153.

**Art. 6045. [3546] Application made in vacation.**

Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 103 Tex. 434, 196 S. W. 1153.

**Art. 6048. [3549] How trial shall be conducted.**

**Amendments.**—The petition may be amended under rules applying in other cases; and, where the cause of removal alleged is the failure of the officer to pay over money, the petition may be amended so as to charge such delinquency to have been willful. *Poe v. State*, 72 Tex. 625, 10 S. W. 737.

**Art. 6055. [3556] Not to be removed for acts done prior to his election.**

**In general.**—An officer who is his own successor, and committed the unlawful act after re-election, and while performing the functions of office, but before he had qualified, should be removed. *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

**CHAPTER FOUR****REMOVAL OF MAYORS AND ALDERMEN****DECISIONS RELATING TO OFFICERS IN GENERAL**

**Powers of legislature.**—The Legislature is without power to abolish constitutional offices or to shorten terms of office which are fixed by the Constitution. *Covell v. Ayers*, 110 Tex. 348, 220 S. W. 764, answers to certified questions conformed to (Civ. App.) 224 S. W. 1119.

**Interference with the statutory terms of present incumbency of state offices constitutes no obstacle to the exercise of the power of the Legislature to abolish offices of its own creation.** *Id.*

The Legislature may impose additional duties on public officers so long as the added duties are distinctly embraced within the same department of government to which the original ones belong, and has the right to provide extra remuneration for the extra services to be rendered by the ex officio members. *Garrett v. Commissioners' Court of Limestone County* (Com. App.) 230 S. W. 1010.

**Abandonment of office.**—A public office may be abandoned, abandonment being a species of resignation, but differing from resignation in that resignation is a formal relinquishment, while abandonment is a voluntary relinquishment through nonuser. *Steingruber v. City of San Antonio* (Com. App.) 220 S. W. 77, affirming judgment (Civ.) *City of San Antonio v. Steingruber*, 177 S. W. 1023.

Nonuser does not of itself constitute abandonment of a public office, but failure to perform the duties pertaining to the office must be with actual or imputed intention on the part of the officer to abandon and relinquish the office, which intention may be inferred from the acts and conduct of the officer, and is a question of fact. *Id.*

Abandonment of a public office may result from an acquiescence by the officer in his wrongful removal or discharge, but to constitute such abandonment the officer must intend to relinquish the office. *Id.*

## TITLE 99

## OFFICIAL BONDS

Chap.

1. The record of official bonds and the relief of sureties thereon.

Chap.

2. Of obtaining new sureties on official bonds.

## CHAPTER ONE

## THE RECORD OF OFFICIAL BONDS AND THE RELIEF OF SURETIES THEREON

## Article 6079. [3576] Sureties on, to be relieved.

Notice and waiver thereof.—The provision as to notice was intended solely for the protection of the officer; and where a surety upon a county treasurer's bond appeared before the commissioners' court with the treasurer, and made application for release, and the treasurer proceeded immediately to file a new bond, the sureties upon the latter bond could not complain because the statutory notice had not been served. *Kempner v. Galveston County*, 73 Tex. 216, 11 S. W. 188.

## CHAPTER TWO

## OF OBTAINING NEW SURETIES ON OFFICIAL BONDS

## Article 6084. [3581] Officer to be cited.

Cited, *Poe v. State*, 72 Tex. 625, 10 S. W. 737.

## TITLE 100

## PARDON ADVISERS—BOARD OF

Chap.

1. Powers and duties of board.

Chap.

2. Paroles, suspended and indeterminate sentences, etc.

## CHAPTER ONE

## POWERS AND DUTIES OF BOARD

**Article 6086. [3582a] Governor shall appoint.**—The Governor is hereby authorized to appoint two qualified voters of the State of Texas, and who shall perform such duties as may be directed by him consistent with the Constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as "The Board of Pardon Advisers" and shall be paid out of any money in the Treasury, not otherwise appropriated, a salary of Three Thousand Dollars each per annum on monthly vouchers approved by the Governor. [Acts 1897, p. 49; Acts 1893, p. 98; Acts 1905, p. 68; Acts 1917, 35th Leg. 1st C. S., ch. 21, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 6, § 1.]

**Explanatory.**—The title of the act purports to amend "chapter 21, Acts of the First Called Session of the Thirty-Fifth Legislature, 1917, being an act amending article 6986, Revised Civil Statutes, chapter 1, title 100, providing," etc. The enacting clause purports to amend "article 6086, Revised Civil Statutes of the State of Texas, chapter 1, title 100," etc.

Took effect 90 days after July 22, 1919, date of adjournment.

## CHAPTER TWO

## PAROLES, SUSPENDED AND INDETERMINATE SENTENCES, ETC.

**Articles 6095c–6095j.** [Superseded.]

See Vernon's Code Cr. Proc. 1916, arts. 865a to 865l.

**Art. 6095c.**

See *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

## TITLE 101

## PARTITION

Chap.

1. Partition of real estate.

Chap.

3. Miscellaneous provisions.

## CHAPTER ONE

## PARTITION OF REAL ESTATE

Art.

6096. Joint owner or claimant may compel partition.

6097. Petition for, and what it shall state.

6099. Citation and service where defendant is unknown.

6100. Court shall determine, what.

Art.

6101. Decree of the court, and appointment of commissioners.

6109. Shall allot shares.

6111. When property is incapable of division, same shall be sold.

6115. Decree of court shall vest title.

**Article 6096. [3606] Joint owner or claimant may compel partition.**

**Right to partition.**—Where one of the members of a joint-stock association, owning half of its stock, was in hopeless deadlock with the owners of the other half of the

stock, making it impossible to proceed with business, held, the association should be dissolved, its affairs wound up, and its property partitioned, although the original agreement provided that the trust should continue 50 years. *Wiess v. McFaddin* (Civ. App.) 211 S. W. 337.

A partition suit is based on the theory of a common title and not of disputed ownership, so that it may be converted into trespass to try title by defendant's alleging right of possession in himself to all the land. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

**Effect of suit.**—Right of cotenant to possess and improve land was neither destroyed nor suspended by commencement of other cotenants' suit for partition against him. *Broom v. Pearson* (Civ. App.) 200 S. W. 191.

### Art. 6097. [3607] Petition for and what it shall state.

See *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

**Parties—Necessary parties.**—A valid partition cannot be had where a cotenant is not party to the proceeding. *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114.

**Jurisdiction.**—Under art. 3556, the heirs of a married woman could have required her husband, as community survivor, to distribute the estate by suit in the county court of probate jurisdiction, and if such right was not exercised within 12 months from filing of the community survivor's bond, district court had jurisdiction, of suit at instance of heirs for partition and distribution. *Simons v. Ware* (Civ. App.) 219 S. W. 858.

**Petition—Sufficiency in general.**—Although description of land in petition for partition was indefinite, petition would not be subject to general demurrer, where description could be rendered certain. *Russell v. Koennecke* (Civ. App.) 197 S. W. 1111.

Joint owners in partition suit were not required specifically to plead their respective titles. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

**Waiver of objections.**—The requirement that the name and residence of joint owners in partition shall be alleged, is not cured by a failure to take action upon it at the trial. *Farrias v. Delgado* (Civ. App.) 210 S. W. 610.

### Art. 6099. [3069] Citation and service where defendant is unknown.

**Service by publication.**—Service by publication, and appearance of defendants by attorneys appointed by the court, is sufficient to confer jurisdiction of the subject-matter in the court. *Foote v. Sewall*, 81 Tex. 659, 17 S. W. 373.

### Art. 6100. [3610] Court shall determine, what.

**Questions to be determined in general.**—*Vernon's Sayles' Ann. Civ. St. 1914*, art. 6100, was intended to confer authority to adjust every conceivable equity existing between cotenants relating to the parties and property partitioned. *Barkley v. Stone* (Civ. App.) 195 S. W. 925.

Where portion of land previously conveyed to third person by cotenant was omitted from partition suit between cotenants because of adverse titles, though court may not exercise any power of partition over lands sold, it may consider portion to ascertain its value and be governed thereby in adjusting equities of parties, not by what remains. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

As no distinction is made between law and equity, questions of conflicting claims may be decided in partition suits, and, where raised, should be disposed of. *Burns v. Nichols* (Civ. App.) 207 S. W. 158.

Where husband gave his second wife a portion of land belonging to the community estate of first marriage in which son by first wife had an undivided interest, and where such portion of the land on second wife's death was incapable of actual partition, a  $\frac{2}{38}$  interest therein owned by son's heirs will not be satisfied out of the other portion of the land to prevent a sale and enable second wife's heir, owner of  $\frac{34}{38}$  interest, to retain the land, where husband's estate consisting of  $\frac{66}{72}$  interest in such land was indebted in sums exceeding value of such interest, since to satisfy the  $\frac{2}{38}$  interest out of such land would be injurious either to owners of such interest or to husband's heirs. *Zellner v. Samuelson* (Civ. App.) 220 S. W. 587.

Court, in decreeing minor heir who was not a party to partition proceeding a one-sixth undivided interest in the land sold, may decree that purchaser may by payment of specified amount to such heir acquire his interest in the land. *Id.*

Proof by plaintiff in partition of a deed to her father, that the grantee was her father, that at the time of execution of the deed he was the husband of defendant, his widow, that he was dead, that plaintiff was his only child, and that defendant was his surviving wife, made a prima facie case for plaintiff entitling her to have half the land set aside to her. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

**Adjustment of claims and equities—Manner of division in general.**—Where plaintiff had acquiesced in deeds conveying a portion of community property to a third person for plaintiff's benefit in consideration of his release, equity will deny him partition of residue, in view of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6100. *Barkley v. Stone* (Civ. App.) 195 S. W. 925.

In effecting partition of land owned in common, where one has improved part, it is rule to allot such part to him if possible without detriment to interest of his cotenants. *Broom v. Pearson* (Civ. App.) 200 S. W. 191.

— **Grantee of specific portion.**—In partition proceedings as to land owned by cotenants, equity will usually set aside to purchaser from one portion described in deed,



if possible without injury to other cotenants, and division will be made according to value, exclusive of purchaser's improvements, where all common property is before court. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

Where father, owning land in common with his children sold a son a portion of the land less both in quantity and value than son's interest in the common estate, the court, in partition action, will not disturb the sale, which did not prejudice the other children. *Johnson v. Johnson* (Civ. App.) 206 S. W. 369.

— **Improvements and other expenditures.**—For the satisfaction of H.'s claim for contribution for money expended for the preservation of the common estate, the H. interest was entitled in the partition to no more land than was necessary for the purpose, and, if an excessive allotment was made to the prejudice of G., he would have the right to challenge it. *Hanrick v. Hanrick*, 110 Tex. 59, 214 S. W. 321.

Where an ousting tenant in common incurred necessary expenses in defending common title, other tenants in common on obtaining partition must bear their just proportion of such expenses. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

In a daughter-in-law's suit for partition, where the court properly decreed certain land to be community property of defendant mother-in-law, who had paid part of the purchase price with her own funds, it properly charged the daughter-in-law with her proportionate part of the purchase money paid by defendant mother-in-law. *Stoppelberg v. Stoppelberg* (Civ. App.) 222 S. W. 587.

When one tenant in common makes improvements upon the common property without the consent of the other cotenants, he can claim reimbursement only to the extent the value of the land is enhanced by the improvement at the time of the partition. *Pynes v. Pynes* (Civ. App.) 225 S. W. 777.

In partition where one tenant in common has made improvements without the consent of the cotenants, the right to reimbursement to the extent of the enhancement of the value of the land may be made a charge upon the interest of each debtor tenant, and division had accordingly. *Id.*

— **Rents and profits.**—In partition between cotenants, plaintiffs were entitled only to their proportion of the rents after they were legally ousted from possession. *Tompkins v. Hooker* (Civ. App.) 200 S. W. 193.

Court, in decreeing minor heir an undivided interest in land sold pursuant to partition proceedings to which he was not a party, properly refused to award him the rental value of land, where purchaser had not in fact received any rent for property during time he had been in possession. *Zellner v. Samuelson* (Civ. App.) 220 S. W. 537.

— **Debts of estate.**—Where land was sold to holder of vendor's notes upon partition of purchaser's land following purchaser's death, the court in decreeing minor heir, who was not a party to the partition proceeding, his portion of interest in land, properly charged such interest with the payment to holder of his proportionate share of the amount of vendor's lien notes held by him. *Zellner v. Samuelson* (Civ. App.) 220 S. W. 587.

#### Art. 6101. [3611] Decree of the court and appointment of commissioners.

See *Keener v. Moss*, 66 Tex. 181, 18 S. W. 447.

**Determination as to divisibility.**—In suit for partition, it was not necessary to allege that land was incapable of division. *Russell v. Koenecke* (Civ. App.) 197 S. W. 1111.

A decree and proceedings in partition held not to show fundamental error, reviewable in absence of bill of exceptions and statement of facts, on the theory that the court in its first decree judicially determined that the land was susceptible of partition, and thereafter in conformity to the report of commissioners ordered it sold. *Cunningham v. Cunningham* (Civ. App.) 210 S. W. 242.

Where joint-stock company is dissolved, the court should not delegate, to commissioners appointed to partition the company's property, the power and authority to ascertain, determine, and report on the question whether or not the property is susceptible of partition and what would be a fair and equitable mode of division, but should decide these questions itself before decreeing partition and appointing commissioners. *Wiess v. McFaddin* (Civ. App.) 211 S. W. 337.

#### Art. 6109. [3619] Shall allot shares.

See *Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520.

#### Art. 6111. [3621] When property is incapable of division, same shall be sold, etc.

See *Lewis v. Sellick*, 69 Tex. 379, 7 S. W. 673; *Hensel v. Sturn* (Civ. App.) 25 S. W. 817; *Boese v. Parkhill* (Civ. App.) 202 S. W. 120; *Wiess v. McFaddin* (Civ. App.) 211 S. W. 337.

#### Art. 6115. [3625] Decree of court shall vest title.

**Final decree.**—In general.—Where party to partition suit establishes his homestead right in the land, the partition, if granted, should be decreed subject to his right to possession as long as he elects to use or occupy the land as a home. *Berry v. Godwin* (Com. App.) 222 S. W. 191, reversing order (Civ. App.) 188 S. W. 30.

In action for partition by some of the co-owners of land against purchasers from a cotenant who claimed to have acquired title by adverse possession, it was error for court, in holding that adverse title had not been acquired as to some of the plaintiff co-

tenants, to give to such cotenants the interest in the land of a cotenant not made a party to the proceeding. *Tompkins v. Hooker* (Civ. App.) 226 S. W. 1114.

That there was no disposition of some of the land would not prevent from being final a decree conforming with the prayer of the petition in the division of the land which followed a former agreement of the parties for partition. *Nabors v. Nabors* (Civ. App.) 230 S. W. 1109.

In a partition suit, in which defendant claimed title to the entire tract, judgment for him was final, though there was no partition, since under such judgment there was nothing to partition. *Didier v. Woodward* (Civ. App.) 232 S. W. 563.

— **Conclusiveness.**—Where decree dividing land between owners contained call for distance, and also incorporated therein prior partition deeds and subdivision map, held, distance call could not be selected from among such descriptions, so as to render the decree conclusive as to adjoining tracts' common boundary line. *Wilson v. Hutcheson* (Civ. App.) 201 S. W. 1158.

Where a judgment in a former partition suit expressly left the question of title open between plaintiff and defendant, plaintiff may maintain a subsequent suit of trespass to try title; there being no attempt to change, alter, or set aside the judgment. *Burns v. Nichols* (Civ. App.) 207 S. W. 158.

**Warranty of title.**—Decree of partition created statutory warranty in writing similar to general warranty expressed in deed, and such statutory warranty cannot be enlarged or restricted by parol evidence. *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005.

A decree of partition between cotenants creates a warranty of title similar to a general warranty expressed in a deed. *O'Connor v. Sanchez* (Com. App.) 229 S. W. 309.

Where land was partitioned between cotenants and subsequently some of them brought suit for repartition because the title to land decreed plaintiffs had failed, they were not entitled to recover where they offered no evidence of ouster under paramount title nor to show that the defendants were requested to defend the suits under which the state took the land decreed to plaintiffs. *Id.*

**Repartition.**—Parties to partition wherein decree was founded on mutual mistake of matter could sue either upon statutory warranty or in equity, and allege the two causes alternatively in same pleading. *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005.

Where land was partitioned among cotenants and some of them brought suit against others for a repartition because the land decreed to them had been recovered by the state as a part of its domain, held, that plaintiffs were bound, whether suing upon a warranty or upon failure of consideration, to prove as a basis for recovery that the state's title to the lands in question was paramount. *O'Connor v. Sanchez* (Com. App.) 229 S. W. 309.

## CHAPTER THREE

### MISCELLANEOUS PROVISIONS

Art. 6122. Provisions of this title shall not affect, what.	Art. 6123. Rules of pleading, practice and evidence.
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#### Article 6122. [3632] Provisions of this title shall not affect, what.

**Partition by act of parties—In general.**—Where certain tenants in common conveyed a specific portion of common property and one of the nonjoining tenants was non compos mentis, a private partition of the unsold portion of the common property among all the tenants equally was not binding upon the incompetent tenant, since he should have received an equal share of the entire tract, and not merely of the unsold portion. *Lasater v. Ramirez* (Com. App.) 212 S. W. 935.

— **What constitutes.**—Oral agreement between surviving husband and first wife's sons, by which the husband conveyed community property for son's benefit in consideration that he release estate from claim, did not constitute a partition. *Barkley v. Stone* (Civ. App.) 195 S. W. 925.

#### Art. 6123. [3633] Rules of pleading, practice and evidence.

**Procedure in general.**—A widow sued by a daughter for partition could not, under plea of general denial, show equitable title by proving the deed to her deceased husband offered in evidence by the daughter was other than what it purported to be, or that it was made to her husband in trust for her own benefit since a plea of general denial only puts plaintiff on proof of facts necessary to make a prima facie case. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

A plea of not guilty has no place in a partition suit. *Id.*

**Burden of proof.**—Plaintiff's allegation in a partition suit that he is the owner of the land means that he is the owner of the legal title, and he must introduce evidence to establish the fact. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

In partition between the children of their father's first marriage and the children of his second marriage as defendants, such defendants, in order to defeat plaintiffs' claim to receive any part of the rents, held to have burden of pleading and proving that the rents came solely from improvements made by their father and his second wife as upon community property. *Pynes v. Pynes* (Civ. App.) 225 S. W. 777.

**Sufficiency of evidence.**—In a suit to recover an interest in, and for partition of, land, evidence held such that it was not error to refuse a requested peremptory charge for the defendants. *Nabors v. Nabors* (Civ. App.) 230 S. W. 1109.

## TITLE 102

## PARTNERSHIPS AND JOINT STOCK COMPANIES

Chap.

1. Partnerships—Limited.

Chap.

2. Unincorporated joint stock companies  
—permitting suit in company name.

## CHAPTER ONE

## PARTNERSHIPS—LIMITED

## Article 6126. [3583] Limited partnerships authorized.

Cited, *Rochelle v. State* (Cr. App.) 232 S. W. 838.

**Construction and operation in general.**—Where underwriters signed an insurance policy as members of an unincorporated association, their liability to the insurer is that of partners, in view of art. 6151, and this article. *Merchants' & Mrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

## DECISIONS RELATING TO PARTNERSHIP IN GENERAL

## I. CREATION AND EXISTENCE OF RELATION

2. **Creation and existence of relation in general.**—Where one party to a contract of partnership or joint venture for the purchase and sale of a certain tract of land to take effect in futuro did not accept the failure of the other party to perform, or his renunciation, as ending the contract, the contract continued to exist, and the other party, though in default originally, could take advantage of its provisions despite his anticipatory breach. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

7. **Community of interest in profits and losses—Sharing profits as compensation for services.**—A contract whereby one party puts his money or property into a business against the services and skill of another under a mutual understanding to share the profits may be said to be a partnership contract in the absence of circumstances opposing such construction. *Lomax v. Trull* (Civ. App.) 232 S. W. 861.

8. — **Sharing profits but not losses.**—If two of partners were to share in profits of a venture and joined with plaintiff's manager, a partnership between three was clearly established by the community of interest in profits as such, although no agreement was made to share in losses.—*Avery v. Llano Cotton Seed Oil Mill Ass'n* (Civ. App.) 196 S. W. 351.

Where a broker employed an assistant, who was to get half of commissions realized from sales of land made to customers from the section of the country from which the assistant came, held, that there was no partnership, but merely the relation of principal and agent; the assistant not having anything to do with losses. *Christian v. Duna-vent* (Civ. App.) 232 S. W. 875.

11½. **Fraud or misrepresentations—Illegality.**—A contract to pay either profits or losses incurred in an illegal enterprise cannot be impeached by showing that the partnership enterprise in which such profits or losses accrued was illegal. *Bellew v. Jacobs* (Civ. App.) 229 S. W. 928.

12. **Creation of partnership as to third persons.**—In determining the question of whether a partnership exists, the actual relation consequent upon the engagement of the parties will be looked to, and as to creditors the court ordinarily will apply the doctrine that one who shares profits must also share liabilities, unless it appears the parties intended and constituted a different relation, in effect excluding that of partnership. *Fink v. Brown* (Com. App.) 215 S. W. 846.

13. — **Sharing profits.**—It is sufficient to constitute a partnership that the parties are to have a community of interest in the profits as such. *Fink v. Brown* (Com. App.) 215 S. W. 846.

An agreement to purchase horses and mules for sale to the government, the parties to share equally in the profits, constituted a partnership notwithstanding they made no provisions as to losses. *Steger v. Greer* (Civ. App.) 228 S. W. 304.

15. — **Particular agreements and transactions.**—Where a lease contract furnished the sole basis for ascertaining whether the relation of partnership existed between the lessor company and the lessee firm, it alone will be looked to to determine the question as to an injured employé, in the absence of facts constituting an estoppel in his favor. *Fink v. Brown* (Com. App.) 215 S. W. 846.

Contract, whereby corporation leased ice plant, land, machinery, and appurtenances, with tools, wagons, teams, etc., to a firm which agreed to share any net profit of more than \$10,000 annually, held not to create a relation of partnership rendering the company liable for injuries to an employé of the firm. *Id.*

16. **Estoppel by holding out as partner—In general.**—A reasonably prudent man, knowing that his name was improperly used in a business as partnership, would have notified all persons whom he knew, or had reason to think, were relying on the existence of the partnership. *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

17. — **Conduct constituting holding out.**—In an action against alleged partners, on the question of whether or not one of defendants permitted himself to be held out as a partner with the other defendant, it was permissible to permit witness to testify that such other defendant told him that defendants were partners: there being other facts shown tending to sustain the claim of estoppel. *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

19. **Defective corporations.**—In suit by the receiver of a bank to enforce stock subscriptions against various subscribers, the subscribers cannot be held liable as partners, for, if they are so liable, it is not on their subscriptions, but for money of depositors received and converted, a liability enforceable by the receiver. *Davis v. Allison*, 109 Tex. 440, 211 S. W. 980.

21. **Evidence to show relation—Weight and sufficiency.**—That defendant's son had 20 per cent. interest in property or that defendant had invested in business funds intrusted to him did not prove a partnership. *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 932.

In an action against a fire insurance company and others for conspiring to prevent plaintiff from obtaining insurance, evidence held not to show that an adjustment company made defendant was a partnership. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

In action to foreclose vendor's lien notes, evidence held insufficient to sustain finding that plaintiff was a partner with land company. *Vineyard v. Miller Land Co.* (Civ. App.) 209 S. W. 693.

In an action against two defendants as partners, where the record disclosed an admitted partnership and the evidence supports a finding of partnership debt, and that the various undisputed items of the account were personally obtained by one of defendants and charged to the partnership account, the evidence is sufficient to support findings for plaintiff. *Pennington v. Fleming* (Civ. App.) 212 S. W. 303.

The profit-sharing stipulation of a contract, standing alone, is but presumptive evidence of a partnership relation between the parties. *Fink v. Brown* (Com. App.) 215 S. W. 846.

Evidence held not to show existence of a partnership by estoppel. *Guaranty Bank & Trust Co. v. Beaumont Cadillac Co.* (Civ. App.) 218 S. W. 638.

In suit on notes signed "Beaumont Cadillac Company, per H. D. Ellis, Manager," held, that court properly found that said company defendant was a branch of defendant corporation and not a partnership composed of said Ellis and two others. *Id.*

In an action against an alleged partnership finding of the jury that one of the defendants was estopped by his conduct to deny that he was a partner held supported by evidence. *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

In an action against alleged partners, evidence held to support finding that one of the defendants had actual notice that the other defendant was signing his name to contracts under a firm name. *Id.*

In a suit to rescind a contract for the sale of land and to recover money paid, evidence that defendant and the one who made the contract, and received the payments had a contract for the subdivision and sale of the lands and shares of the profits which authorized the other to make contracts in their joint names together with an accounting between the parties of receipts under the contracts, held to sustain a finding that defendant and the other were copartners. *Kuykendall v. Schell* (Civ. App.) 224 S. W. 298.

Testimony of one of the defendants that they had entered into an agreement to purchase horses and mules for sale to the government, each to share equally in the profits, was sufficient, if believed by the jury, to establish partnership. *Steger v. Greer* (Civ. App.) 228 S. W. 304.

## II. NAME, POWERS AND PROPERTY OF FIRM

26. **Conversion of joint property into separate property.**—Where a crop of broom corn was raised by a partnership, and after the landlord was paid his share the two partners divided the remainder of the crop, each share became the individual property of the partner taking it, and one could mortgage his share as security for a loan, and insure it for the benefit of the mortgagee bank, which could transfer its interest to a third person who paid the partner's debt to it, this despite any secret agreement between the partners that the mortgaging partner's share should be subject to a charge for sums due in favor of the other partner, so that the insurance money on loss was properly payable to the third person who discharged the debt. *Edwards v. Commercial Union Assur. Co.* (Civ. App.) 218 S. W. 87.

## III. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF PARTNERS

27. **Construction of articles of partnership in general.**—In an action for an accounting by two members of a ranching partnership brought against a third member, who was to finance the business, the partnership contract, though it gave defendant the right to supervise and control his partners and to employ other men if plaintiffs became incapacitated, held not to authorize him to discharge plaintiffs and to substitute himself and charge the partnership for performing plaintiffs' duties; the contract expressly providing that no partner should be entitled to compensation for performing the duties imposed on him. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

28. **Interest on debts.**—Ordinarily one partner will not be charged with interest for the benefit of the firm on funds belonging to it. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

29. **Interests of partners in firm property.**—Law fixes lien for interest of partner in personal property of firm, and in suit by partner to recover fifth interest in tools and profits, no evidence was necessary, except that there was partnership property in hands

of defendant, and that plaintiff owned an interest. *Levin v. Steinle* (Civ. App.) 200 S. W. 1137.

Nothing is to be considered as the share of a partner but his proportionate part of the residue or balance after an accounting has been taken of the debts and credits, including the amount paid by the several partners in liquidating firm debts. *Diamond v. Gust* (Civ. App.) 206 S. W. 366.

A partner has no specific interest in any particular chattel or part of the firm property, but only in the proper proportion of the surplus of the whole after payment of debts, including amounts due the other partners. *Sherk v. First Nat. Bank* (Com. App.) 206 S. W. 507.

In a suit for an accounting by a partner furnishing a garage, machinery, and supplies, against a partner operating the garage and agreeing to furnish labor, supplies, and expenses, if defendant put funds to pay therefor into the business these amounts should be paid out of the partnership assets, and considered in determining profit or loss to be divided equally under the agreement whereby each could take out capital contributed. *Willbanks v. Rogers* (Civ. App.) 228 S. W. 265.

**34. Dealings between partners.**—Where a partnership contract gave defendant partner an absolute right to dispose of the partnership property and to dissolve the firm at his option, and also gave him absolute control over the other partners, but provided that no partner should receive compensation for work performed for the firm, defendant's actions in threatening to dispose of the partnership property and to dissolve the firm if he were not paid a salary for doing the work of the other partners whom he had discharged held to constitute duress, and to make him liable for an accounting for salaries so paid; defendant's threat to exercise a contractual right to accomplish an illegal purpose rendering the threat illegal, and defendant partner was not entitled in equity and good conscience to retain the salary paid, within the rule that to recover moneys paid under duress it must be shown also that it was against equity and good conscience for the payee to retain it. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

Where a partnership agreement provided that a dissolution might be had only on consent of one member, such consent held not a consideration for an agreement to pay a salary to such member, contrary to the partnership contract, where the agreement was made under duress; plaintiffs not regarding such consent as consideration. *Id.*

Where two members of a partnership under duress exercised by a third promised to pay for services rendered by such member in violation of the partnership agreement, such members were not liable to pay therefor as upon an implied contract. *Id.*

Where a member of a partnership wrongfully discharged the other members and substituted himself, making a charge for his services, notwithstanding the contract provided that no partner should make such charge, the services of such substitute held not a consideration for a promise to pay therefor made by the remaining partners under duress. *Id.*

**40. Contribution between partners.**—One of four partners, who, at time of settlement between him and another partner who had assumed entire firm indebtedness, was only liable for payment of fourth of loss, and was induced by fraudulent concealment and representation of facts by partner who had assumed indebtedness to pay more than he owed by way of contribution, had a cause of action. *Chalk v. Collier* (Civ. App.) 208 S. W. 972.

Partner who assumed firm's indebtedness could not make settlement with two other partners of their several liabilities to him in way of contribution, without concurrence of third partner, if settlement would increase third partner's liability, or deprive him of any rights against other two contributing partners. *Id.*

If any of partners liable to contribution in favor of one who had assumed entire firm indebtedness were insolvent, liability of others might be proportionately increased, but insolvent would remain liable for contribution to those paying, and might be compelled to pay them if he thereafter became able. *Id.*

**41. Actions between partners.**—Where one partner appropriated to his individual use a sum of money which was to have been used in discharging a debt for property acquired by the other partner and delivered to the firm, the other partner cannot maintain an action of assumpsit, but should sue for an accounting. *Snyder v. Slaughter* (Civ. App.) 208 S. W. 974.

**43. — Evidence.**—In a suit by a partner against the independent executor of a deceased copartner to recover payments made by plaintiff to the partnership on behalf of decedent, evidence held to support a finding that the debt sued for was an independent and personal obligation of decedent to plaintiff and distinct from any obligation of the partnership as such. *Ewing v. Schultz* (Civ. App.) 220 S. W. 625.

In an action by two members of a partnership against a third for an accounting as to salaries exacted by such third member under duress contrary to the terms of the partnership agreement, evidence held to show that plaintiffs did not ratify defendant's actions, since a contract obtained under duress cannot be ratified by the servient party unless the so-called ratification is after all pressure and coercion have been removed. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

#### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS

**45. Representation of firm by partner—Powers of partners in general.**—Partnership held bound by representations of member, acting for it and for his sister, that latter, by payment of principal and interest of vendor's lien notes owned by trust company acquired title to them, consequently vendor's lien for their security. *Bolding v. Bolding* (Civ. App.) 200 S. W. 587.

While ordinarily the majority of the partners will control, the management of the business may by agreement be committed to one or more of the partners. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

Where a partnership has been proved, the admission of one partner is binding upon all of them. *Steger v. Greer* (Civ. App.) 228 S. W. 304.

The redelivery to grantor of an unrecorded deed by third person without grantee's knowledge or consent was insufficient to reinvest grantor with title, even if the third person was a copartner of grantee, where the land was grantee's individual property; the act of the copartner not being binding on grantee.—*Mason v. Hood* (Civ. App.) 230 S. W. 468.

**52. — Disposition of firm property in general.**—A gift of a house and lot to an employee by one partner was not binding on the others where they had no knowledge thereof. *Leonard v. Cleburne Roller Mills Co.* (Civ. App.) 229 S. W. 605.

Where mules were purchased for a claimed partnership by one who claimed to be a member of the partnership, he had no authority, even apparent, to dispose of the mules for his personal and private benefit. *Gose v. Brooks* (Civ. App.) 229 S. W. 979.

**53. — Contracts in general.**—While a partnership is not recognized as an entity, yet partnership contracts and undertakings are determined and adjusted under the rules of law and equity governing that relation. *Snyder v. Slaughter* (Civ. App.) 208 S. W. 974.

Where a partnership was formed between a broker and a stranger to a contract between broker and another to share commissions, neither the firm nor the partners occupied the status of innocent purchaser as regards the rights of the other party to the contract, but must accept the burdens of the contract as well as its benefits. *Bauer v. Crow*, 110 Tex. 538, 221 S. W. 936, answering certified question (Civ. App.) 171 S. W. 296.

**54. — Purchases and sales.**—One partner of a trading partnership may lawfully and in good faith sell the entire personal assets of the partnership to pay partnership debts. *Diamond v. Gust* (Civ. App.) 206 S. W. 366.

Under Bankr. Act, § 5g (U. S. Comp. St. § 9589), a partner had the implied power to convey the real estate of the firm in settlement of the firm's business and to dispose of his own interest, where neither he nor the firm were parties to a proceeding in which another partner was adjudicated a bankrupt. *H. G. Denny & Co. v. Lee* (Com. App.) 221 S. W. 947, affirming judgment (Civ. App.) 188 S. W. 294.

**55. — Mortgages or deeds of trust.**—Where a partnership purchased land with money advanced by plaintiff partner, who paid partnership notes and debts, and the other partner conveyed all his interest to plaintiff, after giving, while the partnership was insolvent, a deed of his interest to a third person as trustee for a bank, which was his individual creditor, the trustee had no rights superior to those of plaintiff but had merely a right to subject any surplus remaining after payment of partnership debts, including the debt to plaintiff, who did not waive his rights, by accepting the deed. *Sherk v. First Nat. Bank* (Com. App.) 206 S. W. 507.

A partner cannot mortgage partnership property to secure his individual indebtedness, and such mortgage cannot be enforced as against the rights of the other partner, though the creditor did not know that such property belonged to the partnership, unless such partner is estopped to set up his rights. *Western Nat. Bank of Hereford v. Walker* (Civ. App.) 206 S. W. 544.

A general manager of a partnership is without authority to execute a mortgage on the property of his principal to secure a debt of a third person, where the principal is not liable for such debt, nor can he authorize another to so do. *Rowe v. Guderian* (Civ. App.) 212 S. W. 960.

**63. — Estoppel to deny partner's authority.**—Where partner in drug firm, in inducing sister to purchase vendor's lien notes, acted for benefit of firm, his partner was estopped to say that so far as he was concerned sister did not acquire vendor's lien against land of partnership. *Bolding v. Bolding* (Civ. App.) 200 S. W. 587.

**66. — Notice of partner's transactions.**—Where a partnership has loaned casings to an oil company, notice to one partner that the relation of lender and borrower had ceased, and that of debtor and creditor arisen, was notice to the partnership. *Canadian Oil & Gas Co. v. Webb* (Civ. App.) 203 S. W. 135.

Where purchasers of notes are partners therein, knowledge of one is knowledge of all, as regards their being innocent purchasers. *Schallert v. Boggs* (Civ. App.) 204 S. W. 1061.

Where notice to one partner of an adverse claim of title and possession to a house and lot by an employee of the partnership was based on alleged gift of such house and lot by such partner, there was no notice to the partnership of adverse claim and possession; and other partners not knowing of or consenting to the gift. *Leonard v. Cleburne Roller Mills Co.* (Civ. App.) 229 S. W. 605.

**69½. Liability of partners in general.**—Partners are individually and personally liable, as well as jointly liable, for partnership obligations. *Goodman v. Republic Inv. Co.* (Civ. App.) 215 S. W. 466.

Partners are individually responsible for torts by a firm when acting within the general scope of its business, whether they personally participate therein or not. *Sabinal Nat. Bank v. Bryant* (Com. App.) 221 S. W. 940, reversing judgment (Civ. App.) 191 S. W. 1179.

**71. Application of assets to liabilities in general.**—Partnership property is liable for partnership debts, and each partner has right to demand it be so applied. *Bolding v. Bolding* (Civ. App.) 200 S. W. 587.

72. — **Priority of partnership debts.**—Where the husband and his partner bought the wife's dower interest, her action on notes for the price could not be defeated by partnership debts. *Stewart v. Watts* (Civ. App.) 197 S. W. 324.

73. — **To debts of individual partner.**—If payment to it was made out of a partnership fund, the creditor bank could not apply it to the individual liability of a partner. *First Nat. Bank v. Rush* (Civ. App.) 227 S. W. 378.

74. — **Transactions by or between partners affecting creditors' rights.**—The assignee or mortgagee of the interest of one partner takes subject to all partnership debts and liabilities, since he can obtain no greater right than the assignor or mortgagor had. *Sherk v. First Nat. Bank* (Com. App.) 206 S. W. 507.

75. **Actions by or against firms or partners.**—Where plaintiff sued two as partners, alleging that his right of action arose under a contract with them as a firm, he cannot change his action to one against one of the partners as an individual by taking a nonsuit as to the other, since one sued as a partner cannot be held liable save on a partnership obligation. *Rowse v. Woody* (Civ. App.) 197 S. W. 362.

Ordinarily it is error to enter judgment for partner in individual capacity, entitling him to recover funds shown to belong to partnership. *Hale v. McKenzie* (Civ. App.) 198 S. W. 1004.

A partnership fund is not subject to garnishment for the individual debt of a member of the firm, especially where the firm's assets are insufficient to satisfy its debts. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 333.

77. — **Parties.**—One partner could not recover in suit, where other partner was not party. *Morris v. Gwaltney* (Civ. App.) 215 S. W. 473.

One making contract in his own name for benefit of himself and an undisclosed partner may sue for the benefit of himself and partner and recover the full amount of the damages. *Bankers' Trust Co. v. Schulze* (Civ. App.) 220 S. W. 570.

80. — **Sufficiency of evidence.**—In an action for price of wagons sold to a partnership, evidence held insufficient to show delivery and receipt by the partnership. *Owensboro Wagon Co. v. San Antonio Tie & Lumber Co.* (Civ. App.) 199 S. W. 701.

In an action by lessor against lessees and assignees of lease, answer of lessee, which adopted the pleadings of the plaintiff and prayed for judgment against assignees, held sufficient to authorize the trial court to submit the issues as to whether one of the alleged assignees had allowed the other assignee to represent that he was a partner, and whether or not lessees relied upon such representations and holding out. *Bivins v. Oldham* (Civ. App.) 224 S. W. 240.

In an action wherein it was sought to hold a defendant as a partner on a note executed by his alleged copartner, evidence held sufficient to raise issues as to partnership relations between the parties when hay for which the note was given was shipped to the copartner, and as to whether the hay was bought for the partnership, but also to show conclusively that plaintiff had no dealings with the alleged copartner as a partnership, but that it consigned the hay alone to him for sale. *Lubbock Grain & Coal Co. v. Ferguson* (Civ. App.) 227 S. W. 539.

In an action against the owner of a theater by a bill poster for services, a peremptory instruction for plaintiff held not warranted by evidence on theory that one in possession of the theater and who hired plaintiff was defendant's partner or manager. *Markowitz v. Davidson* (Civ. App.) 228 S. W. 968.

#### V. RETIREMENT AND ADMISSION OF PARTNERS

91. **Obligations of old firm—Liabilities of incoming or succeeding partners.**—Person who became member of partnership long after it dug ditch across another's land, damaging it, was not liable individually for such damage. *Wooster v. Hoecker* (Civ. App.) 195 S. W. 332.

93. **Liabilities of retiring partner for acts and obligations of continuing partner or new firm.**—It is incumbent upon members of partnership to give due notice of dissolution, and actual notice is required to those who have had dealings with the partnership, but to those who had knowledge of, but no dealings with, the partnership prior to the dissolution, actual notice thereof is not required; a public notice given in some reasonable manner being deemed sufficient. *Thompson v. Harmon* (Com. App.) 207 S. W. 909.

One seeking to recover against a retiring partner must establish that he knew, at the time of the transaction, that a partnership existed, of which the one sought to be held liable was a member; that he was in ignorance of any dissolution; and that he entered upon the transaction or extended credit in reliance upon the partnership as it had theretofore existed. *Id.*

Knowledge or notice to creditors of partnership and ignorance of its dissolution cannot be established by evidence of general reputation and notoriety in the community as to whether the partnership continued in existence. *Id.*

Where plaintiff dealt solely with defendant's copartner in ignorance that defendant was a dormant partner, notice of subsequent dissolution of the firm need not be given to plaintiff. *Lubbock Grain & Coal Co. v. Ferguson* (Civ. App.) 227 S. W. 539.

#### VI. DISSOLUTION, SETTLEMENT AND ACCOUNTING

98. **Causes of dissolution—Transfer of partner's interest.**—A sale by one partner to another has the effect of dissolving partnership, since it destroys the community of interest. *Sherk v. First Nat. Bank* (Com. App.) 206 S. W. 507.

A sale which practically includes all the property used by a firm in carrying on its business, whether made by the firm or a member thereof, operates as a dissolution. *Lubbock Grain & Coal Co. v. Ferguson* (Civ. App.) 227 S. W. 539.

99. — **Misconduct of partner.**—The mere failure of a partner to pay money into the partnership under a partnership agreement will not work a forfeiture of his interest and a dissolution of the partnership, but abandonment may be implied from acts and conduct of the parties inconsistent with an intention on their part to continue the contract, especially in regard to contracts executory in their nature where little has been done toward their performance. *First Nat. Bank v. Rush* (Com. App.) 210 S. W. 521.

102. **Rights, powers and liabilities after dissolution—Effect of dissolution as to rights and liabilities of third persons.**—There cannot be a surviving partner, with the rights thereof where there was a voluntary dissolution of partnership, though the partner continuing the business, who afterward died, agreed to collect accounts due the firm, and divide the proceeds. *Caognard v. Tarnke* (Civ. App.) 202 S. W. 221.

In an action for rent that oil fields, wherein the partnership dealt, commenced to fail and their business ceased to be profitable, held not sufficient to put plaintiff on notice that the partnership renting the property had been dissolved. *Mansfield v. Gerdling* (Civ. App.) 203 S. W. 462.

103. — **Collections and payments.**—Where one of two partners, who were tenants under a cropping lease, died before the crop was sold, the surviving partner not only could but should repay to the landlord from the copartnership proceeds the advances by the landlord to the firm. *Bright v. Morrow* (Civ. App.) 225 S. W. 580.

104. — **Sale with stipulation to refrain from competition.**—Where defendant sold his interest in a business covenanting not to enter into competition with plaintiff, fact that parties thereafter did business as partners does not warrant defendant after dissolution of second partnership in competing with plaintiff. *Schluter v. McLeod* (Civ. App.) 199 S. W. 311.

105. — **Contracting new obligations in general.**—That settlement on dissolution between partners was not pending would not have the effect of continuing the relation after dissolution by conduct of the parties so as to make one partner the agent of the other and bind the partnership to a contract or obligation executed by one partner without the knowledge or consent of the other. *Lubbock Grain & Coal Co. v. Ferguson* (Civ. App.) 227 S. W. 539.

106. — **Making or indorsing negotiable instruments.**—General authority of one partner on dissolution to settle firm's business does not authorize him to give a note in the firm name for pre-existing firm debts or to renew an existing debt. *Lubbock Grain & Coal Co. v. Ferguson* (Civ. App.) 227 S. W. 539.

107. — **Rights and liabilities of survivor as to estate of deceased.**—Surviving partner has no right to keep and refuse to sell partnership property and thus avoid accounting to heirs of deceased partner. *Schallert v. Boyd* (Civ. App.) 203 S. W. 940.

108. — **Wrongful acts.**—A landlord is not liable for conversion of the funds of a deceased tenant, where it appeared that the surviving partner of deceased, after harvesting the crop, paid an individual debt to the landlord from the proceeds, if it also appeared that after such payment the surviving partner retained sufficient portion of the proceeds to satisfy the deceased partner's claim in full. *Bright v. Morrow* (Civ. App.) 225 S. W. 580.

110. **Distribution and settlement between partners and their representatives.**—A partner who pays or is forced to pay more than his proportionate share of firm debts has a right to a general accounting and contribution from the assets of the firm or from his copartners. *Diamond v. Gust* (Civ. App.) 206 S. W. 366.

111. — **Necessity of settlement in general.**—Where judgment was entered against two partners, it must be presumed that the court found the debt to be a partnership one as alleged, and one partner could not obtain judgment over against another without going into a settlement of the partnership accounts, which would not be proper in such an action. *Pennington v. Fleming* (Civ. App.) 212 S. W. 303.

114. — **Private accounting and settlement.**—In a suit to set aside a settlement of partnership affairs, court need not audit all the partnership accounts, where there is no issue between the parties except as to certain items. *Woldert v. Pukli* (Civ. App.) 221 S. W. 1112.

115. — **Fraud.**—Fraud vitiates a voluntary settlement of partnership affairs as it will any other contract. *Woldert v. Pukli* (Civ. App.) 221 S. W. 1112.

Partners occupy a fiduciary relationship to each other and have the right to repose confidence in one another and to rely upon statements made relative to partnership affairs and are not required to deal with one another at arm's length, even in a settlement of partnership affairs, and it is no answer in a suit to set aside a settlement that plaintiff had means of obtaining knowledge of matters involved. *Id.*

In an action to set aside a settlement of partnership affairs on the ground of fraud, evidence held sufficient to sustain a judgment for plaintiff. *Id.*

116. **Actions for dissolution and accounting—In general.**—The settlement of partnership accounts, and an equitable division of the assets of the partnership among the partners, has always been one of the functions of a court of equity. *Diamond v. Gust* (Civ. App.) 206 S. W. 366.

In suit by one partner for an accounting on ground of fraudulent sale by the other partner, the sale being void as to plaintiff, he continued to hold a half interest in the property and business and could recover, not the value of the loss of his partnership property, but one-half the property and one-half the net profits after all firm debts were paid. *Id.*

In a suit for partnership accounting plaintiff may be decreed a lien on defendant's half interest in uncollected partnership accounts, which may be directed to be sold in



satisfaction thereof, for the amount due in settlement, and this is also true of any partnership funds defendant used for his individual benefit, but no such lien may be allowed for a debt from defendant to plaintiff for a matter not within the partnership. *Willbanks v. Rogers* (Civ. App.) 228 S. W. 265.

119. — **Charges and credits.**—In the settlement of partnership affairs, uncollected notes and accounts should not be treated by the court as money and charged to either party, but the court should provide for the collection or sale of the notes. *First Nat. Bank v. Rush* (Com. App.) 210 S. W. 521.

120. — **Evidence on accounting in general.**—In action to recover partner's fifth interest in plumbing tools and in profits of firm, evidence that plaintiff was entitled to one-fifth of profits, or \$120, held to sustain judgment for that amount. *Levin v. Steinle* (Civ. App.) 200 S. W. 1137.

In a suit to settle partnership transactions in feeding and fattening hogs, the partners to share equally in the expenses and profits, an agreed statement of facts held not sufficient to show that any profits had been made. *Biggs v. Key* (Civ. App.) 209 S. W. 271.

In an action for a partnership accounting, evidence of payment of \$40 by plaintiffs to defendant, under an alleged agreement that the firm should no longer pay the subsistence account of one of the partners, held not to make a refusal to direct a verdict for defendant as to the allowance of such claim erroneous on the ground of estoppel. *Shelton v. Trigg* (Civ. App.) 226 S. W. 761.

Where defendant member of a partnership under duress exacted a salary for his services in violation of the partnership contract, and subsequently forced plaintiffs to enter into a dissolution agreement, a finding that there was no consideration for the salary contract or the dissolution contract held sustained by the evidence. *Id.*

In a suit for accounting, evidence held not to sustain burden of showing misapplication or misuse by defendant of certain money plaintiff furnished for partnership needs. *Willbanks v. Rogers* (Civ. App.) 228 S. W. 265.

## CHAPTER TWO

### UNINCORPORATED JOINT STOCK COMPANIES—PERMITTING SUIT IN COMPANY NAME

Art. 6149. May sue or be sued in its company name.	Art. 6152. Effect of judgment where agent of company only is cited.
6150. Citation, upon whom served.	6153. Effect of judgment where individual stockholders also are cited.
6151. Judgment against, conclusive against stockholders.	6154. This chapter cumulative; not to impair existing rights.

#### Article 6149. May sue or be sued in its company name.

Cited, *Crow v. Cattleman's Trust Co.* (Civ. App.) 198 S. W. 1047.

**Construction and operation in general.**—This article does not undertake to change the legal status of the association or in any way affect the law in so far as it relates to contract, but is intended merely to furnish a convenient method of conducting suits. *Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n* (Civ. App.) 216 S. W. 225.

In suit by stockholders of an oil company, a joint-stock association, against trustees, alleging insolvency and misappropriation of trust funds, etc., held that, though the company was not eo nomine made a party, the court had authority, despite arts. 6149-6154, to appoint a receiver for the property in view of the broad powers vested in trustees by the articles of association. *Bingham v. Graham* (Civ. App.) 220 S. W. 105.

This statute held to constitute an unincorporated association an entity, at least for the purpose of litigation. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

An unincorporated association not having its headquarters in county in which it was sued was not required to file appeal bond within 20 days after notice of appeal under art. 2084, requiring bond to be so filed when appellant resides in the county, since such association is an entity and as such has its residence at the place of the general headquarters of the governing officers and body. *Id.*

**To whom applicable.**—A Lloyds' association doing business in the state by issuing policies signed by numerous underwriters may, under this article, be sued in its distinguishing name and individual underwriters may be joined. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

An association of underwriters issuing fire policies, in all respects substantially an arrangement under the Lloyd's insurance system as adopted in the United States, there being a trust fund administered by attorney in fact, was such an association as is authorized to be sued in the name of the association under the statutes. *Merchants' & Manufacturers' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Com. App.) 229 S. W. 312.

**Subject matter of suits.**—An association, labor union, or the like cannot sue in its own name, unless property rights in which the membership is jointly interested are

involved, and a labor union could not maintain a suit in its name to restrain a city from discharging certain members of the fire department, there being no contract between the labor union and the city, since this article is based upon convenience and economy in permitting all the members of a joint-stock company or association to sue in the name of the association in order to conserve a joint right or redress a joint wrong, and it was never intended that the name of the association could be used to ascertain and protect the several rights of the members or redress their several wrongs. *San Antonio Fire Fighters' Local Union No. 84 v. Bell* (Civ. App.) 223 S. W. 506.

**Suits against trustees or managers.**—Suits in equity may be brought by or against some of the members of an association or trust as representatives of all the members, particularly where defendants are managing officers or trustees. *Davis v. Hudgins* (Civ. App.) 225 S. W. 73.

The relation existing between parties owning shares in a trust to operate an oil company not being that of partners in the ordinary sense, it was not necessary that all shareholders in the association be made parties to a suit between shareholders involving its affairs and seeking accounting, dissolution, etc. *Id.*

#### Art. 6150. Citation, upon whom served.

**Necessity of service on officers.**—Where stockholders sought dissolution of the company, the relief prayed could not be granted, where only three stockholders were served and the officers were not served. *Crow v. Cattlemen's Trust Co.* (Civ. App.) 198 S. W. 1047.

#### Art. 6151. Judgment against, conclusive against stockholders.

Cited, *Crow v. Cattlemen's Trust Co.* (Civ. App.) 198 S. W. 1047.

**Construction and operation in general.**—Where underwriters signed an insurance policy as members of an unincorporated association, their liability to the insurer is that of partners, although the policy limited the liability of each one to a certain percentage of the loss. *Merchants' & Mfrs.' Lloyd's Ins. Exch. v. Southern Trading Co. of Texas* (Civ. App.) 205 S. W. 352.

In a suit on an insurance policy signed by numerous underwriters, where their attorneys in fact have executed a bond to pay off any judgment against the company, every member of the company was bound by a joint and several judgment in favor of the insured. *Id.*

#### Art. 6152. Effect of judgment where agent of company only is cited.

Cited, *Crow v. Cattlemen's Trust Co.* (Civ. App.) 198 S. W. 1047.

#### Art. 6153. Effect of judgment where individual stockholders also are cited.

Cited, *Crow v. Cattlemen's Trust Co.* (Civ. App.) 198 S. W. 1047.

**Debts of joint stock company.**—Individual members of a joint-stock association by statute are made liable for the debts of the concern, the question of their liability for the debts of the firm being under the circumstances of the particular case determinable by the general principles applicable to partnerships. *Dee v. Taylor-Hanna-James Co.* (Civ. App.) 227 S. W. 361.

#### Art. 6154. This chapter cumulative; not to impair existing rights.

Cited, *Crow v. Cattlemen's Trust Co.* (Civ. App.) 198 S. W. 1047.

### DECISIONS RELATING TO UNINCORPORATED ASSOCIATIONS IN GENERAL

**Nature and status in general.**—Parties constituting members of a voluntary association, as a syndicate, have the legal liabilities, rights, and duties of partners, except there ordinarily is no delictus personæ, and the affairs are usually conducted by managers designated according to the by-laws, and as the rights of each member are fixed by certificate, the death of a member will not dissolve the association. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

In the absence of legislation, a voluntary unincorporated association is not regarded by the law as a person or entity, and where such associations engage in business enterprise, the liability of the members to third persons is similar to the liability of partners, and enforceable in the same manner as the partnership liability. *Brotherhood of Railroad Trainmen v. Cook* (Civ. App.) 221 S. W. 1049.

An association of persons and institutions for mutual protection against fire losses by a scheme of mutual insurance and limited liability held not a partnership. *Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 221 S. W. 259, answering certified questions (Civ. App.) 159 S. W. 1036, and answers to certified questions conformed to 223 S. W. 1118.

Agreement between organizers of an oil company held to have created a trust for such purpose, and not an unincorporated joint-stock company. *Davis v. Hudgins* (Civ. App.) 225 S. W. 73.

**By-laws and articles of association.**—A member of an association may, by prior agreement, authorize the association to act for him and bind him by subsequent by-laws, awards, and the like. *Kelsey v. Early Grain & Elevator Co.* (Civ. App.) 206 S. W. 849.

The by-laws of a syndicate formed to buy and sell oil leases provided for an executive committee, which should perform all acts necessary to complete the organization, and

further provided for the election of a board of directors by the stockholders, and that such directors should assume control of the business. Held that, despite conflicting provisions in the by-laws, which apparently would have given the executive committee continuing control, the directors elected by the stockholders are thereafter entitled to control the affairs of the association as against the executive committee. *Oil Lease & Royalty Syndicate v. Beeler* (Civ. App.) 217 S. W. 1054.

A voluntary association has power to enact laws governing the admission of members and to prescribe the necessary qualifications for membership; membership being a privilege which the society may accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interest. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Courts sometimes interfere where members of voluntary associations have been wrongfully excluded or expelled, but as a rule they will not interfere with the right of an association to make laws or rules, unless they are against good morals or violate the laws of the state. *Id.*

Purchasers of stock were bound by the provisions of articles of association authorizing trustees to conduct its business affairs and purchase and otherwise acquire property necessary for its purposes, including their power to sell all of its property for repayment of stockholder when unable to raise sufficient money to improve its property. *Lucky Pat Oil & Gas Ass'n v. Cox* (Civ. App.) 230 S. W. 858.

**Rights of members.**—Purchasers of shares in a colony, with understanding it contained not less than 12,800 acres, each share representing part of the whole tract, on paying the price became collectively equitable owners of their interests in the entire tract, and also acquired equitable title to an excess area of 135.92 acres subsequently discovered in the tract, which was not reserved from sale to them or in any way designated or segregated, though deed was not made by the vendors as provided in the contract, but deeds were executed to each individual purchaser or shareowner for specific property designated by a meeting of shareholders. *Duncanson v. Howell* (Com. App.) 222 S. W. 232, reversing judgment (Civ. App.) *Howell v. Duncanson*, 195 S. W. 349.

Where plaintiff contracted with an unincorporated joint-stock association for \$100 par value of its stock in exchange for a \$100 Liberty Bond which the association returned, plaintiff's acceptance of such return would preclude him from treating the action as a conversion of his stock which had never been delivered. *Thrift Oil & Gas Co. No. 2 v. Newton* (Civ. App.) 227 S. W. 495.

Where defendant committed a breach of contract to sell its own stock returning plaintiff's Liberty Bond which it had agreed to accept, plaintiff was in the same condition as if he had never delivered the bond and could recover the difference between the value of the bond and the value of the stock at the time of the breach, but the bond's depreciation would not warrant his recovering the highest price of the stock between dates of breach and trial. *Id.*

Where a joint-stock association failed to carry on, and, recognizing that stockholders were entitled to a refund, sold land to a company for \$4,000, such company to issue its stock for other stock and to pay to those who refused to accept its stock the face cash value for their stock, held, that all stockholders are entitled to participate in the \$4,000 fund. *Lucky Pat Oil & Gas Ass'n v. Cox* (Civ. App.) 230 S. W. 858.

Stockholder of a joint-stock association held to have ratified the trustee's transfer of its property to another company by refusing to accept rescission of the contract of sale and the placing of each party thereto in statu quo. *Id.*

**Liability of members for acts and debts of association.**—Trustees and members of unincorporated association may limit their liability as to some torts, and even relieve trust estate as to some, since it is not contrary to public policy to stipulate against liability for negligence except where relation of master and servant or passenger and carrier exists, but such members and trustees cannot make valid contract exempting themselves from individual liability for injuries to employes of association. *Fisheries Co. v. McCoy* (Civ. App.) 202 S. W. 343.

In personal injury suit by employe against unincorporated association and two shareholders who were trustees and managing officers, court did not err in refusing to hold such members liable for such part only as would be arrived at by charging each with one-twelfth, etc., defendants being severally liable for full amount. *Id.*

Under applications signed by persons becoming members of an unincorporated association for mutual protection against losses by fire, providing that deposits be made by each member as a fund to pay losses, and that, if the deposits should be expended, the members should pay to the trustee such sums as might be required, "provided said sum shall in no case exceed the amount of the premises on his policy or policies then in force," held, that a member was severally liable for compensation of a manager appointed and losses on other policies only to the amount specified as premium for the insurance carried by him, but that the members were jointly and severally liable as principals to creditors with claims for services rendered or supplies sold to the association and creditors with claims for premiums for risks reinsured. *Sergeant v. Goldsmith Dry Goods Co.*, 110 Tex. 482, 221 S. W. 259, answering certified questions (Civ. App.) 159 S. W. 1036, and answers to certified questions conformed to 223 S. W. 1118.

Where an unincorporated association was formed for the purpose of mutual protection against losses by fire, applications filed by the persons and firms becoming members must be construed along with policies issued in order to determine the liability of any member for the loss of another member; the application being the only document subscribed by any member. *Id.*

**Officers and committees.**—Where three trustees of an association sold property, accepting the services of plaintiff, the association is estopped to deny the authority of

the managing trustee, who contracted with plaintiff for rendition of services in connection with the sale. *Waurika Oil Ass'n No. 1 v. Ellis* (Com. App.) 232 S. W. 364.

**Actions against association.**—In suit against sellers of stock in a joint-stock association to be formed who agreed to drill for oil to the depth of 2,000 feet and to turn the well over to the association, defendants claiming that they drilled the well to the depth agreed, evidence held to sustain case as made by plaintiffs' pleading alleging that the sole consideration for their purchase of the stock was the agreement on the part of defendants to drill a well to a depth of 2,000 feet unless oil or gas should be found in paying quantities before. *Frye v. Wayland* (Civ. App.) 228 S. W. 975.

**Equitable relief.**—Where one of the members of a joint-stock association, owning half of its stock, was in hopeless deadlock with the owners of the other half of the stock, making it impossible to proceed with business, held, the association should be dissolved, its affairs wound up, and its property partitioned, although the original agreement provided that the trust should continue 50 years. *Wiess v. McFaddin* (Civ. App.) 211 S. W. 337.

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## TITLE 103

### PAWNBROKERS AND LOAN BROKERS

Art.  
6155. Definition of "pawnbroker."  
6161. How notice shall be given.  
6171a. "Loan broker" defined.  
6171b. Bond required.

Art.  
6171g. Loan broker to file power of attorney to receive service of process.  
6171i. Judgments collectable from bond.  
6171j. Consent of wife to security for loan.

#### Article 6155. [3636] Definition of "pawnbroker."

Cited, *Juhan v. State*, 86 Cr. R. 63, 216 S. W. 873.

#### Art. 6161. [3642] How notice shall be given.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

#### Art. 6171a. "Loan broker" defined.

See *Mason v. Green* (Civ. App.) 226 S. W. 829.

**Validity.**—This act is unconstitutional, the unreasonable and discriminatory provisions as to service, coupled with the further provision that judgments against persons engaged in the loan business shall be collectible out of the required bond, denying persons engaged in such business of their property and privileges without due process of law. *Juhan v. State*, 86 Cr. R. 63, 216 S. W. 873.

#### Art. 6171b. Bond required.

**Validity.**—The requirements of this article, in connection with art. 6171g, are unconstitutional as denying due process of law. *Juhan v. State*, 86 Cr. R. 63, 216 S. W. 873.

#### Art. 6171g. Loan broker to file power of attorney to receive service of process.

**Validity.**—The provision requiring the broker to file a written irrevocable power of attorney naming the county judge of the county as his duly authorized agent, for the purpose of accepting service and consenting that service of any civil process upon such judge shall be valid, is unconstitutional. *Juhan v. State*, 86 Cr. R. 63, 216 S. W. 873.

#### Art. 6171i. Judgments collectable from bond.

See *Mason v. Green* (Civ. App.) 226 S. W. 829.

#### Art. 6171j. Consent of wife to security for loan.

**Construction and application in general.**—This article is inapplicable to purchase-money mortgage. *Strickland v. Dobbs* (Civ. App.) 200 S. W. 1125; *Mason v. Green* (Civ. App.) 226 S. W. 829.

Art. 3793, providing that a debt for rents and advances made by the landlord to a tenant may be secured by a loan on exempt personal property, held not repealed by this article, which is applicable only to mortgages to loan brokers. *Mason v. Green* (Civ. App.) 226 S. W. 829.

## TITLE 104

## PENITENTIARIES AND CONVICTS

Chap.

1. System of prison government.
3. Workhouse and county convicts.

Chap.

4. Hiring of county convicts.

## CHAPTER ONE

## SYSTEM OF PRISON GOVERNMENT

Art.

6172. Policy of prison system.  
 6183. May purchase instrumentalities for employment of convicts.  
 6184. Purchases of land, how made.  
 6184a. Exercise of certain options.  
 6187. Farm and factory products, movable and real property, household.  
 6188. Prison funds.  
 6192. Prison accounts, how kept.  
 6195a. Removal by suit brought by the attorney general; effect of judgment; appointment of successor.  
 6196. Salaries and qualifications of under-officers and employés.

## RELOCATION OF PRISON

- 6200a. Present prison and forms abandoned.  
 6200b. New site to be purchased; location.  
 6200c. Modern plant to be built.  
 6200d. Equipment.

Art.

- 6200e. Building for females.  
 6200f. Relocating commission.  
 6200g. Housing of prisoners during transfer.  
 6200h. Use of convict labor.  
 6200i. Report to Legislature.  
 6200j. Completed plant to be delivered to Board of Prison Commissioners.  
 6200k. Manufacturing plants.  
 6200l. Limit on expenditures.  
 6200m. Traveling expenses.  
 6200n. Power of eminent domain.

## PRISON BOARD OF SUPERVISION

- 6200o. Board created; qualifications; appointment.  
 6200p. Tenure; compensation; appropriation.  
 6200q. Meetings; visitation; investigations; reports; administration of oaths; stenographer.

**Article 6172. Policy of prison system.**Cited, *Rochelle v. State* (Cr. App.) 232 S. W. 833.

**Art. 6183. May purchase instrumentalities for employment of convicts.**—The Prison Commission shall have the power to purchase or cause to be purchased, with such funds as may be at their disposal, any machinery, tools or supplies needed for the benefit of said Prison System; and may establish such factories as, in their judgment, may be practicable and that may afford useful and proper employment to prisoners confined in the State Penitentiary, under such regulations, conditions and restrictions as may be deemed best for the welfare of the State and the prisoners, it being the purpose of this Act to clothe said board of Prison Commissions with all power and authority necessary for proper management of the Prison System of this State. [Acts 1910, 4 S. S., p. 143, § 12; Acts 1919, 36th Leg., ch. 141, § 1.]

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

**Art. 6184. Purchase of land, how made.**—The Prison Commission shall not purchase any land for the prison system of the State of Texas unless and until the land to be so purchased and the maximum price to be paid therefor shall have been submitted to and received the approval of the Legislature of this State, and when any purchase of land is so approved, the said Prison Commission may pay such sum in cash as may be agreed upon between the vendor and the Prison Commission and for the unpaid purchase money to become due upon said land, they shall execute to the vendor notes payable in such sum and in such time as may be agreed upon between the parties, and the payment of which shall be secured by a deed of trust upon such land in the usual form, and containing such covenants as may be agreed upon between the par-

ties and may pledge a sufficient amount of the net revenues of the property so purchased to pay the deferred instalments of purchase money thereon; and it shall be expressly provided in the conveyance to said land, the notes executed for the unpaid purchase money and the deed of trust, that the vendor relies alone upon the lien created by the deed of trust upon said land and the net revenue so pledged and that no personal liability against the Prison Commission or the State of Texas shall arise out of said transaction beyond said liens; and the purchase money paid originally, as well as the instalments paid upon deferred payments, may be paid out of any funds belonging to the said Prison System. The title to all lands purchased by the Prison Commission under the terms of this Act shall be examined, passed upon and approved as good and sufficient by the Attorney General, before such deed and conveyance shall be accepted by the Prison Commission, and all conveyances, notes and trust deeds, and other instruments executed under the provisions of this Act, shall be prepared, passed upon and approved by the Attorney General. The title to all lands so purchased shall vest in the Prison Commission, and their successors in office, as trustees, for the State. [Acts 1910, 4 S. S., p. 143, § 13; Acts 1919, 36th Leg., ch. 141, § 2; Acts 1919, 36th Leg. 2d C. S., ch. 63, § 1.]

**Explanatory.**—Took effect July 28, 1919. The title and enacting part purports to amend sec. 2 of act approved March 24, 1919, being chapter 141, General Laws 36th Leg. Regular Session, by adding thereto sections 2a and 2b. The act then proceeds to amend sec. 13, ch. 10, Acts 31st Leg., 4th Called Session, so as to read as set forth above. After the provision appears a section marked 2a, reading as set forth below in art. 6184a. After this provision follows a section marked 2b, but which is the usual emergency clause.

**Art. 6184a. Exercise of certain options.**—The right and desire of the Prison Commission to purchase under and in accordance with, and, if necessary, by appropriate action or actions to specifically enforce the options contained in two certain leases from Bassett Blakely to the Prison Commission hereinafter referred to, having been submitted to, is hereby approved by the Legislature, and the said Prison Commission is hereby authorized and directed to exercise said options and to purchase the lands thereunder, and, if necessary, by such appropriate action or actions as they may be advised by the Attorney General, to enforce their rights under said options. Said lease contracts containing said options which relate to and embrace certain lands commonly known as Blue Ridge Farms Numbers One and Two therein described in Fort Bend and Harris Counties, Texas, are as follows:

The first of said contracts is dated first day of February, A. D. 1916, is signed "The Prison Commission of Texas by S. J. Bass, Chairman, "and Bassett Blakeley, Lessor," attested by "Oscar Wolfe, Secretary," and approved by "Jas. E. Ferguson, Governor of Texas." Said contract is likewise acknowledged by Bassett Blakeley before J. W. Lewis, Notary Public, Harris County, was filed for record with the County Clerk of Fort Bend County, February 26th, 1916, and recorded in the deed records of that county, Volume 71, pages 370 et seq.

The second of said contracts was executed on the 9th day of July, A. D. 1918, is signed by "Bassett Blakeley, Lessor," and by "Board of Prison Commissioners. R. L. Winfrey, W. R. Dulaney, W. G. Pryor," and was acknowledged by Bassett Blakeley on the 9th day of July A. D. 1918, before J. H. Farbar, Notary Public in and for Harris County. [Acts 1919, 36th Leg. 2d C. S., ch. 63, § 1.]

**Explanatory.**—Added to Acts 1919, 36th Leg., ch. 141, § 2, as § 2a, by Acts 1919, 36th Leg. 2d C. S., ch. 63, § 1. Said Acts 1919, 36th Leg. 2d C. S., ch. 63, § 1, also added a section to be known as § 2b. This section is merely the usual section declaring an emergency.

**Art. 6187. Farm and factory products, movable and real property, how sold.**—The Prison Commission shall have power to sell and dispose of all farm products and the products of all factories connected with the prison System, and all personal and movable property, at such prices and on such terms as may be deemed best by them, and they may with the approval of the Governor, lease any real estate or other fixed property and appurtenances belonging thereto upon such terms as to them seem best. The Prison Commission shall not have authority to sell any real estate, except as they are directed by the Governor and when directed by the Governor to sell any real estate, they shall have power to execute proper conveyance to the title thereto, such instruments of conveyance shall be prepared and approved by the Attorney General. The Prison Commission shall in the purchase or sale of any machinery or equipment for the Prison System exceeding in value the sum of \$5000, advertised in the manner prescribed by the Prison Commission, for bids for such property in at least three daily papers in this State having a general circulation and shall give all such bids received to the public press at least thirty days before any such contract is let; provided, that no lands shall be sold for a less price than its fair market value. [Acts 1910, 4 S. S., p. 143, § 16; Acts 1919, 36th Leg., ch. 141, § 3.]

**Art. 6188. Prison funds.**

Cited, *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**Art. 6192. Prison accounts, how kept.**

Cited, *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**Art. 6195a. Removal by suit brought by the Attorney General; effect of judgment; appointment of successor.**—In addition to the method of removing members of the Board of Prison Commissioners referred to in Article 6195 hereof, they may likewise be removed for the causes set forth in Article 6195 by suit brought by the Attorney General in the name of the State of Texas on the relation of the Governor; such suit to be brought in the District Court of Walker County or in Travis County, or in the county or residence of the defendant, for which purpose venue and jurisdiction is hereby conferred. It shall be the duty of the Attorney General to bring such action when directed by the Governor to do so provided the Governor accompanies such direction with charges and evidence showing the defendant is subject to removal under Article 6195. Upon the application of the Attorney General, in the name of the State of Texas, the District Judge before whom such suit is pending, may immediately suspend the defendant from office, which order or suspension shall be effective until set aside by the Court on the motion of the defendant, which motion upon the demand of the defendant shall have preference over all other causes pending in such court; provided, however, that if the judgment of the trial court be one of removal from office, the defendant shall be forthwith suspended from office pending any appeal of the case. In the event the defendant be suspended from office, and the suit finally results in favor of the defendant, he shall be entitled to recover all the compensation which would have accrued to him had he not been suspended from office, and judgment, in such event, shall be rendered against the State of Texas that the defendant recover such compensation, determining the amount thereof. The Comptroller of the State shall, upon receipt of a duly certified copy of such judgment, issue a warrant upon the State Treasury for the full amount of such judgment, such warrant to be paid by the State Treasurer out of any funds of the State not otherwise appro-

priated. Whenever the defendant is suspended from office, as hereinabove provided, the district judge at the time of making such order of suspension, shall appoint, for the duration of such suspension, some other qualified person to discharge the duties of the officer suspended, the person so appointed shall receive the same measure of compensation provided by law for such office, to be paid from the same sources and in the same manner as same would have been paid to the officer suspended. The suit shall be a civil action to be tried as other civil cases with the right to appeal and review as in other civil cases. The courts shall have authority to issue all necessary writs to effectuate any judgment of removal or order of suspension rendered hereunder. Such suits for removal shall have precedence over all other cases in trial courts and in appellate tribunals. The procedure of removal herein provided shall be cumulative of all other statutes relating to the subject of removal from office or impeachment. [Acts 1921, 37th Leg. 1st C. S., ch. 32, § 1, adding art. 6195a to Rev. Civ. St. 1911.]

Took effect Aug. 23, 1921.

**Art. 6196. Salaries and qualifications of under-officers and employés.**—The prison commission shall, except as provided in this Title, fix the salaries of all officers and employés of the prison system upon such a basis as the labor and ability of the officer or employé entitles him to, such salary to be paid monthly at the end of each month. They shall pay to those employed as guards of the convicts salaries of not less than Forty (\$40.00) Dollars nor more than Sixty (\$60.00) Dollars per month, and it shall be the duty of the prison commission to promulgate, effective not later than July 1, 1918, an equitable schedule of salaries between the said amounts, based upon the length of service of the guard in the employ of the prison commission, his efficiency and ability to perform in a capable manner the work devolving upon such employés of the prison system; and shall furnish such guards with board and lodging free. No person shall be employed as a guard to guard convicts who is not at least twenty-one years of age, of good moral character and who is not able to read and write and has not a fair knowledge of the English language; and the prison commission may provide such other qualifications as they may deem expedient; provided, that no person shall be employed as a guard who is in any way addicted to the use of alcoholic or intoxicating liquors; and the prison commission shall require all officers and employés connected with the prison system to familiarize themselves with and conform to the rules and regulations and laws governing the prison system of this State; provided, the prison commission shall require all officers and employés with the prison system of this State to take and subscribe to the oath of office prescribed by the Constitution. [Acts 1910, 4 S. S., p. 143, § 29; Acts 1917, 35th Leg. 1st C. S., ch. 32, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 67, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

#### RELOCATION OF PRISON

**Art. 6200a. Present prison and farms abandoned.**—The main penitentiary of the State of Texas, located at Huntsville, Texas, and the following farms belonging to the penitentiary system of Texas: Wynn Farm, Goree Farm, Eastham Farm, Ferguson Farm, Shaw Farm, Clemens Farm, Darrington Farm, Ramsey Farm, Retrieve Farm, Harlam Farm, Imperial Farm, and Blue Ridge Farm, shall be abandoned as prisons and prison farms, and shall be sold in such manner and upon such



terms as shall be fixed by the Commission herein created. [Acts 1921, 37th Leg. 1st C. S., ch. 57, § 1.]

Took effect Nov. 15, 1921.

**Art. 6200b. New site to be purchased; location.**—Sufficient land shall be purchased with the funds realized from the sale of said main penitentiary and prison farms for the said prison farm and the erection of a modern penitentiary plant, all of said land to be in one body, not to exceed five thousand acres, said land so purchased to be located within seventy-five miles of the City of Austin, Texas, and said land for said penitentiary site to be purchased by the Commission hereby created. [Id., § 2.]

**Art. 6200c. Modern plant to be built.**—There shall be built upon said site so purchased a modern penitentiary plant, sufficient for the needs of the penitentiary system of Texas, with all the necessary buildings, equipment and improvements; said penitentiary plant to be established and erected by and under the direction of the Commission hereby created. [Id., § 3.]

**Art. 6200d. Equipment.**—There shall be installed in said penitentiary system and plant proper equipment for vocational training for all white male prisoners under the age of twenty-five years, and there shall be at least three different characters of said vocational training. [Id., § 4.]

**Art. 6200e. Building for females.**—There shall be established by said Commission at some point in close proximity to said central prison a modern prison building, sufficient to care for the female convicts of the State of Texas, said plant to be properly equipped for vocational training for women. [Id., § 5.]

**Art. 6200f. Relocating commission.**—There is hereby created a commission of three persons, consisting of the Governor of Texas, the Attorney General of Texas, and the Land Commissioner of Texas, who shall be known as the Texas Penitentiary Relocating Commission. Said Commission is hereby empowered to offer for sale and to actually sell said main penitentiary at Huntsville and all of said farms belonging to the penitentiary system of Texas, either in whole or in parts, for cash or upon such terms and conditions as they may determine, and they shall immediately after the passage of this Act determine upon a general policy, and shall proceed to dispose of said land and improvements under said plan as rapidly as possible. The proceeds of said sales shall be re-invested by said Commission in the purchase of a new site for a centralized prison plant, as herein provided for, to be located within seventy-five miles of the City of Austin, Texas, and to consist of not more than ten thousand acres of land. The commission shall, however, not be compelled to wait for the proceeds derived from the sale of said lands, if same shall be sold by them on deferred payments, but said Commission may, as soon after the passage of this Act as shall seem proper to them, contract on behalf of the State of Texas for the purchase of such new site upon such terms and conditions as they may deem proper. Said Commission is hereby further empowered to contract on behalf of the State for the erection of said buildings and improvements, and for such equipment as may be necessary for a modern, fire proof penitentiary plant for the State of Texas, and to have under its control and direction the erection of said buildings and improvements on said site, and the installation of all equipment and machinery for the purposes contemplated by this Act; provided that no contract of either

purchase or sale of any character authorized to be made under the terms of this Act by said Texas Penitentiary Relocating Commission shall be acted upon by the contracting parties or either or any of them or be in any part or manner binding upon the State of Texas until the Legislature of the State of Texas shall first approve such contract or contracts by legislative enactment other than by resolution; and provided further, that no letter, telegram or opinion of any character shall have the effect of waiving this special and specific and controlling provision to this Act, and all laws in conflict with this provision are hereby expressly repealed to the extent of such conflict; provided that said Commission shall reserve to the State the minerals in and under said tracts or parts of said lands as the members of said Commission, in their discretion, may determine should be reserved in the interest of the State. [Id., § 6.]

**Art. 6200g. Housing of prisoners during transfer.**—In re-locating said penitentiary, and while disposing of said land the Commission shall hold back sufficient farms and buildings to house the prisoners of the system until the re-located plant is ready to receive said prisoners, and said farms so held back for housing said prisoners shall, as soon as prisoners have been transferred to the re-located prison, be sold as the other farms and properties by said Commission. [Id., § 7.]

**Art. 6200h. Use of convict labor.**—For the purpose of establishing and erecting said prison plant, the Re-locating Commission is hereby further empowered to use such convict labor as may be necessary to erect said buildings, and perform such other labor as may be necessary in laying out and establishing said plant, and the Board of Prison Commissioners of Texas shall, upon requisition by said Re-locating Commission, furnish such convict labor. [Id., § 8.]

**Art. 6200i. Report to Legislature.**—The Re-locating Commission shall make its first report to the first succeeding session of the Thirty-seventh Legislature, to be held hereafter, if any shall be held, and if not, to the Regular Session of the Thirty-eighth Legislature. [Id., § 9.]

**Art. 6200j. Completed plant to be delivered to Board of Prison Commissioners.**—Upon the completion of said plant, same shall be turned over to the management and control of the Board of Prison Commissioners of Texas, and nothing in this Act shall be construed to interfere with the management and control of the prisoners of the prison system of this State heretofore vested in said Prison Commission, but during the sale of said lands and during the erection of said plant as herein authorized and provided for, the Prison Commission shall have complete control of the treatment, feeding, clothing and management of the prisoners of said system. [Id., § 10.]

**Art. 6200k. Manufacturing plants.**—Said Re-locating Commission is further empowered to inaugurate and install such plants as it may see fit for producing or manufacturing, as it may deem to the best interest of the State of Texas, and in which producing or manufacturing, the convict labor of the penitentiary system may be best adapted to. [Id., § 11.]

**Art. 6200l. Limit on expenditures.**—Said Re-locating Committee, in purchasing said site and in erecting said modern penitentiary plant and improvements and equipment shall not exceed in its expenditure the sum of money to be realized from the sale of the prison properties of Texas, as heretofore provided for. [Id., § 12.]

**Art. 6200m. Traveling expenses.**—The members of the Texas Penitentiary Relocating Committee shall be paid all traveling expenses while engaged in their duties hereunder. [Id., § 13.]

**Art. 6200n. Power of eminent domain.**—Said Texas Penitentiary Relocating Commission is hereby expressly vested with the right of eminent domain for the purpose of acquiring such real-estate and property necessary for the purposes herein specified, by condemnation proceedings to be exercised in the same manner and under the rules and regulations as provided for railroad companies. [Id., § 13a.]

#### PRISON BOARD OF SUPERVISION

**Art. 6200o. Board created; qualifications; appointment.**—That there is hereby created a Prison Board of Supervision of the State Penitentiary of Texas, to be known as the Penitentiary Supervisory Board, which shall consist of three persons, the members of which shall be citizens of the State of Texas, and over thirty years of age, and one of said Commissioners shall be a woman. Said Board shall be appointed by the Governor of the State of Texas, by and with the advice of the Senate of Texas. [Acts 1921, 37th Leg. 1st C. S., ch. 59, § 1.]

Took effect Nov. 15, 1921.

**Art. 6200p. Tenure; compensation; appropriation.**—The term of office of each member of the Penitentiary Supervisory Board shall be six years, except the members of the first Board appointed hereunder, whose term shall be two years, four years and six years respectively, and they shall decide by lots among themselves who shall have the two year term, the four year term and the six year term; but after the expiration of the term of office of any member of the first Board appointed hereunder, his successor shall hold for a term of six years. The members of said Board shall receive as compensation for their services Five (\$5.00) dollars per day while actually engaged in following their duties as members of said Board, and shall further receive compensation for traveling expenses while so serving. In order to carry out the provisions of this Act the sum of Five Thousand (\$5,000.00) Dollars, or so much thereof as may be necessary, is hereby appropriated out of the State Treasury not otherwise appropriated; said money to be paid out upon vouchers properly signed and sworn to by the Chairman of the Board created by this Act. [Id., § 2.]

**Art. 6200q. Meetings; visitation; investigations; reports; administration of oaths; stenographer.**—Said Board shall meet once every three months at a place to be selected by the Chairman, and shall visit the main penitentiary and the State prison farms at least once every three months. It shall not be necessary for the entire Board to pay such visit to the main penitentiary or farms, but a visit by any member of said Board shall be sufficient. It shall be the duty of said Penitentiary Supervisory Board upon such visits to the penitentiary system of Texas to make an investigation of the treatment of the convicts in said prison with reference to the character of punishment inflicted, food, clothing, sanitation, health, spiritual and educational training, segregation and classification, and to look into such other matters concerning the general welfare of the convicts as said Board may deem necessary. Said Board shall make a quarterly report to the Governor of the State of Texas, and the Prison Board as to conditions as they find them in the penitentiary system, together with their recommendations, and to report all prison officials or employees, who are found to be derelict in their duty, or

who have acted in the handling of said prisoners in violation of law. Its reports shall also be furnished the Legislature at each session that it convenes. Said Board shall also have such reports published through such media as they see fit. In order to carry out the purpose of this law, said Board shall have access to the main penitentiary or any farm or camp at any time, and shall not be required to give any notice of any proposed visit, and shall be admitted upon their request, and shall have the right to inspect any part of the system; they shall also have the power to administer oaths and take testimony of prison officials and employees, convicts, and such other persons as they may deem necessary. They shall have the right to engage the services of a stenographer at the expense of the State for the purpose of taking such testimony, and for the further purpose of making out reports. [Id., § 3.]

### CHAPTER THREE

#### WORKHOUSES AND COUNTY CONVICTS

Art. 6232. Commissioners' courts to establish workhouses, etc.	Art. 6240. Refractory convicts to be punished. 6244. How to be credited on fine, etc.
6233. "County convicts" defined.	6247. Costs to be paid officers.
6238. To labor on public works, etc.	

**Article 6232. [3727] Commissioners' courts to establish workhouses, etc.**

Cited, *Walton v. Travis County*, 5 Civ. App. 525, 24 S. W. 352.

**Art. 6233. [3728] "County convict" defined.**

See *Ex parte Grimes*, 81 Cr. R. 405, 195 S. W. 858.

**Art. 6238. [3733] To labor on public works, etc.**

**Construction and operation in general.**—The failure of the county commissioners' court to put the county convicts to work on the public roads, and permitting them to remain in jail until fines and costs are satisfied by imprisonment, does not render the county liable to the prosecuting attorney for his fees accruing to him for the prosecution of such convicts, which the county is required, by article 6247, to pay out of the labor of such convicts, since the county is not liable for the negligence of its officers, unless made so by statute. *Walton v. Travis County*, 5 Civ. App. 525, 24 S. W. 352.

**Art. 6240. [3735] Refractory convicts to be punished.**

See *Ex parte Grimes*, 81 Cr. R. 405, 195 S. W. 858.

**Art. 6244. [3739] How to be credited on fine, etc.**

**In general.**—A county convict who has worked at the county farm a sufficient time to satisfy his fine is entitled to his discharge. *Ex parte Dampier*, 24 Tex. App. 561, 7 S. W. 330.

The amendment reducing from one dollar to fifty cents the rate per day allowed a county convict as credit on his fine and costs when working the same out by manual labor, does not apply to a judgment which was rendered, and in process of execution, prior to the passage of the act; since under Const. art. 1, § 16, every law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed, is *ex post facto*. *Ex parte Hunt*, 28 Tex. App. 361, 13 S. W. 145.

**Art. 6247. [3742] Costs to be paid officers.**

Decision under prior statute, see *Grayson County v. May* (App.) 19 S. W. 331.

**Liability of county.**—The failure of the county commissioners' court to put the county convicts to work on the public roads, as required by art. 6238, and permitting them to remain in jail until fines and costs are satisfied by imprisonment, does not render the county liable to the prosecuting attorney for his fees accruing to him for the prosecution of such convicts, which the county is required, by this article, to pay out of the labor of such convicts, since the county is not liable for the negligence of its officers, unless made so by statute. *Walton v. Travis County*, 5 Civ. App. 525, 24 S. W. 352.

## CHAPTER FOUR

## HIRING COUNTY CONVICTS

Art.  
6249. Convicts may be hired out.  
6250. Either publicly, privately or generally, etc.

Art.  
6251. Hirer shall give bond, and its requisites.

**Article 6249. [3744] Convicts may be hired out.**

See *Ex parte Dampier*, 24 Tex. App. 561, 7 S. W. 330; *Ex parte Grimes*, 81 Cr. R. 405, 195 S. W. 858.

**Former law.**—See *Grayson County v. May* (App.) 19 S. W. 331.

**Convicts who may be hired out.**—One convicted of seduction, which is a felony, and punished by fine, could not be hired out. *Ward v. White*, 86 Tex. 170, 23 S. W. 981.

**Residence of parties in county of conviction.**—*Ex parte Medaris*, 38 Cr. R. 493, 43 S. W. 517.

**Art. 6250. [3745] Either publicly or privately, generally or especially.**

See *Ward v. White* (Civ. App.) 24 S. W. 312.

**Art. 6251. [3746] Hirer shall give bond and its requisites.**

**Validity of bond.**—The law authorizing the county judge to hire out one convicted of a misdemeanor or a petty offense and punished by fine, does not apply to a conviction for felony, though the punishment has been assessed at a fine; and the bond given by the hirer of such a convict is not valid, either as a statutory or a common-law bond, and its payment cannot be enforced by the county judge. *Ward v. White* (Civ. App.) 24 S. W. 312.

Where judgment in a criminal case was void, a *capias pro fine*, under which defendant was arrested and delivered into the custody of another on execution by the latter of a convict's bond, issued in furtherance of execution and enforcement of the judgment, was also void; the bond under arts. 6233, 6240, 6249–6256, being but a means of procedure to enforce the judgment. *Ex parte Grimes*, 81 Cr. R. 405, 195 S. W. 858.

## TITLE 105

## PENSIONS

## CHAPTER TWO

## CONFEDERATE SOLDIERS AND SAILORS

Art.  
6267a. Pension to whom granted.  
6278. Certain persons not entitled to.

Art.  
abolished; powers and duties  
transferred to comptroller of pub-  
lic accounts.  
6283b. Appropriation annulled.

COMMISSIONERS OF PENSIONS  
6283a. Office of commissioner of pensions

**Article 6267a. Pension, to whom granted.**—Out of the fund to be created under the provisions of Section 1 hereof [1918 Supp., Art. 6267], there shall be paid an annual pension of sixteen and two-thirds dollars per month, the same to be paid quarterly on the first days of September, December, March and June of each year to every disabled and indigent soldier who under special laws of the State of Texas during the war between the States served for a period of at least six months in organizations for the protection of the frontier against Indian raids and Mexican marauders, and to every indigent and disabled soldier of the militia of the State of Texas who was in active service for a period of at least six months during the war between the States, and to every widow of such soldier who is in indigent circumstances and who was married to such soldier prior to January 1, 1900, and has never re-married, and to every indigent and disabled Confederate soldier or sailor who served for a period of at least three months of active service in the armies or navies of the Confederate States of America during the war between the States and who has become a resident of the State of Texas prior to January 1, 1900, and who has been a bona fide resident of the State of Texas continually since January 1, 1900, and to every widow of such a Confederate soldier or sailor who is in indigent circumstances and who became a resident of the State of Texas prior to January 1, 1900, and has been a bona fide resident of said State continually since January 1, 1900, and who was married to such soldier or sailor prior to March 1, 1880, and the fact of re-marriage since the death of the soldier or sailor shall not bar his surviving widow from receiving a pension hereunder if she be now a widow and in indigent circumstances, if she shall have been the wife of such soldier or sailor at the time of his death and left by him as his widow; and providing that the word "widow" as used in this Act and in the existing law shall not apply to nor include women born since 1861, and provided that in the event the appropriation made by the State Legislature out of such special funds for any one year shall prove insufficient to pay in full said pension, there shall not thereby be created a deficiency outstanding as a valid claim against the State of Texas, and each pensioner shall receive, except as herein or in existing law otherwise provided for, his or her prorata according to the amount appropriated for that year. [Acts 1913, p. 282, § 2; Acts 1917, 35th Leg., ch. 188, § 3; Acts 1919, 36th Leg., ch. 86, § 1.]

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

**Art. 6278. Certain persons not entitled to.**—No person shall, while confined in any of the asylums of this State, at the expense of the State, or while confined in the State penitentiary to satisfy a judgment of conviction, receive a pension under this Chapter; and any person having

been granted a pension under the provisions of this Chapter who shall afterwards be confined in any asylum of this State, as the expense of the State, or who shall be confined in the State penitentiary to satisfy a judgment of conviction, shall, while an inmate of such asylum or penitentiary, forfeit his pension; and no pensioner who leaves this State for a period of over six months shall draw a pension while so absent; provided, that any person who has been granted a pension under this Chapter, and who is thereafter admitted as an inmate in the Confederate Home, or is thereafter admitted as an inmate of the Confederate Woman's Home of this State, shall hereafter be entitled to receive pension payments to the amount of one-half of the pension that such person would be entitled to receive if not an inmate of such home. [Acts 1909, p. 231, § 14; Acts 1921, 37th Leg., ch. 74, § 1, amending art. 6278, Rev. Civ. St.]

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

#### COMMISSIONER OF PENSIONS

**Art. 6283a. Office of commissioner of pensions abolished; powers and duties transferred to comptroller of public accounts.**—That the office of Commissioner of Pensions be, and the same is hereby abolished, and all of the powers and duties conferred upon the Commissioner of Pensions by any existing laws of this State be, and the same are hereby, conferred upon the Comptroller of Public Accounts. [Acts 1918, 35th Leg. 4th C. S., ch. 89, § 1.]

**Explanatory.**—Sec. 3 of the act repeals all laws in conflict and provides that the act shall not become effective until Jan. 1, 1919.

**Art. 6283b. Appropriation annulled.**—All current appropriations made for the support of the State Pension Department for the years 1918 and 1919, are hereby annulled and repealed, except the salary of Chief Clerk of said Department, in the sum of \$1,500.00, per annum, which said appropriation shall be available for the use of the Comptroller of Public Accounts in the administration of the Pension Laws of this State. [Id., § 2.]

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## TITLE 106

### PHARMACY

**Article 6292. Fees of board.**—The Board of Pharmacy shall be entitled to charge and collect the following fees:

For the examination of an applicant for license as a pharmacist, Five Dollars; for the examination of an applicant for license as an assistant pharmacist, Two Dollars and Fifty Cents.

Every registered pharmacist and every registered assistant pharmacist in the meaning of this Article, who desires to continue in the pursuit of pharmacy in this State shall annually, after the expiration of the first year of registration and on or before the first day of January of each year, pay to the Secretary of the Board of Pharmacy a renewal fee to be fixed by the board which shall not exceed Three Dollars in return for which a renewal of registration shall be issued; providing further that the said Board of Pharmacy shall each year turn over to the State Pharmaceutical Association for the advancement of the science and arts of pharmacy out of the annual fees collected by it, such sum as it may deem advisable, not to exceed Two Dollars for each pharmacist and assistant pharmacist who shall have paid his renewal fee during such year, provid-

ing that those holding a certificate of pharmacy and not engaged in the active practice of pharmacy, shall be issued a renewal certificate upon payment of an annual fee of one dollar (\$1.00). Said Association shall report annually to said board on the condition of pharmacy in the State. [Acts 1907, p. 349, § 13; Acts 1917, 35th Leg., ch. 128, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 37, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

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## TITLE 107

### PILOTS

#### CHAPTER THREE

#### PILOT BOARDS IN CERTAIN CITIES

Art.

6319—1. Cities may establish pilot boards.

6319—2. Cities may appoint and suspend branch or deputy pilots.

6319—3. Examination of branch and deputy pilots.

Art.

6319—4. Disqualification to act as commissioner.

6319—5. Cities may fix rates of pilotage.

**Article 6319—1. Cities may establish pilot boards.**—From and after the passage of this Act, the right, power and authority is hereby granted to city councils or boards of commissioners of any and all cities of one hundred thousand population or more, situated along or upon navigable streams in the State of Texas, and owning or operating municipal docks, wharves or warehouses, to provide by ordinance for the appointment of pilot boards for their respective cities, said cities to have exclusive jurisdiction, as hereinafter defined, over the pilotage of boats between the Gulf of Mexico and their respective ports, said ordinance to define the rights, powers and duties of such pilot board consistent with the provisions of this Act. Said pilot boards shall be comprised of five commissioners of pilots whose personnel shall consist of the harbor boards of the respective cities where such boards exist, and all of whom shall be nominated by the mayor of such city and confirmed by the city council or board of commissioners thereof for such term of office as may be provided by such charter for other officials of said city appointed by the mayor thereof. [Acts 1920, 36th Leg. 4th C. S., ch. 3, § 1.]

**Explanatory.**—Sec. 6 of the act repeals all laws in conflict. The act took effect Oct. 2, 1920.

**Art. 6319—2. Cities may appoint and suspend branch or deputy pilots.**—The right, power and authority is also granted to the city councils or boards of commissioners of such cities, upon recommendation of said pilot boards, to appoint, suspend or dismiss from office branch pilots, or deputy pilots, of their respective ports, upon the passage of an ordinance providing for the establishment of said pilot boards and the selection, removal, suspension and regulation of branch and deputy pilots of said port. [Id., § 2.]

**Art. 6319—3. Examination of branch and deputy pilots.**—The right, power and authority is further granted to such city councils or boards of commissioners, upon recommendation of said pilot boards hereinabove provided for, to examine and determine upon the qualifications for office of any and all branch or deputy pilots in office at the time of the taking effect of this Act, and to retain in service, or suspend or dismiss from



service, any and all branch or deputy pilots as they may deem advisable. [Id., § 3.]

**Art. 6319—4. Disqualification to act as commissioner.**—No person who is directly or indirectly engaged in the towing business, or in any pilot boat, or who is directly or indirectly interested in any other business affected by or connected with the performance of his duties as commissioner of pilots shall be appointed or retained as a member of such pilot board. [Id., § 4.]

**Art. 6319—5. Cities may fix rates of pilotage.**—The right, power and authority is further granted to such city councils, or board of commissioners of such cities to fix rates of pilotage applicable to the service of their respective pilots, and to establish and enforce by criminal ordinance or otherwise, any and all regulations compatible with Federal regulations thereof as may be needed for the government of the pilots and the proper operation of their respective ports. [Id., § 5.]

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## TITLE 107 A

### POOL HALLS

Art.  
6319a. Local option elections.

Art.  
6319m. Authority of county and district attorneys; injunction.

#### Article 6319a. Local option elections.

See *State v. Humphries*, 81 Cr. R. 322, 195 S. W. 194; *Fearis v. Gafford* (Civ. App.) 204 S. W. 675.

#### Art. 6319m. Authority of county and district attorneys; injunction.

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

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## TITLE 108

### PRAIRIE DOGS—PROVIDING FOR THE EXTERMINATION OF

Art.  
6328e. Purchase by counties of poisons and apparatus for destruction of prairie dogs, rats, coyotes, etc.; sale of same.

6328f. Designation of day for setting out poison; notice of.

Art.  
6328g. Formulas and instructions for preparation and use of poison.

6328h. Same.

6328i. Duty of landowners as to placing of poison.

6328j. Duties of lessees and tenants.

**Article 6328e. Purchase by counties of poisons and apparatus for destruction of prairie dogs, rats, coyotes, etc.; sale of same.**—The Commissioners' Court of each and every county in the State of Texas shall have the power and authority to purchase the necessary poisons and all accessories required by the citizens of such counties for the purpose of destroying prairie dogs, rats, coyotes, wolves, wild cats, gophers, ground squirrels, English sparrows and ravens, and to pay for the same out of the general fund of the county, and the Commissioners' Courts in their discretion may furnish the poisons and accessories to citizens of the county, either at cost or free. When the Commissioners' Court shall elect to sell such poisons and accessories the funds derived from the sale

thereof shall be turned into the treasury to the credit of the general fund. [Acts 1918, 35th Leg., 4th C. S., ch. 62, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 6328f. Designation of day for setting out poison; notice of.**—It shall be the duty of the Commissioners' Court to designate a certain day or days for putting out poison giving notice of same by posting up notices in public places, such as school houses, gins and mills or other public places, and also publishing the same in at least one county newspaper, if there be one, for three successive issues. Said notices shall be given at least twenty days prior to the first day of the time designated to put out the poison. Said notices shall state the time of putting out poison and that the poison can be secured from the Commissioners' Court and shall state the terms on which said poison can be procured. [Id., § 2.]

**Art. 6328g. Formulas and instructions for preparation and use of poison.**—It shall be the duty of the Commissioners of Agriculture to furnish the Commissioners' Court with formulas and instructions for preparing the poisons, and plans for using the same. [Id., § 3.]

**Art. 6328h. Same.**—The Commissioners of Agriculture shall, upon the request of any Commissioners' Court as soon as practicable after receiving such request, demonstrate and give instructions how to prepare the poison and when and how to apply same. [Id., § 4.]

**Art. 6328i. Duty of landowners as to placing of poisons.**—It shall be the duty of every land holder whose premises are infected with any of the pests mentioned in this Act at the time specified in the notices to procure poison and apply the same, as set forth in the plans furnished by the Commissioner of Agriculture. [Id., § 5.]

For section 6 of this act see Penal Code, art. 649—1.

**Art. 6328j. Duties of lessees and tenants.**—It shall be the duty of every lessee or tenant holding premises by contract to procure the poison and destroy all of the pests described in this Act and all expenses incurred by such tenant or lessee in thus destroying the pests shall be a charge against the owner of the land, and collectible as other valid debts. [Id., § 7.]

## TITLE 109

## PRINCIPAL AND SURETY

Art. 6329. Surety may require suit to be brought.	Art. 6332. Execution levied first on property of principal.
6330. Discharged by failure to sue, when.	6336. Surety not to be sued alone, unless, etc.
6331. May have question of suretyship tried, when.	6337. Who is surety within this title.

**Article 6329. [3811] Surety may require suit to be brought.**

See *Hodges v. Roberts*, 74 Tex. 517, 12 S. W. 222.  
Cited, *State Nat. Bank of Ft. Worth v. Vickery*, (Com. App.) 206 S. W. 841; *Fisher v. Russell* (Civ. App.) 204 S. W. 143.

**Notice by surety to creditor to proceed against principal.**—Although a chattel mortgage gave the mortgagee power to take possession upon removal of the property, and such right was also given by statute, yet, where a surety who signed the mortgage did not in writing, request that such summary power be exercised, the mortgagee was not guilty of negligence discharging the surety because it failed to exercise such summary power on the surety's oral inquiry concerning the matter the day the mortgagee left; the debt secured by the mortgage not yet being due. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

As notice by surety to obligee to collect from the principal must be in writing, a verbal request is inadmissible. *Bumpus v. Lovejoy* (Civ. App.) 196 S. W. 631.

**Evidence.**—Evidence held insufficient to show that defendant, who claimed to be a surety, gave the required notice to the obligee to collect from the principal. *Bumpus v. Lovejoy* (Civ. App.) 196 S. W. 631.

**Art. 6330. [3812] Discharged by failure to sue, when.**

See *Hodges v. Roberts*, 74 Tex. 517, 12 S. W. 222.  
Cited, *State Nat. Bank of Ft. Worth v. Vickery* (Com. App.) 206 S. W. 841.

**Failure of creditor to proceed against principal.**—In an action by the payee of a promissory note against the surety, the promise of the payee to the surety to bring action against the maker which promise was not kept constitutes no defense where not alleged. *Fisher v. Russell* (Civ. App.) 204 S. W. 143.

**Art. 6331. [3813] May have question of suretyship tried, when.**

**Burden of proof.**—Since it will be presumed that all the makers of a joint and several note were equally liable with each other, the burden of showing the contrary rests upon such of the makers as allege that their liability is limited and different from that of the other makers. *Lockett v. Farmers' State Bank of Vernon* (Civ. App.) 205 S. W. 526.

**Art. 6332. [3814] Execution, levied first on property of principal.**

See *Dignowity v. Staacke* (Civ. App.) 25 S. W. 824.  
**In general.**—In an action on a note against the maker and surety, where judgment is rendered for the payee, it is error to enter an absolute judgment in favor of the surety against the maker, but the court should order the sheriff to levy execution first on the property of the maker, and, if sufficient property of the maker cannot be found, to levy on property of the surety for the deficiency. *Dignowity v. Staacke* (Civ. App.) 25 S. W. 824.

This article held without application, in suit by bank against public weigher and sureties for breach of duty in releasing without surrendering of receipts cotton for which he had issued receipts, which were pledged to bank, to require judgment to protect weigher and sureties by subjecting property of depositor of cotton and pledgor of receipts first to execution, etc. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

**Art. 6336. [3818] Surety not to be sued alone, unless, etc.**

See *El Paso Bank & Trust Co. v. First State Bank of Eustis* (Civ. App.) 202 S. W. 522.

**Parties.**—Creditor company properly joined in one suit its debtor and the surety who signed with the debtor a purported guaranty of account. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

If the holder of the note sued guaranteeing indorser, alleging that the maker was only an accommodation maker, it was right of the guaranteeing indorser to have the maker made a party for the determination of that issue. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

Sureties may be impleaded in proper suits, or even come in themselves and have the question of their liability determined and fixed. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

Only in case of a conditional guaranty, and not where the guaranty is absolute, need the principal be sued before the guarantor, or joined in the action against him. *Smith v. Cummer Mfg. Co. of Texas* (Civ. App.) 223 S. W. 338.

### Art. 6337. [3819] Who is surety within this title.

See *Smith v. Cummer Mfg. Co. of Texas* (Civ. App.) 223 S. W. 338.

**Parties.**—Creditor company properly joined in one suit its debtor and the surety who signed with the debtor a purported guaranty of account. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

If the holder of the note sued guaranteeing indorser, alleging that the maker was only an accommodation maker, it was right of the guaranteeing indorser to have the maker made a party for the determination of that issue. *Moore v. Belt* (Civ. App.) 206 S. W. 225.

## DECISIONS RELATING TO SUBJECT IN GENERAL

### I. CREATION AND EXISTENCE OF RELATION

**2. Validity of obligation of principal.**—A bonding company's bond to secure the execution of a building contract was not vitiated by the fact that obligee had only the legal title to the premises, and the equitable title was in another. *Texas Fidelity & Bonding Co. v. Elliott* (Civ. App.) 195 S. W. 301.

That a contract is usurious does not entirely discharge sureties, but they are liable for principal. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

The liability of a surety for a promise made by a person incompetent to contract is not necessarily ascertained by determining the liability of the principal, the surety being released only if the undertaking is illegal, or the principal's promise is induced by fraud or deceit, incapacity of the principal being a contingency against which the surety assures the promisee. *Mitchell v. Zurn* (Com. App.) 221 S. W. 954. Reversing judgment (Civ. App.) *Zurn v. Mitchell*, 196 S. W. 544.

Sureties for a corporation whose contract to do grading and excavating, build a cement foundation, and lay floors was ultra vires, the company being chartered only to manufacture and deal in building material, were liable to the other party on the corporation's breach; the contract being neither illegal nor against public policy. *Id.*

Where the principal, a married woman or a minor, is discharged on account of his or her incapacity, the debt remains, and its burden must be assumed by the surety for the woman or minor. *Id.*

**3. Creation of relation in general.**—Letters written by the son of the maker of a note to the holder of same held not to make the writer liable as guarantor for the debt of his father. *Hopkins v. Schallert* (Civ. App.) 195 S. W. 219.

Where letters are relied on as constituting guaranty of payment of a note, all the essential terms of a guaranty contract must clearly appear from the writing. *Id.*

Evidence held to show that defendant promised to pay plaintiff on services rendered individually and not as surety. *Bumpus v. Lovejoy* (Civ. App.) 196 S. W. 631.

While a surety is usually bound with his principal in one and the same instrument, executed at the same time and on the same consideration, a guarantor's obligation is his separate undertaking, on which he is not liable until the default and liability of the principal creditor has been established. *Farmers' & Merchants' Nat. Bank of Comanche v. Lillard Milling Co.* (Civ. App.) 210 S. W. 260.

**5. Change from principal debtor to surety.**—Where, after vendee had defaulted and judgment had been obtained against him, he and his wife conveyed property to a trustee, who in turn conveyed to the wife, stipulation in deed to wife that she agreed to pay judgment had the effect to bind her as primary obligor, and make her husband surety, if she had capacity to make such contract. *Johnson v. Scott* (Civ. App.) 208 S. W. 671.

Where an assumption has been accepted by the payee, the assumptor becomes the principal and the original debtor is surety as to the creditor, unless otherwise specially contracted by the parties. *Wilson v. J. W. Crowds Drug Co.* (Com. App.) 222 S. W. 223, affirming judgment (Civ. App.) 190 S. W. 194.

For a debtor to obtain the advantage that may have accrued to him as surety by reason of the fact that the extension actually given by the creditor to the purchasers of the debtor's stock of goods assuming the debt was different from that consented to by the debtor, it was incumbent upon the debtor to establish an unconditional acceptance by the creditor of the assumption by the purchasers of the debt. *Id.*

**11. Delivery of written instruments—Acceptance and notice thereof.**—Notice of acceptance of bond, it being one of security, and not of guaranty, securing performance of their contract by cigar salesmen, held not necessary to charge the sureties. *Martinez v. Cathey* (Civ. App.) 215 S. W. 370.

**12. Consideration.**—Where, in consideration of written guaranty of note of guarantor's deceased brother, noteholder extended note and waived lien on horses under mortgage securing note, which horses guarantor's son was to use in hauling to secure funds to pay note, consideration for guaranty did not fail because deceased brother's administrator took possession of horses. *McDaniel v. Cage & Crow* (Civ. App.) 201 S. W. 1073.

Extension of note, or release of security, is sufficient consideration for written guaranty of note. *Id.*

Note executed to pay indebtedness of third party for goods furnished prior to execution of note, and not at request of maker, was without consideration and was not collectable. *Santikos v. Hamilton-Turner Grocery Co.* (Civ. App.) 208 S. W. 560.

13. **Mistake.**—If one is induced to become a surety for another through material misrepresentations of fact, though honestly made, the contract is invalid. *Southwestern Surety Ins. Co. v. Hico Oil Mill* (Civ. App.) 203 S. W. 137.

One who signs a chattel mortgage without reading it is not released from his liability because of his negligence. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

## II. NATURE AND EXTENT OF LIABILITY OF SURETY

18. **General rules of construction.**—The rule that surety contracts will be strictly construed applies only after the legal scope or effect of the terms used is determined by an application of the same rules of construction that are applied to any other character of contract. *State Nat. Bank of Ft. Worth v. Vickery* (Com. App.) 206 S. W. 841.

A suretyship contract is to be interpreted with a view of ascertainment of the intent of the parties, the same to be gathered from the language of the instrument in its entirety, and where necessary resort may be had to the purpose of the parties in the making of the contract. *Id.*

Surety contracts will be strictly construed, merely that the obligation of the surety shall not be extended by implication or presumption, and not to relieve the surety from an onerous condition or obligation. *Id.*

The rules which determine the rights of uncompensated sureties are applicable in determining the rights of corporation sureties who enter into contract of suretyship for profit. *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

Surety on a contractor's bond is charged with knowledge of all the terms, stipulations, and legal consequences of the contract upon which it became a guarantor. *O'Neil Engineering Co. v. First Nat. Bank* (Com. App.) 222 S. W. 1091, reversing judgment (Civ. App.) *First Nat. Bank v. O'Neil Engineering Co.*, 176 S. W. 74.

The liability of sureties is strictissimi juris, and not to be extended by construction. *Chapman v. Gross R. Scruggs & Co.* (Civ. App.) 230 S. W. 471.

19. **Scope and extent of liability in general.**—The liability of a surety cannot be extended beyond the terms of the contract out of which his obligation arises. *Southland Life Ins. Co. v. Stewart* (Civ. App.) 211 S. W. 460; *McGregor & Henger v. Escalada* (Civ. App.) 216 S. W. 398.

Contractor to erect church, and sureties, held liable for cost of insurance paid by church trustees for breach of contract obligation to keep building insured and to carry liability insurance. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

In an action against surety on a contractor's bond, evidence tending to show an oral agreement between contractor and owner to which surety was not a party held properly excluded. *General Bonding & Casualty Ins. Co. v. Harlan* (Civ. App.) 196 S. W. 906.

Contract purporting to guarantee payment of account, signed by principal debtor and claimed guarantor, held one of suretyship and not of guaranty. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

Though city ordinance for the licensing of operators of jitney busses required such operators to file a bond in the amount of \$1,000 conditioned on payment of all damages from negligence, etc., declared that in no event should the sureties be liable for more than the amount of the bond, yet, where a bus operator filed two bonds each in the amount of \$1,000, the liability of the sureties is not restricted to \$500 each, and in event of a judgment for more than \$2,000 against the operator, surety is liable to the full amount of the bond, though the other surety had paid \$900 in compromise of the claim against him. *Western Indemnity Co. v. Murray* (Civ. App.) 208 S. W. 696.

Where milling company having elevator in which it stored its own wheat was granted loans of \$10,000 at different times evidenced by three promissory notes of that amount, and company gave as collateral its warehouse receipts covering wheat in elevator, and also gave bond with surety with obligation against fraudulent issue of certificate, withdrawal of wheat without return of certificate and conversion of wheat by milling company, surety, on facts showing that on issuance of first note company had full amount of wheat in elevator, but not requisite amount on issuance of other two notes, and that company went into bankruptcy, having no wheat on hand, was liable as to first note for the distributive share that the obligee would have received with other creditors if converted wheat had been on hand at market price at time of bankruptcy, but as to other notes was liable at face of notes as the certificates securing these were fraudulently issued. *New England Equitable Ins. Co. v. Mechanics'-American Nat. Bank of St. Louis* (Civ. App.) 213 S. W. 685.

A written guaranty of any indebtedness for merchandise sold to guarantor's son guarantees the payment of notes given by son for merchandise purchased, which is merely representing the indebtedness in a different form. *Cooper Grocery Co. v. Neblett* (Com. App.) 221 S. W. 963, reversing judgment (Civ. App.) 203 S. W. 365.

Where city canceled contract for construction because contractor was financially embarrassed, when contractor's surety undertook to take over and complete work, it was under duty to use reasonable care and good faith to do so at minimum cost, and to account to contractor for difference between cost and amount received from city, a duty not escaped by letting the contract to a construction company for an arbitrary sum. *Lion Bonding & Surety Co. v. O'Kelly* (Civ. App.) 221 S. W. 1115.

A mere guaranty of accounts, or of payment of accounts, without more, is an absolute guaranty. *Smith v. Cummer Mfg. Co. of Texas* (Civ. App.) 223 S. W. 338.

A surety may keep aloof from participation in his principal's fraud, in which case he can be held only on the basis of his bond; but the moment he abandons that position and deals with the principal in the fraud, he will be stripped of his benefits and made to respond with his principal in damages. *Bain v. Coats* (Civ. App.) 228 S. W. 571.

In an action against the operator of a jitney bus and his surety to recover on a

bond, required by the city, covering a particularly described automobile, failure to prove that the injury was caused by such automobile held to require a reversal of a judgment against the surety. *Motor Car Indemnity Exch. v. Lillenthal* (Civ. App.) 229 S. W. 703.

**21. Conditions of liability.**—Where milling company, not a bonded warehouse, for purpose of securing loans, gave bond with surety reciting that company intends to operate an elevator for warehousing of grain and will be desirous of obtaining loans from obligee on warehouse receipts issued by it, etc., surety cannot defeat liability on bankruptcy of milling company which did not have amount of wheat in elevator as evidenced by the receipts it gave on ground that bonded warehouse receipts were meant and none were issued, all parties to transaction knowing that milling company could not issue public bonded warehouse receipts. *New England Equitable Ins. Co. v. Mechanics'-American Nat. Bank of St. Louis* (Civ. App.) 213 S. W. 685.

Where a surety's bond, given for the operation of a jitney business, prescribed a route and required a change of route to be consented to by the surety, the surety will not be liable for injuries caused by a jitney bus or its driver, where the driver was not only off the prescribed route but had temporarily discontinued the actual conduct of the jitney business. *Motor Car Indemnity Exch. v. Lillenthal* (Civ. App.) 229 S. W. 703.

**22. Duties of office or employment, and performance thereof by principal.**—Bank's cashier "willfully misapplied or willfully abstracted" bank's funds, within his bond, whether he used all the money for himself personally, or got it and willfully misapplied it in some other way, to the use of some other person. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

**23. Performance of contract by principal.**—A building contract bond that the contractors will "well and truly perform the covenants," etc., of the contract, the surety assuming liability for any and all damages naturally and directly resulting from failure to do the work in the time specified, renders the bonding company liable for damages from delay by the contractor. *Texas Fidelity & Bonding Co. v. Elliott* (Civ. App.) 195 S. W. 301.

Where a surety executed a bond that the contractor should faithfully perform his contract and he abandoned it before completing the building, whereupon the owner completed it at extra cost, he was entitled to judgment on the bond. *General Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 195 S. W. 373.

When sureties for contractor for building executed bond he should faithfully perform, and if he abandons before completion, and owner completes at extra cost, owner is entitled to judgment on bond. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where a surety bond, conditioned that a contractor would perform a building contract, stipulated that the bond should terminate and become void on August 1, 1914, such stipulation does not preclude obligee from recovering on the bond for nonperformance, though all of the work of another contractor in doing the work had not been finished, and all payments to such contractor had not been made at such date. *American Surety Co. v. Camp* (Civ. App.) 202 S. W. 798.

### III. DISCHARGE OF SURETY

**24. Provisions of contract of suretyship or guaranty in general.**—Where a written guaranty provided for payment of any indebtedness due thereunder at a certain place the fact that notes taken for indebtedness thereby guaranteed were payable at a different place does not change the obligation of the guarantor so as to relieve him from his guaranty; the provision in the guaranty contract having reference to the ultimate obligation of the guarantor and not to the principal's debt. *Cooper Grocery Co. v. Neblett* (Com. App.) 221 S. W. 963, reversing judgment (Civ. App.) 203 S. W. 365.

**25. Change in obligation or duty of principal.**—An agreement to extend the time of payment of a note bearing 12 per cent. interest, in consideration of the payment by the maker of the interest then due and 3 per cent. additional interest, discharges the liability of the sureties, without whose knowledge and consent it is made; the validity of the agreement not being affected by Rev. St. Tex. 1879, arts. 2978, 2979, limiting the rate of interest to 12 per cent., and providing that contracts for a greater rate shall be void as to the whole of the interest only. *Mann v. Brown*, 71 Tex. 241, 9 S. W. 111.

Act of owner in purchasing bricks which he was authorized only to select under a building contract held a violation of contract, and, no lien being thereby established, released surety. *General Bonding & Casualty Ins. Co. v. Harlan* (Civ. App.) 196 S. W. 906.

Independently of and under art. 5623, and adding article 5623a, sureties of contractor to erect church building held not released because of changes in plans and specifications, which architect authorized and church trustees paid for. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

A change in a contract of indebtedness, increasing interest from legal rate of 6 to 10 per cent. on past-due interest, and a change making place of payment in a county other than debtor's residence, were both material, and would release a guarantor. *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

The law in reference to releasing a surety by reason of a change in the construction contract, which surety guaranteed, has no application to change in the contract between contractor and subcontractor, thereafter made, where there was no resultant injury to the surety. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

The liability of a surety cannot be extended beyond the terms of the contract out of which his obligation arises, and if the contract is altered without his consent his obligation ceases, regardless of whether alteration is to his injury or to his advantage. *Southland Life Ins. Co. v. Stewart* (Civ. App.) 211 S. W. 460.

Where cigar salesmen contracted with their employer they should sell a certain

brand in territory, including Kansas City, but there was a tacit exclusion of Kansas City from the territory, and also their employer delayed in furnishing cigars necessary to fill orders, thus causing loss of commissions, the modifications of the contract discharged the sureties on the bond of the salesmen, responsible for their own default *Martinez v. Cathey* (Civ. App.) 215 S. W. 370.

Whether injury results to the surety or not, the creditor has no right to make any contract with the principal changing the contract without the consent of the surety to the contract actually made. *Wilson v. J. W. Crowdus Drug Co.* (Com. App.) 222 S. W. 223, affirming judgment (Civ. App.) 190 S. W. 194.

In determining whether changes in the plans or construction affect the liability under a contractor's bond which referred to and made a part of its plans and specifications reserving to the owners the right to alter or modify the plans and specifications, the test is whether the changes "alter or modify the plans and specifications" of the building contracted to be erected, or do they amount to a contract for a different building? *Southern Surety Co. v. Nalle & Co.* (Civ. App.) 231 S. W. 402.

In an action on a contractor's bond reserving the right to "alter or modify the plans and specifications," where it appeared that the original contract provided for a three-story hotel, but the plans were subsequently changed so as to provide for a four-story building, held, that such change constituted such a departure from the plans and specifications as to call for a different building, and therefore released the surety, in the absence of ratification. *Id.*

**31. Change in parties to obligation secured.**—Where a copartnership contracted for the erection of a school building and gave the required bond, but dissolved before the work was performed, though the one partner continued performance of the contract under the firm's name, the sureties were not thereby released from liability to those who furnished materials to the partner after the dissolution. *U. S. Fidelity & Guaranty Co. v. Burton Lumber Co.* (Civ. App.) 221 S. W. 699.

**32. Extension of time for payment or other performance.**—Time of payment must not be extended without the consent of the surety. *State Nat. Bank of Ft. Worth v. Vickery* (Com. App.) 206 S. W. 841; *Pattillo v. Citizens' Nat. Bank of Stamford* (Civ. App.) 197 S. W. 1054.

If payee of a note bound himself by agreement founded on a good consideration to forbear until property could be sold, sureties would be released, although maker might have privilege of paying at any time. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

The time for payment on a note, providing that "time of payment may be extended without notice thereof," could be extended from time to time without releasing the surety, surety having consented not merely to one extension, but that time of payment could be prolonged or continued as agreed upon between maker and holder. *State Nat. Bank of Ft. Worth v. Vickery* (Com. App.) 206 S. W. 841.

Where debt, for payment of which sureties were obligated, was originally in the form of open account and bore interest at the rate of 6 per cent., the execution of notes, without sureties' consent, by principal to creditor in settlement of the open account extending time for payment and bearing interest at the rate of 8 per cent., and providing for a 10 per cent. increase for payment of attorney's fees, released the sureties, being a material change in their obligation. *Southland Life Ins. Co. v. Stewart* (Civ. App.) 211 S. W. 460.

Regardless of injury or benefit, where principal debtor and one of the sureties make a valid agreement by which time of payment is extended, every other surety who does not consent to such extension is released from liability, although at the time of such agreement and continuously since then the principal has been insolvent. *Short v. Shannon* (Civ. App.) 211 S. W. 463.

**33. — Requisites and validity of agreement in general.**—If note could have originally been made payable at a time to be determined by a contingency, extension may be made on same terms if supported by consideration. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

As agreement for extension of time for payment of note must be mutual, payee must not only be bound to wait for such time of payment, but maker must be bound not to pay before such time. *Id.*

**34. — Consideration.**—That it was customary for maker of notes to convey property to secure them would not of itself impose an obligation to continue it or show that property was not conveyed as consideration for agreement to extend time of payment, so as to discharge sureties, and if property was transferred to payee of a note as additional security pursuant to agreement for extension, such conveyance would be sufficient consideration for agreement so as to discharge sureties. *C. C. Slaughter Co. v. Eller* (Civ. App.) 196 S. W. 704.

Contract for extension of time for payment of a note for a definite period, when the debt bears interest, is on a valuable consideration, and binding on the parties; thus discharging the surety not consenting thereto. *Scarborough v. McKinnon* (Civ. App.) 202 S. W. 223.

**36. Payment or other satisfaction by principal.**—Where the principal maker of a note pays it with money secured from a third person, and takes it up without any assignment of it being made, the debt is discharged, and the person who furnishes the money cannot recover on the note against the surety therein. *Stroud v. Miller* (Civ. App.) 204 S. W. 1175.

Where a railway contractor gave the railroad an indemnity bond to protect it against all claims, demands, suits, or causes of action which might be brought against it by reason of acts or doings of the contractor, and a third person was injured through the contractor's negligence, the surety was not released from liability to the railroad where

the contractor, without such surety's knowledge, entered into a settlement agreement with the injured person, since the contractor's action in making the settlement agreement was only in fulfillment of the common obligation of the bond, providing the amount he agreed to pay did not exceed amount to which injured party was justly entitled; the railroad being called upon to make good the settlement by reason of the default of the contractor. *Galveston, H. & S. A. Ry. Co. v. Walker*, 110 Tex. 286, 219 S. W. 815.

Where railway contractor gave indemnity bond to railroad to protect it against damages occasioned by any acts of the contractor, and a third person was injured by reason of the negligence of the contractor, and a settlement agreement was entered into between the contractor and the injured party, and through the railroad's fraudulent representation as to the contractor's financial condition the injured person accepted notes in part payment of the amount agreed on, such fraud on the part of the obligee in the bond did not release the surety from liability to the railroad, which was called upon to pay the amount of such notes by reason of the fraud; the basis of any liability on the railway's part being primarily the contractor's default in payment of the injured person's claim. *Id.*

**38. Release or loss of other securities.**—Where plaintiff contracted to sell lumber with sight draft attached, but sued for a balance due, showing waiver of the sight draft clause, the purchaser's sureties on the contract were not liable. *Watson-Christensen Lumber Co. v. Maund* (Civ. App.) 199 S. W. 894.

Where a note was given, secured by a chattel mortgage, and the payee did not record the mortgage, and indorsed the note to plaintiff, and assigned the chattel mortgage to him, the plaintiff's duty to record mortgage could not be inferred from his mere acceptance of the note and unrecorded mortgage, and the plaintiff was entitled to recover against the original payee as an indorser. *Palm v. Nunn* (Civ. App.) 203 S. W. 1124.

The rule that the release by creditor of securities held by him for the payment of an obligation for which the surety is liable operates to discharge and release the surety to the value of the securities released does not apply to a surety engaged in suretyship for profit, not injured by such transaction. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

Where a chattel mortgage was binding between the parties and the mortgagee or assignee might have seized the property which was removed by the mortgagor without consent, the fact that the instrument was not registered was not the proximate cause of the removal, and so would not discharge a surety on such mortgage. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 226 S. W. 428.

**40. Unauthorized payment to principal.**—See *Tarkington Prairie Lodge, A. F. & A. M., No. 498, v. George W. Smyth Lumber Co.* (Civ. App.) 214 S. W. 588.

Where a surety executed a bond for faithful performance of a contract, and the contractor had earned \$700, for which he gave an assignment to one furnishing materials which had gone into the building, and the owner accepted the assignment, the amount was rightfully paid; there being more due the contractor at the time. *General Bonding & Casualty Ins. Co. v. Hill* (Civ. App.) 195 S. W. 873.

Building contractor's surety held not discharged by building owner, after abandonment of work by contractor, making installment payments to materialmen without certificate of architect, provided for by contract. *Williams v. Baldwin* (Civ. App.) 202 S. W. 975.

In an action involving the liability of a surety on an indemnity bond given by a railway contractor to the railroad, where there was no pleading that the railroad was under any duty to the surety to withhold payment of amounts due the contractor, and it was merely averred that the railroad at the time of the settlement was indebted to the principal in an amount in excess of that which a person injured through the contractor's negligence agreed to accept, and thereafter, without the surety's knowledge or consent, but with the knowledge that the contractor had not paid notes given to the injured third party, paid such amount to the contractor, there was no sufficient charge that the railroad company breached any duty to the surety by making such payment. *Galveston, H. & S. A. Ry. Co. v. Walker*, 110 Tex. 286, 219 S. W. 815.

Sureties on bond of contractor to build church held released from liability on his bond by reason of the conduct of the principals in the bond, the building committee of the church, in failing to retain 20 per cent. of the contract price until 30 days after completion and acceptance of the building, as provided in the contract. *Burton Lingo Co. v. First Baptist Church* (Civ. App.) 224 S. W. 913.

Payments by owner to contractor without certificates of architects without sureties consent in violation of bond held to discharge sureties. *Williams v. Baldwin* (Com. App.) 228 S. W. 554.

**41. Discharge of principal without payment or satisfaction.**—Plea by principal of bond, contractor for building, which will release him if established, will also release sureties. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

Where J. gave T., as payment or security for note he owed him, note payable by W. and M. to J., J. not becoming principal obligor on the W. and M. note, by indorsing it, or afterwards signing a renewal, to get extension of time, discharge by T. did not affect the liability of W. and M. to T. *Wilson v. Thompson* (Civ. App.) 202 S. W. 341.

The cancellation of notes, given for the price of a plow, for fraud practiced on the buyer, released comakers of the notes, whether they were joint or joint and several obligors or sureties. *Hackney Mfg. Co. v. Celum* (Com. App.) 221 S. W. 577, affirming judgment (Civ. App.) 189 S. W. 988.

**42. Negligence of creditor in general.**—Where an owner was negligent in a suit by materialmen claiming liens on his property and seeking foreclosure in not setting up in such suit that he had paid certain amounts and other defenses which he might have made, he was not entitled to any relief against surety on contractor's bond. *General Bonding & Casualty Ins. Co. v. Harlan* (Civ. App.) 196 S. W. 906.



44. **Neglect to give notice to surety of default.**—It is not Texas doctrine that surety for hire is only released from payment of damages for principal's delay in completing work by owner's failure to give notice of default required by bond. *American Indemnity Co. v. Board of Trustees of Robstown Independent School Dist.* (Civ. App.) 200 S. W. 592.

45. **Neglect to act or proceed against principal.**—Where an unregistered chattel mortgage and note were assigned to a bank, and the mortgagor thereafter removed the property, a surety on the note and mortgage was not discharged on the theory of negligence because the surety, on learning that the mortgagor was leaving, made inquiries of the mortgagee, and was told that the mortgage could not be found, where he did not demand that the mortgagee take possession or offer to pay the debt, so that he could take possession, for, had he done so, he would doubtless have been advised of the assignment and could have protected himself. *Self Motor Co. v. First State Bank of Crowell* (Civ. App.) 236 S. W. 428.

The general rule is that a creditor owes no duty of active vigilance to the surety to enforce the collection of the indebtedness arising from the obligation, as the latter, at any time after default of the principal, is entitled to pay the debt and reimburse himself by enforcing it against the principal and his cosureties. *Id.*

47. **Consent by surety to transactions between creditor and principal.**—Where clause in note provided that makers, sureties, indorsers, and guarantors waived protest and consented that the time of payment might be extended without notice thereof, that plaintiff, to whom payee indorsed note, agreed to two extensions without knowledge or consent of sureties, did not release them. *Archenhold Co. v. Smith* (Civ. App.) 218 S. W. 808.

48. **Waiver or estoppel of surety.**—Where the surety under a contractor's bond consents to, or ratifies, a change in plans, its receipt of additional pay by reason of such change is proof of such ratification or of having consented to the change in advance. *Southern Surety Co. v. Nalle & Co.* (Civ. App.) 231 S. W. 402.

49. **Payment or other satisfaction by surety.**—In action on bond conditioned to save plaintiff harmless from vendor's lien on property purchased, held that where surety discharged lien, though seller did not discharge it when due, plaintiff could not recover from surety attorney's fees incurred in suing on bond. *American Surety Co. of New York v. Phillips* (Civ. App.) 198 S. W. 623.

Where a surety could have interpleaded a fourth claimant as if occupying the position of stakeholder for all injured, yet such claimant, knowing of other claims, had no right to assume such would be done, and delay enforcing his claim until surety was bound by judgments of the other three exhausting the bond, and if he did so he was estopped from holding the surety. *Darrah v. Lion Bonding & Surety Co.* (Civ. App.) 200 S. W. 1101.

Where three persons injured in the same accident, sued a jitney bus owner and his surety for injuries, securing judgments which exhausted the surety bond, the benefit of the policy was for a fourth claimant as well, and he could have intervened in each suit to secure his share and he was still entitled to hold the surety for his pro rata, unless he was guilty of laches in suing surety. *Id.*

#### IV. REMEDIES OF CREDITORS

50. **Rights of action against surety.**—In depositor's action against bank for deposits misappropriated by bank's cashier, in which bank impleaded cashier's surety with prayer for judgment over, depositor was not entitled to a judgment against the surety in absence of showing that bank was insolvent or could not meet its obligations by reason of any of the alleged wrongful acts of such cashier. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

54. **Pleading.**—When principal and sureties are sued in same action on same contract, if principal pleads facts showing nonliability, whether same facts are pleaded by sureties, they can urge an appeal nonliability under principal's plea. *Garrett v. Dodson* (Civ. App.) 199 S. W. 675.

A plea by bonding company that claimant had waived his rights to share in the indemnity paid to other claimants by permitting their judgments to be collected for the maximum amount of the insurance is sufficient to include negligence of the claimant in delaying his suit until after such judgments. *Darrah v. Lion Bonding & Surety Co.* (Civ. App.) 200 S. W. 1101.

55. **Evidence.**—Where a father guaranteed the payment of indebtedness previously incurred by his son for merchandise and payment for such indebtedness thereafter incurred, the fact that the son on the same day the guaranty was executed gave notes for the indebtedness which was already incurred, requiring payment of interest and attorney's fees, is evidence that future indebtedness might likewise be represented by similar notes without discharging the guarantor. *Cooper Grocery Co. v. Neblett* (Com. App.) 221 S. W. 963, reversing judgment (Civ. App.) 203 S. W. 365.

In depositor's action against bank for deposits alleged to have been misappropriated by bank's cashier, in which bank asked for judgment over against cashier's surety, evidence held to sustain finding that cashier wrongfully abstracted or willfully misapplied bank's moneys. *National Surety Co. v. Atascosa Ice, Water & Light Co.* (Civ. App.) 222 S. W. 597.

#### V. RIGHTS AND REMEDIES OF SURETY

##### (A) As to Creditor

58. **Recourse to and exhaustion of remedy against principal.**—Subrogation as a rule applies to principal and surety, the object of the rule of subrogation being to give the paying surety all the remedies that the creditor has against the principal debtor. *Texas & P. Ry. Co. v. Archer* (Civ. App.) 203 S. W. 796.

The debt being that of deceased, it was duty of creditor to exhaust its remedy against his property before resorting to property of son mortgaged by deceased to secure debt. *Cavitt v. Beall Hardware & Implement Co.* (Civ. App.) 204 S. W. 798.

A transaction by which a bank loaned money to contractors for payment of wages due laborers, which money was so used, held not to constitute an equitable assignment of labor debts, nor subrogate the bank to the laborers' claims against contractor's surety. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171.

60. **Recovery of payments to or money received by creditor.**—Where bridge building contractor in consideration of execution of contractor's bond agreed that all payments specified in bridge contract and withheld by the county should be paid to the surety company, and later gave a bank, to secure its advances of moneys used to pay wages of laborers, an order on the county to be paid out of money due on the bridge contract, held that each had merely an equitable assignment of money retained by the county, so that the surety company as the elder must prevail. *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

(B) *As to Principal*

61. **Right of recourse to principal, in general.**—The mere fact that a bonding company was a bank's surety did not in law make it a creditor of the bank with which the county had deposited funds. *Lion Bonding & Surety Co. v. Austin* (Civ. App.) 208 S. W. 542.

Where vendors of land deposited in bank \$1,000 of total price paid in cash, to be paid over to them when they should obtain release of mortgage and place it in bank, bank occupied toward buyer position of surety for vendors, and vendors to bank position of indemnitors, they having informed bank release had been obtained, and bank having applied deposit to payment of their note held by it, and refused to pay money to buyer. *Bank of Snyder v. Howell* (Com. App.) 208 S. W. 908.

Sureties on a promissory note for the accommodation of the maker could purchase the obligation executed by both of them from the payee bank and maintain a suit thereon against the maker and principal. *Brokaw v. Collett* (Civ. App.) 230 S. W. 790.

63. **Rights of surety after payment or satisfaction by him of debt or liability.**—Where, when note became due, surety thereon for a valuable and adequate consideration purchased it and collateral note from payee, held, note was discharged, so that right, if any, which surety or payee had thereafter against makers, would be on an implied promise to pay, although surety on the day that he purchased notes obtained a loan from payee and delivered notes to it as security. *Kynerd v. Security Nat. Bank* (Civ. App.) 207 S. W. 133.

Payee's indorsement of note to surety under agreement between payee and surety that surety was not to satisfy the note, but merely become the owner of it, held not to extinguish the note and satisfy the debt. *Security Nat. Bank of Dallas v. Kynerd* (Com. App.) 228 S. W. 123.

## TITLE 110

## PRINTING—PUBLIC

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| <p>Art.<br/>6338. Board of Public Printing; how constituted; quorum.<br/>6338a. Same; organization; Secretary of Board and State Expert Printer; election; term of office.<br/>6339, 6340. [Superseded.]<br/>6341. Secretary of Board and State Expert Printer; qualifications; general duties; office; salary; clerical help.<br/>6341a. Contracts for printing, binding, etc.; letting; advertisement for; rejection of bids.<br/>6341b. Same; rules and regulations.<br/>6342. Classification of printing, etc.<br/>6342a. Same; letting contracts for classes.<br/>6342b. Printing of bills, resolutions, journals, committee reports, etc., of Legislature.<br/>6343. Proclamations, notices, etc., to be published in newspaper; rates for.<br/>6343a. Quantity of reports, documents, etc., ordered to be published.<br/>6344. [Superseded in part.]<br/>6346, 6347. [Superseded.]<br/>6348-6350. [Superseded in part.]<br/>6351, 6352. [Superseded.]<br/>6353. Bonds of bidders.<br/>6354. Officers not to be interested in contracts.<br/>6355-6359. [Superseded.]<br/>6360. Printing of Journals of Senate and House of Representatives.</p> | <p>Art.<br/>6361. Printing of laws and resolutions; copies for contractor.<br/>6362. Same; Secretary of State to read and revise proofs.<br/>6362a. Carbon copies of enrolled bills and resolutions for Secretary of State.<br/>6363. Laws and journals, etc., printed; to be delivered to Secretary of State; exceptions.<br/>6364. Same; when to be delivered.<br/>6365. Audit of accounts for printing, etc.; payment for.<br/>6366. Same.<br/>6367. [Superseded.]<br/>6368. Abrogation of contracts for printing and stationery.<br/>6369. Letting of new contracts.<br/>6370. Stationery for reporters of Supreme Court and Court of Criminal Appeals.<br/>6370-1. Approval of contracts; repeal.<br/>6370-2. State Board of Control substituted for Board of Public Printing.<br/>6370a. Reports of Supreme Court and Court of Criminal Appeals; award of contract, etc.<br/>6370b. Terms of contract; duty of clerks of courts.<br/>6370c. Price of reports; number of volumes; plates; copyright.<br/>6370d. Laws repealed.</p> |
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**Article 6338. [4219] Board of Public Printing; how constituted; quorum.**—The Attorney General, the State Comptroller and the Secretary of State, shall constitute the Board of Public Printing for the State of Texas, and a majority thereof shall constitute a quorum for the transaction of business. [Act June 27, 1876, p. 31, §§ 1, 16; Acts 1919, 36th Leg. 2d C. S., ch. 84, § 1, superseding art. 6338, Rev. Civ. St. 1911.]

Took effect 90 days after July 22, 1919, date of adjournment.  
See post, art. 7150¼c.

**Art. 6338a. Same; organization; Secretary of Board and State Expert Printer; election; term of office.**—Upon the taking effect of this Act, the members of said Board shall meet at the Capitol and organize by the election of one of their number as chairman, and shall elect a Secretary who shall be also the State Expert Printer, whose duties shall be hereafter defined, said Secretary and Expert Printer to hold his office at the pleasure of said Board of Public Printing. In February, 1921, and biennially thereafter, the said Board of Public Printing shall meet in the same manner for the election of a Chairman and Secretary and State Expert Printer. [Acts 1919, 36th Leg. 2d C. S., ch. 84, § 2.]

See art. 7150¼c, post.

**Arts. 6339, 6340. [4220, 4221] [Superseded.]**

Explanatory.—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 84. See arts. 6341, 6341a, post.

**Art. 6341. [4222] Secretary of Board and State Expert Printer; qualifications; general duties; office; salary; clerical help.**—The Secretary of the Board of Public Printing, who shall also be the State Ex-

pert Printer, shall be a competent journeyman printer of not less than four years practical experience in the art of printing, who shall be a qualified compositor, either at hand composition or machine composition, or both, who shall be learned in the point system of type sizes, and who shall be competent to cast up the quantity of type set on the system of cms or points; who shall be qualified to determine the weight, value and quality of paper of all kinds and who shall be qualified to determine the quality of binding. He shall, as Secretary of said Board of Public Printing keep an accurate record of all proceedings of said Board of Public Printing, in a well bound book. He shall attend the meetings of said Board of Public printing and give expert advice on technical matters coming before said Board. He shall be furnished an office in the Capitol by the Superintendent of Public Buildings and Grounds, and such furniture and fixtures and filing cabinets as are necessary to the proper conduct of the duties of his office. He shall receive a salary of \$2,400 per year, payable in monthly installments, on voucher approved by a majority of said Board of Public Printing. He shall have authority to employ such clerical help, including bookkeeper and stenographer, or either of them, as may be provided by the appropriation provided for said department. [Id., § 3, superseding art. 6341, Rev. Civ. St. 1911.]

**Art. 6341a. Contracts for printing, binding, etc.; letting; advertisement for; rejection of bids.**—Upon the expiration of the present contracts for printing, binding, stationery and supplies now existing, the Board of Public Printing shall contract with responsible persons, firms, corporations or associations of persons who shall be residents of the State of Texas, for a term of not exceeding two years, for supply to the state of all printing, binding, stationery and supplies of like character, for all departments, institutions and Board of Control, save and except for the Judicial Department, and such work as may be done at the various educational eleemosynary institutions in this State, said contracts to be let to the lowest and best responsible bidder, after public advertising of such proposed letting for a period of thirty days in at least six newspapers of general circulation in the State of Texas, which shall have the largest circulation in the county of its publication, no two such papers to be published in the same county, and the said Board of Public Printing shall have the authority to reject any and all bids, providing the reasons for such rejection shall be entered in full on the minutes of said Board, and be open to the inspection of the public at all times. And biennially thereafter said contracts shall be made in the same manner as hereinbefore provided. [Id., § 4.]

**Art. 6341b. Same; rules and regulations.**—The Board of Public Printing shall have the authority to establish rules and regulations in advertising for bids for printing and stationery and supplies, as herein provided for, in such manner as will best serve the State. Any bidder shall be allowed to bid on either, any or all of the items to be contracted for. [Id., § 5.]

**Art. 6342. [4223] Classification of printing, etc.**—The Board of Public Printing may, in its discretion group any class in advertising for bids and awarding contracts in such manner as shall give the State the most efficient service. [Id., § 5a, superseding art. 6342, Rev. Civ. St. 1911.]

**Art. 6342a. Same; letting contracts for classes.**—The Board of Public Printing shall have the authority to determine to which bidder

the several classes of work shall be awarded, being authorized to let the contract for the several classes of printing to separate bidders, and in calling for proposals it shall be specified that bids for stationery and office supplies shall be separate and distinct from the bids for printing. Any bidder shall be allowed to bid on either, any, or all of the classes to be contracted for. [Id., § 5b.]

**Art. 6342b. Printing of bills, resolutions, journals, committee reports, etc., of Legislature.**—The current printing of the bills, resolutions, journals, committee reports, etc., of the Legislature, shall be done in the city of Austin, the unit price for such work to be in accordance with the contract then existing, and said printing contractor shall perform his duties under the exclusive jurisdiction of the Legislature or either house thereof, and the printing contractor shall be responsible to the Legislature or either House thereof, for the faithful performance and delivery of the work, and charges therefor shall be audited by and paid by the Legislature or either House thereof. [Id., § 6.]

**Art. 6343. [4223a] Proclamations, notices, etc., to be published in newspaper; rates for.**—All proclamations of the Executive Department and all other notices required to be published by the State of Texas, or any department, institution or Board of Control, shall be published in the newspaper selected by the Secretary of State, if from the Executive Department, and in the newspaper selected by the department, or institution or Board of Control issuing such notice, provided that the same notice or proclamation shall not be published in more than one newspaper in the same county, and the rate for such official publication shall not exceed one cent per word for the first insertion and one-half cent per word for each subsequent insertion, all bills for publications to be accompanied by a certificate of the publisher under oath, certifying to the number of publications and the dates thereof, together with a clipping of said publication from an issue of his newspaper, said bills to be audited by the Board of Public Printing. [Id., § 7, superseding art. 6343, Rev. Civ. St. 1911.]

**Art. 6343a. Quantity of reports, documents, etc., ordered to be published.**—The Board of Public Printing shall order such quantity of all reports, documents, messages, journals and laws to be published as may be deemed necessary, not less than 600 nor more than 5000 of each report. [Id., § 8.]

**Art. 6344. [4224]**

**Explanatory.**—This article is to some extent superseded by Acts 1919, 36th Leg. 2d C. S., ch. 84, § 7 (art. 6343, ante), but as it has not been expressly repealed, and deals with subjects not covered by the Act of 1919, it should possibly be regarded as living law as to matters not provided for in the latter act.

**Art. 6346. [4226] [Superseded.]**

**Explanatory.**—Superseded by repeal of art. 6345 by Act March 23, 1915, ch. 126, § 2 (note under art. 7325, Supplement 1918), and by Acts 1919, 36th Leg. 2d C. S., ch. 84, set forth in this chapter.

**Art. 6347. [4227] [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 84. See art. 6342b, ante.

**Arts. 6348–6350. [4228–4230] [Superseded in part.]**

**Explanatory.**—These articles are superseded in part by art. 6343a, ante, but it would seem that they still have some vitality in so far as they indicate the distribution of printed books and documents, and the particular matters that are to be printed.

**Arts. 6351, 6352. [4231, 4232] [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 84, set forth in this chapter and by Act March 23, 1915, ch. 126, set forth as art. 7325, Supp. 1918.

**Art. 6353. [4233] Bonds of bidders.**—The Board of Public Printing shall require that each bid be accompanied by a bond, in an amount to be fixed by the Board of Public Printing, conditioned that if awarded the contract said contractor will comply with all terms and conditions thereof, said bond to be with two or more good and sufficient sureties or a bond by a surety company authorized to do business in Texas. For any breach of contract, the Attorney General, when so instructed by the Board of Public Printing, shall file suit in the proper court as in such cases provided. [Id., § 9, superseding art. 6353, Rev. Civ. St. 1911.]

**Art. 6354. [4234] Officers not to be interested in contracts.**—No member or officer of any department of the Government shall be in any way interested in any contract which shall be let under the provisions of this Act. [Id., § 10, superseding art. 6354, Rev. Civ. St. 1911.]

**Arts. 6355–6359. [4235–4239] [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 84, set forth in this chapter, and by Act March 23, 1915, ch. 126 (Supp. 1918, art. 7325).

**Art. 6360. [4240] Printing of journals of Senate and House of Representatives.**—It shall be the duty of the Secretary of the Senate and of the Journal Clerk of the House of Representatives to deliver to the Contractor the journals of their respective Houses for the purpose of being printed, together with a comprehensive index to the same, to be printed at the end thereof, and it shall be the duty of the Contractor to carefully use the same, and return them without delay, uninjured, to such Secretary and Journal Clerk respectively when the printing thereof is completed. [Id., § 11, superseding art. 6360, Rev. Civ. St. 1911.]

**Art. 6361. [4241] Printing of laws and resolutions; copies for contractor.**—It shall be the duty of the Secretary of State to deliver to such contractor, as soon as practicable after their passage or approval, copies of all laws and resolutions adopted by the Legislature, together with a comprehensive index to same. [Id., § 12, superseding art. 6361, Rev. Civ. St. 1911.]

**Art. 6362. [4242] Same; Secretary of State to read and revise proofs.**—It shall also be the duty of the Secretary of State to read and revise the proofs of such laws and resolutions, and to superintend the printing of the same, and to compare the same with the originals in his office, and to certify that the laws and resolutions as published are true copies of such originals, which certificates, together with a statement of the date on which the Legislature adjourned, which shall be appended to and printed at the end of each volume of such laws and resolutions. But the provisions requiring the Secretary of State to read and revise the proofs shall not dispense with the duty of the contractor to see that such proofs are properly read and corrected. The Secretary of State shall employ such additional help as shall enable him to expeditiously prepare the copy of the laws and immediately mail same as soon as delivered by the contractor. [Id., § 13, superseding art. 6362, Rev. Civ. St. 1911.]

**Art. 6362a. Carbon copies of enrolled bills and resolutions for Secretary of State.**—Whereas, It is necessary that copy of all enrolled bills in both the House and Senate be furnished to the State Printer by the Secretary of State and by such copy being made and so furnished by the Enrolling Clerks of both the House and Senate much time and expense will be saved the State; therefore, be it

Resolved by the Senate, the House of Representatives concurring, That the Enrolling Clerk of the Senate and the Enrolling Clerk of the

House be directed and required to make carbon copies of all enrolled bills and resolutions that are sent to the Governor for his approval, and they shall furnish said copies to the Secretary of State at the same time the original enrolled bills and resolutions are transmitted to the Governor. [Acts 1919, 36th Leg. 1st C. S., S. C. R. No. 1, May 8, p. 8.]

**Art. 6363. [4243] Laws and journals, etc., printed; to be delivered to Secretary of State; exceptions.**—The whole number of such laws and journals, reports of public officers and other public documents authorized to be printed shall be delivered to the Secretary of State, at his office, except such printing as may be ordered by the two Houses of the Legislature or either of them, for their use, which shall be delivered to such persons at such times as such Houses or either of them, may direct. [Acts 1919, 36th Leg. 2d C. S., ch. 84, § 14, superseding art. 6363, Rev. Civ. St. 1911.]

**Art. 6364. [4244] Same; when to be delivered.**—Delivery of the general and special laws shall begin within thirty days after the last copy shall have been furnished, and on the Journals within sixty days after the last copy has been furnished the contractor; provided that at least one-fourth of the copy shall have been delivered each week for three weeks prior to the delivery of the last copy; but it is expressly understood that the index shall not be considered as part of the regular copy and the limit as specified above shall apply to last copy furnished, not including index and history of bills and resolutions. The reports of public officers shall be delivered to the Governor by the respective officers making the same, in sufficient time to be delivered to the contractor one month before the meeting of the Legislature, and if so furnished to said contractor shall be delivered to the Secretary of State not later than the first week of said session. [Id., § 15, superseding art. 6364, Rev. Civ. St. 1911.]

**Art. 6365. [4245] Audit of accounts for printing, etc.; payment for.**—All accounts for printing done or stationery furnished, under the provisions of this Act, except that for the Legislature when in session, shall be audited as follows: The account shall be verified by the affidavit of the contractor that said account is true and correct; that the amount of work charged for has actually been performed, or the actual amount of stationery or supplies delivered, and that the prices charged in said account are in accordance with the stipulations of the contract, and shall be accompanied with a sample of the work done or the stationery furnished. After which it shall be examined by the State Expert Printer and the Board of Public Printing, and if found correct, approved by said Board. Such claim, when thus examined and approved, shall be sufficient authority for the Comptroller to issue his warrant to be paid out of the appropriations for public printing or stationery. [Id., § 16, superseding art. 6365, Rev. Civ. St. 1911.]

**Art. 6366. [4246] Same.**—All accounts for printing done or stationery used in either House of the Legislature shall, before being approved by the Legislature or the committee on public printing or either House, be presented to the State Expert Printer, for certificate from him that said printing or binding or stationery is charged for at the rate of the current contract, and which account, when approved by the committee on public printing of either House of the Legislature, shall authorize the Comptroller to draw his warrant to pay such account out of the contingent fund. [Id., § 17, superseding art. 6366, Rev. Civ. St. 1911.]

**Art. 6367. [4247] [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 84, set forth in this chapter, and by Act March 23, 1915, ch. 126, set forth as art. 7325, Supp. 1918. See art. 6368, post.

**Art. 6368. [4248] Abrogation of contracts for printing and stationery.**—The contracts for printing and stationery herein provided for may be abrogated by the Legislature when in session, or by the Printing Board with the consent of the Governor or Comptroller, when the Legislature is not in session, if the contractor should fail to perform the work, or furnish the supplies in accordance with law and with his contract, and as promptly as the exigencies of the public service demand. [Id., § 18, superseding art. 6368, Rev. Civ. St. 1911.]

**Art. 6369. [4249] Letting of new contracts.**—Should the successful bidder fail to execute the bond with security as herein provided, or should the contract be abrogated, it shall be the duty of the Board of Public Printing to proceed to let a new contract as herein provided. Provided, however, that said Board of Public Printing may in its discretion, make such temporary arrangement to meet the emergency as is demanded by the public interest. [Id., § 19, superseding art. 6369, Rev. Civ. St. 1911.]

**Art. 6370. [4250] Stationery for reporters of Supreme Court and Court of Criminal Appeals.**—The reporters for the Supreme Court and Court of Criminal Appeals shall be furnished by the Board of Public Printing, with all stationery necessary for the performance of their duties. [Id., § 20, superseding art. 6370, Rev. Civ. St. 1911.]

**Art. 6370-1. Approval of contracts; repeal.**—All contracts made under the provisions of this Act shall be subject to the approval of the Governor, the Secretary of State and the Comptroller, as required by Article XVI, Section 21, of the Constitution of this State. All laws and parts of laws in conflict herewith are hereby repealed. [Id., § 21.]

**Art. 6370-2. State Board of Control substituted for Board of Public Printing.**—Upon the taking effect of the Act of the Regular Session of the Thirty-sixth Legislature creating the State Board of Control, with subsequent amendments thereto, the members of said State Board of Control shall be substituted for the members of the Board of Public Printing, as provided for in Section one of this Act. [Id., § 22.]

**Art. 6370a. Reports of Supreme Court and Court of Criminal Appeals; award of contract, etc.**—The Board of Public Printing of this State, or such other board or state agency as may be created by law in place of said Board of Public Printing, is hereby authorized and it is made its duty, from time to time, for the purpose of the publication of the reports of the decisions of the Supreme Court and Court of Criminal Appeals of the State of Texas, to cause to be printed and bound the said decisions of said courts, in the form, size and manner as now provided by law, and for this purpose to invite bids not confined to residents of this State, upon proposals advertised by said Board, or such other board or state agency, for such time and manner as may be fixed by said Board, or such other board or state agency, and to award the contract for such printing and binding to the lowest responsible bidder, and that said Board, or such other board or state agency, shall have the right to reject any and all bids. [Acts 1913, p. 59, § 1; Acts 1919, 36th Leg., ch. 36, § 1.]

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

**Explanatory.**—This article amends § 1 of Acts 1913, p. 59, ch. 30.



**Art. 6370b. Terms of contract; duty of clerks of courts.**—Said Board, or such other board or state agency, is hereby given full power and discretion to fix all the conditions, provisions and details of such contract, concerning the printing, binding, publication and sale of such reports and to demand such security from the contractor as will secure the performance of such contract and the interest of the State of Texas; provided that such contract shall be for a term of six years duration at a time. Said contract may also provide for the printing and binding of delayed manuscripts of said reports; and said Board of Printing, or such other board or state agency, may also provide, from time to time, by separate contracts under similar conditions, for the reprint of said reports, or volumes thereof; and said Board, or such other board or state agency, may also, from time to time, provide by separate contracts, under similar conditions, for renewal contracts in the event of forfeiture or for other reasons; and to facilitate the prompt printing and binding of said reports in the future; the clerks of said courts shall provide the reporters of said courts with manifold copies of the opinions of said courts as the said courts rendering the same shall direct to be published, duly certified, together with a record of the cases as soon as said opinions become final. [Acts 1913, p. 59, § 2; Acts 1919, 36th Leg., ch. 36, § 2.]

**Explanatory.**—This article amends § 2 of Acts 1913, p. 59, ch. 30.

**Art. 6370c. Price of reports; number of volumes; plates; copyright.**—The maximum price of such reports furnished by the contractor to the legal profession and the public of the State shall not exceed two dollars per volume and the maximum price paid by the State for such volume shall not exceed four dollars per volume, and the number of volumes to be delivered to the State shall not exceed two hundred and fifty of each volume of said reports for the use of the State; and said contract shall also provide that the contractor shall keep on hand a sufficient number of volumes of said reports, or make such arrangements as to enable the legal profession and the public in this State to obtain from such contractor such reports at the price fixed in such contract. Said Board, or such other board or state agency, shall also determine whether electrotype or stereotype plates of said reports are to be made and to regulate the use thereof, but the ownership of such plates, together with the copyright of said reports, shall remain in the State of Texas. [Acts 1913, p. 59, § 3; Acts 1919, 36th Leg., ch. 36, § 3.]

**Explanatory.**—This article supersedes § 3 of Acts 1913, p. 59, ch. 30.

**Art. 6370d. Laws repealed.**—That Article 1651, Chapter 13 of the Revised Civil Statutes of the State of Texas, A. D. 1911, and all other laws or parts of laws in conflict with this Act be, and the same are, hereby repealed. [Acts 1913, p. 59, § 4; Acts 1919, 36th Leg., ch. 36, § 4.]

**Explanatory.**—This article amends § 4 of Acts 1913, p. 59, ch. 30.

## TITLE 113

### PUBLIC BUILDINGS, GROUNDS AND PARKS

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|--|--|---|
| Chap.  |  | Chap.   |
| 1. Public buildings and grounds.                           |  | 3. Contractors' bonds to secure laborers and materlalmen. |
| 2. State Inspector of Masonry, Public Buildings and Works. |  |   |

#### CHAPTER ONE

##### PUBLIC BUILDINGS AND GROUNDS

- |                          |                    |
|--------------------------|--------------------|
| Art.                     | Art.               |
| 6380-6382. [Superseded.] | 6383-6392. [Note.] |

**Articles 6380-6382. [3820-3822] [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg., ch. 167, § 7, post, art. 7150½f, abolishing the office of Superintendent of Public Buildings and Grounds.

**Arts. 6383-6392. [3823-3832]**

**Explanatory.**—The duties of the Superintendent of Public Buildings and Grounds, set forth in these articles, are transferred to the State Board of Control. See art. 7150½f, post.

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#### CHAPTER TWO

##### STATE INSPECTOR OF MASONRY, PUBLIC BUILDINGS AND WORKS

- |   |   |
|---|---|
| Art.  | Art.  |
| 6394a. [Superseded.]  | ings; superintendence of such buildings, proviso. |
| 6394b-6394d. [Note.]  |   |
| 6394dd. Inspection of plans and specifications of proposed municipal build- | 6394e. [Superseded.]                              |

**Article 6394a. [Superseded.]**

**Explanatory.**—Superseded by arts. 7150½d, post, abolishing the office of State Inspector of Masonry, etc.

**Arts. 6394b-6394d.**

See art. 7150½f, post, making the provisions of these articles applicable to the State Board of Control.

**Art. 6394dd. Inspection of plans and specifications of proposed municipal buildings; superintendence of such buildings; proviso.**

**Construction and operation in general.**—This act does not require county officials to submit plans to inspector, though requiring them to forward his fees, but failure to conform thereto would not invalidate a contract in other respects valid. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

**Art. 6394e. [Superseded.]**

**Explanatory.**—Superseded by art. 7150½d, post, abolishing the office of State Inspector of Masonry, Public Buildings and Works.

## CHAPTER THREE

## CONTRACTORS' BONDS TO SECURE LABORERS AND MATERIALMEN

<p>Art. 6394f. Contractors with state, municipalities, etc., to give bond; actions on bond, etc.</p> <p>6394g. Laborers and materialmen to have right of action, when.</p>	<p>Art. 6394h. Action to be commenced, when; parties.</p> <p>6394i. Judgment; sureties may pay into court.</p> <p>6394j. Notice of lis pendens.</p>
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**Article 6394f. Contractors with state, municipalities, etc., to give bond; actions on bond, etc.**

Cited, *Howard v. Barthold & Casey* (Civ. App.) 206 S. W. 378.

**Construction and operation in general.**—This article is mandatory, and the commissioners' court has no authority to release a contractor from the execution of such bond, but there is no objection to deferring its execution to a time prior to beginning the work. *Headlee v. Fryer* (Civ. App.) 208 S. W. 213.

Art. 5623a does not relate to bonds given in accordance with this article, and sureties upon bond of contractor constructing school building for school district were discharged, where school district failed to retain 20 per cent. of contract price for 30 days, as required by building contract. *Larkin v. Pruett Lumber Co.* (Civ. App.) 209 S. W. 443.

As to county contractor's bond, the rule that instruments insufficient as statutory bonds may be enforced as common law obligations has no application unless it appears on the face of the instrument that it was executed for the benefit of the person seeking to enforce it. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

Art. 5623a, passed by the Thirty-Fourth Legislature and expressly made a part of Rev. St. tit. 86, c. 2, relating to liens, does not relate to a bond given under this article, passed by the Thirty-Third Legislature, and hence a bond given by a building contractor under the latter section to secure the performance of a contract to erect a schoolhouse cannot be employed as a basis for recovery by a materialman under art. 5623a. *Cooper v. H. H. Hardin & Co.* (Civ. App.) 219 S. W. 550.

This article, having been enacted after the execution of a bond by a county contractor, cannot be relied on for the purpose of affording relief to unpaid materialmen against the surety on the contractor's bond. *Mosher Mfg. Co. v. Equitable Surety Co.* (Com. App.) 229 S. W. 318.

Independent of any statute, a municipality has implied authority to bind contractors to pay the claims of laborers and materialmen, and hence, though public buildings, as a county courthouse, are not subject to materialmen's liens, the county may by contract, regardless of any statute, obligate the contractor to give bond to secure materialmen and laborers, for such agreements are justifiable, just as lien statutes, on the theory that they protect public interest by securing responsible dealers and better materials. *Id.*

Parties to public contractor's bond were presumed to know the provisions of this article, requiring such a bond. *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.* (Com. App.) 229 S. W. 483.

In action involving the question of whether public contractor's bond executed under this article, protected laborers and materialmen, the court will take judicial notice that such statute was enacted to protect laborers and materialmen who in many cases were left unpaid. *Id.*

**Bonds—Construction.**—Where bridge contractor's bond was conditioned on completion according to specifications and delivery to city free from all liens, which completion was had and delivery free from liens made to city because no one can have a lien on public works, surety was not liable to materialmen; "liens" having its usual signification, and not meaning "claims." *Lion Bonding & Surety Co. v. Trussed Concrete Steel Co. of Texas* (Civ. App.) 204 S. W. 1176.

Wood furnished as fuel for an engine used by a bridge contractor in hoisting steel, and for repairs of tools and hauling material from railroad to river, were items for "material used and labor performed" in the prosecution of the work, under the contract, for which contractor's surety would be liable, but a scraper and paint brushes were tools and not materials. *Hess & Skinner Engineering Co. v. Turney* (Civ. App.) 207 S. W. 171, judgment reformed and affirmed 110 Tex. 148, 216 S. W. 621.

Where a contractor, in constructing a bridge, in order to facilitate work, had laborers take their meals in camp instead of going into town for them, the labor in cooking such meals was labor performed in the prosecution of the work, and for such the contractor's surety would be liable. *Id.*

In order to constitute a sufficient statutory obligation, the bond of a contractor with a county must comply substantially with the terms and requirements of the statute, and when it appears from the bond that no effort was made to condition it for the payment of laborers and materialmen, art. 5623, so requiring, will not be read into the instrument to create a liability not disclosed by the language used. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

Bank which advanced money to bridge bonding contractor to pay wages of laborers and later secured an order on county which retained balance due under bridge con-

tract held not protected by contractor's bond as to the debt. *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621, reforming and affirming judgment (Civ. App.) 207 S. W. 171.

The bond given by a contractor for a school building, secures the materialmen and laborers as well as the city and may be sued upon by them. *U. S. Fidelity & Guaranty Co. v. Burton Lumber Co.* (Civ. App.) 221 S. W. 699.

A bond given by a school contractor, which contained no clause for payment for supplies furnished the contractor as required, is not the bond required by the statute, and, even if it is valid as a common-law bond, does not make the surety liable for supplies furnished the contractor. *Ame Brick Co. v. Taylor* (Civ. App.) 223 S. W. 248.

Where contract for construction of school building required completion of building within six months from date of delivery of bonds to contractor, but in other provision of contract provided that the contractor should not be held responsible for delay by reason of fires, acts of Providence, and other acts beyond the contractor's control, and where specifications provided for additional time for delays resulting from additional work or changes in work or other acts of the parties on contractor giving written notice thereof, it was proper for the court in ascertaining time of contractor's default in completion of contract under the provision of the contractor's bond requiring notice to surety within 30 days of default to exclude the period of delays resulting from accidental or uncontrollable causes, though the contractor had given no written notice thereof; the requirements as to written notice being applicable only to the delays from change in the work, etc., and other delays occasioned by the acts of the parties as contemplated by the specifications. *Board of Trustees of Robstown Independent School Dist. v. American Indemnity Co.* (Com. App.) 228 S. W. 105.

Where a surety bond given by contract to secure performance of an agreement to build a courthouse for a county was conditioned on faithful performance of the contract by the principal, on payment of all claims for labor and material used, and on indemnity to the county, the bond should be construed not only as for the benefit of the county, but as securing the claims of materialmen, and giving them a right of action thereon against the surety; such persons not being otherwise secured. *Mosher Mfg. Co. v. Equitable Surety Co.* (Com. App.) 229 S. W. 318.

Bridge contractor's bond conditioned on contractor's performance of his contract, inured to the benefit of materialmen who furnished material to contractor, though the contract provided that the bond should cover the guaranty that all "labor and materialmen liens should be paid," since such provision as to liens will be disregarded as surplusage, inasmuch as there could be no such liens on public works, and since such statute requires that the bond be executed to protect laborers and materialmen, and will be read into the bond. *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.* (Com. App.) 229 S. W. 483.

This article is by implication read into a city contractor's bond, and the bond will be construed in connection with the contract and the statute. *Id.*

**Sureties—Liability in general.**—Sureties on the bond of a bridge contractor with a county, though liable to the county, were not liable to parties not mentioned in the bond, and not protected by it in any way, who furnished material, etc., for the construction of the bridges. *Scharbauer v. Lampasas County* (Civ. App.) 214 S. W. 468.

That bridge company did not require one-half of the cost of steel furnished to contractor to be paid in cash at point of shipment, when its contract with contractor would have entitled it to such cash payment, and, when it held an assignment of the contract from contractor to secure purchase price of steel, consented to application of money due under construction contract to payment of claims of local merchants and laborers for which surety was liable on bond, did not change the contract guaranteed by the surety on contractor's bond, nor relieve surety from liability to the bridge company. *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

Where a contractor's bond securing the erection of a school building did not include, as required, the obligation that the contractor should promptly make payments to all persons supplying him with labor and materials, and did not make the bondsmen liable except for the performance by the contractors of all the obligations resting on them for the construction of the building according to the plans, no recovery could be had, by a materialman under such section of the statute. *Cooper v. H. H. Hardin & Co.* (Civ. App.) 219 S. W. 550.

Though the failure to procure the certificate required by statute as a condition precedent to a valid contract for the construction of a school building makes the contract void as between the city and the contractor and his sureties, it does not affect the liability of the contractor's sureties to those who furnished material which was used in the construction of a building accepted by the city. *U. S. Fidelity & Guaranty Co. v. Burton Lumber Co.* (Civ. App.) 221 S. W. 699.

Failure of trustees of school district to comply with arts. 2740, 2771, and arts. 2904n, 2904o, relating to securing of building permits, sale of bonds, and deposit of proceeds, etc., did not affect liability on school building contractor's bond. *Board of Trustees of Robstown Independent School Dist. v. American Indemnity Co.* (Com. App.) 228 S. W. 105, reversing judgment (Civ. App.) *American Indemnity Co. v. Board of Trustees of Robstown Independent School Dist.*, 200 S. W. 592.

**Actions on bond.**—Though petition of contractor for road construction suing on bond of subcontractor was insufficient, held, in view of answers or cross-actions of subcontractor's creditors, pleadings as a whole were sufficient to support judgment for contractor against subcontractor's surety. *Southern Surety Co. v. Owens Bros.* (Civ. App.) 200 S. W. 1148.

Materialman, suing principal paving contractor and surety on his bond for materials furnished subcontractor, was not required to plead and prove that no suit

had been instituted by the city within the preceding six months. *Fennell v. Trinity Portland Cement Co.* (Civ. App.) 209 S. W. 796.

In materialman's action on paving contractor's bond, giving materialmen right to intervene in city's action on bond or bring action in its own name if no action is instituted by city within six months, the defense that materialman's action was prematurely brought should be raised by plea in abatement. *Id.*

#### Art. 6394g. Laborers and materialmen to have right of action, when.

Cited, *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

**Construction and operation in general.**—This article having been enacted after the execution of a bond by a county contractor, cannot be relied on for the purpose of affording relief to unpaid materialmen against the surety on the contractor's bond. *Mosher Mfg. Co. v. Equitable Surety Co.* (Com. App.) 229 S. W. 318.

**Actions.**—Materialman, suing principal paving contractor and surety on his bond for materials furnished subcontractor, was not required to plead and prove that no suit had been instituted by the city within the preceding six months. *Fennell v. Trinity Portland Cement Co.* (Civ. App.) 209 S. W. 796.

State or city for whom work is being constructed by contractor, is not required to bring suit on such bond, except when there has been a breach of some of the conditions in which the state or municipality is interested. *Id.*

**Right of action by materialmen.**—A surety bond to secure the performance of a contract to build a courthouse for a county held a bond of indemnity to the county alone, and not to give materialmen a right of action thereon in their own names. *Equitable Surety Co. v. Mosher Mfg. Co.* (Civ. App.) 202 S. W. 788.

Paving contractor's bond, given to secure performance of contract and "payment of all indebtedness incurred incident thereto for labor and material," and giving materialmen furnishing "materials used in the construction of such work \* \* \* right of action thereunder," held to give materialman furnishing materials to subcontractor a right of action thereon. *Fennell v. Trinity Portland Cement Co.* (Civ. App.) 209 S. W. 796.

Where paving contractor gives bond, to secure payment of all indebtedness incurred incident to the performance of the contract, materialman's right of action against the contractor was given him by the bond, and was not dependent upon the statute. *Id.*

#### Art. 6394h. Action to be commenced, when; parties.

Cited, *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

#### Art. 6394i. Judgment; sureties may pay into court.

Cited, *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

#### Art. 6394j. Notice of lis pendens.

Cited, *Hess & Skinner Engineering Co. v. Turney*, 110 Tex. 148, 216 S. W. 621.

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## TITLE 114

### QUO WARRANTO

Art. 6398. Quo warranto, when.	Art. 6403. Law cumulative.
6401. Proceedings as in civil cases.	

#### Article 6398. [4343] Quo warranto, when.

**In general.**—Where contestants alleged that the election officers wrongfully refused to count the ballots in a certain precinct, declared the offices in such precinct vacant, and appointed the defeated candidates thereto, their remedy held not by mandamus to compel issuance of the certificate of election, but by quo warranto. *Wells v. Commissioners' Court of Presidio County* (Civ. App.) 195 S. W. 608.

Rule that election contest is not civil suit, and that district court has no jurisdiction, under constitutional provision giving jurisdiction of suits where amount in controversy is \$500, does not apply to quo warranto in name of state against one charged with unlawfully withholding office. *Shipman v. Jones* (Civ. App.) 199 S. W. 329.

Prior to amendment of Const. art. 5, § 8, in 1891, district court had no jurisdiction of election contest, but did of information in nature of quo warranto, contesting result of election as declared, to remove intruder and install person entitled, and it also had jurisdiction of suit for office. *Id.*

A director of an irrigation district can be removed only in a proceeding conducted in the name of the state, as prescribed in arts. 6030, 6042, 6398. *J. C. Engleman Land Co. v. Donna Irr. Dist. No. 1* (Civ. App.) 209 S. W. 428.

The action of quo warranto is the proper proceedings to try title to a county office. *Griffith v. State* (Civ. App.) 216 S. W. 469.

Although a county judge is entitled to hold the office until his successor is elected and qualified, quo warranto will lie before his successor has qualified. *Id.*

In an action in quo warranto to remove a person from an office, a suit for the office must be dismissed where the term of office has expired. *Griffith v. State* (Civ. App.) 226 S. W. 423.

A proceeding in quo warranto, is a "civil proceeding" and is governed by the rules applied to other cases under article 6401. *Pease v. State* (Civ. App.) 228 S. W. 269.

**Exercise of corporate franchises and powers.**—Information in the nature of a quo warranto is the proper remedy to determine whether a school board is lawfully exercising authority in annexed territory formerly belonging to another independent school district and to restrain such exercise if unauthorized. *State v. Bradshaw* (Civ. App.) 228 S. W. 656.

A levee improvement district is a governmental agency, and a body politic and corporate, and its existence and right to act as such could be questioned only in quo warranto proceedings prosecuted by or on behalf of the state. *Wilmarth v. Reagan* (Civ. App.) 231 S. W. 446.

**Parties plaintiff or petitioners.**—A proceeding to forfeit the charter of a corporation can only be instituted by the Attorney General, and the attempt to confer such power on the district or county attorney is in violation of Const. art. 4, § 22. *State v. Waller* (Civ. App.) 211 S. W. 322.

The state is merely a nominal party; the real party being the relator. *Pease v. State* (Civ. App.) 228 S. W. 269.

**Petition.**—A petition by the state, on the relation of certain persons, praying that a special act incorporating a city and the charter granted be declared void and the defendants be ousted from their offices, held sufficient, under a general exception, to negative the fact that the qualified voters of the city voted for the adoption of the charter contained in the special act and to show that the state is seeking to oust the officers and vacate the charter upon the relation of the relators named in the petition. *State v. Vincent* (Civ. App.) 217 S. W. 402.

**Sufficiency of evidence.**—In a suit in the nature of quo warranto contesting an election and seeking to oust defendant from the office of mayor, pleadings and evidence held insufficient to support a money judgment in favor of relator for salary. *Pease v. State* (Com. App.) 209 S. W. 162.

**Art. 6401. [4346] Proceedings as in civil cases.**—Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial of civil cases in this State; and either party may prosecute an appeal or writ of error from any judgment rendered, or which may have heretofore been rendered by the trial court, as in other civil cases and the court on appeal shall give preference to such cases, and hear and determine the same at the earliest day practicable. [Acts 1879, S. S., p. 43, § 4; Acts 1921, 37th Leg., ch. 114, § 1, amending art. 6401, Rev. Civ. St. 1911.]

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

**In general.**—A proceeding in quo warranto, is a "civil proceeding" and is governed by the rules applied to other cases. *Pease v. State* (Civ. App.) 228 S. W. 269.

**Time for appeal.**—Appeals in quo warranto must be prosecuted to the term of the appellate court in session at the time judgment was rendered in the district court, and respondents, having abandoned their appeal, cannot have the case reviewed on writ of error. *Bartlett v. State* (Civ. App.) 222 S. W. 656.

To give a Court of Civil Appeals jurisdiction of appeal from judgment in a quo warranto proceeding respondents should have filed their appeal in it not later than the first Monday in July, 1918, during the term of the court in session when the judgment was rendered in the trial court, and should have filed transcript on appeal within 20 days after perfecting appeal. *Id.*

**Failure to file transcript.**—Where there is motion to dismiss writ of error prosecuted by respondents in a quo warranto proceeding on the ground that appeal was not perfected or transcript filed within time, the question raised by the motion is jurisdictional, and leaves the court no discretion relative to dismissing writ. *Bartlett v. State* (Civ. App.) 222 S. W. 656.

**Costs.**—In an action in quo warranto, the costs will be taxed against the relator, where judgment was rendered against him on his claim for the salary, fees, and emoluments of the office and the suit for the office is dismissed because the term has expired. *Griffith v. State* (Civ. App.) 226 S. W. 423.

**Art. 6403. [4348] Remedy cumulative.**

See *Troilo v. Gittinger* (Civ. App.) 230 S. W. 233.

## TITLE 115

## RAILROADS

Chap.	Chap.
1. Incorporation of railroad companies.	12. Forfeiture of charter.
2. Amending or changing charter.	13. Ticket agents—Authority and duty.
3. Public offices and books.	14. Liable for injuries to employés.
4. Officers of railroad corporations.	15. Railroad Commission of Texas.
6. Stock and stockholders.	16. Issuance of stocks and bonds regulated.
8. Right of way.	18. Street railroads.
9. Other rights of railroad corporations.	18a. State railroad.
10. Restrictions upon, duties and liabilities of railroad corporations.	19. General provisions.
11. Collection of debts from railroad corporations.	

## CHAPTER ONE

## INCORPORATION OF RAILROAD COMPANIES

Art.	Art.
6405. Not less than ten persons may form.	6415. When authorized to be sold or conveyed under special law.
6406. Who may build railroads.	
6412. May proceed to act when.	

**Article 6405. [4350] Not less than ten persons may form.**

See *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.  
Cited, *Roaring Springs Town-Site Co. v. Paducah Tel. Co.*, 109 Tex. 452, 212 S. W. 147.

**Art. 6406. Who may build railroads.**

**Applicability of statute.**—Railroad laid down for purpose of removing logs to be owned by individual vendor of logs and operated by foreign corporation without due authorization was railway within meaning of this article. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 197 S. W. 1037.

Foreign corporation, having made contract to operate railroad to remove lumber and having permit only to engage in lumber and logging business, had no power to operate railroad in view of this article, so that its contract was for an illegal purpose and unenforceable. *Id.*

**Foreign company using domestic company's road.**—A foreign railroad corporation entered into an arrangement with a Texas corporation, which owned a small railroad lying wholly within the state, whereby through trains were operated over the lines of the two companies. The Texas company owned no rolling stock, but the accounts were kept separate, and employés who in many instances represented both railroads were separately paid by each. An employé of the foreign corporation injured in a foreign state sued the foreign corporation in the Texas courts. Held, under this article, and Const. art. 10, § 6, that service of process on officials of Texas company cannot be treated as service on the foreign corporation, on the theory that the foreign corporation was working a deception and was doing business in Texas, for the fraud in no event could injure one whose cause of action arose in a foreign state. *Atchison, T. & S. F. Ry. Co. v. Weeks* (D. C.) 248 Fed. 970.

**Art. 6412. [4356] May proceed to act when.**

See *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.

**Art. 6415. [4359] When authorized to be sold or conveyed under special law.**

**Liabilities of successor.**—Interest coupons attached to bonds of railway sold by owner were not included in exception to contract of sale, providing owner contracted railway should be delivered clear of debts, "except the first mortgage above referred to." *West v. Carlisle* (Civ. App.) 199 S. W. 515.

In view of contract whereby owner of all stock and bonds of railway agreed to sell securities and deliver control, held, that the trial court erred in not charging seller with taxes for 1912, and with sum paid by purchasers in settlement of pending suits and other claims. *Id.*

## CHAPTER TWO

## AMENDING OR CHANGING CHARTER

**Article 6421. [4365] May project, etc., branch line by amendment.**

Limited to branch lines.—Rev. St. 1879, art. 4113, does not confer the right to buy another railroad. *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.

## CHAPTER THREE

## PUBLIC OFFICES AND BOOKS

Art.  
6423. Shall keep offices in this state.

Art.  
6435. Change of location of general offices,  
etc., prohibited, etc.

**Article 6423. [4367] Shall keep offices in this state.**

**Constitutionality.**—The restriction upon a corporation organized to take over a sold-out railroad, under arts. 6624, 6625, imposed by this article, preventing removal of offices and shops from a county which has issued bonds in consideration of location of such offices and shops, is not invalid, as imposing a burden upon interstate commerce since the burden, if any, is indirect. *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807.

**Location of general offices—Change.**—Under this article, and art. 6624, providing that the charter of a sold-out railroad shall pass to the purchaser, subject to art. 6625, authorizing such purchasers to form a new corporation, but that no right shall be acquired in conflict with the present Constitution and laws, held, that a new corporation could not move offices and shops located pursuant to contract, as it is subject to the "limitations imposed by law." *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807.

**Contracts for location of shops and offices—Validity.**—Contract made by receiver of railroad and complied with by receiver and company for over 20 years to establish headquarters for division at particular town held perpetual contract which railroad company could not terminate without showing that it could not by reasonable effort discharge duties while complying with contract. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

In view of this article, a contract of receiver of railroad to establish division headquarters with necessary roundhouses and machine shops at particular town based on valuable consideration and which was adopted by company is valid and enforceable. *Id.*

— **Bind successors.**—Where the original railroad company, a Texas corporation, whose property and franchises were acquired by defendant, also a Texas company, had contracted, in consideration of an issue of county bonds, to maintain its general offices, machine shops, and roundhouses at a city within the county, this article applied, and precluded a change by defendant, although its articles of incorporation fixed the place for its general offices as another city. *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807.

Purchaser of railroad property and corporation organized to operate it held charged with contract made by receiver to establish for a valuable consideration division headquarters at particular town. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

— **Enforcement of contract.**—A judgment against a railroad based on this article, and requiring perpetual maintenance of railroad offices and shops at a place in a certain county, was not in improper form, as purporting to be perpetual, since the word "perpetual" added nothing to the requirement, which would be perpetual until the law was changed. *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807.

Contract of railroad company to maintain its division headquarters at particular town entered into by receiver for valuable consideration and complied with for many years may be enforced by injunction. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

**Art. 6435. [4376] Change of location of general offices, etc., prohibited, etc.**

Cited, *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.



## CHAPTER FOUR

## OFFICERS OF RAILROAD CORPORATIONS

Art.  
6445. Corporate powers vested, etc.

Art.  
6446. President and other officers.

**Article 6445. [4386] Corporate powers vested in directors.**

See *Midland & N. W. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 216 S. W. 627; note to art. 6446.

**Art. 6446. [4387] President and other officers.**

**Authority of officers and agents—In general.**—Under this article, and art. 6445, all authority of railroad officers depends on action of the board in conferring authority on them. *Midland & N. W. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 216 S. W. 627.

— **President.**—To recover of a railroad company on an acceptance by its president, there must be proof of authority conferred on him by its board of directors to execute the acceptance or of estoppel or ratification; and therefore pleading of these things. *Midland & N. W. Ry. Co. v. Midland Mercantile Co.* (Civ. App.) 216 S. W. 627.

## CHAPTER SIX

## STOCK AND STOCKHOLDERS

**Article 6469. [4410] No stock shall be issued, except, etc.**

**Consideration.**—Under Const. art. 12, § 6, a railroad company can legally accept notes secured by deeds of trust upon lands as "property" in payment of stock subscriptions. *Lumpkin v. Brown* (Com. App.) 229 S. W. 498.

Such right carries with it the power to dispose of such securities, including the lesser power to transfer and assign them as collateral, a power not to be denied in the absence of a constitutional or statutory prohibition. *Id.*

## CHAPTER EIGHT

## RIGHT OF WAY

Art.  
6481. Right to construct, etc., road anywhere in the state.  
6482. Right of way over public lands.  
6484. May lay out road two hundred feet wide.  
6485. Across streams of water, etc.  
6486. Opening through fences, etc.  
6494. Crossings of public roads.  
6495. Culverts, etc.  
6499. Other railways, etc.  
6503. Damages, etc.  
6504. When owner and corporation can not agree, etc.  
6506. Statement to be filed, etc.  
6507. Regular judge disqualified; special judge appointed.  
6508. County judge shall appoint.

Art.  
6509. Commissioners shall be sworn.  
6511. To give written notice, etc.  
6512. Manner of service, etc.  
6513. Return of notice.  
6514. Property of minors, etc.  
6515. Non-residents, or party secreting himself.  
6518. Rules of damages, etc.  
6520. Same subject.  
6522. Assessments to be in writing, etc.  
6523. Others may be appointed, when.  
6527. May remove cause, when.  
6528. Decision made judgment, when.  
6530. Damages to be paid, when.  
6531. Practice in case specified.  
6532. Right of way, how construed.  
6534. Right of way vested how.

**Article 6481. [4422] Right to construct, etc., road anywhere in the state.**

**Acquisition of right of way—Condemnation.**—Individual cannot exercise the right of eminent domain in view of Const. art. 1, § 17, and Rev. St. 1911, arts. 6504-6530, and this article. *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 197 S. W. 1037.

**Art. 6482. [4423] Right of way over public lands.**

**Width of way.**—Under this article, a railroad, which constructed its main line over a hundred foot right of way condemned through private lands, is entitled to a right of way of like width only over adjacent public lands against a county seeking to open a road. *Texarkana & Ft. S. Ry. Co. v. Bland* (Civ. App.) 205 S. W. 727.

A railroad, claiming, under this article, a right of way over public lands in excess of the hundred foot width which it condemned over private lands for its main line, had the burden to show the necessity for a way over public lands exceeding 100 feet in width. *Id.*

**Art. 6484. [4425] May lay out road two hundred feet wide.**

See *Texarkana & Ft. S. Ry. Co. v. Bland* (Civ. App.) 205 S. W. 727.

**Duty to employes.**—Duty under this article to cut down standing trees as affecting liability for injuries to employes, see *The T. & St. L. Ry. Co. v. Vallie*, 60 Tex. 481.

**Art. 6485. [4426] Right to construct across streams of water, etc.**

See *Panhandle & S. F. R. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

**Applicability.**—A railway company's refusal to permit a vessel to pass through its drawbridge during the Galveston storm of 1915 did not violate this article, and *Rivers and Harbors Act*, § 5. *West v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 196 S. W. 343.

Receivers of railroad, who had authority to construct road, and who in so doing were required to build an embankment, had implied authority to excavate in street, in view of this article, and art. 6494, beyond the limits of the right of way, where the engineers for the receiver testified that such excavation was necessary to get the proper drainage, to secure an underground crossing, and to place road in reasonable state of usefulness. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

**Art. 6486. [4427] Opening through fences, etc.**

**Inclosed land divided by right of way.**—This article is mandatory; and, where a railway left an opening, without gates, but with cattle guards, that was not inappropriate to the needs of the owner and the situation of the property, it had the right to set up the defense that the right of way was fenced, in an action by landowner's tenant to recover the value of a mule killed on the right of way; the opening having been made with the acquiescence, if not the express consent, of the landowner. *Butler v. Baker* (Civ. App.) 226 S. W. 827.

**Art. 6494. [4435] Crossings of public roads.**

See *St. Louis, S. F. & T. Ry. Co. v. Morgan* (Civ. App.) 220 S. W. 281.

**Construction and repair of crossings.**—Receivers of railroad, who had authority to construct road, and who in so doing were required to build an embankment, had implied authority to excavate in street, in view of this article, and art. 6485, beyond the limits of the right of way, where the engineers for the receiver testified that such excavation was necessary to get the proper drainage, to secure an underground crossing, and to place road in reasonable state of usefulness. *Kansas City, M. & O. Ry. Co. of Texas v. Weaver* (Civ. App.) 217 S. W. 740.

A contract by which a brick plant agreed to save a railroad harmless from all claims arising out of negligence in maintaining a spur crossing, was not violative of public policy, in that it had a tendency to cause the railroad to omit the performance of the duties imposed by this article. *Houston & T. C. R. Co. v. Diamond Press Brick Co.* (Com. App.) 222 S. W. 204, reversing judgment (Civ. App.) 188 S. W. 32, and judgment modified 226 S. W. 140.

**Art. 6495. [4436] Shall first construct necessary culverts, or sluices.**

See *Austin & N. W. Ry. Co. v. Anderson*, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061.

Cited, *Texas & S. R. Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565.

**1/2. Right to construct drains in general.**—Railroad had right, by digging ditch on its own property, to drain right of way, and, so far as adjoining owner was concerned, had legal right to continue ditch on property of some one else so as to connect with gully. *Ingrando v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 203 S. W. 925.

**10. Actions for damages for breach of duty—Liability in general.**—Under art. 4694, as to railroad's liability for causing death, and this article, it is liable for death of one knocked from tree by its floating trestle, if failure to have insufficient drainage was proximate cause. *San Antonio & A. P. Ry. Co. v. Behne* (Civ. App.) 198 S. W. 680.

Where there was a ditch between adjoining land sufficient to protect lower land from surface water flowing from upper land, a railroad which so constructed and maintained its roadway as to divert water into ditch and caused water to overflow and injure crops on lower land, is liable, though part or even all of such water may have been water which had fallen upon the upper land. *Houston & T. C. R. Co. v. Hanson* (Civ. App.) 227 S. W. 375.

In action for diversion of surface water, injuring plaintiff's crops, it was error to submit question whether railroad had diverted water and caused it to so increase the flow of water from other land being drained by ditch between such land and plaintiff's land as to cause such water to overflow and damage plaintiff's crops. *Id.*

**12. — Cause of injury.**—For failure of railroad in constructing roadbed to leave sufficient openings for drainage, as required by this article, to be proximate cause of death of one knocked by its floating trestle from tree, it need not have anticipated some one would be so located. *San Antonio & A. P. Ry. Co. v. Behne* (Civ. App.) 198 S. W. 680.

Failure of a railroad to have sufficient opening for flood water in bridging a creek as required in this article, whereby in a not unprecedented flood its bridge was washed away, held not the proximate cause of the death of one drowned when thrown from a tree downstream in which he had taken refuge from the flood, when the tree was struck by the bridge. *San Antonio & A. P. Ry. Co. v. Behne* (Com. App.) 231 S. W. 354.

Requisites of proximate cause stated. *Id.*

Where the act or omission is wrongful or negligent, whether as a result of failure to observe a statutory or common-law duty, liability, in either case, is limited to proximately caused injuries, and the rules for determining proximate cause are the same in either case. *Id.*

17. — **Measure of damages in general.**—Measure of damages for injury or destruction of growing crops held value at time and place of injury, to be determined from reasonable market value when matured, less cost of cultivating, harvesting, and marketing. *Houston & T. C. R. Co. v. Wright* (Civ. App.) 195 S. W. 605.

Measure of damages is difference between market value of land immediately before overflow and its market value immediately thereafter. *San Antonio & A. P. Ry. Co. v. Pemberton* (Civ. App.) 204 S. W. 253.

Where it is shown that plaintiff's land would have been flooded by natural causes, but that the defendant's negligent construction of a bridge has increased the loss, the measure of damages is the increase of loss. *Ft. Worth & D. C. Ry. Co. v. Speer* (Civ. App.) 212 S. W. 762.

Where crops have been planted and are growing or have matured and are yet on the land, plaintiff is entitled to recover for their destruction from overflow caused by defendant's wrongful act the reasonable value of such crops at the time and place of destruction. *Id.*

26. — **Evidence.**—Where only evidence of amount of damages to growing crops was evidence of cost of plowing land and planting crops, evidence held insufficient to support verdict and judgment. *Houston & T. C. R. Co. v. Wright* (Civ. App.) 195 S. W. 605.

Evidence held to support verdict for landowner for damages to crops by construction of railway embankment impounding waters and causing overflow. *Missouri, K. & T. Ry. Co. of Texas v. Patterson* (Civ. App.) 204 S. W. 1026.

In an action against a railroad company for overflow of land and crops resulting from negligent construction of a bridge, defendant was not liable for such damage as would have resulted from overflow had no bridge been constructed, and where the evidence was insufficient for the jury to determine what portion of the damage was caused by the increased overflow due to the bridge, they had no basis for determination of the amount of plaintiff's recovery. *Ft. Worth & D. C. Ry. Co. v. Speer* (Civ. App.) 212 S. W. 762.

In such action evidence held not sufficient to require an instruction on plaintiff's contributory negligence in failing to remove obstructions consisting of trees and drift from the channel of a creek. *Id.*

In such action testimony showing overflow more extensive than those before construction, but not showing extent of increase or the amount of damage caused by such increase, is insufficient. *Id.*

**Art. 6499. [4440] Shall have the right to cross, intersect, etc., other railways.**

**Agreements for connection.**—Contract for connection between railroads means physical joining of rails so as to permit trains to pass from one set of rails to other. *Phillip A. Ryan Lumber Co. v. Ball* (Civ. App.) 197 S. W. 1037.

**Art. 6503. [4444] Value of same and damages shall first be paid.**

See *Lyon v. McDonald*, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

**Art. 6504. [4445] In case corporation and owner can not agree, etc.**  
—If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate, or the material thereon, required for the purpose of its incorporation or the transaction of its business, for its depots, station buildings, machine and repair shops, for the construction of reservoirs for the water supply, or for the right-of-way, or for a new or additional right-of-way, for change, or relocation or road bed, to shorten the line, or any part thereof, or to reduce its grades, or any of them, or for double tracking its railroad or constructing and operating its tracks, which is hereby authorized and permitted or for any other lawful purpose connected with or necessary to the building, operating or running its road, such corporation may acquire such property in the manner provided in this Chapter; provided, that the limitation in width prescribed in Article 6484, Revised Statutes, 1911, shall not apply to real estate, or any interest therein, required for the purposes herein mentioned, other than right-of-way, and shall not apply to right-of-way

when necessary for double tracking or constructing or adding additional railroad tracks, and that real estate, or any interest therein, to be acquired for such other purposes, or any of them, need not adjoin or abut on the right-of-way; provided, further, that no change of the line through any city or town, or which shall result in the abandonment of any station or depot, shall be made, except upon written order of the Railroad Commission of Texas, authorizing such change; and provided, further, that no railroad corporation shall have the right under this Act to condemn any land for the purposes mentioned in this Article situated more than two miles from the right-of-way of such railroad corporation; and provided, further, that nothing herein shall be construed to repeal or limit the provisions of section 1, Chapter 93 of an Act passed at the Fourth Called Session of the Thirty-fifth Legislature, approved April 13, 1918. [Acts 1876, p. 146, § 21; amended Acts 1901, p. 46; Acts 1919, 36th Leg., ch. 151, § 1.]

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

See *Philip A. Ryan Lumber Co. v. Ball* (Civ. App.) 197 S. W. 1037; note under art. 6481; *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

Cited, *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

**Authority of commission.**—Judgment restraining removal of railroad depot in violation of covenant held not to prevent such removal in obedience to order of Railroad Commission when public benefit requires such removal. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 195 S. W. 621.

While the Railroad Commission has authority to enforce the law as to the removal of railway depots, it is not its duty to enforce contracts of railroad companies with private individuals as to the maintenance of depots. *Id.*

— **Change of line.**—A railroad company, after having located, established, and operated its line cannot abandon or change the location of its tracks without legislative authorization, and this article authorizes a relocation for shortening the line or reducing the grade only. *Jeff Bland Lumber & Building Co. v. Railroad Commission of Texas* (Civ. App.) 203 S. W. 402.

The railroad commission is not authorized under this article, to make an order granting a railroad company the right to enter a city over the tracks of another railway and abandon its own. *Id.*

#### Art. 6506. [4447] Statement to be filed with county judge.

See *Porter v. City of Abilene* (App.) 16 S. W. 107.

Cited, *Roaring Springs Town-Site Co. v. Paducah Tel. Co.*, 109 Tex. 452, 212 S. W. 147; *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

**Jurisdiction.**—Since Rev. St. 1879, art. 4182 et seq., provide for condemnation proceedings by railroads in the county court, the district court has no jurisdiction to award condemnation in a suit by the land-owner against the railroad for use and occupation. *Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co.*, 72 Tex. 454, 10 S. W. 537.

A county court has jurisdiction in matters of eminent domain, such jurisdiction not being taken away by Acts 32d Leg. c. 24. *Balch v. San Antonio, F. & N. R. Co.* (Civ. App.) 161 S. W. 1091.

In view of arts. 6481-6534, held, that district court would not enjoin condemnation proceedings where county court had acquired jurisdiction by filing of sufficient petition and parties had failed to agree on damages as provided by this article. *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

The district court has jurisdiction to enter judgment of condemnation only in cases within art. 6531. *Pecos & N. T. Ry. Co. v. Malone*, 222 S. W. 217, reversing judgment (Civ. App.) 190 S. W. 809.

**The statement—in general.**—Petition to condemn land for use of railroad company held sufficient under this article, since right to condemn land for purposes mentioned is given by art. 6504. *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

Filing of application containing allegations of all facts necessary to confer upon county court jurisdiction to determine issues involved in proposed condemnation immediately fixed jurisdiction. *Id.*

The application hereunder should state a failure to agree or an excuse therefor, as by showing that the landowner is a minor. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

— **Description of land.**—A description of real estate in a petition under this article which would enable a surveyor, or one skilled in locating land, to locate the land sought to be condemned, is sufficient. *Parrish v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 224 S. W. 205.

— **Purpose of condemnation.**—In a proceeding under this article, a railway company is not required to condemn each tract for all the purposes named in the statute, but to have a specific tract appropriated to its use for any one of the statutory purposes, and the damages should be measured by the use to which the land is applied. *Parrish v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 224 S. W. 205.

**Art. 6507. Regular judge disqualified; special judge appointed.**

See *Porter v. City of Abilene* (App.) 16 S. W. 107.

**Art. 6508. [4448] County judge shall appoint commissioners.**

See *Porter v. City of Abilene* (App.) 16 S. W. 107.

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

**Appointment—Necessity of disagreement.**—Despite Charter of the City of Dallas, art. 11, § 5, appointment of commission here-under was not invalid for lack of agreement between the parties as to the commissioners. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

**Jurisdiction.**—See note under art. 6506.

**Art. 6509. [4449] Commissioners shall be sworn.**

See *Porter v. City of Abilene* (App.) 16 S. W. 107; *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

**Parol evidence of oath.**—See note under art. 3687

**Art. 6511. [4451] Shall issue written notice to parties.**

Cited, *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

**Recital of judgment on report as to notice.**—Rev. St. 1879, art. 4186, does not authorize the commissioners to find the fact of notice; and the recital of such fact in their report, without other sufficient proof, confers no jurisdiction on the county court. *Adams v. San Angelo Waterworks Co.* (Civ. App.) 25 S. W. 165.

**Art. 6512. [4452] Manner of serving notice.**

See *Adams v. San Angelo Waterworks Co.* (Civ. App.) 25 S. W. 165.

Cited, *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

**Art. 6513. [4453] Return of notice.**

See *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518; *Adams v. San Angelo Waterworks Co.* (Civ. App.) 25 S. W. 165.

**Art. 6514. [4454] When the property belongs to an estate or to a minor, notice shall be served on whom.**

See *Adams v. San Angelo Waterworks Co.* (Civ. App.) 25 S. W. 165.

Cited, *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

**Service.**—In suit by an infant to set aside judgment condemning her land at the instance of a city, evidence held insufficient to show the personal notice on the landowner required by this article. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

**Art. 6515. [4455] Property of non-resident, unknown owner, or one who secrets himself.**

See *Adams v. San Angelo Waterworks Co.* (Civ. App.) 25 S. W. 165.

Cited, *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

**Art. 6518. [4459] Rule of damages.**

**Measure of compensation.**—In general.—The damages should be measured by the use to which the land is applied. *Parrish v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 224 S. W. 205.

— **Additional servitude.**—If property owner acquired land from common vendor after railroad had lawfully acquired right of way, he could not have damages for construction of a switch track, causing depreciation in value of his property. *Stubblefield v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 203 S. W. 936.

— **Excessiveness of award.**—Award of \$900 as damages to balance of tract of 36 acres, from taking strip 17 or 18 feet wide adjoining railroad right of way, held excessive and to indicate passion or prejudice. *Galveston, H. & S. A. Ry. Co. v. Schelling* (Civ. App.) 198 S. W. 1018.

**Art. 6520. [4461] Same subject.**

See *Texas Pipe Line Co. v. Hildreth* (Civ. App.) 225 S. W. 533.

**Art. 6522. [4463] Assessment shall be in writing, dated, signed, etc.**

Cited, *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

**Amendment of return.**—An award is not void because commissioners amended their return to the county court to include purposes for which it was sought to condemn the land not included in the first return, where if the commissioners held a second hearing on the question of damages, no injury was shown. *Parrish v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 224 S. W. 205.

**Art. 6523. [4464] Other commissioners may be appointed, when.**

Cited, *Dallas, P. & S. E. R. Co. v. Day*, 3 Civ. App. 353, 22 S. W. 538.

**Art. 6527. [4468] Either party, if dissatisfied with decision, may remove cause, etc.**

See *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172; *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

**Proceedings after filing opposition—Jurisdiction.**—County court empowered by its judgment to vest title to realty in city in condemnation proceedings held the proper court for the landowner to file petition attacking the judgment of condemnation on the ground that recitals essential to jurisdiction in the record were false, and to establish aliunde the record that the court in truth was without jurisdiction. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

**Sufficiency of petition.**—Petition of landowner and husband to cancel and annul, for want of service and citation or other notice, judgment in a condemnation suit by defendant city, held to set up a cause of action as distinguished from a mere motion to correct an error of entry. *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

**Art. 6528. [4469] Decision shall be made the judgment of the court, when.**

**Judgment, sufficiency, effect, etc.**—See *City of Laredo v. Benavides* (Civ. App.) 25 S. W. 482; notes under art. 6534.

**Art. 6530. [4471] Damages must be paid before property is taken.**

See *Ellis v. Houston & T. C. Ry. Co.* (Civ. App.) 203 S. W. 172.

Cited, *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

**Effect of judgment.**—See *City of Laredo v. Benavides* (Civ. App.) 25 S. W. 482; note under art. 6534.

**Bond.**—Where bond of railroad company to obtain possession of land pending appeal by landowner from judgment of condemnation is signed by the company and two individuals, the names of the individuals are to be taken as signed as sureties. *Dysart v. Wichita Falls, R. & Ft. W. Ry. Co.* (Civ. App.) 220 S. W. 277.

**Payment of compensation.**—Subd. 2 of this article, providing that an award in condemnation proceeding and a like amount must be deposited in court, which shall be held together with the award itself, etc., clearly contemplates that the award shall not be paid to the landowner pending the suit. *City of Rosebud v. Vitek* (Civ. App.) 210 S. W. 728.

**Art. 6531. [4472] Practice in case specified.**

See *City of Dallas v. Crawford* (Civ. App.) 222 S. W. 305.

**Jurisdiction of District Court.**—The district court has no jurisdiction to enter a judgment of condemnation, except in cases falling within the terms of this article. *Pecos & N. T. Ry. Co. v. Malone* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 190 S. W. 809.

**Applicability—To other than railroad companies.**—In view of art. 2590, as to condemnation by drainage district, this and related articles, as to condemnation by railroads, and Const. art. 1, § 17, as to payment of condemnation damages, an insolvent drainage district, in suit to enjoin it from damaging land by flowage could not in its answer seek to condemn the lands by making offer to pay the damages determined. *Matagorda County Drainage District No. 5 v. Borden* (Civ. App.) 195 S. W. 308.

Arts. 1283a-1283f, as to the incorporation of gas, electric current and power companies, in providing, by art. 1283d, for condemnation by such company in the same manner as is provided by law in the case of railroads, does not extend to such the benefits of this article, in view of Rev. St. arts. 1232, 1306. *Pecos & N. T. Ry. Co. v. Malone* (Com. App.) 222 S. W. 217, reversing judgment (Civ. App.) 190 S. W. 809.

**Art. 6532. [4473] The right of way, how construed.**

**Fee in land.**—Where railroad company owned fee in strip on which its road was constructed, it could not be restrained from extracting oil therefrom, notwithstanding art. 1164. *Crowell & Conner v. Howard* (Civ. App.) 200 S. W. 911.

A railroad company may exclude trespassers from its right of way, and take reasonable steps to effect that purpose and protect itself therefrom. *Texarkana & Ft. S. Ry. Co. v. Bland* (Civ. App.) 205 S. W. 727.

**Adverse use.**—An easement for a public road may be acquired on a portion of a railroad right of way by prescription. *Gulf, C. & S. F. Ry. Co. v. Bluit* (Civ. App.) 204 S. W. 441.

Since public policy, in the absence of statute, does not prevent acquisition of rights of way to highways by adverse possession it does not prevent the acquisition of railway rights of way in that manner. *Texas & P. Ry. Co. v. Belcher* (Civ. App.) 226 S. W. 471.

**Forfeiture of charter.**—Rev. St. 1879, art. 4206, was intended to prevent the right of way from reverting to the grantors on the dissolution of the company, and despite forfeiture under art. 4278, the unfinished road is nevertheless its property, to be sold for

the benefit of its creditors and shareholders. *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 2 Civ. App. 650, 22 S. W. 107.

### Art. 6534. [4475] Right of way vested by judgment of the court.

**Enforcement of judgment.**—Under the provisions of this and related articles, a judgment for damages, rendered on trial after objection to the award of commissioners, may be enforced by execution against a city, though it has not taken possession of the property condemned for a street. *City of Laredo v. Benavides* (Civ. App.) 25 S. W. 482.

#### INJURIES FROM CONSTRUCTION OR MAINTENANCE OF RAILROAD

1. **Injuries to abutting property—In general.**—Every abutting owner has an interest in full width of street, and, if it is obstructed by a railway so as to damage sale or rental value of property, has a right of action for damages. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

2. — **Necessity of compensation.**—The construction of a steam railroad upon a street or highway, the fee of which is owned by abutting owners, constitutes a taking of private property for public use which Const. art. 1, § 17, provides cannot be done without making adequate compensation. *City of Orange v. Rector* (Civ. App.) 205 S. W. 503.

7. — **Negligence.**—Regardless of its negligence a railway is liable for damages resulting from location of roundhouse within 800 feet of plaintiffs' homestead. *Texas & P. Ry. Co. v. Reeves* (Civ. App.) 202 S. W. 814.

8. — **Measure of damages.**—Measure of damages to abutting lot is determined by value of lot immediately before, and its value immediately after, construction of railroad in street. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

11. — **Ingress and egress.**—In abutting owner's action for damages from construction of street railroad viaduct occupying part of street, interference with ingress and egress and with light and air are not the only elements of damages. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

13. — **Switches or spur tracks.**—In action against a railway company for injury to residence property resulting from maintenance of side track, it was improper to plead plaintiff's limited means, and that property was the pride of himself and family. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

It was proper to plead its peculiar value as residence property as showing "market value." *Id.*

A railroad company is not liable to the owner of adjoining property for the depreciation of the value of such property caused by the mere presence of a newly constructed switch track upon the right of way adjoining the property. *Wight v. Daniels* (Civ. App.) 226 S. W. 473.

Where the court, though finding that considerable noise and smoke were made by the operation of trains on a newly constructed switch, concluded as a matter of law that the railway company was liable for damage to adjacent property by constructing the embankment and the track complained of, the compensation awarded was allowed only for damages accruing from the construction of the switch track, and not from the operation of trains thereon. *Id.*

Under Const. art. 1, § 17, as to compensation for property taken or injured, owner of property which depreciated owing to construction of switch track near by, and storage and hauling of freight, could recover his damages regardless of negligence in construction or operation of the track. *Stubblefield v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 203 S. W. 936.

Property owners adjacent to side track cannot recover for personal inconvenience by operation of trains, in the absence of negligence therein. *Id.*

Petition, alleging plaintiff was owner of property fronting on street, on opposite side of which was a 150-foot railway right of way, in the center of which was the track, and that railroad caused depreciation of his property when it built switch track on edge of right of way and stored freight in the street, held to state a cause of action. *Id.*

15. — **Annoyance, discomfort and inconvenience.**—The discomfort to owners as distinguished from depreciation in property value is only recoverable when resulting from improper location or operation of railway tracks constituting nuisances. *St. Louis, B. & M. Ry. Co. v. Green* (Civ. App.) 196 S. W. 555.

Where plaintiff did not allege operation of defendant's railway in such a manner as to constitute a nuisance he could not recover for discomforts resulting therefrom. *Id.*

16. — **Noise, vibrations, smoke, noxious odors and cinders.**—Railroad's federal charter, though not expressly making it liable for "damaging" property, but only where it "takes" or "destroys," and Const. U. S. Amend. 5, prohibiting "taking" of private property for public use without just compensation, do not relieve it from liability for unreasonably damaging property by soot, smoke, etc., from its roundhouse. *Texas & P. Ry. Co. v. Taylor* (Civ. App.) 200 S. W. 1117.

A railway company is liable to the owner of adjoining property for injuries to the property caused by discharging water thereon and by the noise and smoke resulting from the construction of a switch track and the operation of trains thereon, though necessary to the operation of the railway as a federal corporation engaged in interstate commerce, and directed by the federal court, which had appointed a receiver, and though there was no evidence that the construction was negligent. *Wight v. Belcher* (Civ. App.) 226 S. W. 472.

17. — **Benefits.**—Where the construction of a switch track and the operation of trains thereon adjacent to plaintiff's property depreciated its market value at the time

of construction, it is no defense that the value had since increased, along with other property, so that at the time of the trial it was worth as much as before the construction of the switch. *Wight v. Belcher* (Civ. App.) 226 S. W. 472.

21. — **Defenses.**—That street railroad viaduct raised above ground was authorized by the city council did not absolve street railroad company from damages resulting from its construction. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

23. — **Evidence.**—In abutting owner's action for damages from construction of street railroad viaduct occupying part of street, evidence held to justify court's conclusion that structure prevented building of residences or business houses on opposite side of street. *Southern Traction Co. v. Fears* (Civ. App.) 199 S. W. 856.

In an action against a railroad for loss of cattle escaping through openings made in plaintiff's fence during railroad construction, evidence as to extent of damages held sufficient to warrant verdict as to amount. *Gulf, C. & S. F. Ry. Co. v. Baker* (Civ. App.) 218 S. W. 7.

27. **Negligence in construction or maintenance—Injuries to children.**—Where child was injured playing on turntable, action of towerman, near by, in speaking generally to the children on turntable, telling them they might get hurt, did not relieve railroad company from liability. *Gulf, C. & S. F. Ry. Co. v. Chappel* (Civ. App.) 201 S. W. 1037.

That lock bar on turntable was left in place by railroad employes using turntable does not affect liability of company for injury to child playing on turntable; such lock bar not being a secure fastening, but used simply to hold the turntable track in line when switching, and being easily shaken loose by trespassing children. *Gulf, C. & S. F. Ry. Co. v. Chappell* (Civ. App.) 202 S. W. 366.

34. **Nuisance—In general.**—A roundhouse constituting a nuisance, it was no defense to action for damages that it was more convenient to construct and operate it at that place than another, that in constructing and operating it the railroad neither "took" nor "destroyed" plaintiff's property, or that the railroad was not negligent in constructing or operating it. *Texas & P. Ry. Co. v. Taylor* (Civ. App.) 200 S. W. 1117.

Railroad's federal charter, though not expressly making it liable for "damaging" property, but only where it "takes" or "destroys," and Const. U. S. Amend. 5, prohibiting "taking" of private property for public use without just compensation, do not relieve it from liability for unreasonably damaging property by soot, smoke, etc., from its roundhouse. *Id.*

## CHAPTER NINE

### OTHER RIGHTS OF RAILROAD CORPORATIONS

Art. 6537. Shall have the right to hold lands and other property.	Art. 6544. Right to borrow money, issue bonds, etc.
6538. Shall have the right to receive and hold grants, etc.	6545. Mortgage invalid, unless, etc.
6542. Right to erect and maintain buildings, etc.	6548a. Abandonment, change, or relocation of line; petition; order.
6543. Right to regulate time, etc., of transportation.	6548b. Same.
	6548c. Same; power of eminent domain.
	6548d. Same; certain acts validated.
	6548e. Same; hearing of application.

**Article 6537. [4478]** Shall have the right to purchase and hold lands and other property.

See *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S. W. 453.

**Purposes for which land may be taken.**—A railroad company has the right to acquire real estate without limitation or restriction in use, and when so acquired its title is as absolute as that of a private individual, at least in so far as concerns immunity from attack by any one except the state. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639.

**Art. 6538. [4479]** Shall have the right to receive and hold grants, etc.

See *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S. W. 453.

**Grants for right of way or other purposes—Title, estate or interest acquired.**—Conveyance to railroad company in the usual form of a general warranty deed held to give title to the property, and not a mere right of way. *Crowell & Conner v. Howard* (Civ. App.) 200 S. W. 911.

Instrument by presiding justice of county court reading, "I, ———, donate, grant, and convey" certain land to railroad for use as depot site, construed with county court's order using words "grant" and "donate," was intended to pass title, and not merely permissive possession, where only word of limitation declared grant void upon railroad's failure to build line through certain town. *Texas & N. O. R. Co. v. Orange County* (Civ. App.) 206 S. W. 539.

Where county granted land to railroad, and for more than 40 years permitted railroad to use land and pay all taxes thereon, the county will be held to have intended to grant land absolutely, and not merely to give permissive right to use same as site for depot. *Id.*



— **Covenants and conditions.**—When the public interest requires the removal of a railway depot, it can be removed notwithstanding a covenant with private individuals not to remove it. *San Antonio & A. P. Ry. Co. v. Mosel* (Civ. App.) 195 S. W. 621.

A grantor of land could burden it with a covenant requiring the maintenance of a railroad depot thereon for the benefit of any land in the vicinity, whether owned by him or not. *Id.*

Judgment restraining removal of depot contrary to covenant with plaintiffs' grantor held not to be reversed where one plaintiff had bought land owned by the common grantor at the time of the covenant. *Id.*

While the Railroad Commission has authority to enforce the law as to the removal of railway depots, it is not its duty to enforce contracts of railroad companies with private individuals as to the maintenance of depots. *Id.*

Judgment restraining removal of railroad depot in violation of covenant held not to prevent such removal in obedience to order of Railroad Commission when public benefit requires such removal. *Id.*

Where land is deeded to railroad on condition subsequent that it shall be used for railroad purposes only, forfeiture of the easement created by the deed is the effect of permanent abandonment of such use. *Red River, T. & S. Ry. Co. v. Davis* (Civ. App.) 195 S. W. 1160.

Provision of a deed as to consideration and binding the grantee railroad to use the land for railroad purposes only, held to import a condition subsequent. *Id.*

Deeds to a railroad on condition that premises shall be used exclusively for railroad purposes, and that after they shall cease to be so used they shall revert, naming a small consideration, the real consideration being expected enhancement in value of adjoining property, held to convey a fee upon condition subsequent, and not upon limitation, and railroad took an indefeasible title after grantors' sale of adjoining land. *Stevens v. Galveston, H. & S. A. Ry. Co.* (Com. App.) 212 S. W. 639.

#### **Art. 6542. [4483] Right to erect and maintain buildings, etc.**

**Fixtures.**—Where a lease of a portion of a railroad right of way provided that on termination the lessee should be allowed a reasonable time in which to remove improvements, he forfeited his right to remove house, and it became a part of the realty if it was not removed within a reasonable time, and he had no claim for damages because the lessor subsequently tore it down. *Texas & N. O. R. Co. v. Clevenger* (Civ. App.) 223 S. W. 1036.

**Concessions—Privilege to hackmen.**—A railroad company may confer on a particular company the exclusive privilege of having its hack stand on the company's ground and soliciting business there, and may exclude by injunction other hackmen intruding thereon for the purpose of soliciting transportation of passengers and baggage, where they are not prevented from entering the premises and transporting any individuals with whom they had previous contracts. *Clisbee v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 230 S. W. 235.

#### **Art. 6543. [4484] Right to regulate time of transportation.**

See *Panhandle & S. F. Ry. Co. v. Harp* (Civ. App.) 199 S. W. 502.

#### **Art. 6544. [4486] Right to borrow money, issue bonds, etc.**

Cited, *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 2 Civ. App. 650, 22 S. W. 107.

#### **Art. 6545. [4487] Mortgage invalid, unless, etc.**

**Estoppel to assert invalidity.**—Where, in pursuance of a resolution to issue bonds secured on mortgage not adopted in consonance with Rev. St. 1879, art. 4220, a contract has been executed and the company has had the benefit thereof, it is estopped from denying its authority to make the contract. *Texas W. Ry. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98.

**Art. 6548a. Abandonment, change, or relocation of line; petition; order.**—When any railroad in this state whether incorporated under State or Federal charter desires to abandon, change or relocate any portion of its line or railroad within this state adjacent to but not within any incorporated City of 50,000 or more inhabitants of this state according to the United States census, it shall present a petition therefor to the Railroad Commission of Texas showing that portion of its line sought to be changed, relocated or abandoned and the situation of the new or relocated line, with the reasons justifying the same; thereupon the Railroad Commission of Texas shall set aside said application for hearing and give public notice thereof of not less than ten days in the locality where such change is desired by publishing notice in a newspaper of general circulation published nearest thereto, setting out substantially what such contemplated change may be; and if after such hearing the Railroad Commission of Texas shall be of opinion that it is to the public

interest to permit such change, relocation or abandonment of said line, it shall enter its order approving same and thereupon said railroad corporation or receivers of any railroad shall be empowered to make such change, relocation or abandonment; provided that nothing contained herein shall be construed to authorize the Railroad Commission of Texas to permit any railroad corporation or receivers of any railroad to abandon such substantial part of its line as shall amount to impairment of its charter contract or deprive any city or town of railroad facilities. Provided that the Railroad Commission of Texas shall not exercise the power herein granted unless and until said railroad corporation or receivers of any railroad shall have obtained the permission of the County Commissioners Court of the County for such change, relocation or abandonment, which permission shall be evidenced by the duly authenticated order of such court which shall accompany the petition of such railroad corporation or receivers of any railroad to the Railroad Commission of Texas. [Acts 1918, 35th Leg. 4th C. S., ch. 27, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 6548b. Same.**—When any Railroad Corporation or receivers of any railroad of the State desire to change, relocate or abandon any part of its line within any incorporated City containing 50,000 or more inhabitants according to the United States census, it shall present its petition therefor to the governing legislative authority of such city said petition to be also supported by the names of not less than five hundred resident citizens who shall be property owners in said city, showing the reasons therefor and the part of the line sought to be changed, relocated or abandoned, the new location, or arrangements proposed for operation; whereupon such governing legislative authority if of opinion that the same is for the public interest, shall enter its order permitting such change, relocation or abandonment of said line. That thereupon the said railroad corporation or Receivers of any railroad shall present its petition to the Railroad Commission of Texas praying for authority to make such change, relocation or abandonment, with a description of that portion of its lines; providing that no change shall be made that will seriously affect the charter obligations of any railroad company sought to be changed, relocated or abandoned, together with a description of the changed or relocated line, or arrangement for the new operation, which petition shall be accompanied by the order of the governing legislative authority of the City as aforesaid approving same; whereupon the Railroad Commission of Texas shall set down such application for public hearing upon not less than ten days notice, and if upon such hearing the Railroad Commission of Texas shall be of opinion that the public interest will be conserved by the granting of such petition, it shall enter its order to that effect and thereupon said railroad corporation or Receivers of any railroad shall have full power to make such change, relocation or abandonment of its line. Providing that no application to alter, change or re-locate railway tracks, as contemplated by this section, shall be acted upon by the governing Legislative authority of such city until 30 days after the petition of citizens provided for herein shall have been filed with said body, and publication thereof has been made for two consecutive weeks in a newspaper of general circulation within the limits of said city, prior to action had thereon. [Id., § 2.]

**Art. 6548c. Same; power of eminent domain.**—When any railroad corporation or Receivers of any railroad shall have been empowered under the provisions of this Act, to change, relocate or abandon its line of railroad in this State, it shall have full power to acquire by condem-

nation or otherwise all lands for rights of way, depot grounds, shops, roundhouses, water supply sites, sidings, switches, spurs or any other lawful purpose connected with or necessary to the building, operating or running of its road as changed, relocated or abandoned; provided, however, that all property so acquired is hereby declared to be for and is charged with public use so far as same may be necessary. [Id., § 3.]

**Art. 6548d. Same; certain acts validated.**—All changes, relocations and abandonments of parts of their lines by railroad corporations or Receivers of any railroad in or adjacent to any city having a population according to the United States census of 50,000 inhabitants or over, heretofore made with the permission of the Railroad Commission of Texas or authorized by its written order, are hereby validated and made legal as fully as if made under the provisions of this Act, and such permission or written order of the Railroad Commission of this State, given prior hereto, shall be full power and authority to a railroad corporation or Receivers of any railroad to make such change, relocation or abandonment of parts of its line; providing that this Act shall not affect any right or rights for damages that any person, firm or corporation may now have, may have had or may have in the future for damages caused by any such removal, change or abandonment. [Id., § 4.]

Sec. 5 repeals all inconsistent acts or parts of acts.

**Power of Legislature.**—The Legislature, by this article, could ratify effectually an abandonment and relocation by a railroad of a portion of its main line tracks. *Jeff Bland Lumber & Bldg. Co. v. Galveston, H. & S. A. R. Co.* (Civ. App.) 212 S. W. 750.

**Art. 6548e. Same; hearing of application.**—Whenever the governing authority of any City containing 50,000 inhabitants or more shall present to the Railroad Commission of this State its application for any change or relocation of any tracks of any railroad corporation or Receivers of any railroad in such way as to better serve the public interest, said Railroad Commission shall set down such application for a hearing after giving ten days notice to such railroad corporation or Receivers of any railroad, whose tracks are sought to be changed or relocated and after such a hearing may make its order directing such change or relocation if in the opinion of the Railroad Commission such change or relocation would be to the best interest of all parties concerned. Provided that no application to alter, change or relocate railway tracks, as contemplated by this section, shall be determined upon by the governing legislative authority of such city until 30 days after publication of the proposed change or relocation of said railway tracks shall have been made in the official newspaper of the said city. [Id., § 6.]

#### SPECIAL ACTS PERMITTING REMOVAL OF RAILROAD

Acts 1919, 36th Leg., ch. 28, permits the Riviera Beach & Western Ry. Co. to remove its tracks.

Acts 1919, 36th Leg., ch. 56, permits the Texas Southeastern Ry. Co. to remove its tracks between Vair and Neff.

Acts 1919, 36th Leg., ch. 69, permits Artesian Belt R. R. to remove tracks.

Acts 1919, 36th Leg., ch. 80, permits the Texas, Arkansas & Louisiana Ry. Co. to remove certain tracks.

## CHAPTER TEN

### RESTRICTIONS UPON, DUTIES AND LIABILITIES OF RAILROAD CORPORATIONS

**Art.**  
6552. Trains to be regular.  
6552a. Effect of preceding section.  
6554. Refusal to transport, etc.

**Art.**  
6557. Shall not collect more than specified in bill of lading.  
6558. Freight to be delivered on payment of charges.

Art.		Art.	
6559.	Penalty for refusal to deliver freight.	6598.	Character of.
6563.	Signs shall be erected at crossings.	6600.	Liability for failure, etc.
6564.	Bell and steam whistle, duty as to.	6601.	Johnson grass not to be permitted to go to seed on right of way.
6589.	Stations shall be erected, etc.	6602.	Penalty and damages.
6590.	No storage charged, except.	6603.	Liability for stock, etc.
6591.	Depots opened, lighted, etc., penalty for failure.	6608.	To receive freight, etc., from connecting lines.
6592.	Water closets to be erected.	6610.	Terms for receiving, etc.
6593.	Separate closets, how constructed and maintained.	6612.	Penalty.
6594.	Penalties and suits for.	6615.	Penalty for refusal, etc.
6595.	Switch cars shall be furnished, when.	6616.	Equal facilities, etc.
6596.	Cattle-guards and stops, at what places.	6617.	Damage for failure, etc.
		6618.	Passenger fare.
		6618a.	Reduced rate to certain officers.

**Article 6552. [4494] Trains to be regular, and notice to be given.**

—Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property, as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings and stopping places established for or receiving and discharging way passengers and freight, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of railroad companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and such abuse shall be at once corrected and regulated by the Railroad Commission. Provided further that no railroad corporation nor any manager or receiver of any railroad shall ever abandon operation of its trains over said railroad, or any part thereof, and in case any railroad corporation, manager or receiver has now or may hereafter abandon operation of its trains over its said railroad, or part thereof, the Railroad Commission of Texas shall at once issue its order directing said railroad corporation, manager or receiver to at once resume operation of its trains over said road, or part thereof, in accordance with the orders, rules, and regulations of the Railroad Commission.

Provided further that if any railroad corporation, manager or receiver shall attempt to abandon any railroad, or part thereof, by failing to operate its trains or to resume operation of its trains over its said road, or part thereof, if the operation of trains has been abandoned, the Railroad Commission shall report the same to the Attorney General of the State of Texas who shall at once file a suit in behalf of the State against said railroad corporation, manager or receiver in any District Court of any county through which said railroad may pass, or of Travis County, for the purpose of determining whether or not said railroad corporation, manager or receiver has failed or refused to carry out the purpose of this article and if it shall be determined by the court that said corporation, manager or receiver has so failed or refused, said court shall appoint a receiver for the purpose of operating said railroad and carrying out the purposes of this Article, and the said receiver shall have had no connection, directly or indirectly, with said railroad corporation, manager or receiver prior to the time of his appointment, but who shall be a good business man well qualified to perform the duties of said receiver.

Provided further that said receiver shall collect freight and passenger rates as prescribed by the Railroad Commission and shall do and perform any and all things necessary in the operation of said trains over said

road and shall report to the said court at such times as may be prescribed by the decree of the court all of his acts as such receiver. [P. D. 4893; amended Acts 1903, 1 S. S. p. 21; Acts 1918, 35th Leg. 4th C. S., ch. 88, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

See Galveston, H. & S. A. Ry. Co. v. Schmidt (Civ. App.) 25 S. W. 452; note under art. 6554; Panhandle & S. F. Ry. Co. v. Harp (Civ. App.) 199 S. W. 502

Stations where no tickets are sold.—See note under art. 6618.

**Sidings and spur tracks.**—This article, if construed so as to require railroads to construct sidings and spur tracks at stations, requires construction thereof only where necessary for accommodations for transportation of passengers and freight. Railroad Commission of Texas v. Pecos & N. T. Ry. Co. (Civ. App.) 212 S. W. 535.

The reasonableness and justness of Railroad Commission's order requiring construction of depot building and sidings and spur tracks, whether made pursuant to this article or art. 6715, depends upon the facts of the particular case. *Id.*

**Art. 6552a. Effect of preceding section.**—This act shall be considered cumulative of all laws of the State of Texas now in force on this subject when not in conflict herewith, but when in conflict herewith, this Act shall control; provided further that the provisions of this Act shall not apply to railroads to which the right of eminent domain is not granted under the laws of this State. [Acts 1918, 35th Leg. 4th C. S., ch. 88, § 2.]

#### **Art. 6554. [4496] Refusal to transport passenger or property.**

See St. Louis & S. W. Ry. Co. v. Kay (Civ. App.) 23 S. W. 91.

Cited, Ft. Worth & R. G. Ry. Co. v. Jones (Civ. App.) 212 S. W. 552.

**3. Repeal.**—This article does not repeal art. 6559. St. Louis, A. & T. Ry. Co. v. McKee (App.) 15 S. W. 45.

Art. 709 is repealed by implication, so far as concerns railroad companies, by this article, and art. 6680. San Antonio & N. P. Ry. Co. v. Bailey (App.) 15 S. W. 203.

**7. Failure or refusal to furnish cars or transport.**—Under this article, a shipper who shows that he was ready to pay freight charges may recover damages caused by a refusal to transport his property.—Galveston, H. & S. A. Ry. Co. v. Schmidt (Civ. App.) 25 S. W. 452.

Railroads are quasi public corporations, and require thereby an exclusive privilege to carry on their business over their highways, which powers are granted with the express view of their rendering adequate and impartial service to the public. Ft. Worth & D. C. Ry. Co. v. Strickland (Civ. App.) 208 S. W. 410.

A carrier is not required to accept as a passenger one without an attendant who is mentally incapable of caring for himself. Chicago, R. I. & G. Ry. Co. v. Sears (Com. App.) 210 S. W. 684.

**17. Measure of damages—Penalty.**—In suit for conversion of a carload of hay, the evidence and verdict establishing the conversion, plaintiff cannot recover the penalty prescribed by this article, on the value of the hay up to the time of the judgment; the action for conversion being an election to treat title of the date of conversion. Panhandle & S. F. Ry. Co. v. Talmage (Civ. App.) 206 S. W. 862.

#### **Art. 6557. Shall not collect more than specified in the bill of lading.**

See Gulf, C. & S. F. Ry. Co. v. Adair (App.) 14 S. W. 1076; Schloss v. Atchison, T. & S. F. Ry. Co., 85 Tex. 601, 22 S. W. 1014; note under art. 6559.

#### **Art. 6558. Freight to be delivered on payment of charges.**

See Schloss v. Atchison, T. & S. F. Ry. Co., 85 Tex. 601, 22 S. W. 1014; note under art. 6559.

**Constitutionality.**—The fact that this article applies only to railroads, and not to other carriers, does not render it class legislation. Gulf, C. & S. F. Ry. Co. v. McCown (Civ. App.) 25 S. W. 435.

Though it applies to shipments from outside the state, it is not repugnant to, or superseded by, the interstate commerce act. *Id.*

**Excuses for failure to deliver.**—A failure to comply with this article is not excused by the refusal of the owner to surrender the bill of lading, or to give an indemnity bond in lieu of such surrender. Gulf, C. & S. F. Ry. Co. v. McCown (Civ. App.) 25 S. W. 435.

#### **Art. 6559. Penalty for refusal to deliver freight.**

**Constitutionality.**—This article is not unconstitutional as a regulation of interstate commerce, though applied to freight shipped from a point without the state. Ft. Worth & D. Ry. Co. v. Lillard (App.) 16 S. W. 654. Following Railway Co. v. Dwyer (Tex.) 12 S. W. 1001.

This article is not an attempted regulation of the interstate commerce law, but a valid police regulation, which the state has a right to pass. Gulf, C. & S. F. Ry. Co. v. Nelson, 4 Civ. App. 345, 23 S. W. 732.

**Repeal.**—This article is not repealed by art. 6554. *St. Louis, A. & T. Ry. Co. v. McKee* (App.) 15 S. W. 45.

**Tender of charges.**—In order to recover the penalty prescribed in this statute, the shipper must bring himself strictly within its requirements, and a consignee who tendered the amount of freight shown to be due by an expense account furnished by the carrier, which was no part of the bill of lading, could not maintain an action for such penalty. *Schloss v. Atchison, T. & S. F. Ry. Co.*, 85 Tex. 601, 22 S. W. 1014.

**Pleading and proof.**—In an action under this article for a penalty, for overcharge on a bill of lading, which, provided, "weight and classification subject to correction," plaintiff must allege and prove that the freight charges specified therein were based on the actual weight of the freight. (*Railway Co. v. Cruse* [Sup.] 18 S. W. 755, followed.) *Gulf, C. & S. F. Ry. Co. v. Loonie*, 84 Tex. 259, 19 S. W. 335.

Where, in an action to recover the penalty authorized by this article, it was admitted by both parties that the bill contained the words, "Weight subject to correction," and it was claimed by defendant that more was due than tendered, the court erred in charging that the jury could only consider evidence as to the true weight if they believed that such words were in the bill, as the burden of proof was on plaintiff to show that he tendered the full amount. *Gulf, C. & S. F. Ry. Co. v. Nelson*, 4 Tex. Civ. App. 345, 23 S. W. 732.

In a suit for penalty under this article, where the bill stipulates that the weights named therein are subject to correction, plaintiff must plead and prove that the weights stated in the bill are correct. *Wichita Val. Ry. Co. v. Nance*, 6 Tex. Civ. App. 34, 25 S. W. 47.

**Matters excusing carrier.**—A railroad company is not liable to the penalty prescribed by this article, when the freight is detained by a connecting line to which it has been delivered together with the bill of lading. *Gulf, C. & S. F. Ry. Co. v. Adair* (App.) 14 S. W. 1076.

The company is not liable to the penalty prescribed by this article where the detention was while the road was in the hands of receivers. *Missouri, K. & T. Ry. Co. v. Stoner*, 5 Civ. App. 50, 23 S. W. 1020.

#### Art. 6563. [4506] Signs shall be erected at cross-roads, etc.

**Accidents at crossings.**—See notes at end of chapter 10 of this title.

— **Failure to provide signboards.**—Rev. St. 1879, art. 4231, applies equally to roads public by dedication as to public roads established by statutory proceedings. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857.

#### Art. 6564. [4507] Bell and steam whistle; duty as to.

See *Gulf, C. & S. F. Ry. Co. v. York*, 74 Tex. 364, 12 S. W. 68; *St. Louis, S. F. & T. Ry. Co. v. Morgan* (Civ. App.) 220 S. W. 281.

**Rights of action.**—Rev. St. 1879, art. 4232, does not give any right of action on account of an accident causing death. *Galveston, H. & S. A. Ry. Co. v. Cook* (Sup.) 16 S. W. 1038.

**When and where signals must be sounded—in general.**—Rev. St. 1879, art. 4232, as amended, does not require both the whistle to be blown and the bell rung; and it is sufficient if the whistle is blown at a distance of at least 80 rods before the crossing is reached, without continuing the blowing until the crossing is passed. *Missouri, K. & T. Ry. Co. v. Kirschoffer* (Civ. App.) 24 S. W. 577.

— **Engine starting within 80 rods from crossing.**—The statute does not apply to a train and engine backing from a point less than 80 rods from a crossing. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

**For whose benefit duty is imposed.**—Omission of statutory signals on approach of train to highway crossing is negligence per se only in case of those using or about to use highway, and not with respect to trespassers. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

Where the killing of operator of motor car by a passenger train did not occur at a crossing, and where deceased was not on the road when hurt, the statute requiring a whistle to be blown when approaching a crossing has no application. *Gulf, C. & S. F. Ry. Co. v. Whitfield* (Civ. App.) 206 S. W. 380.

**Accidents at crossing—Failure to signal negligence per se.**—Railroad's failure to blow whistle and ring bell at least 80 rods from public crossing as required by this article, held negligence per se. *Hines v. Foreman* (Civ. App.) 229 S. W. 630; *Houston, E. & W. T. Ry. Co. v. Hall* (Civ. App.) 219 S. W. 526.

Failure of trainmen in backing train toward crossing to give signals required by this article, does not constitute negligence per se. *Chicago, R. I. & G. Ry. Co. v. Shockley* (Civ. App.) 214 S. W. 716.

— **Proximate cause.**—In actions for injuries to passengers in automobile struck by car with gong and whistle sufficient to give reasonable warning, as jury found, court properly refused to submit issue whether accident would have happened had car been equipped with different bell and whistle, as required in certain cases by this article. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 203 S. W. 397.

Where a train of 23 cars was backing towards a crossing, and the engine was some 900 feet away when automobile was struck at the crossing, on evidence that the bell, if rung, could not have been heard at the crossing, failure to ring it was not the proximate cause of the injury. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

— **Evidence.**—The failure to comply with these requirements at the crossing at which plaintiff was injured was prima facie evidence of negligence, making the company liable for the injury if it occurred without any fault of plaintiff. *Gulf, C. & S. F. Ry. Co. v. Breitling* (Sup.) 12 S. W. 1121.

Negative testimony of the driver of an automobile struck at a crossing and another person that they did not hear the bell rung as the train was approaching held insufficient to sustain a finding that the bell was not rung. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

In an action for death of driver of automobile truck struck by a train at a crossing, evidence held sufficient to sustain jury finding of negligence proximately causing the injury. *Schaff v. Merchant* (Civ. App.) 212 S. W. 970.

In an action for killing a mule at a public crossing, evidence held to warrant finding that failure to blow whistle and ring bell at crossing, as required by this article, was negligence proximately causing mule's death. *Houston, E. & W. T. Ry. Co. v. Hall* (Civ. App.) 219 S. W. 526.

**Crossing another railroad.**—Under Rev. St. 1879, art. 4232, in an action for damages caused by a collision between two trains at a crossing, instruction that, if defendant's engineer, on approaching the crossing, failed to bring his engine to a full stop at such a distance from the crossing as, under the circumstances, common prudence would dictate as necessary to avoid a collision, and that the collision occurred by reason of such failure, the defendant would be liable held proper. *Ft. Worth & D. C. Ry. Co. v. Mackney*, 33 Tex. 410, 18 S. W. 949.

### Art. 6589. [4519] Station depots shall be erected, etc.

**Mandatory character of statute.**—This article is mandatory, and to secure compliance therewith it is the duty of the Railroad Commission to order a railroad company which maintains only a shed at a town containing several stores, mills, etc., to erect a depot there sufficient to handle the freight and passenger traffic. *Angelina & N. R. R. Co. v. Railroad Commission of Texas* (Civ. App.) 212 S. W. 703.

Such an order of the Railroad Commission is not subject to a test of reasonableness: the only question of reasonableness possible being as to the kind of buildings required to be built. *Id.*

A railroad company cannot evade the statutory duty imposed upon it because of increased expense to the company. *Id.*

**Duty as to goods not stored.**—Where a carrier had established a platform as a place for the reception and delivery of cotton, it was required, under this article, to do whatever was reasonably necessary to protect cotton placed on the platform from fire caused by sparks from passing engines, or from a cotton gin located 75 or 80 yards therefrom. *Hartford Fire Ins. Co. v. Triplett* (Civ. App.) 223 S. W. 305.

**Suits—Defenses.**—Under this article, and art. 6693, it is no defense to a consignee's action for failure to deliver goods to connecting carrier that freight could not have been left at junction point where there was no station, without loss. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 198 S. W. 814, 816.

Where a railroad, in the absence of a warehouse building to protect cotton at its station, as required by this article, unloaded cotton shipped over its road on the platform of a compress company, the compress company was the agent of the railroad, and not an independent warehouseman. *Wichita Valley Ry. Co. v. Golden* (Civ. App.) 211 S. W. 465.

### Art. 6590. [4520] No storage to be charged, except, etc.

See *Hines v. First Guaranty State Bank of Aubrey* (Civ. App.) 228 S. W. 668.

### Art. 6591. [4521] Passenger depots opened, lighted, warmed, etc.; penalty for failure.

See *Hines v. Hadnot* (Civ. App.) 220 S. W. 136.

**Stations where no tickets are sold.**—See note to art. 6618.

**Lighting and heating depots, etc.**—A railroad company owes a duty to the traveling public to exercise ordinary care to keep its passenger station buildings and other depot premises set apart for the use of passengers in reasonably safe condition and to light such premises at night when necessary. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 225 S. W. 822.

— **Limiting liability.**—Though a carrier may stipulate against liability for failing to set down a passenger riding on a drover's pass at a station or to furnish lights for him, it nevertheless must exercise the high degree of care which it owes to a passenger not to set him down at an unsafe place, or a place so remote from the depot platform used for passengers as would expose him to manifest danger. *Robert v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 229 S. W. 954.

— **Contributory negligence.**—Passenger on a dark night walking off unlighted platform without paying particular attention to where she was going, held contributorily negligent as a matter of law, and cannot recover. *Hines v. Hadnot* (Civ. App.) 220 S. W. 136.

**Safe means of ingress and egress.**—Where the usually traveled and apparently safe way between depot and public road was between the main and switch tracks, it cannot be said that pathway leaving that walk only a few feet from the public road, running diagonally across the switch track over the end of a culvert, was the only practical way to reach the public road, so that the railroad owed duty to the public to keep such way in suitable condition for such use, or to provide lights for the guidance of those passing

over it after alighting from a passenger train. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 225 S. W. 822.

**Evidence.**—In an action by passenger who claimed to have contracted la grippe resulting in pneumonia and tuberculosis from exposure in cold waiting room, evidence held sufficient to sustain a finding that the passenger suffered such injuries as claimed, and the denial of a new trial was not error. *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

#### Art. 6592. Water closets to be erected.

**Effect of Federal Control.**—Under Act Cong. March 21, 1918, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115½j), the Federal Director General of Railroads whose predecessor in office took over the properties of a railroad in the possession and control of a receiver is not liable to penalties for failure of himself and predecessor to keep well lighted the waterclosets and adjacent depot grounds maintained at several passenger stations, as required by this and the two succeeding articles. *State v. Hines* (Civ. App.) 228 S. W. 667.

**Questions for jury.**—In an action for penalties for failure to comply with this article, whether water-closets 524 feet from a depot in a town without sewers were within a reasonable and convenient distance held for the jury. *Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 216 S. W. 393.

**Verdict.**—In an action for penalties under this article, verdict that defendants were guilty of not having their water-closets at a convenient place at the town named, which was without sewers, did not find the facts essential to support the imposition of penalties. *Galveston, H. & S. A. Ry. Co. v. State*, 110 Tex. 128, 216 S. W. 393.

#### Art. 6593. Separate closets, how constructed and maintained.

Effect of Federal Control of railroads, see note under art. 6592.

#### Art. 6594. Penalties, and suits for.

Effect of Federal control of railroads, see note under art. 6592.

#### Art. 6595. [4522] Switch cars shall be furnished.

See *Gulf, C. & S. F. Ry. Co. v. Wallace*, 2 Tex. Civ. App. 270, 21 S. W. 973.

#### Art. 6596. [4523] Cattle-guards and stops at what places.

See *Ward v. Bonner*, 80 Tex. 168, 15 S. W. 805.

#### Art. 6598. [4525] Character of cattle-guards and stops.

See *Ward v. Bonner*, 80 Tex. 168, 15 S. W. 805.

#### Art. 6600. [4527] Liability of company for neglect to place and keep in repair cattle-guards and stops.

See *Ward v. Bonner*, 80 Tex. 168, 15 S. W. 805.

**Liability for negligence—Damages.**—Where railroad, after running line through plaintiff's lands, by neglecting and refusing to close openings on right of way by fence and cattle guards, gradually destroyed value of grass and herbage as pasturage by failing to protect it from stock of others, case was one of special damages, to be measured by loss to plaintiff rather than market value of grass. *San Antonio, U. & G. Ry. Co. v. Ernst* (Civ. App.) 210 S. W. 603.

#### Art. 6601. Johnson grass not permitted to go to seed on right of way.

See *International & G. N. Ry. Co. v. Dawson* (Sup.) 232 S. W. 279; note under art. 6602.

#### Art. 6602. Penalty and damages.

See *Galveston, H. & S. A. R. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

**Effect of receivership—Penalty.**—Receivers of railway companies appointed by the United States court are liable under this and the preceding article, for penalties for allowing Johnson grass to go to seed on the right of way of the railway company of which they had control. *International & G. N. Ry. Co. v. Dawson* (Sup.) 232 S. W. 279.

**Duties of landowner.**—It was not incumbent on plaintiff, suing railroad for damage through the spread of Johnson grass, to cease plowing the land, or tediously to gather the grass roots placed thereon through the negligence of defendants. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

**Measure of damages.**—Evidence held insufficient to support the measure of damages which is the reasonable cost of exterminating the additional Johnson grass, and placing the land in the same condition it was in before defendant's wrong. *Galveston, H. & S. A. Ry. Co. v. Seligman* (Civ. App.) 219 S. W. 303.

The amount whereby the value of the land infested with the grass has been diminished is the measure whereby damages are to be ascertained, though plaintiff landowner



alleges in the alternative that the grass can be eradicated for a smaller amount. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

**Actions—Parties.**—A railroad and a brick company, alleged and proved to be joint tort-feasors in permitting the spread of Johnson grass from a spur track to his land, were properly joined in one suit; it being clearly alleged that the spur track was leased by the brick company but controlled by the railroad company, the parties jointly undertaking the upkeep of the right of way. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 227 S. W. 734.

### Art. 6603. [4528] Liability of companies for stock killed or injured.

See *Texas Electric Ry. v. Barton* (Civ. App.) 213 S. W. 689.

**6. Street and other electric railways.**—An interurban railway using electricity as a motor power is a "railroad," within this article, which is remedial and to be liberally construed. *Texas Electric Ry. v. Barton* (Civ. App.) 213 S. W. 689.

**8. Applies only to injuries from collision.**—Owner cannot recover under this article; live stock not having been hurt in collision with train. *Schaff v. Page* (Civ. App.) 203 S. W. 807; *International & G. N. R. Co. v. Hughes*, 68 Tex. 290, 4 S. W. 492.

**8½. Care required and liability in general.**—Under this article, where horses attached to a wagon run away, and are injured at a place on the track which was not fenced, nor a public crossing, defendant is liable. *Gulf, C. & S. F. Ry. Co. v. Keith*, 74 Tex. 287, 11 S. W. 1117.

In action for injuries to mule on railway track, instruction that railroad must provide reasonable approach to freight unloading points, and that plaintiff, hauling material from cars, had a right to use the most reasonable and convenient approach, whether provided by the railroad or not, was erroneous. *St. Louis Southwestern Ry. Co. of Texas v. Rea* (Civ. App.) 202 S. W. 812.

Railroad's duty to make freight unloading points as safe as reasonable care will make them does not make it liable for injury to animal resulting from the unsafe condition of parts of the premises not intended for public use, and into which the public is not invited. *Id.*

The presence of box cars, lumber, and cordwood, placed near a public crossing for railroad purposes, though an obstruction of trainmen's view, is not negligence upon which liability for killing a mule at the crossing can be based, but may be considered in determining whether train was operated with proper care. *Houston, E. & W. T. Ry. Co. v. Hall* (Civ. App.) 219 S. W. 526.

**12. — Care as to animals seen on or near track.**—It was not the duty of a railroad's engineer to slow his train down when already running at a fairly slow rate because he saw cattle evidencing no nervousness or excitement standing 50 feet away from the track, as he could not anticipate they would attempt to cross. *San Antonio & A. P. Ry. Co. v. Dumm* (Civ. App.) 207 S. W. 204.

**13. Liability where right of way is fenced.**—Where a railroad has its right of way properly fenced, it is necessary, to admit proof that hogs were killed on the track, to allege that the railroad was negligent. *Texas & N. O. R. Co. v. Lovett* (Civ. App.) 199 S. W. 498.

A railroad company may gain a certain immunity from liability for killing live stock on its right of way by fencing the same, although not required by law to fence it. *Butler v. Baker* (Civ. App.) 226 S. W. 827.

**14. Liability where right of way is not fenced.**—There is no law compelling railroads to fence a right of way. *Ft. Worth & R. G. Ry. Co. v. Wilhite* (Civ. App.) 210 S. W. 765.

**15. Liability where stock are prohibited from running at large—In general.**—Where stock is prohibited from running at large, the owner of stock killed on a railroad track must prove negligence, although the railroad has not fenced its right of way. *Baker v. McMillan* (Civ. App.) 199 S. W. 701; *Texas City Terminal Co. v. McGee* (Civ. App.) 201 S. W. 673; *Gulf, C. & S. F. Ry. Co. v. Messer* (Civ. App.) 208 S. W. 232; *Ft. Worth & R. G. Ry. Co. v. Wilhite* (Civ. App.) 210 S. W. 765.

It is not negligence for a railroad company to remove a portion of the fence inclosing its right of way unless the remaining portion thereby makes the situation more dangerous for stock running at large. *Paris & Mt. P. R. Co. v. Bridges* (Civ. App.) 204 S. W. 350.

Where the stock law is enforced, it is sufficient if the railroad company uses such care as a reasonably prudent person would under the same circumstances, not merely the degree of care exercised by the owner of the stock to prevent its running at large. *Gulf, C. & S. F. Ry. Co. v. Messer* (Civ. App.) 208 S. W. 232.

**20. Liability where right of way cannot be fenced—Places where fences are not required.**—The statute imposing a liability on railroad companies for injuries done to animals, unless the track was fenced, does not apply to a flag station and siding at which trains stop only when passengers or freight are to be received or discharged. (*Railway Co. v. Cocks*, 64 Tex. 154, followed.) *Gulf, C. & S. F. Ry. Co. v. Wallace*, 2 Civ. App. 270, 21 S. W. 973.

That point where plaintiff's horse was killed by defendant's locomotive was within switching limits of railroad does not as a matter of law establish place was not one which defendant should inclose with a fence in order to avail itself of protection against killing of stock. *Gulf, C. & S. F. Ry. Co. v. Taylor* (Civ. App.) 198 S. W. 600.

Where the section foreman of a railroad company which had fenced its right of way at place where a fence was not required by law was negligent in letting the fence

get out of repair so that plaintiff's mare got on the right of way and was killed by a train, the company was liable, though the trainmen could not by exercising ordinary care have avoided the injury. *Bigham v. Hines* (Civ. App.) 226 S. W. 512.

Railroad held liable for death of mule, where after discovery of the mule on the track at a place not required to be fenced, the trainmen did not use ordinary means to prevent injuring it, and where such failure was proximate cause of the mule's death. *Hines v. Curlee* (Civ. App.) 229 S. W. 669.

21. — **Necessity of showing negligence.**—To recover from a railroad for killing cattle at a crossing which could not be or was not required to be fenced, it devolved on plaintiff to show negligence on the part of the railroad. *San Antonio & A. P. Ry. Co. v. Dunn* (Civ. App.) 207 S. W. 204; *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 219 S. W. 496; *Houston, E. & W. T. Ry. Co. v. Hall* (Civ. App.) 219 S. W. 526; *San Antonio & A. P. Ry. Co. v. Martin* (Civ. App.) 220 S. W. 1113; *Houston E. & W. T. Ry. Co. v. Peterson* (Civ. App.) 227 S. W. 747.

23. **What constitutes fence—Repair and maintenance.**—Railway fence so out of repair that it will not exclude live stock is no fence within this article. *Robbins v. Bell* (Civ. App.) 195 S. W. 865.

25. **Liability for stock injured at private crossing.**—Duty to erect gates at crossing of third-class road, see *Galveston, H. & S. A. Ry. Co. v. O'Neal* (App.) 16 S. W. 537.

27. — **Repair of gates.**—Gate being part of a right of way fence, and placed there by the railway company, though for the accommodation of landowner, it was the company's duty to make it of such strength, and with such fastenings, as to turn stock of ordinary disposition. *Texas Electric Ry. Co. v. Simmons* (Civ. App.) 214 S. W. 563.

29. **Contributory negligence of owner.**—It is the duty of landowner to keep shut and to repair trivial defects developing in gate put in right of way fence by railroad company for his accommodation and, till it got out of repair so as to impart knowledge thereof to the company, to make such defect known to the company. *Texas Electric Ry. Co. v. Simmons* (Civ. App.) 214 S. W. 563.

30. **Proximate cause of injury.**—Where cattle were run down by train, proceeding in excess of speed allowed by ordinance, and there was testimony that had train not been proceeding so fast cattle could have been driven from tracks, recovery cannot be denied on theory that violation of municipal ordinance was not proximate cause. *Galveston, H. & S. A. Ry. Co. v. Liuzza* (Civ. App.) 201 S. W. 1043.

Where plaintiff's mare was killed by a train while she was caught in cattle guard at a road crossing, the negligent failure of the railroad employes to sound the statutory warnings for the crossing could not be proximate cause of the killing. *Hines v. Collins* (Civ. App.) 221 S. W. 1108.

31. **Presumptions and burden of proof.**—Proof of killing of stock on railway track makes prima facie case against railway, under this article, though if railway can prove it fenced track where injury occurred, it is defense against prima facie case, and merits of case depends on questions of railway's negligence, owner's contributory negligence, and proximate cause. *Baker v. Schroeder* (Civ. App.) 198 S. W. 394.

33. **Sufficiency of evidence.—In general.**—See *Texarkana & Ft. S. Ry. Co. v. Philpot* (Civ. App.) 204 S. W. 1183.

In action for killing mule, evidence held to justify inference that defendant's train actually struck the mule. *Robbins v. Bell* (Civ. App.) 195 S. W. 865.

Testimony of plaintiff and another witness held to sustain verdict that plaintiff owned mules killed by defendant railroad, although both witnesses had made contrary statements before trial. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 139 S. W. 868.

Evidence held to show that the crossing at which plaintiff's mule was killed by defendant railroad was a public crossing. *Houston E. & W. T. Ry. Co. v. Peterson* (Civ. App.) 227 S. W. 747.

34. — **Negligence of defendant.**—Evidence held not to show that the accident was due to defendant railroad's negligence. *Houston E. & W. T. Ry. Co. v. Peterson* (Civ. App.) 227 S. W. 747; *Jefferson County Traction Co. v. Giles* (Civ. App.) 206 S. W. 224.

In an action against a railroad company for the death of a mule which had strayed onto the right of way because of the removal of a fence, evidence held insufficient to show negligence. *Paris & Mt. P. R. Co. v. Bridges* (Civ. App.) 204 S. W. 350.

In an action for killing a cow at a point where railroad company was not required to fence its tracks, evidence held insufficient to show that trainmen were negligent in failing to give signals and keep proper lookout and that such negligence was the proximate cause of the injury. *Gulf, C. & S. F. Ry. Co. v. Cooper* (Civ. App.) 219 S. W. 496.

Evidence held to support finding that railroad was negligent in failing to maintain its right of way fence, and that such negligence was the cause of the entry of plaintiff's cattle on right of way. *Hines v. O'Brien* (Civ. App.) 219 S. W. 497.

Evidence held insufficient to warrant conclusion that employes in charge of locomotive were negligent in failing to keep a proper lookout. *Houston, E. & W. T. Ry. Co. v. Hall* (Civ. App.) 219 S. W. 526.

A finding that interurban car was operated at negligent rate of speed held warranted. *Eastern Texas Electric Co. v. Hunsucker* (Civ. App.) 230 S. W. 817.

— **Proximate cause.**—In an action against a railroad for damages for a cow killed in a cut, evidence held insufficient to show that fencing and placing a cattle guard at only one end of the cut was the cause of the accident. *Gulf, C. & S. F. Ry. Co. v. Messer* (Civ. App.) 208 S. W. 232.

36. **Measure of recovery—In general.**—In action for negligently killing mules, measure of damages is their market, and not their reasonable, value. *Texas & N. O. R. Co. v. Turner* (Civ. App.) 199 S. W. 868.

Measure of damages recoverable against railroad for injuring an animal is difference between market value at time of injury in the vicinity, if there is such a value, or, if not, the market value in the nearest vicinity, and such value immediately after injury. *Texarkana & Ft. S. Ry. Co. v. Wilson* (Civ. App.) 204 S. W. 491.

38. — **Interest.**—The amount recoverable from a railroad for stock killed does not include interest. *St. Louis Southwestern Ry. Co. of Texas v. Post* (Civ. App.) 220 S. W. 129.

#### **Art. 6608. [4535] To receive freights and passengers from connecting lines.**

Cited, *Ft. Worth & D. C. Ry. Co. v. Williams*, 77 Tex. 121, 13 S. W. 637.

**Liability of connecting carriers.**—Facts held insufficient to fix any liability upon defendant terminal carrier as member of a partnership or as joint contractor for injuries to live stock while in the hands of the contracting carrier; its action in hauling such stock, as required by this article, not of itself amounting to a ratification of the contract. *Ft. Worth & D. C. Ry. Co. v. Fuller*, 3 Civ. App. 340, 22 S. W. 1006.

**Ratification of initial carrier's contract.**—Under Rev. St. 1879, art. 4251, a railroad company is not bound by a through bill of lading, under which it receives freight, in ignorance of its terms, the original carrier having no authority to contract for it. *Gulf, C. & S. F. Ry. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001, 7 L. E. A. 478, 16 Am. St. Rep. 926.

Facts held not enough to prove conclusively a contract of agency or partnership between the companies, nor a ratification by the delivering company, so as to bind it to the freight rate named in the bill of lading. *Ft. Worth & D. C. Ry. Co. v. Johnson*, 5 Civ. App. 24, 23 S. W. 827.

Receiving from initial carrier goods for transportation was not a ratification of initial carrier's contract, but merely a compliance with this and related articles. *Ponder v. Crenwelge* (Civ. App.) 203 S. W. 1125.

#### **Art. 6610. [4537] Terms for receiving.**

See *Gulf, C. & S. F. Ry. Co. v. Baird*, 75 Tex. 256, 12 S. W. 530.

#### **Art. 6612. Penalty.**

See *Gulf, C. & S. F. Ry. Co. v. Baird*, 75 Tex. 256, 12 S. W. 530.

#### **Art. 6615. [4539] Penalty for refusing to receive from connecting lines.**

See *Gulf, C. & S. F. Ry. Co. v. Baird*, 75 Tex. 256, 12 S. W. 530.

#### **Art. 6616. [4540] Equal facilities to be furnished.**

**Fixing rates.**—In mandamus to compel railroad to furnish express company facilities under this and the following article, court was not empowered to determine what constituted a reasonable rate; the establishment of rates being a legislative and not a judicial function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

Railroad was under no obligation to furnish express company facilities under this and the following article, though contract tendered by express company called for same per cent of gross rates as was provided for by the railroad's contract with another express company, where latter company did a big interstate business and its contract guaranteed a minimum payment, and where contract tendered contained no such guaranty and contemplated only intrastate business. *Id.*

**Tender of business.**—Express company to be entitled to facilities by railroad under arts. 6616, 6617, must make a demand therefor with payment or tender of the proper rate. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

**Judgments.**—To enforce a rate established by a contract between express company and railroad company, the decree must follow the contract in its entirety, and any substantial variation therefrom would be the fixing of the rate by the court in usurpation of a legislative function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

**Contracts for use of road.**—Railroad companies may make contracts in their private character for the use of road, as distinguished from their public character of common carrier. *Hicks v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 212 S. W. 840.

#### **Art. 6617. [4541] Damages for failure to comply, etc.**

See *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222; note under art. 6616.

#### **Art. 6618. [4542] Passenger fare three cents per mile.**

Cited, *Gulf, C. & S. F. Ry. Co. v. Ions*, 3 Civ. App. 619, 22 S. W. 1011; *State v. St. Louis, Southwestern Ry. Co. of Texas* (Civ. App.) 197 S. W. 1006.

**Stations where no tickets are sold.**—Under this article and arts. 6552, 6591, a company is liable for the ejection of a passenger from a freight train, who gets on at a junction where there is no ticket office, notwithstanding its rule that passengers without tickets cannot ride on such trains. *Eddy v. Rider*, 79 Tex. 53, 15 S. W. 113.

**Baggage.**—The provision in this article, for an allowance of baggage to each railroad passenger, does not permit the passenger to take the baggage of another. *Andrews v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 25 S. W. 1040.

Despite statute regulating railroad passenger's allowance of baggage, under statute creating Railroad Commission, held, that commission had power to classify baggage, and to fix what articles shall constitute such for transportation, determining it shall consist, among other things, of articles carried as samples by traveling salesmen. *Texas & N. O. R. Co. v. Levy* (Civ. App.) 199 S. W. 513.

**Art. 6618a. Reduced rate to certain officers.**—From and after the passage of this Act, any steam railroad company or any electric inter-urban railroad company or any person or persons operating the same, or any receiver or receivers, or lessee or lessees thereof shall be permitted to transport between points wholly within this State at the reduced rate of one cent per mile, while traveling on official business connected with their respective offices, the following named peace officers, to-wit:

Adjutant General of the State of Texas; State Rangers; the sheriff of any county, his deputies to be designated by him; constables; chiefs of police and assistant chiefs and captains; city marshals, chief of the detectives of any county or city, and assistant detectives. [Acts 1921, 37th Leg., ch. 88, § 1.]

**Explanatory.**—Sec. 2 of the act imposes a criminal penalty and is set forth, post, as art. 1531i, Penal Code. The act took effect 90 days after March 12, 1921, date of adjournment.

#### INJURIES FROM OPERATION OF RAILROAD

##### II. COMPANIES AND PERSONS LIABLE FOR INJURIES

$\frac{1}{2}$ . In general.—Ultimate carrier for foreign car, loaded by consignor, held not liable for injuries to consignee's servant from falling of loose casting within car while being unloaded; defect not being discoverable by outside inspection. *Kansas City, M. & O. Ry. Co. of Texas v. Pysher* (Civ. App.) 195 S. W. 981.

1. **Ownership, possession and control of road in general.**—Under the Federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{1}{2}$ a-3115 $\frac{1}{2}$ p), the possession, control, and management of railroads was completely and exclusively vested in the Director General. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

A railroad company whose road was in charge of the Director General of Railroads was not responsible, after the promulgation of General Orders 50 and 50a, for the acts of the Director General's servants in destroying a house constructed on the right of way by a lessee whose lease had terminated. *Texas & N. O. R. Co. v. Clevenger* (Civ. App.) 223 S. W. 1036.

A railroad under federal control authorized by Congress is not liable for the death of a person struck at a crossing. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

Under Act Cong. Feb. 23, 1920, § 206, subd. (d), notwithstanding sections 202, 211, action pending at termination of federal control for injury to railroad employee during federal control is thereafter to be prosecuted against the agent appointed by the President under such act for defending such actions. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

Where, in action, for negligent operation of railroad during federal control, judgment was rendered after such control had terminated, and the agent appointed by the President had been made a defendant, it should have been against him alone; there being no liability of the railroad company in its corporate capacity. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

After dismissal of defendant railway company from the suit which continued against defendant Director General of Railroads, it was error for the trial court to render judgment fixing a lien against the properties of the railroad to secure payment of judgment rendered against the Director General. *Gulf, C. & S. F. Ry. Co. v. Hamrick* (Civ. App.) 231 S. W. 166.

Where the Director General of Railroads, after taking charge of a railroad, continued to maintain and operate trains over a crossing without in any way attempting to remedy the defective and dangerous conditions surrounding it, he was responsible for negligence in maintaining such condition, though the crossing was constructed long before he took charge. *Payne v. Wallis* (Civ. App.) 231 S. W. 1114.

3. **Companies permitting use of road by others.**—A railroad is liable for negligence of other roads using its tracks, whether licensees or lessees. *Texas & N. O. R. Co. v. Jones* (Civ. App.) 201 S. W. 1085.

A railway company, which permitted a lumber company to use its tracks under contract unauthorized by law, is responsible to third persons for negligence of lumber company. *Trinity Valley & N. Ry. Co. v. Scholz* (Civ. App.) 209 S. W. 224.

A servant employed upon a train making trips over another company's road is entitled to presume that such company performed its duty to keep the track in a safe condition, and is entitled to damages for injuries received by reason of its failure in such respect. *Hicks v. Gulf C. & S. F. Ry. Co.* (Civ. App.) 212 S. W. 840.

5. **Joint liabilities.**—Where a defendant railroad company was an active tort-feasor guilty of affirmative negligence causing the death of an employé of another company also charged with negligence, the railroad company is not entitled to recover over against the other company. *Rio Grande, E. P. & S. F. R. Co. v. Guzman* (Civ. App.) 214 S. W. 628.

Where employé of express company was also in charge of baggage car, the railroad and the express companies held jointly liable for injury caused by his negligence in throwing a parcel out of the door, whether such parcel was express matter, baggage, or mail matter. *American Express Co. v. Chandler* (Civ. App.) 215 S. W. 364.

### III. INJURIES TO PASSENGERS OR FREIGHT

See Carriers, Title 20.

### IV. INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL

8. **Injuries to persons at stations.**—A boy who of his own accord crawls under a railroad's warehouse to see animals unloaded from a circus train attracting him to the place is a trespasser, and the railroad is not liable for his death by the collapse of the building caused by its insecurity and the presence of people on top of it. *Texas Mexican Ry. Co. v. Garcia* (Civ. App.) 216 S. W. 1108.

9. **Injuries to persons working on or about cars.**—Where one drove a team onto railroad land at a place used for unloading of cars, the railroad owed him, as an invitee, the duty to use ordinary care for his safety, and was liable, where, by reason of negligently causing noise and escape of steam, the team was frightened and ran away. *St. Louis Southwestern Ry. Co. of Texas v. Barrett* (Civ. App.) 207 S. W. 557.

Trainmen are not bound to maintain a lookout to discover whether the train's approach frightened a team standing at the side of a box car on a switch track, and so negligence cannot be predicated on their failure to keep a lookout. *St. Louis Southwestern Ry. Co. of Texas v. Reynolds* (Civ. App.) 209 S. W. 184.

Trainmen, shunting car on an oil company's spur track, were not as matter of law entitled to assume that the oil company would warn its employés working beside the track of any danger from shunted cars. *Blair v. Jefferson & N. W. Ry. Co.* (Civ. App.) 214 S. W. 936.

Where the station agent of one railroad rightfully entered the box car of another to discharge his duty as agent for the first, the servants of the other road could not negligently injure him without subjecting their company to liability, even if the agent was not the agent of such company in handling freight, and not a joint agent of the two roads. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

Where warehouse company's employé, aware of the condition of a side track, was injured when in pushing a car a steel sliver on a rail caught his clothing, the railroad was not liable for his injuries, though it had knowledge and failed to warn him. *Galveston, H. & H. R. Co. v. McLain* (Civ. App.) 218 S. W. 65.

Railroad's duty toward shipper's employé who, while assisting in loading and unloading freight, was required to help in moving flat car which the railroad had failed to properly place, was that of exercising ordinary care, since such employé was rightfully upon premises, and was not a volunteer, trespasser, or mere licensee. *Rio Grande E. P. & S. F. Ry. Co. v. Guzman* (Civ. App.) 221 S. W. 1102.

11. **Injuries to persons on trains—Care required and liability as to licensees.**—A lumber company owes a licensee on its log train no duty with respect to the condition of its track, cars, or other instrumentalities; its sole duty being to exercise ordinary care in the operation of the train. *Kirby Lumber Co. v. Davis* (Civ. App.) 212 S. W. 831.

Where a logging company permitting a licensee to ride on its logging train creates a new danger after he is on the train, if by making up its train in a manner not before used by it, it must assume with reference to such new hazard the responsibility of exercising due care to protect him from injury resulting by reason thereof. *Id.*

Where a railroad gave a lumber company written permission to use its tracks, receiving no consideration therefor, lumber company not being a common carrier, a servant of the lumber company, while riding on one of the lumber company's motorcars, was a mere licensee (quoting *Words and Phrases*, First and Second Series, Licensee). *Hicks v. Gulf C. & S. F. Ry. Co.* (Civ. App.) 212 S. W. 840.

A railroad company owes to a mere licensee, riding on a motorcar operated over its track, no affirmative duty in regard to fencing its right of way so as to keep stock off of the track, or the condition of the track, the licensee assuming all the risks incident to the operation of the car. *Id.*

12. — **Care required and liability as to children.**—In action for injuries to an eight year old boy while on a locomotive in charge of a hostler, failure of the court to present issue of defendant's alleged negligence in knowingly consenting to the presence of the boy upon the locomotive cab held error. *Dickey v. Gulf, T. & W. Ry. Co.* (Civ. App.) 210 S. W. 552.

14. **Removal of trespassers.**—A carrier is liable for ejection of a trespasser from its moving freight train if it used unnecessary force, or if by threats or violence it terrified him to such an extent as to cause him to believe that he could only save himself from bodily hurt by jumping off. *Baker v. Cobb* (Civ. App.) 221 S. W. 314.

16. **Contributory negligence of person injured—Persons working on or about cars.**—One injured while attempting to block a car after having released a defective brake,

was not required to inspect the car before moving it, defendant knowing of the custom of allowing coal cars to move a short distance by gravity to facilitate unloading. *Texas Midland R. R. v. Brown* (Civ. App.) 207 S. W. 340.

It is the duty of a person driving any team near a locomotive to exercise such care and prudence to prevent such team from running away and causing injury as a person of ordinary care would exercise under the same or similar circumstances for his own safety. *St. Louis Southwestern Ry. Co. of Texas v. Barrett* (Civ. App.) 207 S. W. 557.

It is the duty of a person unloading a car, when a switching crew undertakes to move it, to exercise that degree of care that a person of ordinary prudence would commonly exercise under the same circumstances to avoid injury to himself. *Schaff v. Moss* (Civ. App.) 219 S. W. 548.

A son injured by the movement of cars while assisting his father in loading a car with household goods is not chargeable with father's negligence, where the son has no control over the management of the work. *Hines v. Welch* (Civ. App.) 229 S. W. 681.

The principle of imputed negligence rests on agency or authority of each, express or implied, to act for all in respect to the control of the means or agencies employed to execute the common purpose or enterprise. *Id.*

A "joint enterprise" within the law of imputed negligence is the joint prosecution of a common purpose under such circumstances that each has authority express or implied to act for all in respect to the control or agencies employed to execute such common purpose. *Id.*

In the absence of the relation of parent and child and of principal and agent, negligence in the conduct of another will not be imputed to a plaintiff if he neither authorized such conduct or participated therein, nor had the right or power to control it. *Id.*

If either of the persons whose negligence injures a third person is the agent or representative of the third person, or under the third person's control, the third person cannot recover for injuries, because the negligence of his representative or agent is chargeable to him as principal. *Id.*

**20. Acts or omissions of employes or others.**—Act of conductor in apprehending boys whom he thought implicated in stoning trains held within general authority as conductor and in furtherance of railroad's business as carrier. *Gulf, C. & S. F. Ry. Co. v. Besser* (Civ. App.) 200 S. W. 263.

Where everything passenger on train did in relation to arrest of two boys was done at request and advice of conductor, passenger's acts must be treated as those of conductor as to liability of railroad for arrest. *Id.*

If railroad's yard watchman, within general scope of employment to protect railroad's property, acted unreasonably and negligently in performance of duties as he saw them, railroad was liable for any injury suffered by another thereby, whether watchman acted upon reasonable appearances or not. *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105.

That sewer is constructed by independent contractor does not relieve principal of responsibility for defects causing injury to pedestrians in refilling excavations where such principal contractor retained authority to decide as to the manner of refilling. *Houston Belt & Terminal Ry. Co. v. Scheppelman* (Civ. App.) 203 S. W. 167.

The act of trainmen in moving cars on a mill track to places designated by an oil company was for the mutual benefit of both companies, not for the sole benefit of the latter, so as to render the trainmen its servants, for whose negligence it would be solely responsible. *Blair v. Jefferson & N. W. Ry. Co.* (Civ. App.) 214 S. W. 936.

Where master placed armed guard at gate, who arrested plaintiff and wrongfully shot him because he attempted to escape, the master was liable, though he had expressly forbidden the guard to use his weapon for any such purpose. *Lancaster v. Campbell* (Civ. App.) 218 S. W. 550.

Where a railroad company engaged an independent contractor to disinfect stock cars with a medicated creosote solution, which work was not inherently dangerous, an employe of the contractor, who was not warned of the danger of slipping and suffered injuries from the splashing of the solution in the eye, cannot recover from the company; the contractor's fault being purely collateral to the work. *Crow v. McAdoo* (Civ. App.) 219 S. W. 241.

The one contracting to disinfect cars on a car basis, hiring and discharging his help, held an independent contractor," for whose acts causing injury to one assisting him the railroad company is not responsible. *Id.*

Where an employe engaged to operate a gasoline motorcar requested a blacksmith who had repaired the car, the motor of which was owned by the employe, to ride on the car to detect any defect, held that, the employe was acting within the scope of his apparent authority. *Hines v. Parsons* (Civ. App.) 221 S. W. 1027.

Where plaintiff went to defendant's railroad station for the purpose of sending a telegraphic message, the station agent being the operator, and an altercation and assault resulted when the demand of the agent that plaintiff dismiss an action which as attorney he had brought against the railroad company was refused, defendant was not responsible, as such demand was not within the scope of the agent's employment. *Payne v. Tisdale* (Civ. App.) 232 S. W. 881.

**23. Actions for injuries to licensees or trespassers—Weight and sufficiency of evidence.**—In suit for injuries to child 13 years of age invited to ride on moving box car, evidence held to warrant finding that child lacked capacity to understand danger, and was not guilty of contributory negligence. *Houston & T. C. Ry. Co. v. Lawrence* (Civ. App.) 197 S. W. 1020.

In action against railroad and watchman, evidence held to justify finding that shot which injured plaintiff was not fired maliciously or with intent to shoot plaintiff, but merely to induce him to leave railroad yards. *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105.

In such action, evidence held to support finding watchman was acting within general scope of authority. *Id.*

In a personal injury action, evidence held sufficient to sustain jury's special finding that the injured boy had sufficient intelligence to appreciate, and sufficient discretion to avoid, the danger from which the injury resulted. *Farrand v. Houston & T. C. R. Co.* (Civ. App.) 205 S. W. 845.

In action for injury to plaintiff by escaping steam from passing engine when he drove his team between depot platform and track for purpose of unloading lumber, conflicting evidence held sufficient to support verdict for plaintiff. *St. Louis, S. F. & T. Ry. Co. v. Whatley* (Civ. App.) 212 S. W. 968.

In action for injuries to shipper of stock caused by flashing a light before animals on loading chute causing them to rush back and trample plaintiff, evidence held to raise the issue whether or not the light came from a trainman's lantern or from some other source. *Galveston, H. & S. A. Ry. Co. v. Wilson* (Civ. App.) 214 S. W. 773.

In an action against a railway for death of an oil company's employé, working beside a spur track, evidence held sufficient to support finding that the trainmen owed the oil company's employé the duty to warn him before shunting a car toward him. *Blair v. Jefferson & N. W. Ry. Co.* (Civ. App.) 214 S. W. 936.

In an action against railroad receivers for personal injuries sustained when the box car in which plaintiff was unloading brick was struck by another car, evidence held not to support a finding of defendant's negligence. *Lancaster v. Hunter* (Civ. App.) 217 S. W. 765.

In an action against a railroad by a warehouse company's employé caught on a siver on a rail while engaged in moving a freight car on a side track, evidence held to show that plaintiff had full knowledge of the defect. *Galveston, H. & H. R. Co. v. McLain* (Civ. App.) 218 S. W. 65.

In an action by a servant shot by an armed guard because plaintiff attempted to leave the guard's custody after arrest, a finding of liability held sustained by the evidence. *Lancaster v. Campbell* (Civ. App.) 218 S. W. 650.

In an action for injuries to a drayman injured by a falling tombstone on a station platform, evidence held to warrant findings of the jury that the stone which fell was not so placed as to be reasonably safe for persons to pass it, conveying freight. *Hines v. Jones* (Civ. App.) 225 S. W. 412.

24. — **Damages.**—In action against railroad for arrest of boys thought to be implicated in stoning trains, verdict of \$1,000 for each boy held not so excessive as to indicate bias, prejudice, or other improper motive or consideration on part of judge. *Gulf, C. & S. F. Ry. Co. v. Besser* (Civ. App.) 200 S. W. 263.

In action against railroad and yard watchman for shooting plaintiff in calf of leg, verdict for plaintiff for \$2,500 was not excessive. *Galveston, H. & H. R. Co. v. Fleming* (Civ. App.) 203 S. W. 105.

\$6,000 damages was not excessive for mail clerk, whose muscles were torn loose from the spinal column. *Texas-Mexican Ry. Co. v. Creekmore* (Civ. App.) 204 S. W. 682.

#### VI. ACCIDENTS AT CROSSINGS

34. **Mutual rights and duties at public crossings.**—It was duty of interurban railroad's servants in approaching crossing where view was obstructed to exercise ordinary care in operation of car, and duty of one driving wagon over crossing to exercise ordinary care. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

Common sense and public welfare dictate that right of precedence at railroad crossing, as between train and automobile driver or other user of intersecting highway shall be accorded to train. *Baker v. Collins* (Civ. App.) 199 S. W. 519.

An interurban railroad company has no right to the exclusive use of that part of the street upon which its track is laid, but all persons have an equal right to the use thereof for traveling over and across the street. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

Travelers on a public highway intersected by an electric railway do not have equal rights at crossing with the railway company. *Southern Traction Co. v. Kirksey* (Civ. App.) 222 S. W. 702.

35. **Defects in crossings and approaches.**—A railroad company failing to use ordinary care in maintaining a public crossing in repair, is liable for injuries to a driver thrown from a wagon by the bad condition of the track without negligence on his part. *Panhandle & S. F. Ry. Co. v. Huckabee* (Civ. App.) 216 S. W. 666.

39. **Signboards, signals, flagmen and gates at crossings.**—Railway crossing flagman is obliged to use ordinary care in keeping a lookout and giving warning of approaching trains to traveling public. *Sulzberger & Sons Co. of America v. Page* (Civ. App.) 195 S. W. 928.

Where a petition alleged that view of travelers approaching crossing in village was obstructed by cars and temporary depot, it was not error to overrule special exception to the petition charging negligence in failing to have a flagman or watchman at the crossing. *Panhandle & S. F. Ry. Co. v. Tisdale* (Civ. App.) 199 S. W. 347.

Where it was customary to run trains at from 15 to 35 miles an hour at a crossing, which was one of the most used streets, jury could find negligence because of failure to have flagman at crossing. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

A railroad is not required to keep watchmen at public crossings except when crossing

is peculiarly or extraordinarily dangerous. *Chicago, R. I. & G. Ry. Co. v. Shockley* (Civ. App.) 214 S. W. 716.

There is no legal duty to provide a watchman at a crossing, unless such crossing is so peculiarly dangerous that an ordinarily prudent person could not use it with safety. *Chicago, R. I. & G. Ry. Co. v. Zumwalt* (Civ. App.) 226 S. W. 1030.

Railway companies should maintain a flagman in towns and cities at crossings which are unusually dangerous or attended with more than ordinary hazard, though there is no ordinance or statute requiring it. *Tisdale v. Panhandle & S. F. Ry. Co.* (Com. App.) 228 S. W. 133.

The proper test for determining the question of negligence in not maintaining a flagman at a crossing is not the population of a town or city, but whether the crossing is unusually dangerous and attended with more than ordinary hazard. *Id.*

Where a valid city ordinance requires a flagman at a railroad crossing, it is negligence as a matter of law on the part of the railroad company to fail to comply with such ordinance, and if such failure is the proximate cause of an injury to one using the crossing, the railroad company is liable. *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

A railway company's duty to keep a flagman at a public highway crossing only arises where the crossing can be said to be attended with extra hazard or unusual danger, which depends upon the extent of the use of the crossing and the surrounding circumstances. *Id.*

**40. Care in running trains in general.**—Instruction that the law requires those in charge of trains to use "great care and prudence" in operating them, so as to avoid injury, held erroneous in requiring a higher degree of care on the part of the railroad than is required by law. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Com. App.) 228 S. W. 159.

**42. Lights, signals and lookouts from trains or cars.**—Railroad company's duty to exercise due care at crossings includes duty of looking out for any traveler in using crossing, and in using means of avoiding injury. *Lyon v. Phillips* (Civ. App.) 196 S. W. 995.

A place on a railroad track where persons on foot and in vehicles habitually crossed, with the knowledge and without the objection of a railroad, for a number of years, and where its employes operating its train might expect persons to be at any time of the day or night, imposed upon the company the duty to give statutory signals. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

**44. Rate of speed.**—In action for death of plaintiff's decedent struck by train at crossing, negligence might be predicated on speed of train, although place of accident was in country, and there was no statute regulating speed; it being duty of defendant to exercise ordinary care in regard thereto. *Missouri, K. & T. Ry. Co. of Texas v. Luten* (Civ. App.) 203 S. W. 909.

Whether an ordinance limiting the speed of trains to 10 miles an hour applied to the receiver was immaterial, where the trial judge found as a fact that the receiver was negligent in operating the train at the rate of speed at which it was operated over a crossing; and such finding was supported by the evidence. *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

**47. Precautions as to persons seen at or near crossings—In general.**—A flagman on a train backing towards crossing, who sees the imminence of the danger of collision with an approaching automobile, and realizes that the automobile will not stop before reaching track, must exercise ordinary care to use every reasonable means in his power to prevent collision by stopping the train. *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710.

Trainmen have a right to presume that person approaching track is in full possession of his senses, and will make proper use of them, and are not bound to anticipate that he will be negligent. *Id.*

A brakeman on the rear of a train backing toward a crossing, on discovering that an automobile will go upon the tracks, must exercise ordinary care to use all means at his command to avert collision, but he is not bound at all hazards to use all the means at his command. *Chicago, R. I. & G. Ry. Co. v. Shockley* (Civ. App.) 214 S. W. 716.

It is the duty of a railroad engineer to use the facilities at hand to prevent a collision either by stopping or lessening its speed or by giving some warning of its approach when he can reasonably infer that an approaching automobile will likely undertake to cross the track, and he has no right to wait until absolutely certain that the driver is going into a place of danger. *Hines v. Arrant* (Civ. App.) 225 S. W. 767.

**49. Contributory negligence of person injured—Care in going on or near tracks in general.**—Negligence of the driver of a private vehicle in approaching a railroad crossing is not ordinarily chargeable to other occupants of the vehicle while riding at his invitation or with his consent. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277; *Lyon v. Phillips* (Civ. App.) 196 S. W. 995.

Want of ordinary care on part of one riding with another in his automobile as mere guest would be measured by whether he failed in his duty to keep a lookout and warn his companion operating automobile when he discovered approach of train at crossing. *Lyon v. Phillips* (Civ. App.) 196 S. W. 995.

Where it does not appear that passenger in wagon was in any respect responsible for acts of driver, driver's negligence in going upon interurban railroad's crossing cannot be imputed to passenger unless it was sole cause of injury. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

The act of a person going upon a railroad track at a public crossing, or where the railroad has expressly or impliedly licensed the act, is not negligence per se. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.



Passenger in overcrowded jitney car held not, as a matter of law, contributorily negligent in becoming a passenger in the car and remaining therein while approaching a crossing, submitting herself to care and custody of driver. *Chicago, R. I. & G. Ry. Co. v. Wentzel* (Civ. App.) 214 S. W. 710.

Such passenger must use ordinary care to avoid injury, though the driver's negligence is not imputable to him. *Id.*

Where plaintiff and her husband going to the city on business, accepted an invitation from a brother-in-law to ride in his automobile, as he was taking his sister to the city, the driver and plaintiff's husband were not engaged in a joint undertaking so as to render his negligence imputable to them. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

50. — **Care required of children and others under disability.**—If boy of 10 years, injured at railroad crossing, acted with prudence that child of his age, intelligence, and experience would use under same circumstances, he was not guilty of contributory negligence. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

That automobile driver approaching crossing was under the influence of intoxicants would be a fact that jury might consider in determining whether he was guilty of contributory negligence, but it would not of itself convict him of such negligence. *St. Louis, S. F. & T. Ry. Co. v. Morgan* (Civ. App.) 220 S. W. 281.

52. — **Duty to stop, look, and listen.**—Where passengers in automobile approaching railroad crossing were warned by bell that car or cars were approaching in time to have caused driver to stop, and also could have seen approaching car in time, they were negligent, so that railroad was not liable to them despite any negligence of motor-man. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397.

One approaching railroad crossing is required, in the exercise of ordinary care, to look and listen for approaching train before attempting to cross track. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 203 S. W. 935.

If decedent approached crossing without looking or listening, and if, by so doing, he would have seen or heard train in time, and if a man of ordinary prudence would have looked or listened, he was guilty of contributory negligence proximately causing his death. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

A driver of an ambulance, who failed to use ordinary care to discover the approach of a train before he drove his ambulance so near the railroad track as to render it impossible to stop and prevent the collision, was guilty of contributory negligence. *Texas & N. O. R. Co. v. Houston Undertaking Co.* (Civ. App.) 218 S. W. 84.

Generally the failure of one about to go over a public railroad crossing to look and listen does not of itself constitute negligence as a matter of law. *Trochta v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 218 S. W. 1038.

Failure to look and listen at a railroad crossing may be treated as conclusively showing contributory negligence when the undisputed facts show that the failure to use such precaution was an inexcusable act of carelessness of which no person of ordinary prudence would have been guilty. *Hines v. Arrant* (Civ. App.) 225 S. W. 767.

Failure of an automobilist to look and listen before crossing a railroad track is not, under all circumstances, contributory negligence. *Hines v. Richardson* (Civ. App.) 232 S. W. 889.

53. — **Duty where view or hearing obstructed.**—See *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In an action for injuries in collision between a motortruck and a train running at an excessive speed without giving the statutory signal, where plaintiff looked first to the right and then to the left as he passed the last obstruction, and the evidence was undisputed that had he looked first to the left he could have avoided the collision, held, that he was not guilty of contributory negligence as a matter of law. *Hines v. Messer* (Civ. App.) 218 S. W. 611.

An automobilist, who was traveling 12 miles an hour as he went upon a crossing, where he was struck by a passenger train traveling at 18 miles an hour, was negligent as a matter of law, where the view of the crossing was obstructed. *Houston E. & W. T. Ry. Co. v. Wilkerson* (Civ. App.) 224 S. W. 574.

Driver of a motortruck is not required to stop his truck and get out and walk on to a main track at a crossing, where view is obstructed by standing cars, to see whether or not a train is approaching. *Chicago, R. I. & G. Ry. Co. v. Zumwalt* (Civ. App.) 226 S. W. 1080.

It was not contributory negligence as a matter of law to approach a railroad crossing in an automobile at a speed of 12 miles an hour, though the view of approaching trains was greatly obstructed, and the automobile driver was familiar with the crossing, where he knew that trains were not operated over the crossing more than once a day, and sometimes not oftener than once a week, and he testified that he was looking and listening for trains. *Payne v. Wallis* (Civ. App.) 231 S. W. 1114.

54. — **Knowledge of danger.**—One crossing a railroad track must exercise some degree of care for his own safety, being charged with knowledge that a railroad track is a dangerous place, even at a public highway. *Gulf, C. & S. F. Ry. Co. v. Gaddis* (Com. App.) 208 S. W. 895.

55. — **Reliance on precautions on part of railroad company.**—Where deceased, though warned by flagman, attempted to cross in front of a train running at a speed in excess of that fixed by ordinance, he was guilty of contributory negligence, and no recovery could be had on the theory that he could assume the railroad was not violating the ordinance. *Gulf, C. & S. F. Ry. Co. v. Gaddis* (Com. App.) 208 S. W. 895.

While as a general rule reliance on due care by the railroad company's servant does not excuse negligence by a person crossing the track, the jury may find absence

of negligence, where the pedestrian saw a train standing near the crossing, and relied on notice of starting the train by ringing a bell or blowing the whistle. *Galveston, H. & S. A. Ry. Co. v. Price* (Civ. App.) 222 S. W. 628.

While persons using a railway crossing have the right to expect that the law requiring signals will be obeyed, this will not excuse them for failure to use care. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

58. — **Crossing near approaching trains or cars.**—Railroad held not liable for death of auto driver who drove on crossing when if not negligent he must have seen headlight and known train was approaching, unless negligence of railroad caused him to place himself in such peril as to produce terror incapacitating him from acting normally. *Baker v. Collins* (Civ. App.) 199 S. W. 519.

59. — **Acts in emergencies.**—It was not negligence for plaintiff to leave in his automobile, a violin, which was destroyed with the car when the latter, stuck on a railroad crossing, was demolished by a train. *San Antonio & A. P. Ry. Co. v. Moore* (Civ. App.) 208 S. W. 754.

61. **Proximate cause of injury.**—Negligence of railroad in failing to keep flagman at crossing was proximate cause of injuries to boy when he backed into passing freight train, in endeavor, as he claimed, to avoid another engine approaching on another track. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

If one is guilty of negligence in attempting to cross a railroad, and is killed by an approaching train, the negligence is the proximate cause of the death. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

Where the injury to plaintiff as the result of her negligence in proceeding on a railroad crossing could have been anticipated, such negligence, as a matter of law, is the proximate cause. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

The failure of the conductor of a freight train waiting on a passing track at a highway crossing for a passenger train to pass to station a member of the crew at the crossing as a flagman held the proximate cause of an injury to one struck by the train. *Baker v. Hodges* (Civ. App.) 231 S. W. 844.

62. **Injury avoidable notwithstanding contributory negligence.**—Where train crew discovered peril of decedent negligently attempting to cross ahead of train in his automobile, road came under new duty to use means reasonably at hand or within its power to prevent collision and decedent's death. *Galveston, H. & H. R. Co. v. Sloman* (Civ. App.) 195 S. W. 321.

In such case road was not liable for death unless after discovering peril it could have avoided collision by proper use of means at hand. *Id.*

In action against railroad for death in crossing collision, where issue of discovered peril intervened on trial, all issues of original negligence became immaterial. *Id.*

Where railroad train crew discovered peril of decedent, who was about to attempt crossing in front of train in his automobile, use of danger signals, such as continuous ringing of bell, blowing of whistle, and also checking speed of train, were within road's new duties. *Id.*

The principle of last clear chance has no application in the absence of actual knowledge by defendant of danger. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

Plaintiff whose automobile stuck on a railroad crossing and was demolished by a train, though the engineer had actually seen it in time to stop by using proper means, could recover from the railroad, even if he had been a trespasser on the track, which he was not. *San Antonio & A. P. Ry. Co. v. Moore* (Civ. App.) 208 S. W. 754.

If an engineer, discovering the peril of a driver approaching track, fails to exercise ordinary care to avoid injury, the railroad is liable, notwithstanding the driver's contributory negligence. *Trochta v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 218 S. W. 1038.

Where the engineer failed to sound whistle after discovering the peril of a driver, and where such negligence was the proximate cause of the injury, railroad was liable, notwithstanding the driver's contributory negligence. *Id.*

The test of liability for injury to one who negligently drives upon a crossing is not whether the engineer on discovering the peril did what he thought proper in the emergency to avoid the collision, but whether he did what a man of ordinary prudence would have done under the circumstances, he being required to exercise ordinary care proportionate to the danger. *Id.*

The failure of occupants of an automobile to indicate to the motorman of an approaching interurban car that they heard his warning whistle does not show that he knew they were in peril, so that he should have stopped or checked his car, where the speed of the automobile was such that he inferred it would stop before going on the crossing. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

Where a person is discovered in a perilous position at a crossing, the trainmen are only required to use ordinary care in the use of the means at hand consistent with the safety of the train, its crew and passengers, to avoid injury. *Texas & N. O. R. Co. v. Pearson* (Civ. App.) 224 S. W. 708.

If there are facts to sustain a finding of negligence, the question of negligence remains the principal question to be submitted, and it is not removed from the case by the issue of discovered peril. *Hines v. Foreman* (Civ. App.) 229 S. W. 630.

The doctrine of "discovered peril" permits recovery, notwithstanding contributory negligence, if the defendant saw the danger in time to prevent the injury by the use of ordinary care and failed to do so, but the doctrine does not permit defendant to avoid liability for primary negligence by showing that he made reasonable efforts to avert injuries after discovering the dangerous situation caused by such negligence. *Id.*

The doctrine of discovered peril involves the exposed condition brought about by the plaintiff's negligence; the actual discovery by defendant's agents of plaintiff's perilous situation in time to avert, by use of all means at their command, commensurate with their own safety, injury to him, and the failure thereafter to use such means. *Baker v. Shafter* (Com. App.) 231 S. W. 349.

**64. Actions for injuries—Pleading, including issues, proof and variance.**—In action against railroad for injuries to passengers in automobile struck at crossing by railroad's motorcar court properly overruled plaintiff's motion to exclude evidence as to crossing bell maintained by railroad which pleaded contributory negligence. *Sellers v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 208 S. W. 397.

**67. — Sufficiency of evidence.**—In action against interurban railroad for injuries in collision, evidence held not to show as matter of law that negligence of driver of wagon in which plaintiff rode was sole cause of collision. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

In action for injuries to 10 year old boy at railroad crossing when he stepped back into passing freight train, as he claimed, to avoid switch engine on other track, in view of age of boy, evidence held sufficient to support finding acquitting him of contributory negligence. *Houston & T. C. Ry. Co. v. Roberts* (Civ. App.) 201 S. W. 674.

In such action, evidence held to show boy stopped and stood between two tracks to let switch engine go by, and, in attempting to get out of its way, backed into freight train behind. *Id.*

Evidence held to show the boy must have known freight train was passing behind him when he stepped backward into it, so that railroad's failure to keep bell at crossing could not have been proximate cause of injury. *Id.*

In an action for injuries received in crossing accident, evidence held sufficient to support finding that defendant's train was running at the rate of 18 miles an hour. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

In action for injuries to automobile stuck on crossing evidence held to justify finding that engineer's negligence was direct and proximate cause of injury; car having been on tracks by accident over which plaintiff had no control. *San Antonio & A. P. Ry. Co. v. Moore* (Civ. App.) 208 S. W. 754.

Evidence held to sustain finding that automobile driver injured in collision at crossing was not contributorily negligent by failing to look and listen before attempting to cross track. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935.

In an action for death of driver of automobile truck struck by a train at a crossing, evidence held insufficient to show that driver was guilty of contributory negligence. *Schaff v. Merchant* (Civ. App.) 212 S. W. 970.

In an action for damages to an ambulance in collision with a train at a crossing, evidence held sufficient to support a finding that plaintiff's driver was guilty of contributory negligence. *Texas & N. O. R. Co. v. Houston Undertaking Co.* (Civ. App.) 218 S. W. 84.

Conflicting evidence upon the issue of plaintiff having reduced the speed of his automobile to 6 miles an hour within 30 feet of the track held sufficient to sustain the verdict against defendant. *Hines v. Messer* (Civ. App.) 218 S. W. 611.

Evidence as to whether defendant's employes operating train discovered that plaintiff's team was in danger of being struck in time to have avoided a collision by the use of the means at their command, and failed to exercise reasonable care and diligence to stop the train, held to justify a finding for plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Roach-Manigan Paving Co. of Texas* (Civ. App.) 221 S. W. 1017.

In an action for the death of an automobile driver, evidence held not to show that the interurban crossing at which the accident occurred was one of special danger, though it was in a small incorporated town, and there was some obstruction to the view, so that it was error to admit evidence that there was no watchman or automatic crossing warning maintained there. *Galveston-Houston Electric Ry. Co. v. Patella* (Civ. App.) 222 S. W. 615.

Testimony by several witnesses that they did not hear crossing signals, though they could and would have heard them if they had been given, though negative in character, is sufficient to support a special verdict that the signals were not given against testimony of the employes and other witnesses that the whistle and bell were sounded as required by statute. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

In an action for death at a railroad crossing, a finding that deceased was not guilty of contributory negligence held so against the weight of the evidence as to be clearly wrong. *Texas & N. O. Ry. Co. v. Wagner* (Civ. App.) 224 S. W. 377.

In an action for damages to a truck struck at a crossing where structures and cars obstructed the view and hearing, evidence held sufficient to sustain the finding of the jury that plaintiff was not guilty of contributory negligence. *Chicago, R. I. & G. Ry. Co. v. Zumwalt* (Civ. App.) 226 S. W. 1080.

In an action for damages to a truck struck at a crossing, a finding that the railroad was negligent in not having a flagman at the crossing at the time held sustained by evidence. *Id.*

In an action for the death of plaintiff's wife and son, who were killed when an automobile the wife was driving was struck by a train, a finding exonerating the wife of contributory negligence held so contrary to the great preponderance of the evidence as to show prejudice and necessitate reversal. *Hines v. Roan* (Civ. App.) 230 S. W. 1070.

Evidence in action for collision of train with auto truck held not to conclusively show that the driver saw the train in time to stop before going on the crossing. *Missouri, K. & T. Ry. Co. of Texas v. Merchant* (Com. App.) 231 S. W. 327.

On the issue of contributory negligence of deceased, the jury had the right to consider the evidence most favorable for plaintiff from the position of deceased just before and at the moment of the collision, rejecting all evidence most favorable to defendant. *Id.*

A finding that the failure to ring the bell as a train approached a crossing was the proximate cause of a collision with an automobile cannot be disturbed, though there was a brakeman on the end of the car to give warning, where the evidence showed that the crossing was in such a deep cut, and the view thereof was so obstructed that it was doubtful whether the driver of the automobile could have been seen by the brakeman in time to prevent the collision. *Payne v. Wallis* (Civ. App.) 231 S. W. 1114.

68½. — **Damages.**—A verdict for \$3,000 held not excessive where a man 45 years old was injured in the kidneys and both legs resulting in piles and Bright's disease, in consequence of which he could live but a few years. *Texas Midland R. R. v. Combs* (Civ. App.) 195 S. W. 1178.

Minor or adult suing for personal injuries is entitled to recover such sum as would, in jury's opinion, compensate him in items sued for if paid in cash at time of trial. *Southern Traction Co. v. Owens* (Civ. App.) 198 S. W. 150.

Elements of damage recoverable by plaintiff from interurban railroad which injured him at crossing were physical and mental pain suffered, or which might be suffered, and any impairment in capacity to labor and earn money. *Id.*

Value of plaintiff's horse just prior to accident at defendant's railroad crossing, and its value subsequent to accident after reasonable time had elapsed within which injury might have developed was not correct measure of damages. *Houston Belt & Terminal Ry. Co. v. King* (Civ. App.) 203 S. W. 1112.

Evidence held sufficient to sustain the jury's finding that plaintiff's injuries were permanent. *Galveston, H. & S. A. Ry. Co. v. Harling* (Civ. App.) 208 S. W. 207.

Where it was shown that plaintiff had a life expectancy of 15 or 16 years, was permanently injured, totally disabled from performing profitable labor, and for a number of years up until about 2 years previous to injury had earned from \$5,000 to \$10,000 per year, a verdict for \$20,000 is not excessive. *Id.*

The true measure of damages for injury to automobile was the difference in the market value immediately before and immediately after the accident. *Beaumont, S. L. & W. Ry. Co. v. Myrick* (Civ. App.) 208 S. W. 935.

#### VII. INJURIES TO PERSONS ON OR NEAR TRACKS

71. **Right to go on or near track—Customary use of track.**—Where a railroad habitually placed cars upon a commercial track to be there moved by warehouse employes for unloading, such an employe engaged in moving cars was not a trespasser or licensee upon the track, but an invitee, as to whom it owed ordinary care to keep its track in safe condition. *McLain v. Galveston, H. & H. R. Co.* (Civ. App.) 195 S. W. 292.

In an action for death on railroad track at a point habitually used by the public, the law of assumed risk does not apply. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

If the portion of a roadbed of a railway company has been commonly and habitually used for a long time by the public as a footpath, with the knowledge and acquiescence of the company, it is considered as having licensed the public to use such portion of its roadbed for that purpose. *Id.*

73. **Care required as to licensees.**—A railroad owes a mere licensee upon its tracks the duty to exercise ordinary care to avoid injuring him, including the duty to keep a proper lookout to discover his presence on the track and to give warning of the approach of a train. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

74. **Care required as to trespassers.**—It is the duty of a railroad to exercise care not to kill a trespasser or a drunken person. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

Instruction that railroad company owed a trespasser no duty until his position of peril was discovered was erroneous. *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198.

A railroad is guilty of actionable negligence in failing to exercise ordinary care to discover and avoid injuring persons on the track at such places and upon such occasions as one of ordinary prudence would expect to find them, and whether such persons are trespassers or rightfully upon the track makes no difference, apart from issues of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

75. **Frightening animals near railroad.**—A railroad company is liable for injuries caused by a team on a neighboring road becoming frightened, if such injury is occasioned by unusual and unnecessary noise made by the train. *Baker v. Galbreath* (Civ. App.) 211 S. W. 626.

Where a frequently traveled road is near a railroad, the company owes the duty not to make any unnecessary and unusual noise of a character calculated to frighten a team, though the company's employes are unaware of the presence of the team. *Id.*

Blowing whistles and making noise being a necessary result of operating trains, those in charge of them are under no obligation to look for teams, which might become frightened by the noise even though such teams be upon public roads. *Id.*

76. **Defects in roadbed, tracks or equipment.**—A mere licensee walking upon any part of a railroad's right of way set apart for the maintenance of track and operation of trains, must take such right of way as he finds it, and in the absence of invitation by the railroad it owes him no duty to repair defects or light the way, though it knows such use is being made of such way by the public and fails to object, and though persons using it are doing so to reach a station to become passengers or to travel from stations after alighting from trains. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 225 S. W. 822.

**78. Articles projecting, falling or thrown from trains.**—Where automobile struck an iron bar extending from the side of a railroad car, the door of which had been left open after the car was unloaded, it was the duty of railroad company to exercise ordinary care to prevent the car, or any portion thereof, from injuring pedestrians or persons riding in the street adjacent to the tracks. *St. Louis Southwestern Ry. Co. of Texas v. Ristine* (Civ. App.) 219 S. W. 515.

**79. Mode of running trains or cars.**—A licensee on a lumber company's tramroad assumes all risks growing out of the operation of a train thereon with the tender in front of the engine. *Kirby Lumber Co. v. Scurlock* (Civ. App.) 229 S. W. 975.

**80. Signals and lookouts—In general.**—A duty of reasonable lookout, varying according to circumstances, to discover infants near or on the track, devolves upon train operatives. *St. Louis Southwestern Ry. Co. of Texas v. Wallace* (Civ. App.) 200 S. W. 178.

In action for death of child killed on track, negligence being alleged both as to lookout and permitting bushes and weeds on side of track, obstructing train operatives' lookout, the condition of the right of way was important only as an incident affecting the question whether proper lookout was kept. *Id.*

That the fireman, engineer, and brakeman failed to keep a lookout for a licensee, or to see him until too late, and failed to give proper signals, held to show negligence of trainmen. *Ft. Worth & D. C. Ry. Co. v. Gober* (Civ. App.) 211 S. W. 305.

**81. — Persons entitled to benefit of signals and lookouts.**—When a trespasser, injured by a train, is a child or other person incapable of being charged with negligence, the company is liable for injury for failure of the operatives of the trains to exercise ordinary care to keep a lookout. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

A railroad company must at all times exercise ordinary care to discover persons on its tracks, even though they be trespassers, and in the absence of contributory negligence is responsible for damages to them from its negligence in this respect. *Id.*

**82. — Places for giving signals or keeping lookout.**—If ordinary care would require a railroad to give warning of the approach of its trains by the blowing of whistles and the ringing of bells, at a place on the track habitually used by the public, failure to give such warning would be actionable negligence. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

**83. Rate of speed.**—In the absence of statutory regulations or special circumstances, a railroad company may run its trains at any speed without being chargeable with negligence. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

A railroad company cannot be charged with negligence merely because of the speed of its train near a pumping station on its grounds, there being no crossing there, and it not being a place for stopping, merely because on the grounds, at a place in a sense apart from the tracks, the pumper lived with his family; the country being level and the tracks visible for a long distance. *Id.*

**84. Violation of ordinance as negligence.**—A railway company may violate an ordinance by permitting the space between its tracks in the street to become dangerous to vehicles, and yet not be liable for injuries if such violation is not the proximate cause of the injuries. *Schaff v. Hollin* (Civ. App.) 213 S. W. 279.

The violation of an ordinance limiting the speed of a railroad train to six miles an hour, attended with injury to one near the track as a consequence thereof, is negligence per se. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

**85. Precautions as to persons seen on or near tracks—In general.**—Where operatives of a train discovered presence of a trespasser on tracks in a perilous position, they are only required to exercise ordinary care in use of all means within their power consistent with safety of train to avoid injuring him, and are not required to do everything in their power to stop the train. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 202 S. W. 338.

When trainmen, discovering object on track, in the exercise of proper care, did not recognize it as a human being, it was not their duty to stop the train until they discovered that it was a man. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 222 S. W. 699.

**86. Right to presume that person will leave track or avoid danger.**—Rule that those in charge of trains have right to presume that persons walking on track will observe usual danger signals and seek place of safety has no application when those in charge of cars know or have good ground for knowing that for some reason warnings were not heard or will not be observed. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

**89. Contributory negligence of person injured—Care required of persons on or near tracks in general.**—A person was not guilty of contributory negligence in going upon a railroad track at a point habitually used by the public, where there was no other convenient way of reaching his destination, or where there was another convenient way, but he had no knowledge of it. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

It is not the law that a licensee using a railroad track as a passageway because it is accompanied with some danger, by that fact alone and as a matter of law, is guilty of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Gober* (Civ. App.) 211 S. W. 305.

Contributory negligence is a defense in an action for injuries through failure, of trainmen to use ordinary care to discover the person injured on the track, and to avoid infliction of injury. *St. Louis Southwestern Ry. Co. of Texas v. Watts*, 110 Tex. 106, 216 S. W. 391.

One lying down on a railroad track is guilty of contributory negligence as a matter of law, unless his presence is accounted for and explained. *Kirby Lumber Co. v. Boyett* (Civ. App.) 221 S. W. 669.

When a trespasser on a railroad track injured by a train is accountable for his own acts, the fact that he has exposed himself to the danger is conclusive evidence of his negligence, and defeats recovery. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

90. — **Care required of children and others under disabilities.**—One lying down on a railroad track by reason of disease, mental or physical, is not guilty of contributory negligence. *Kirby Lumber Co. v. Boyett* (Civ. App.) 221 S. W. 669.

A railroad's section foreman, knowing the schedules of trains, by drinking to the point of stupor and falling asleep on the track in the evening, when he was passing along on his own affairs in the railroad's hand car, at a time when a train was about due to pass, was guilty of negligence contributing to his death when struck. *Baker v. Loftin* (Com. App.) 222 S. W. 195, reversing judgment (Civ. App.) 198 S. W. 159.

That a child escapes the watchfulness of parents and gets on a railroad track is not conclusive proof of failure in their duty to exercise ordinary care to prevent it from going into danger, which would prevent a recovery for its death. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

92. — **Knowledge of danger.**—The doctrine of assumption of risk, even if applying to anything else than personal risks of the servant, could not prevent recovery by employé, living with his family on railroad, for death of his child, killed on the track through negligence of train operatives in not keeping a proper lookout; the negligence to which the risk was incident not being known by the employé till the very moment of the accident. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

93. — **Reliance on precautions on part of railroad company.**—Failure to anticipate negligence on the part of another is not negligence, and so one riding on a gasoline motorcar on defendant's track is not negligent in failing to anticipate that other motors might be operated in the dark without any light. *Hines v. Parsons* (Civ. App.) 221 S. W. 1027.

94. — **Acts in emergencies.**—Where plaintiff was hemmed in between the wheels of a wagon hitched to a horse, which was frightened at approaching train, his attempt to escape by his only avenue across the railroad track was not contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Where one acts to save another from imminent danger brought about by the negligence of a third person, the rule of ordinary care is not applied to his act, but he is only precluded from recovering from such third person for his injury in such attempted rescue if he acted rashly under the circumstances. *Panhandle & S. F. Ry. Co. v. Haywood* (Civ. App.) 227 S. W. 347.

95. **Proximate cause of injury.**—Failure of train operatives to keep proper lookout is proximate cause of death of infant near the track only when proper lookout would have prevented the death. *St. Louis Southwestern Ry. Co. of Texas v. Wallace* (Civ. App.) 200 S. W. 178.

Where child killed on railroad track was not discernible by train operatives at any time before she reached a point within five or six feet of the track, and then only when the train, running about 25 miles an hour, was about 160 steps away, the death was not proximate result of negligent failure of operatives to keep lookout. *Id.*

In action for death of trespasser run down by defendant's train, instruction that if the engineer, after discovering deceased and knowing his position of peril, exercised ordinary care to avoid striking deceased, verdict should be for defendant, was improperly refused. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 202 S. W. 338.

For the negligent speed of a railroad train to be the proximate cause of an injury to one near the track it is not necessary that the operators of the train should have anticipated injury occurring in the particular manner it did occur, but it is sufficient that they should have anticipated that some injury might occur. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

Where plaintiff's peril could have been seen in time to have stopped a train running at a lawful rate of speed the jury may infer that the train operatives would have performed their duty to keep a reasonable lookout, and have discovered his peril, so that the speed was the proximate cause of the injury. *Id.*

96. **Injury avoidable notwithstanding contributory negligence.**—For one walking on railroad tracks to come within doctrine of discovered peril requiring those in charge of trains to exercise care, it is not necessary that pedestrian should be in actual danger; it being sufficient if it is apparent that he is about to enter into a perilous situation. *Southern Traction Co. v. Rogan* (Civ. App.) 199 S. W. 1135.

Where those operating a locomotive discovered a hack standing too close to the track at a station, and failed to use every means consistent with the safety of the train and its operatives to avoid collision, the railroad company is liable notwithstanding contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

Though wife of railroad section foreman was negligent in going upon bridge with her husband, where they were caught by a train and forced to seek to escape by retracing their steps, which resulted in wife's death, railroad was liable; engineer and fireman having failed to exercise due care to avoid injuring wife after discovering peril. *Texas & N. O. R. Co. v. House* (Civ. App.) 208 S. W. 358.

To recover for death of an intoxicated person on the track, on the theory of breach of duty imposed by discovery of his peril, it is essential to show, not merely that those in charge of engine by exercise of reasonable care might have acquired a knowledge of his peril in time to avoid injury, but that they actually possessed it. *Baker v. Loftin* (Com. App.) 222 S. W. 195, reversing judgment (Civ. App.) 198 S. W. 159.

An instruction that the defendant railway company owed the deceased no duty, except to exercise ordinary care in the use of all means within its power, consistent

with the safety of the train and the people thereon, to avoid injuring deceased after his peril was discovered, is not erroneous as requiring the trainmen to exercise more than ordinary care. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 222 S. W. 699.

102. **Actions for injuries—Sufficiency of evidence.**—In action for death on the track, evidence held sufficient to sustain a verdict for plaintiff. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 196 S. W. 357.

Evidence held sufficient to show that engineer could have reasonably anticipated that deceased might fall into a cattle guard and that engine might overtake him before he reached street crossing. *Id.*

Evidence that deceased had discovered approaching train and ran along a track towards a cattle guard and crossing tended to show contributory negligence. *Id.*

Evidence held sufficient to sustain a jury's finding that operatives of defendant's locomotive discovered that plaintiff's intestate's horses had backed his hack upon the track about 150 feet ahead of the train, and failed to use the means at their command to avoid injury. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 206 S. W. 696.

In action for injuries received upon the unexpected moving of a train while plaintiff was attempting to cross between tender and coal car, evidence held insufficient to raise issue whether brakeman upon seeing plaintiff knew train was likely to move, and whether, if he had so known, he could have prevented train from moving. *Freeman v. Huffman* (Com. App.) 206 S. W. 819.

In an action for death on defendant's track, evidence held sufficient to sustain a finding that the company had knowingly permitted the public to use its roadbed at the point where the accident occurred. *St. Louis Southwestern Ry. Co. of Texas v. Douthit* (Civ. App.) 208 S. W. 201.

Evidence held to warrant a finding that the deceased was not sitting or lying on the track when struck, although nobody saw the accident. *Id.*

In an action for death at a point upon a railroad track habitually used by the public, evidence held to warrant a finding that deceased was not guilty of contributory negligence. *Id.*

In such action evidence held sufficient to sustain a finding that the servants operating the train failed to keep a proper lookout to discover the deceased. *Id.*

In such action evidence held to warrant a finding that the negligent failure to keep a lookout and to give warning was the proximate cause of the accident. *Id.*

In section foreman's action for death of his wife, struck as she was escaping from bridge on which they had been caught by approaching train, evidence held sufficient to support finding that engineer and fireman did not use due care to avoid injuring plaintiff's wife after they discovered her peril. *Texas & N. O. R. Co. v. House* (Civ. App.) 208 S. W. 358.

Evidence held to support a finding that a licensee using railroad tracks stopped, looked, and listened before going upon the track where he was injured. *Ft. Worth & D. C. Ry. Co. v. Gober* (Civ. App.) 211 S. W. 305.

Evidence held to show that a pedestrian using tracks of a switchyard was a licensee at the time of his injury. *Id.*

In an action for injuries to a pedestrian struck by a train, running faster than permitted by city ordinance, evidence that a train running at the lawful speed could have been stopped after the plaintiff's danger was seen, or that plaintiff could have cleared the track, is sufficient to warrant the jury's finding that the negligence was the proximate cause of the injury. *Galveston, H. & S. A. Ry. Co. v. Cook* (Civ. App.) 214 S. W. 539.

In an action for the death of one lying on a railroad track evidence held insufficient to sustain a finding that he was not guilty of contributory negligence. *Kirby Lumber Co. v. Boyett* (Civ. App.) 221 S. W. 669.

In an action for death, evidence held insufficient to support finding, necessary to road's liability on theory of discovered peril, that fireman and engineer saw decedent and knew of his peril in time to avoid injuring him, and yet failed to use all means within their power. *Baker v. Loftin* (Com. App.) 222 S. W. 195, reversing judgment (Civ. App.) 198 S. W. 159.

In action for death on a railroad track, evidence held sufficient to sustain a verdict in favor of plaintiff on a theory of discovered peril, notwithstanding the positive testimony of trainmen in defendant's favor. *San Antonio & A. P. Ry. Co. v. McGill* (Civ. App.) 222 S. W. 699.

103. — **Damages.**—It was not error to refuse to instruct at defendant's request that, if railroad was guilty of negligence proximately causing the flagman's death, and the flagman himself was guilty of negligence proximately contributing thereto, the damages should be reduced as provided by Acts 1909 (1st Ex. Sess.) c. 10, where the court had directed a verdict for the defendant if the jury found the flagman guilty of contributory negligence, which was a charge more favorable to defendant than the charge which was refused. *Pecos & N. T. Ry. Co. v. Sutor*, 110 Texas 250, 218 S. W. 1034.

\$8,000 held not excessive where plaintiff, 34 years old, struck by defendant's railroad train, sustained a fracture of the leg and suffered considerable pain, his earning capacity was decreased to the extent of over \$5,000, and the injury might be permanent. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

## IX. FIRES

108. **Defects in construction of engines.**—If spark arresters used by railroad had proven to be inadequate during a high wind, it was its duty to secure better ones, or to use reasonable diligence to protect an adjacent landowner, from fire started by igniting

grass and weeds on its right of way, in some other manner. *Quanah A. & P. Ry. Co. v. Stearns* (Civ. App.) 206 S. W. 857.

110. **Combustibles on railroad property.**—Where hot winds dried grass on railroad's right of way, rendering it combustible, and, on account of velocity of wind, it was dangerous to attempt to burn it off, duty to plow or burn fireguards to protect adjacent lands rested on railroad rather than landowner. *Quanah A. & P. Ry. Co. v. Stearns* (Civ. App.) 206 S. W. 857.

113. **Contributory negligence of owner of property—Combustibles near railroads.**—Landowner adjoining railroad's right of way is not required to anticipate railroad's negligence in respect to setting fires, and has right to full enjoyment of his property for all lawful purposes, including growing of grass. *Quanah A. & P. Ry. Co. v. Stearns* (Civ. App.) 206 S. W. 857.

That plaintiff had for several years stacked inflammable fodder so near a railroad track as to show contributory negligence gives no prescriptive right as against the railroad company to stack it there, nor does it lessen plaintiff's negligence in similarly stacking the fodder which burned. *Ft. Worth & D. C. Ry. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

117. **Injury avoidable notwithstanding contributory negligence.**—Knowledge by a railroad company that fodder is stacked near its tracks without protection from sparks does not render it liable under the doctrine of discovered peril for failure to use care to prevent the escape of sparks. *Ft. Worth & D. C. R. Co. v. Thompson* (Civ. App.) 222 S. W. 289.

119. **Contracts for exemption from liability.**—Under contract whereby road leased site on right of way for grain and seed house, with limitation of liability, held, that road was not liable for destruction of seed house by fire set by burning cotton seed hulls from freight car delivered to house. *Walling v. Houston & T. C. R. Co.* (Civ. App.) 195 S. W. 232.

124. **Actions for injuries by fire—Sufficiency of evidence.**—In action for destruction of grass and growing timber on plaintiff's land, caused by a fire set out by defendant's locomotive, evidence held sufficient to support a verdict for plaintiff. *Angelina County Lumber Co. v. Mast* (Civ. App.) 208 S. W. 360.

In an action for damages for burning a residence, evidence held sufficient to support a verdict on the theory that defendant's employes failed to exercise ordinary care in handling and operating a locomotive, allowing it to emit sparks, though equipped with a proper spark arrester. *St. Louis Southwestern Ry. Co. of Texas v. Johnson* (Civ. App.) 209 S. W. 133.

Although it is necessary to trace fire to railroad, it is not necessary that evidence should exclude all possibility of another origin, but it is sufficient if all the facts and circumstances fairly warrant a conclusion that the fire did not originate from some other cause. *Moose v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 212 S. W. 645.

In an action for loss by fire of cotton stored on a platform established by carrier, evidence held insufficient to show that sparks from a passing engine or sparks from a cotton gin nearby caused the fire. *Hartford Fire Ins. Co. v. Triplett* (Civ. App.) 223 S. W. 305.

In an action for burning a barn, evidence held to support the conclusion that the fire originated from sparks emitted from engine, though the barn was 130 feet from the track. *Hines v. Jumper* (Civ. App.) 229 S. W. 350.

125. — **Damages.**—The true measure of damages for the burning of grass is its reasonable market value at time of its destruction, but, if the grass has no market value at that point, the owner's measure of recovery would be the reasonable value of the grass to him, considering the use to which he was putting it. *Gulf, C. & S. F. Ry. Co. v. Price* (Civ. App.) 219 S. W. 518; *Chicago, R. I. & G. Ry. Co. v. Word* (Com. App.) 207 S. W. 902; *San Antonio, U. & G. Ry. Co. v. Ernst* (Civ. App.) 210 S. W. 603.

Damages by fire, sustained by lessee from railroad of site for grain and seed house, on which lessee could not procure insurance on account of proximity of building used for storage of inflammable oils, held not within contemplation of parties or such as would naturally and possibly result from breach, and so too remote to be recovered from the road. *Walling v. Houston & T. C. R. Co.* (Civ. App.) 195 S. W. 232.

Where the grass on plaintiff's land was fired by railroad company, plaintiff is entitled to recover the highest market value for any purpose to which he might wish to subject the land or the grass, including the purpose of pasturage. *Ft. Worth & D. C. Ry. Co. v. Hapgood* (Civ. App.) 201 S. W. 1040.

In suit against railroad for injuries to fruit and shade trees by fire, measure of plaintiff's damages held sum necessary to compensate him for being deprived of trees for intended use, rather than difference in value of land before and after injury. *Stephenville, N. & S. T. Ry. Co. v. Baker* (Civ. App.) 203 S. W. 385.

In action for the negligent burning of grass in a pasture, a charge, permitting recovery for the cost of feed and expenses of caring for cattle, does not furnish a certain rule of damages, but the correct rule is to permit recovery for the value of the grass at the date of its destruction. *Chicago, R. I. & G. Ry. Co. v. Word* (Com. App.) 207 S. W. 902.

The measure of damages for the negligent burning of grass by a railroad company is its market value for any use or purpose for which it may be valuable to its owner, but in the event that it has no market value then the measure of damages is its value to its owner for any uses to which he may put it. *Galveston, H. & S. A. Ry. Co. v. Harris* (Civ. App.) 216 S. W. 430.



In an action for damages to a pasture caused by fire from a passing engine, the measure of damages was the difference in the value of the land because of the injury. *Houston & T. C. R. Co. v. Ellis* (Sup.) 224 S. W. 471, affirming judgment (Civ. App.) 160 S. W. 606.

## CHAPTER ELEVEN

### COLLECTION OF DEBTS FROM RAILROAD CORPORATIONS

Art.		Art.	
6619.	Property of company subject to execution.	6626.	Jurisdiction, etc.
6621.	Service of notice and how given.	6627.	Sale under deed of trust, where made.
6623.	When wages to be paid discharged employé.	6628.	Judgment, execution, etc.
6624.	Road liable to be sold for debt.	6629.	Unpaid stock, etc.
6625.	New corporation in case of sale.	6630.	After sale, old directors to be trustees.

#### Article 6619. [4543] Property of company subject to execution.

**Parties entitled to object.**—The Director General of Railroads cannot complain of a judgment because it provides for execution against the railroad or the receiver in case the railroad property is returned to them, though they were not parties to the action, since those provisions of the judgment, if unauthorized, are void and do not affect its validity as against the Director General. *Hines v. Robey* (Civ. App.) 225 S. W. 201.

**For what debts railroad liable.**—Petition against federal Director General of Railroads and receiver of a railroad for conversion of government bonds paid for by the owners, employés of the railroad, through monthly deductions from salary, held to state a cause of action against the Director General alone, and not to show the liability of the receiver. *Chambers, Watson & Wilson v. Hines* (Civ. App.) 225 S. W. 200.

#### Art. 6621. [4545] Service of notice and how given.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

#### Art. 6623. [4547] When wages to be paid discharged employé.

**Unconstitutional.**—This article is special legislation, not protecting alike the interest of employer and employé, and is unconstitutional. *San Antonio & A. P. Ry. Co. v. Wilson* (App.) 19 S. W. 910.

#### Art. 6624. [4549] Road, etc., liable to be sold for debts.

See *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807; note under art. 6625.

#### Art. 6625. [4550] New corporation, in case of sale, may be formed, how.

**Constitutionality.**—The restriction upon a corporation organized to take over a sold-out railroad, under this and the preceding article, imposed by the Office-Shops Act (art. 6423), is not invalid, as imposing a burden upon commerce between the states, although the railroad is engaged in such commerce, since the burden, if any, is indirect. *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807.

**Duties and liabilities of purchaser of railroad in general.**—Purchaser of railroad property and corporation organized to operate it held charged with contract made by receiver to establish for a valuable consideration division headquarters at particular town. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Debts represented by notes were not "subsisting liabilities and claims" within this article, where debts and claims within such statute had been paid with money procured by giving the notes without any assignment of the claims or agreement that the lender should be subrogated to the rights of the creditors whose claims were paid with the borrowed money. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

Indorsement of vouchers to bank, which advanced money to pay claims against railroad company of character mentioned in this article, constituted assignment of vouchers to bank, which in consequence became subrogated to right of original holders. *Id.*

**Proceedings relating to claims.**—That intervener in receivership proceedings failed to set up by amendment claim under this article, in addition to his claim of priority under doctrine of equity, held not to estop him, on doctrine of election of remedies, from setting up his statutory claim in subsequent suit. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

Claims against a railroad company under this article, could not have been adjudicated in receivership proceedings had prior to the enactment of such statute, and therefore prior to the existence of the purchasing corporations. *Id.*

That claim under this article, could have been asserted by amendment of plea of intervention filed prior to enactment of such statute did not make determination of pleas adjudicata as to such claim. *Id.*

Evidence, in a suit to enforce against railroad property purchased from receiver a claim under this article, held to show that stockholders of old company received stock in or control over new company in consideration of their holdings in the old company. *Id.*

— Jurisdiction.—See art. 6626.

Location of offices.—Under this and the preceding article, and art. 6423, a new corporation could not move offices and shops already located, as it is subject to the "limitations imposed by law." *International & G. N. Ry. Co. v. Anderson County*, 246 U. S. 424, 38 Sup. Ct. 370, 62 L. Ed. 807.

#### Art. 6626. [4551] Jurisdiction, etc.

Jurisdiction of state court.—Under this article, railroad company organized to operate railroad property acquired on sale by receiver appointed by federal court held estopped to assert jurisdiction of federal court to determine validity of contract of receiver. *Houston & T. C. R. Co. v. City of Ennis* (Civ. App.) 201 S. W. 256.

Reservation of jurisdiction in decree of federal court, wherein validity and priority of claims on principles of equity were determined, held not to preclude state court from passing on claim under the preceding article, against property sold by receiver. *International & G. N. Ry. Co. v. Concrete Inv. Co.* (Civ. App.) 201 S. W. 718.

#### Art. 6627. [4552] Sale under deed of trust, when and where made.

Cited, *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 2 Civ. App. 650, 22 S. W. 107.

#### Art. 6628. [4553] Judgment, execution, levy and sale.

Cited, *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 2 Civ. App. 650, 22 S. W. 107.

#### Art. 6629. [4554] Unpaid stock subscriptions of stockholders of sold-out company.

Cited, *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

#### Art. 6630. [4555] After sale old directors to be trustees.

Cited, *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

Suits—Parties.—Despite art. 3723, relating to deceased natural persons only, and having no application to dissolved corporations, under this article, a clear right is vested in the last secretary of a sold-out railway company and the sole surviving members of its last board of directors, as trustees of the property of the sold-out company, to maintain an action for its recovery, and, when they assert the validity of an execution sale and their rights as trustees, the sale is not open to challenge by a naked trespasser. *Richardson v. Allison* (Com. App.) 213 S. W. 252.

## CHAPTER TWELVE

### FORFEITURE OF CHARTER

Art. 6633. Forfeiture for failure to build and equip.	Art. 6635i. Extension of time to build branches; restoration of franchises, etc.
6635g. Extension of time to build branches.	6635j. Repeal.
6635h. Extension of time to build road; restoration of franchises, etc.	

#### Article 6633. [4558] Forfeiture for failure to build and equip.

Effect of forfeiture.—Under this article such unfinished road is nevertheless its property, to be sold for the benefit of its creditors and shareholders, and another company, not connected with the old, has no right to take possession of such unfinished road, and hold it as its own property. *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. of Texas*, 2 Civ. App. 650, 22 S. W. 107.

Art. 6635g. Extension of time to build branches.—That any railway corporation which by amendment to its charter filed since the first day of January, 1896, has further provided for the locating, constructing, maintaining, owning and operating of any extension of its line of railway, and which has failed to complete such extension, or any part thereof, within the time required by law, shall, upon payment of all its franchise tax, be and is hereby restored to and granted all and singular

the rights, privileges and franchises acquired by such amendment to its articles of incorporation, as if the same was filed and recorded in the offices of the Secretary of State on the day of the taking effect of this Act; and such corporation shall, upon payment of its franchise tax, be and is hereby authorized to project, complete, construct, own and operate any such extension of its line of railway under and as provided for in such amendment or amendments to its articles of incorporation; provided that such extension of its line of railway shall be by such corporation completed and put in good running order within eighteen months from the taking effect of this Act. [Acts 1921, 37th Leg., ch. 7, § 1.]

**Art. 6635h. Extension of time to build road; restoration of franchises, etc.**—That the time in which any railway corporation chartered under the laws of the State of Texas since the first day of January, 1892, or the charter of which has been amended since that date, is required to begin construction of its road, and construct, equip, and put the same in good running order as required by Article 6633 of the Revised Statutes of the State of Texas of 1911, be and the same hereby is, as to any unfinished portion of such road, extended two years from the taking effect of this Act; and any railroad company having been chartered since January first, 1892, or the charter to which has been amended since said date, which shall have forfeited its corporate existence or any of its rights and powers, or is about to do so, by reason of the failure to comply with said Article 6633, or any part of said Article, shall have restored and preserved to it, its corporate existence, and it shall have and enjoy all the corporate franchises, property rights and powers held or acquired by it previous to any cause of forfeiture as aforesaid; provided that no railway company which shall be revived or the time extended by virtue of this Act, shall claim or exercise any franchise not allowed, granted or permitted to other railway corporations under the law as now in force in this State. [Acts 1921, 37th Leg., ch. 85, § 1.]

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

**Art. 6635i. Extension of time to build branches; restoration of franchises, etc.**—Any railway corporation chartered since the first day of January A. D. 1892, and which by its original charter or by amendment thereto, filed since said first day of January, A. D. 1892, has further provided for the locating, constructing, maintaining, owning and operating of any extension or branch line or lines of railway, and which has failed or is about to fail to complete the same, or any part thereof, within the time required by law, shall, upon payment of all its franchise tax, be and is hereby restored to and granted all and singular the rights, privileges and franchises acquired by its original charter, or by such amendment to its articles of incorporation, as if the same was filed and recorded in the office of the Secretary of State on the day of the taking effect of this Act, and such corporation shall, upon payment of its franchise tax, be and is hereby authorized to project, complete, construct, own and operate any such extension and branch line or lines of railway under and as provided for in its charter or in any amendment to its articles of incorporation; provided, that such extension and branch line of railway shall be by such corporation completed and put in good running order at the rate of at least ten miles in two years from the taking effect of this Act, and twenty additional miles for each and every year thereafter, until all the branch line or lines of extension as provided for are completed; provided that the provisions of this Act shall not apply to any railroad company which has been chartered by the State of Texas

for a period of ten years or more, and which has twenty miles or less of railroad to build in order to comply with its original charter, or any amendment thereto. [Id., § 2.]

**Art. 6635j. Repeal.**—That nothing in this Act contained shall repeal or impair an Act introduced as House Bill No. 191 and passed at the present Session and approved by the Governor February 1st, 1921 [Art. 6635g], the same being entitled, "An Act for the relief of railway corporations having charters amended since the first day of January, 1896, and which have failed to construct any extension, or any part thereof, authorized by said amendment or amendments, within the time required by law, and declaring an emergency." [Id., § 3.]

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## CHAPTER THIRTEEN

### TICKET AGENTS—AUTHORITY AND DUTY

#### Article 6637. [4560a] Authorized agents for the sale of tickets.

**Authority of ticket agent.**—Station agent of railroad, in circulating rumor plaintiff had stolen overcoat of newsboy on train, cannot be said to have acted as representative of railroad or within his employment. *Beaumont, S. L. & W. Ry. Co. v. Daniels* (Civ. App.) 204 S. W. 481.

A station agent has no apparent authority to bind the railroad by a contract to board and lodge a mule which was part of a shipment and was injured while in the railroad's possession. *Lancaster v. Futrell* (Civ. App.) 218 S. W. 805.

**Railroad commission's powers.**—See note to art. 6693.

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## CHAPTER FOURTEEN

### LIABLE FOR INJURIES TO EMPLOYÉS

Art. 6640. Liable for injuries to fellow-servants.	Art. 6646. No assumed risk where safety appliance not provided.
6641. Who are vice-principals.	6648. Liable for injury or death of employé.
6644. Contributory negligence a defense, except, etc.	6649. Contributory negligence, rule as to.
6645. When assumed risk not available as defense.	6650. Assumed risk, rule as to.
	6651. Contract changing liability void.

#### Article 6640. Liable for injury to fellow-servant.

**Effect of statute in general.**—Under this article, a railway shop laborer did not assume the risk of the negligence of his fellow servants in failing to render him proper assistance in lifting a heavy box onto a truck. *Payne v. Harris* (Civ. App.) 223 S. W. 350.

**What constitutes operating cars, etc.**—Protection against the negligence of a fellow servant under this article, is not given those employed to operate a car, locomotive, or train, but to those who at the time of injury are actually engaged in the act or work of such operation. *Houston Belt & Terminal Co. v. Glover* (Com. App.) 213 S. W. 597.

One assisting in operating a derrick on a wrecking car used in unloading another car is not engaged in the "operation of a car," within this article. *Id.*

**Interstate commerce.**—The federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) abolished the common-law doctrine of fellow servants. *Wight v. Morgan* (Civ. App.) 220 S. W. 295; *Cox v. St. Louis & S. F. R. Co.* (Sup.) 222 S. W. 964, reversing judgment (Civ. App.) *St. Louis & S. F. R. Co. v. Cox*, 159 S. W. 1042.

#### Art. 6641. Who are vice-principals.

**Constitutionality.**—This article does not deny to railroads within the state the equal protection of the laws, so as to be invalid, under Const. U. S. Amend. 14. *Campbell v. Cook* (Civ. App.) 24 S. W. 977.

**Receivership.**—This article applies to railroad operatives employed by the receiver of a railway corporation. *Campbell v. Cook* (Civ. App.) 24 S. W. 977.

**Art. 6644. Contributory negligence a defense, except, etc.**

1. **Application of the doctrine of contributory negligence in general.**—An independent contractor guilty of negligence contributing to his injury through his employer's negligence is barred from recovery. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

6. **Inexperienced or youthful employé.**—In action by infant for personal injuries received by reason of his acceptance of invitation of employé of defendant railway to help couple engines, in order to recover, it must be shown that the infant was not capable of appreciating the danger. *Trinity Valley & N. Ry. Co. v. Scholz* (Civ. App.) 209 S. W. 224.

7. **Reliance on care of master.**—An employee has the right to assume that employer has exercised proper care with respect to providing a safe place to work and suitable and safe appliances for the work. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 223 S. W. 637.

12. **Knowledge of defects or dangers—Constructive notice.**—As regards assumption of risk and contributory negligence, knowledge is presumed where the danger is so obvious that an ordinarily prudent person would have appreciated that it endangered his safety. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

14. **Duty to discover or remedy defects or dangers—Duty to observe defects or dangers.**—Where it was no part of a servant's duty to place standards in the sockets on flat cars on which rails were loaded, he was not required to use even ordinary care to ascertain whether the standards were in place. *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 138.

15. — **Reliance on care of master or fellow employés.**—Employé has right to rely on the master's furnishing safe tools and appliances and a safe place to work, and need not use ordinary care to learn of defects and dangers therein. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

24. **Dangerous operations and methods of work—In general.**—An engineer on a wrecking car who started engine operating a crane to pull upright a wrecked box car upon signal by plaintiff foreman could not be guilty of negligence toward plaintiff, who was injured by a loose roof falling off the car, for he was doing the very act that the foreman directed him to do. *Wight v. Morgan* (Civ. App.) 220 S. W. 295.

28. — **Riding on trains, cars, or locomotives.**—A switchman riding on the top of toolhouse on a car in a wrecking train, held not guilty of negligence contributing to his injuries when the engineer's act in increasing speed with a jerk threw him off. *Baker v. Grace* (Civ. App.) 213 S. W. 299.

30. — **Switching cars.**—Where switchman attempted to board engine at the designated place on the footboard for another switchman, who had assumed plaintiff's station thereon, and was thrown and injured by the other's attempt to assume his proper station, held, that plaintiff was in the exercise of due care. *El Paso & S. W. R. Co. v. Lovick* (Civ. App.) 210 S. W. 283.

37. **Compliance with commands or threats.**—An employé who was ordered by his foreman to go upon a railroad water tank to pour cinders into it to stop leaks was not required to ascertain if the tank was safe. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

39. **Proximate cause of injury.**—Where railroad's negligence was the proximate cause of the death of a section foreman on the track, at midnight with a motor car, it is liable notwithstanding that the foreman was negligent. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

44. **Sufficiency of evidence—In general.**—Evidence held to support a finding that a servant relied on the supposed superior knowledge of a foreman as to the safety of picking up a live wire torn down by a wreck on defendants' track. *Houston Belt & Terminal Ry. Co. v. Wolkarte* (Civ. App.) 197 S. W. 1023.

45. — **Contributory negligence shown.**—In action for injury to station agent, who, after steps had been removed, and while attempting to step from edge of a mixing trough to freight platform and to pull himself up by a railing on platform, fell back into a ditch which railroad was constructing, held, on the evidence, that agent was guilty of contributory negligence, proximately causing his injury. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Com. App.) 209 S. W. 399.

46. — **Contributory negligence not shown.**—In an action for the death of a section foreman killed while on the track at midnight with a motor, evidence held to sustain a finding that he was not drunk, or lying on the track to sleep or negligent. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

In a railroad employé's action for injuries, due to a defective guard rail in the vestibule of a Pullman coach, a finding that plaintiff himself had adjusted the guard rail held not supported by the evidence. *Blackman v. San Antonio & A. P. Ry. Co.* (Civ. App.) 200 S. W. 412.

50. — **Dangerous operations and methods of work.**—Regarding contributory negligence of superintendent killed between cars, jury could say, he, seeing engine standing still, and switchmen working between cars, might, exercising proper care, have concluded engineer had been signaled, and would obey signal, not to move engine. *Texas & P. Ry. Co. v. Howard* (Civ. App.) 200 S. W. 1159.

**Art. 6645. When assumed risk not available as defense.**—That the plea of assumed risk shall not be available as a bar to recovery of dam-

ages in any suit hereafter brought in any court of this State against any corporation, receiver or other person, operating any railroad, interurban railway or street railway in this State, for the recovery of damages for the death or personal injury of any employé or servant caused by the wrong or negligence of such person, corporation or receiver; it being contemplated that while the employé does assume the ordinary risk incident to his employment he does not assume the risk resulting from any negligence on the part of his employer, though known to him.

Where, however, in any such suit, it is alleged and proven that such deceased or injured employee was chargeable with negligence in continuing in the service of any such corporation, receiver or person above named in view of the risk, dangers and hazards of which he knew, or must necessarily have known, in the ordinary performance of his duties, such fact shall not operate to defeat a recovery, but the same shall be treated and considered as constituting contributory negligence and if proximately causing or contributing to cause the death or injury in question it shall have the effect of diminishing the amount of damages recoverable by such employee, or his heirs or representatives in case of the employee's death, only in proportion to the amount of negligence so attributable to such employee. [Acts 1905, p. 386, § 1; Acts 1921, 37th Leg., ch. 100, § 1, amending art. 6645. Rev. Civ. St. 1911.]

See *Missouri, K. & T. Ry. Co. of Texas v. Watson* (Civ. App.) 195 S. W. 1177; *Thornhill v. Kansas City, M. & O. Ry. Co. of Texas* (Civ. App.) 223 S. W. 490.

Cited, *Hines v. Bannon* (Civ. App.) 221 S. W. 684.

**2. What law governs and interstate commerce.**—The defense of assumed risk is available to the employing railroad under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), applicable where the injury was in interstate commerce. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407; *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665; *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 188; *Gulf, C. & S. F. R. Co. v. Drennan* (Civ. App.) 204 S. W. 691; *Southern Pac. Co. v. Berkshire* (Civ. App.) 207 S. W. 323; *Houston Belt & T. Ry. Co. v. Christian* (Civ. App.) 209 S. W. 816; *Hines v. Bannon* (Civ. App.) 221 S. W. 684.

Under federal Employers' Liability Act, when the negligence does not amount to a violation of the Safety Appliance Acts, the defense of assumed risks at common law is left intact, and such defense may be set up in action for injuries on railroad turntable as against allegations that the handle was too short, there was insufficient light, the current was on in the electric turner, and that same was out of order. *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

State statutes abrogating defense of assumed risk are inapplicable to actions for injuries to railroad employés engaged in interstate commerce, federal statutes and decisions governing. *Schaff v. Hendrich* (Civ. App.) 207 S. W. 543.

Federal Employers' Liability Act has not abrogated the defense of assumed risk under the common law. *Id.*

While the defense of assumed risk is eliminated by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) in cases of interstate commerce, where the violation by the carrier of the statute enacted for the safety of employés contributed to the injury in all other cases it is a complete bar. *Southern Pac. Co. v. Miller* (Civ. App.) 207 S. W. 554.

The defense of assumed risk is left available to railroad company by the federal Employers' Liability Act and amendments (U. S. Comp. St. §§ 8657-8665), where a workman is injured by being knocked from a scaffold by a passing vehicle while painting a railroad bridge used by interstate trains. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

In an action under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and the Safety Appliance Act (U. S. Comp. St. §§ 8605-8623), testimony relating to contributory negligence and assumed risk is properly excluded. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

Except in those cases where the defense of assumed risk is taken away by express provisions of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), that defense remains as it existed at common law before the act was passed. *Southern Pac. Co. v. De la Cruz* (Com. App.) 228 S. W. 108.

In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries caused by the railroad's violation of the Ash Pan Act (U. S. Comp. St. § 8624), the railroad could not defend on the plea of assumed risk or contributory negligence, in view of Federal Employers' Liability Act, § 4 (U. S. Comp. St. § 8660), and Employers' Liability Act 1908, §§ 1-4 (U. S. Comp. St. §§ 8657-8660). *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

In action for an injury to an employee engaged in painting a bridge used in interstate commerce, the common-law doctrine of assumed risk, if supported by the facts, is a complete defense. *Texas & N. O. R. Co. v. Gericke* (Com. App.) 231 S. W. 745.

**3. Construction and application of statute.**—In action against railroad by employé injured in handling heavy barrel unaided, plaintiff's requested charge on assumption of risk, where servant continued in employment and master was aware of danger, held an improper application of this article. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

The rule of assumed risk in Texas is the same as it was known to the common law, except where abrogated or modified by statute. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

**4. — Assumed risk merged in contributory negligence.**—This article does not merge the defense of assumed risk into that of contributory negligence, the doctrine of comparative negligence founded on art. 6649, as to contributory negligence of railroad employé affecting recovery, not applying where plaintiff is barred from any recovery for injuries by assumption of risk. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

**5. — Risks assumed in general.**—This article applies only to situation where there is defect in the appliance used or in surrounding conditions affecting employé's safety, and not to a case where the negligence claimed is in not having any appliances of any kind to facilitate the work. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

Under this article, defense of assumed risk is not available against railroad section hand, injured in assisting to move motorcar from toolhouse onto the track, if the employer was guilty of negligence in failing to provide instrumentalities with which to do the work with reasonable safety, which was a proximate cause of the injury, though the employee knew of the defective and dangerous means provided, if the employer also knew thereof, or if the employer did not know thereof, unless a person of ordinary care with knowledge of the defect and danger would not have continued in the service. *Olds v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 228 S. W. 336.

This article is applicable to a suit for injuries resulting from a railway company's failure to furnish a shop laborer sufficient help in lifting heavy box; the term "defect," in the statute, including a "defective" force of men, a force of men less than required for the service. *Payne v. Harris* (Civ. App.) 228 S. W. 350.

**7. — Notice to or knowledge of employer.**—Under the provision making the plea of assumed risk unavailable where the employer or his foreman knows the danger, risk of injury resulting from the fall of a lumber pile is not assumed where the foreman knew of the danger and promised to hold the pile up while the men were working under it. *Lancaster v. Johnson* (Civ. App.) 224 S. W. 207.

**8. — Prudence in continuing work.**—The second subdivision of this article does not impair common-law rule that, when a person of ordinary prudence having such knowledge would not have continued in service, such employé, continuing in service, does assume the risk. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

An instruction that employee did not assume risk if, with knowledge of defendant's negligence, he exercised ordinary care to avoid injury therefrom, would have been defective under subd. 2 of this article. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

**11. Nature and extent of risks assumed in general.**—Issue raised by evidence of employé choosing unsafe way of doing work, when safe, suitable, and convenient way is available, is only that of contributory negligence, and not of assumption of risk. *Southern Pac. Co. v. De la Cruz* (Civ. App.) 201 S. W. 428.

Assumed risk must be confined to the ground of negligence found warranting recovery, and it is immaterial to what extent the risks of independent grounds of negligence may have been assumed. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

**15. Dangers incident to nature of work.**—Dangers ordinarily incident to employment are those commonly and usually pertaining to or incident to it, which a reasonably prudent person might anticipate, and do not include danger by acts of negligence, unless habitual and known to the servant. *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614.

An employé assumes risks naturally and ordinarily incident to employment. *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 188.

**18. Defective or dangerous tools, machinery, appliances or places—Tracks and roadbeds.**—Railroad employé, 26 years of age, intelligent, and experienced, having full knowledge of the uneven condition of roadway which caused his fall while between moving cars which he was uncoupling, held to have assumed, as a matter of law, the danger of the risk, precluding him from recovering damages under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). *Hamm v. Texas & N. O. R. Co.* (Civ. App.) 221 S. W. 345.

**20. Dangerous operations and methods of work—In general.**—The common-law defense of assumed risk, available under the federal act as distinguished from contributory negligence held presented by a showing that a railway blacksmith's helper received injuries to his thumbs by the falling of a trip hammer while he was using his hands, instead of tongs furnished, to place an iron in position under the hammer. *Southern Pac. Co. v. De la Cruz* (Com. App.) 228 S. W. 108.

**21. — Operation of trains.**—Impact of box cars being switched is a risk ordinarily incident to the work of a switchman, which he assumes, and he cannot recover for injuries caused by being wrenched while operating a brake on top of a box car by an impact of the force usual and ordinary in the switching business. *Baker v. Beattie* (Civ. App.) 222 S. W. 653.

**23. Insufficient force for work.**—In action against railroad for injuries to servant while lowering pipe into well by rope, requested instruction that plaintiff could not recover if he knew assistance was inadequate, and yet undertook work of his own

voltion, while ordinarily prudent person would not, held properly refused, as erroneous, in view of this article. *Stephenville, N. & S. T. Ry. Co. v. Shelton* (Com. App.) 208 S. W. 915.

**29. Knowledge by servant of defect or danger—Necessity and effect in general.**—Railroad employé engaged in interstate commerce, knowing that machinery is defective, the place of work unnecessarily dangerous, or that proper rules are not enforced, assumes risk thereof, unless he informs employer, who promises to correct conditions. *Schaff v. Hendrich* (Civ. App.) 207 S. W. 543.

Injured employé is not excused from consequences of assumed risk because another servant also assumed same risk at same time, in absence of testimony that other as vice principal specifically commanded plaintiff servant to assist him in doing dangerous work, assuring him there was no danger. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

**32. — Constructive notice.**—Plaintiff entering the services of the company assumed the risks and dangers incident to his employment which were obvious and known to him, or which he must necessarily, in discharge of his duties, have known of. *Southern Pac. Co. v. Hazelbusch* (Civ. App.) 200 S. W. 268.

At common law a servant assumes, not only risks ordinarily incident to his employment, but also those arising from the negligence of the master, if he knows or in the proper discharge of his duties necessarily must have known of such negligence and of the dangers incident thereto. *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

To subject servant to defense of assumed risk, it is not necessary that he understand operation of a complicated machine, but only that he know the dangerous condition thereof, or should know it, in the exercise of reasonable care. *Id.*

An employé does not assume risk in consequence of employer's negligence, unless employé has knowledge thereof, or must necessarily have acquired knowledge thereof. *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 188.

As regards assumption of risk and contributory negligence, knowledge is presumed where the danger is so obvious that an ordinarily prudent person would have appreciated that it endangered his safety. *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419.

The servant has a right to assume that the master has discharged his duty in providing a safe working place, and does not assume the risks arising from master's failure to so do, unless he knows of such failure and the attendant risks, or in the ordinary discharge of his own duty must have necessarily acquired the knowledge. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

A charge on assumed risk which imposes on the employee the duty of exercising ordinary care to discover danger due to the master's negligence is improper. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

A servant assumes the risks of dangers of which he has actual knowledge, and of such hazards as he should have learned by the exercise of ordinary care, but, in the absence of knowledge to the contrary, he may rely on the assumption that the master will do his duty, and is not under obligation to look out for the master's negligence. *St. Louis, S. F. & T. Ry. Co. v. Reichert* (Civ. App.) 227 S. W. 550.

**33. — Continuing work with knowledge of danger.**—Railroad employee who knew, or must have known, of railroad's negligence, and continued in the service, could not recover under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), even though with knowledge of such negligence he exercised ordinary care to avoid the injury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

**34. — Defective or dangerous appliances or places in general.**—A roundhouse helper who had worked for over two years about engines and a turntable, assumed the risk of injury from conditions which had never changed during such time. *Ft. Worth & D. C. Ry. Co. v. Miller* (Civ. App.) 201 S. W. 1049.

Railroad station employé, who drew truck loaded with trunks along a cement walk, knowing that walk had broken places in it, though lights had been turned off, so he could not see, held to have assumed risk of injury, when truck was jostled off on him. *Hines v. Wicks* (Civ. App.) 220 S. W. 581.

**35. — Cars and locomotives.**—Where it was the duty of the master or his agent to remove any oil spilled on the top of the tank or tender of an engine, a servant could presume this had been done, and until he had been notified or acquired knowledge to the contrary, he does not assume the risk of slipping and falling from such cause. *Southern Pac. Co. v. Hazelbusch* (Civ. App.) 206 S. W. 268.

Where employé, hoisting rails on flat cars, was required in haste, while the train was switching, to mount a car, and went upon a car without standards, so that rails fell about him and endangered him, absence of the standards, which were only a few inches tall, was not so plainly observable that he must be conclusively presumed to know of their absence. *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 188.

Where railroad employé, after seeing a box car containing lumber jammed and jarred by other cars, proceeds to unload lumber and is injured by falling into open space over which lumber had slid because of impact, he cannot recover for injury, having assumed risk of working in the car after the jarring of the lumber. *Gulf, C. & S. F. Ry. Co. v. Drennan* (Civ. App.) 204 S. W. 691.

Though railroad was negligent in failing to inspect car loaded with gasoline, and in representing to employé of refinery company, requested to repair leak, that it was loaded with unrefined naphtha, refinery company's employé assumed risk of injury where prior to time car exploded after he loosened dome cap he either learned it contained gasoline or something more dangerous. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.



Roundhouse hostler did not assume risk of working in cab with wet and greasy floor unless the grease and water and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the grease and water and appreciated the danger. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

36. — **Tracks and roadbed.**—Though a bridge painter, working on a scaffolding over a highway, and who could not see approaching vehicles, knew that the scaffolding was too low to permit high-topped wagons to pass, so that he assumed the risk of injury from that defect, such knowledge does not show assumption of risk by him of his employer's failure to have watch kept if such watch was reasonably necessary for the employee's protection. *Texas & N. O. R. Co. v. Gericke* (Com. App.) 231 S. W. 745.

An employee placed by his employer in a position where he could not guard himself against danger by any reasonable amount of care can assume that his employer had made such provision for his safety as is reasonably necessary and is not required to use even ordinary care to see whether this had been done, and he can therefore be held to have assumed the risk of the master's failure to take such precaution only when he knew it had not been taken or when in the ordinary discharge of his duty he must have acquired such knowledge. *Id.*

40. — **Incompetency or negligence of fellow servants.**—Where a railroad trucker assisted by his foreman in unloading bundles from a truck in a manner required by the foreman was injured by the foreman swinging his end of a bundle before the trucker was ready, and before it reasonably appeared so, there was no assumption of risk as to the foreman's negligence in swinging his end, as the nature of the act precluded knowledge or discovery thereof in time to have averted injury. *Cox v. St. Louis & S. F. R. Co.* (Sup.) 222 S. W. 964, reversing judgment (Civ. App.) *St. Louis & S. F. R. Co. v. Cox*, 159 S. W. 1042.

41. **Inexperienced or youthful employé.**—Where minor servant of railroad's receiver did not know of dangers of working on hand car under circumstances surrounding him at time he received his injuries, he did not assume the risk. *Chicago, R. I. & P. Ry. Co. v. Lopez* (Civ. App.) 209 S. W. 192.

42. **Obvious or latent dangers.**—If a railroad was negligent in furnishing to its section foreman and his men an untempered hammer, a defect which, in the exercise of ordinary care, would not have come to the foreman's knowledge, the road cannot escape liability on theory the foreman assumed the risk. *Hines v. Flinn* (Civ. App.) 222 S. W. 679.

43. **Notice to or knowledge of master.**—Where, after calling attention to possible danger, a servant, relying on his foreman's assurance of safety, proceeds to do work in a required manner, he cannot be charged with assumption of risk unless the danger is so obvious that an ordinarily prudent person would appreciate it, despite the assurance. *Cox v. St. Louis & S. F. R. Co.* (Sup.) 222 S. W. 964, reversing judgment (Civ. App.) *St. Louis & S. F. R. Co. v. Cox*, 159 S. W. 1042.

45. **Compliance with commands.**—In determining whether an engineer of a railroad wrecker, injured while complying with commands of his foreman, assumed the risk of injury because outriggers were not set out, the question is not whether the engineer used ordinary care in ascertaining whether outriggers were set out, but whether he had actual knowledge of the necessity for using them, or whether the omission was so plainly observable that he would be presumed to have known of it. *Houston Belt & T. Ry. Co. v. Christian* (Civ. App.) 209 S. W. 816.

A railroad employé who, under foreman's orders to so do, went on top of water tank to pour cinders into it to stop leaks, without knowledge of the defective condition of the tank, did not assume the risk of injury by the collapse of the tank so as to prevent recovery under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

48. **Concurrent negligence of master.**—In general.—A servant does not assume the risk of his master's negligence, nor is he required to anticipate such negligence. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 203 S. W. 1155.

An employee does not assume negligence of his employer as a risk ordinarily incident to his service. *Texas & N. O. R. Co. v. Gericke* (Com. App.) 231 S. W. 745.

49. — **Knowledge by servant of defect or danger.**—Employé assumes risk of normal dangers not attributable to employer's negligence, but does not assume risk from defect attributable to employer's negligence until aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

Under common-law doctrine of assumed risk, servant does not assume any risks or dangers arising from negligence of master of which he has no knowledge, but does assume risks caused by master's negligence of which he has prior knowledge. *Hines v. Bannon* (Civ. App.) 221 S. W. 684.

Where the employer was derelict in his duty to a brakeman in operating a dump car in a particular method, and thereby imposed an extraordinary hazard upon the brakeman, he did not as a matter of law assume the risk, unless he was specifically informed of the danger, or unless it was so open and obvious that he must necessarily have realized and comprehended it. *Schaff v. Morris* (Civ. App.) 227 S. W. 199.

53. **Sufficiency of evidence.**—**Knowledge of servant.**—Evidence held to support a finding that railroad's foreman, a master mechanic, had a knowledge superior to an employé as to whether a wire torn down by a wreck was a live wire. *Houston Belt & Terminal Ry. Co. v. Wolkarte* (Civ. App.) 197 S. W. 1023.

Evidence held to show that railroad employé, injured while working in roundhouse pit by reason of slippery condition of pit bottom, knew of such condition and realized

risk of slipping and falling by reason thereof in performance of his duties. *Schaff v. Hendrich* (Civ. App.) 207 S. W. 543.

In a railroad employé's action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries from collapse of a tank, evidence held sufficient to sustain the jury's finding that plaintiff in going on tank did not know of its dangerous and defective condition. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

In an action for an injury to a railroad bridge painter, evidence held to sustain the jury's finding that he did not know of the master's failure to have watch kept for approaching vehicles which would strike the scaffold. *Texas & N. O. R. Co. v. Gericke* (Com. App.) 231 S. W. 745.

54. — **Assumption of risk shown.**—In an action by a switchman jerked from a car by sudden application of brakes, evidence held to show that plaintiff had assumed the risk. *Southern Pac. Co. v. Miller* (Civ. App.) 207 S. W. 554.

55. — **Assumption of risk not shown.**—In an action for injuries to a railroad bridge painter knocked from a scaffold by a vehicle passing on the street below, evidence held sufficient to authorize a finding that his injuries were not the result of a risk that he had assumed. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

### Art. 6646. No assumed risk where safety appliance not provided.

**Operation and effect in general.**—In an action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries caused by the railroad's violation of the Ash Pan Act (U. S. Comp. St. § 8624), the railroad could not defend on the plea of contributory negligence, in view of Federal Employers' Liability Act, § 4 (U. S. Comp. St. § 8660), and Employers' Liability Act 1908, §§ 1-4 (U. S. Comp. St. §§ 8657-8660). *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

### Art. 6648. Liable for injury or death of employé.

#### I. CONSTITUTIONALITY, CONSTRUCTION, APPLICATION AND EFFECT OF STATUTE

1. **Constitutionality.**—Legislature of state, without unjustly discriminating, could impose on railroads penalty in fixed sum in cases of persons negligently killed who were not employés, and, as to employés, give right of action for damages actually sustained, and make persons and corporations other than those operating railroad liable for all damages by negligent killing. *Clay v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 201 S. W. 1072.

#### II. NATURE AND EXTENT OF LIABILITY IN GENERAL

6. **What law governs and interstate commerce.**—See *St. Louis Southwestern Ry. Co. v. Texas v. Smitha* (Sup.) 232 S. W. 494.

Railroad section hand, injured while assisting foreman of section crew in taking ties to stack near toolhouse, was not injured in interstate commerce, though branch road on which ties were afterwards used was employed by road in handling interstate freight. *Missouri, K. & T. Ry. Co. of Texas v. Watson* (Civ. App.) 195 S. W. 1177.

Congress intended by legislation on liability of railroads for injury to employés in interstate commerce to take exclusive control in order to make liability uniform throughout United States, and it is to be determined by provisions of legislation itself and general common law as administered by federal courts. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

A fireman on an interstate train assisting other employés in repairing a water spout at a tank where his engine must then take water was within his duties, and an injury while so engaged comes under the federal Liability Act. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149.

A railroad company in breaking up interstate trains at a junction point within the state to facilitate delivery of shipments to other points within the state is engaged in interstate commerce notwithstanding interstate cars were to be delivered within state or at terminal where trains were broken up. *Southern Pac. Co. v. Stephens* (Civ. App.) 201 S. W. 1076.

The operator of a hoist used to load rails on flat cars, after workmen had removed them from the ties and laid new rails, was engaged in repair of tracks, and, where the road operated in two states, was engaged in interstate commerce. *Hargrove v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 202 S. W. 188.

In view of the federal Safety Appliance Act of March 2, 1903, mere fact that car at moment of injury was not engaged in interstate commerce did not preclude recovery, where railroad was engaged in interstate commerce. *Texas & P. Ry. Co. v. Sprole* (Civ. App.) 202 S. W. 935.

In servant's action for injuries, due to violation of federal Safety Appliance Act of March 2, 1893, the master's liability was enforceable in the courts of Texas, without reference to the laws of Louisiana, in which state the tort occurred. *Id.*

Mere fact that car at time of injury was on special track used to carry freight to plant of a refining company did not relieve railroad of liability under the federal Safety Appliance Act of March 2, 1893, for a defective coupling causing the injury. *Id.*

Where lumber is loaded in a box car in one state and is shipped to another state to be used in the manufacture of doors for grain cars designed for the handling of interstate shipments of grain, an employé who unloaded the lumber in the latter state is engaged in "interstate commerce." *Gulf, C. & S. F. Ry. Co. v. Drennan* (Civ. App.) 204 S. W. 691.

A brakeman on an interstate train, injured while respotting local cars, which were necessarily dislocated when his train had to take a siding, was engaged in "interstate commerce," within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). *Texas & P. Ry. Co. v. Lester* (Civ. App.) 207 S. W. 555.

A brakeman, injured by defective coupler of a car of an interstate railway company, is within the protection of the federal Safety Appliance Law (U. S. Comp. St. § 8606), though not at the time engaged in interstate service. *Id.*

Act Cong. Feb. 17, 1911 (U. S. Comp. St. §§ 8630-8639), providing for official inspection of locomotives engaged in interstate commerce under rules of Interstate Commerce Commission, did not change railroad's legal duty to exercise ordinary care to keep its machinery in reasonably safe condition, so that the fact that an appliance is not condemned upon inspection is not conclusive on question of whether it is a safe appliance. *Lancaster & Wight v. Allen* (Civ. App.) 207 S. W. 984.

In action for death of fireman engaged in interstate commerce, Act Cong. Feb. 17, 1911 (U. S. Comp. St. §§ 8630-8639), to promote the safety of employes and travelers by compelling common carriers to equip their locomotives with safe and suitable boilers, and section 2 of that act, as amended by Act Cong. March 4, 1915 (U. S. Comp. St. §§ 8639a-8639d), and the regulations of the Interstate Commerce Commission, constitute the law of the case. *Id.*

One engaged in the initial step of a switching operation, which would start cars upon their return trip to a place in another state to be again loaded, was engaged in interstate commerce, and the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) was applicable, where he was injured while so engaged. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

Employé, who was handling trunks, some of which had come on a direct train from Louisiana to Texas, held injured in "interstate commerce," so that the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) controlled. *Hines v. Wicks* (Civ. App.) 220 S. W. 531.

A trucker injured in unloading freight shipped from another state is employed by a carrier in "interstate commerce," and liability therefor is governed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). *Cox v. St. Louis & S. F. R. Co.* (Sup.) 222 S. W. 964, reversing judgment (Civ. App.) *St. Louis & S. F. R. Co. v. Cox*, 159 S. W. 1042.

Under federal Employers' Liability Act, § 2 (U. S. Comp. St. § 8658), a railroad employé in a territory is within the provisions of the act, though his employment was not in interstate commerce or in commerce between the territory and a state. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472.

An interstate carrier's shopman, crushed between cars which he was chaining together, because of the absence of a drawhead, when a switch engine, coming onto the siding suddenly pushed the cars together, held to come within the Safety Appliance Act of Congress (U. S. Comp. St. §§ 8605-8612) as a matter of law. *Wight v. Callicut* (Civ. App.) 225 S. W. 389.

7. **Relation of parties—In general.**—That plaintiff has procured employment by false and fraudulent statements contained in his application for employment is no defense to an action against his employer for injuries. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 203 S. W. 1155.

Where the state owned and operated a railroad under Laws 30th Leg. c. 74; Laws 31st Leg. (2d Ex. Sess.) c. 24; Laws 33d Leg. c. 139, arts. 6745a-6745f, and employed labor, held that the state occupies to such employes the relations of an ordinary employer; and, where an employé was injured through the negligence of agents having supervision and management of the road, the state is liable, though it cannot be sued without commission. *State v. Elliott* (Civ. App.) 212 S. W. 695.

In action against railroad receivers for injuries to an employé, assigned error based on refusal to instruct a verdict in favor of the receiver upon the ground that the liability is against the Director General of Railroads will be overruled. *Lancaster v. Keebler* (Civ. App.) 217 S. W. 1117.

During the period of government control of railroads under the Federal Control Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p) relation of master and servant did not exist between an employé and the railroad company, and the company was not liable for injury to employé sustained during such a period. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

In a servant's action for injuries on a railroad under federal control, it was error to deny a motion to dismiss receiver of the railroad, so that the case could be prosecuted against the Director General alone, under Order No. 50, Oct. 28, 1918, and Act Cong. March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p). *Baker v. Bell* (Civ. App.) 219 S. W. 245.

Whether action for injury to railroad employee from operation of a car during government control should be in name against the company, under Federal Control Act, § 10 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¼j), or against the Director General under his General Orders Nos. 50 and 50a, action is in effect against the government, and there is no individual liability of the company. *Hines v. Collins* (Civ. App.) 227 S. W. 332.

It is not important whether the nominal defendant, in action for injury to railroad employee during federal control, was the company or the Director General; he being in court, and the litigation being conducted by the proper government representatives. *Id.*

A judgment against receivers of a railroad for the death of an employee during the time the railway was operated by the federal government through the Director General was erroneous. *Lancaster v. Morgan* (Civ. App.) 227 S. W. 524.

10. — **Volunteers in general.**—Station agent of one railroad injured in the box car of another in discharge of his duty as agent of the first to check a shipment of iron being delivered to his railroad by the other, held not an intruder, meddler, stranger, or mere volunteer in the work of unloading the other railroad's car. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

11. — **Acts done under employment or by invitation of master's servants.**—Employé of railroad company, injured while riding upon track in a motorcycle by invitation of another employé after working hours, motorcycle being run down by freight train, held a "trespasser." *Frick v. International & G. N. Ry. Co.* (Civ. App.) 207 S. W. 198.

12. — **Agreement between railroads for joint use of yard.**—Where two intersecting railroads erected an interlocking plant for their joint use, the one, knowing that servants of the other would use the plant, was under the same duty to keep it in a reasonably safe condition for the other's employés as was the other itself. *Missouri, K. & T. Ry. Co. of Texas v. Grimes* (Civ. App.) 196 S. W. 691.

13. — **Commencement, suspension or termination of relation.**—Effect of government control, see note 7, ante.

Where an employer leases or hires his employés to another without their knowledge or acquiescence in the change of relationship, the original employer is not thereby relieved from liability for injuries sustained by the servant in the course of his employment. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472.

14. **Scope of employment—In general.**—Master's obligation to exercise ordinary care to provide reasonably safe premises can be invoked as basis for liability for injury to servant only when the injury is received in the line of the servant's duty. *Houston Belt & Terminal Ry. Co. v. Stephens*, 109 Tex. 185, 203 S. W. 41.

16. **Care required in general.**—A master must exercise due care to furnish a servant a reasonably safe place to work, and if his negligence renders such place unsafe, with resulting injury to servant, master is liable, if injury is such as under circumstances might reasonably have been foreseen as natural, probable, and proximate result of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Com. App.) 209 S. W. 399.

18. **Medical attendance on injured employé.**—Defendant railway, which deducted certain per cent. from employé's wages turning it over to hospital association, held not liable for damages to employé resulting from refusal of association to give medical treatment for injuries. *Davis v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 196 S. W. 603.

Railway Employés' Hospital Association, formed to provide medical and surgical treatment for its members, which include all the employés of the Railway Company, held not an insurance company, but a mutual benefit association, and its contracts with its several members cannot be regarded or construed as contracts of insurance. *International & G. N. Ry. Employés' Hospital Ass'n v. Bell* (Civ. App.) 224 S. W. 309.

A rule of Railway Employés' Hospital Association held not to authorize the treatment of a member away from the line of the railway, or by other than one of the physicians of the association, and a member who was suddenly taken sick in St. Louis, Mo., while in the performance of his duties, was not entitled to receive money expended for medical services, although under his contract of employment with the railroad he was required to pay monthly dues to the association. *Id.*

19. **Cause of injury—In general.**—"Proximate cause" incorporates in it such anticipation of result as ought, from the circumstances, to have been foreseen as natural consequences of a negligent act; and if a negligent act produces an injury, and more serious injury naturally flows from the negligence, without any intervening independent cause, those consequences are probable and ought to be foreseen, and are chargeable to the negligence. *Collins v. Pecos & N. T. Ry. Co.* (Com. App.) 212 S. W. 477.

Test as to whether or not act or omission amounting to negligence is proximate cause of injury is whether or not injury is natural or probable consequence of such act or omission, and whether or not injury of such character should reasonably have been foreseen as consequence, in light of circumstances. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

If it required two agencies to produce the injury, or if both contributed thereto as concurrent forces, the presence and existence of one will not exculpate the other, because it would still be the efficient cause of the injury. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

20. — **Acts or omissions of third persons.**—In an action by a railroad fireman injured in a collision when the engine on which he was working passed through an open switch, where the sole basis for liability was the negligence of the engineer in not discovering that the switch was open, it is immaterial that switch was changed by an unauthorized person. *Lancaster v. Mays* (Civ. App.) 207 S. W. 676.

Where it was the duty of an employer to guard an engine standing with steam up on a side track, and performance of such duty would have prevented a trespasser from moving it, so that it ran upon the main track and killed an employee, the failure to perform such duty was a proximate cause of the accident. *Lancaster v. Morgan* (Civ. App.) 227 S. W. 524.

Where express messengers who were in fact joint employees of the express company and the railroad company were assisted by a sole employee of the express company at a time when a trunk was thrown out of a car and injured an employee of the railroad company, an instruction allowing recovery against the railroad company though the trunk was thrown by the assistant, who was solely an employee of the express company, was improper. *American Express Co. v. Chandler* (Com. App.) 231 S. W. 1085.

21. **Accidental or improbable injury—In general.**—Negligence is essential to liability for unintentional injury. *Southern Pac. Co. v. Berkshire* (Civ. App.) 207 S. W. 323.

22. — **Anticipation of consequences.**—Action of switching foreman in releasing coupling, without warning, as switchman was stepping from one car to another at point of separation, was negligence proximately causing the injuries to switchman from falling, if foreman, in exercise of ordinary care, could have reasonably anticipated that the switchman might be at the point of separation. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Civ. App.) 203 S. W. 1155.

The action of the foreman was negligent if, in the exercise of ordinary care, the foreman might reasonably have foreseen that when he uncoupled the cars, switchman might be in the act of stepping from one car to another, and it was not necessary, for the act to be negligent, that the foreman should have foreseen that the switchman would be so doing. *Id.*

Where there is reason to anticipate some injury may result to the servant, the master must exercise such care as will prevent the injury, and a failure to do so is actionable negligence, if injury follows the breach of duty. *Collins v. Pecos & N. T. Ry. Co.* (Com. App.) 212 S. W. 477.

Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation, but to render negligence actionable it must be incorporated into some injury. *Id.*

Where an engine, containing defects calculated to release the brakes, was left with steam up and unblocked on a down grade leading to the main track where trains were frequently passing, and it ran upon the main track and collided with another engine, the jury was justified in finding that the employer should have foreseen the consequences resulting from the movement of the engine and owed employees working on the main track the duty to guard the engine. *Lancaster v. Morgan* (Civ. App.) 227 S. W. 524.

23. **Joint liability of employers and others.**—In a railroad employé's action for injuries due to an alleged defective guard rail on a Pullman coach, the Pullman company and the railroad company hauling the Pullman coach, if liable at all for the injury, were jointly liable. *Blackman v. San Antonio & A. P. Ry. Co.* (Civ. App.) 200 S. W. 412.

Where the joint station agent of two railroads was injured while helping the employés of the second road unload freight from a box car, through the negligence only of a brakeman of the second road, the first road was not liable for the injuries, and judgment in the agent's suit against both roads was properly rendered in his favor against the second only. *Houston, E. & W. T. Ry. Co. v. Jackman* (Civ. App.) 217 S. W. 410.

Where an express messenger handled baggage as well as express matter, both the express company and the railroad company held liable to an employee of the railroad company for injury caused by the negligence of the messenger in throwing a trunk out of a car, regardless of whether it was baggage or express. *American Express Co. v. Chandler* (Com. App.) 231 S. W. 1085.

25. **Contracts limiting or releasing liability.**—See notes to art. 6651.

### III. APPLIANCES AND PLACES FOR WORK

27. **Nature of master's duty and liability and care required in general—Appliances.**—A master is not required to provide machinery for handling heavy barrels to supplement aged employé's failing strength, where employé has been doing that work for more than two years without injury. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

In the absence of a violation of some other statute, the common carrier's liability under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injury or death by reason of defect in equipment depends on whether defect was due to carrier's negligence, but where statute requires common carrier to furnish certain equipment or to furnish equipment in a certain condition, and death or injury is due to a violation thereof, the violation fixes liability for the consequent damages. *Lancaster & Wight v. Allen*, 110 Tex. 213, 217 S. W. 1032.

28. — **Places for work.**—The state, as an employer operating state's railroad, is bound to furnish employés with a safe place in which to work. *State v. Elliott* (Civ. App.) 212 S. W. 695.

It is the employer's duty to use ordinary care to provide employé a safe working place. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

This rule has no application where the servant is engaged for the very purpose of repairing and making a dangerous place safe. *Id.*

A railroad employé who, under orders of his foreman, went upon top of a water tank to pour cinders into tank to stop a leak, could recover for injuries sustained on collapse of tank because of its defective condition, on theory that employer was negligent in failing to provide safe place in which to work; the rule that employer is not required to use ordinary care to provide a safe working place where servant is engaged for the very purpose of repairing and making a dangerous place safe being inapplicable to such case. *Id.*

The employer is required to furnish a reasonably safe place in which to work. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

33. **Delegation of duty.**—It is the duty of an employer to take necessary reasonable precautions to make the servant's place of work reasonably safe and such duty is non-delegable. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

A master is not liable for injuries to a servant from a selection from an adequate stock of suitable appliances of an appliance which was unsuitable for the purpose for which he intended to use it if such unsuitableness was a result of a defect which could not have been detected and provided against on the part of the master or of its being too light for the use for which it was intended. *Roberg v. Houston & T. C. R. Co.* (Civ. App.) 220 S. W. 790.

A railroad furnishing a wrecking crew with chains of various and ample strength is not liable under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the

death of an experienced foreman from breaking of a chain of insufficient strength which he selected. *Id.*

The master's duty to use ordinary care to furnish reasonably safe appliances includes the duty of inspection, and such duty is nondelegable. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Com. App.) 222 S. W. 198, affirming judgment (Civ. App.) 180 S. W. 300.

If there was nothing to indicate to injured section foreman that the temper of a maul has been changed since it was furnished him, or that he knew the dangerous condition in which it was because not properly tempered, he was not under duty to send it to the blacksmith shop to be properly tempered, as required by the railroad's rules. *Hines v. Flinn* (Civ. App.) 222 S. W. 679.

The duty of furnishing a safe and suitable maul or sledge for use in his work by its section foreman is a nondelegable duty of a railroad, of which it cannot relieve itself by charging the foreman with its performance. *Id.*

36. **Appliances or places owned, controlled or provided by third persons.**—The general duty of the master to furnish only such equipment and appliances as are reasonably safe in the particular use applies to the acceptance for transportation of cars coming to one railroad from another. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

37. **Defects in tools, appliances and places for work in general.**—A railroad owes to a carpenter, who fell off of a bridge because the head of a spike which he was attempting to pull broke off, no duty not to use secondhand spikes. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 198 S. W. 598.

A railroad company employing a night watchman to patrol a roundhouse owes him the duty to keep a drop pit in the roundhouse covered or to warn him thereof. *Texas & P. Ry. Co. v. Duncan* (Civ. App.) 199 S. W. 1177.

39. **Locomotives.**—Under U. S. Comp. St. § 8631, making it unlawful to use a locomotive in moving interstate traffic unless the boiler and appurtenances are in proper condition, the receivers of a railroad are liable to the widow of an engineer killed by a boiler explosion due to defect in the bolts and stays designed to sustain the crown sheet. *Lancaster v. Carroll* (Civ. App.) 211 S. W. 797.

Under Act Cong. Feb. 17, 1911 (U. S. Comp. St. §§ 8630-8639), as amended by Act Cong. March 4, 1915 (U. S. Comp. St. §§ 8639a-8639d), and rules and regulations of the Interstate Commerce Commission thereunder, railroad was not negligent where the flanges on the wheel were in accordance with such rules; the question of whether railroad exercised ordinary care to keep flanges safe for operation of locomotive not being the test of negligence in such case. *Lancaster & Wight v. Allen*, 110 Tex. 213, 217 S. W. 1032.

Where an engine, with defects, calculated to release the brakes was left with steam up and unblocked on a down grade leading to the main line track where trains were frequently passing, and that it ran upon such track and collided with another engine, killing an employee, the jury had a right to find negligence in leaving the engine unattended under such circumstances. *Lancaster v. Morgan* (Civ. App.) 227 S. W. 524.

Safety Appliance Act (U. S. Comp. St. §§ 8617-8623), requiring an engine to be equipped with an ash pan which can be dumped or emptied or cleaned without the necessity of an employee going under the locomotive, held to protect an employee not only while he is actually under the locomotive adjusting the pan, but also in each and every step necessary to accomplish that purpose. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

40. **Cars—In general.**—Negligence cannot be predicated upon railroad's failure to make car brake beam safe for a switchman to step on as the car approaches him standing on track in order to ride the car while making a coupling. *Freeman v. Garretts*, 109 Tex. 78, 196 S. W. 506.

An engine and two wrecking cars on one of which plaintiff switchman was riding when injured held not a "train" within Act Cong. March 2, 1893, § 1 (U. S. Comp. St. § 8605), as amended by Act Cong. March 2, 1903, § 1 (U. S. Comp. St. § 8613), so that failure of the railroad to have the air brakes on the cars coupled up to enable the engineer to control the cars from the engine was negligence on the railroad's part as a matter of law. *Baker v. Grace* (Civ. App.) 213 S. W. 299.

49. **Platforms and ladders.**—That railroad took away steps which were convenient and direct passage for its agent to freight platform, and left known safe routes of travel, did not charge it with negligence because such other routes might have been inconvenient to agent and have required more of his time in performance of his duties. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Com. App.) 209 S. W. 399.

54. **Inspection and test—Things to be inspected.**—A railroad has no duty to inspect spikes for defects as to one who fell off a bridge on account of the head coming off of a spike he was attempting to pull in repairing or constructing a bridge. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 198 S. W. 598.

The rule requiring master to furnish servant safe place in which to work does not apply to work in a box car unloading lumber therefrom, it being unreasonable to expect master to inspect every car of lumber before the unloading thereof. *Gulf, C. & S. F. Ry. Co. v. Drennan* (Civ. App.) 204 S. W. 691.

A standard make hand car, purchased from a reputable manufacturer and furnished to a section foreman, is not a simple tool or appliance, and its purchase is not the exercise of ordinary care, relieving the railroad of the duty of inspection to ascertain its fitness for use, depending on a proper adjustment of the cogwheels. *St. Louis Southwestern Ry. Co. of Texas v. Ewing* (Com. App.) 222 S. W. 198, affirming judgment (Civ. App.) 180 S. W. 300.

55. — **Foreign cars.**—A railroad is bound to inspect the cars of another railroad used on its road just as it would inspect its own cars, and owes such duty as master, and is responsible for the consequences of such defects as would be discovered by ordinary inspection. *Rowe v. Colorado & S. R. Co.* (Civ. App.) 205 S. W. 731.

The general duty of the master to furnish only such equipment and appliances as are reasonably safe in the particular use applies to the acceptance for transportation of cars coming to one railroad from another, and is discharged if the accepting railroad exercises ordinary care to inspect the cars, not being liable for latent defects. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

57. — **Time and opportunity for making.**—Without proof of master's actual knowledge of the existence of a defect in appliances, etc., such defect must have existed for such length of time as to raise the presumption of negligence in failing to discover it by reasonable inspection. *Houston E. & W. T. Ry. Co. v. Hickman* (Civ. App.) 207 S. W. 550.

61. **Knowledge by master of defect or danger.**—Leakage of gas from car containing gasoline held insufficient to put railroad's employes on notice contents had been mislabeled unrefined naphtha, and that car contained casing head gasoline, to make cause of action for negligence in favor of refinery company's employé requested to remedy leak, particularly where explosion would not have occurred if employé had not loosened dome cap. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

62. **Repairs.**—Employment contract held not such repair work as invokes the doctrine that when the servant is engaged in making repairs to machinery in unsafe condition the master is not required to provide a safe place to work. *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 881.

Refinery company's employé having been employed by railroad as expert to remedy a dangerous leaky condition in an oil car, general rule imposing on master duty to furnish a safe place to work was not applicable. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

64. **Proximate cause of injury—Appliances in general.**—Where a railroad furnished a wrecking crew with chains of ample strength to be used for various purposes, its failure to inspect a chain of insufficient strength selected by the foreman, the breaking of which caused his death, was not the proximate cause of his injury. *Roberg v. Houston & T. C. R. Co.* (Civ. App.) 220 S. W. 790.

65. — **Locomotives.**—Where a roundhouse hostler slipped in stepping on water and grease on floor of engine cab while descending to ground to go under engine to close ash pan, the railroad's failure to keep ash pan in repair, in violation of Ash Pan Act (U. S. Comp. St. § 8624), was the proximate cause of the injury, notwithstanding that he would not have fallen but for the water and grease on the floor of the cab. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

#### IV. METHODS OF WORK, RULES AND ORDERS

72. **Customary methods.**—In a railway repair man's action for injury, due to being struck by an engine while at work near a track in a train shed, where there was evidence that it was customary to signal or give warning of the approach of locomotives, defendant owed plaintiff the duty of giving such warning. *Texas & P. Ry. Co. v. McGraw* (Civ. App.) 207 S. W. 559.

75. **Care required in operating locomotives, trains and cars—Employés riding on locomotives, trains, or cars.**—Where a brakeman, whose overalls were being wound around a carwheel, gave the engineer signal to stop, but the engineer disregarded it until the brakeman called out to stop, which was too late, so that the brakeman's leg was injured, the railroad was liable for such negligence of the engineer; the brakeman not having been negligent himself. *Hines v. Douglas* (Civ. App.) 225 S. W. 211.

Failure to stop a work train, as was customary, to permit laborers to alight at their boarding place, causing one to jump from the train after it had slowed down, held not negligence per se. *Panhandle & S. F. Ry. Co. v. Kornegay* (Com. App.) 227 S. W. 1100.

76. — **Employés on or near tracks.**—That a flagman's duties in guarding a crossing require him to watch approaching engines and cars does not absolve the railroad company from its duty to exercise ordinary care to avoid striking him with an approaching engine; the flagman being entitled to rely upon the exercise of such care by his employer. *Pecos & N. T. Ry. Co. v. Suitor*, 110 Tex. 250, 218 S. W. 1034.

The moving of an open dump car with its side and bottom overhanging and forming a trap in which a brakeman standing at the usual distance from the track and intent upon his duties was caught and injured when it closed by gravity, instead of operating the car by air, as intended by its manufacturer, constituted actionable negligence, whether or not it constituted a violation of the duty to furnish a safe place to work. *Schaff v. Morris* (Civ. App.) 227 S. W. 199.

That the engineer of a passenger train going 25 to 30 miles an hour when 100 yards from a freight brakeman, saw him alight from the freight engine, did not impose upon the engineer the duty to reduce his speed. *Sorrell v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 230 S. W. 768.

Where an experienced freight brakeman was struck when he tried to jump across the main track ahead of a passenger train, which was visible for two miles, while his train was on a siding with signals indicating clear track, the engineer's failure to signal was not available as a ground of negligence. *Id.*

The engineer of a passenger train going 25 to 30 miles an hour and visible for two miles while approaching a siding occupied by a waiting freight train, with signals indicating clear track, is not bound to anticipate that members of the freight crew will be on the track so as to impose on him the duty to reduce his speed. *Id.*

**80. Proximate cause of injury.**—Where, in process of switching, string of cars is bumped against lumber box car changing position of lumber, injury to employé falling into open space formed by the lumber sliding is not proximately caused by the negligent bumping. *Gulf, C. & S. F. Ry. Co. v. Drennan* (Civ. App.) 204 S. W. 691.

Where foreman directed cars to be switched onto a clear track, but instead they were switched onto a different track, where they bumped into standing cars, injuring a switchman operating a brake, the efficient cause of the injury was the impact of the cars and not the switching onto the wrong track. *Baker v. Beattie* (Civ. App.) 222 S. W. 658.

Where a railroad laborer knew that a work train was not going to stop as was customary but only to slow down, and alighted when conductor signaled the engineer to speed up, the failure to stop was not the proximate cause of his injuries in alighting. *Panhandle & S. F. Ry. Co. v. Kornegay* (Com. App.) 227 S. W. 1100.

#### V. WARNING AND INSTRUCTING SERVANT

**94. Obvious or latent dangers.**—In an action against a railroad for a fall from a bridge by reason of becoming overbalanced by the breaking off of the head of a spike which plaintiff was attempting to pull, defendant owed no duty to instruct plaintiff of the danger of such work. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 198 S. W. 598.

**95. Dangers from extraneous sources.**—Where the head brakeman threatened by armed trespassers returned to the rear of the train and got his pistol in the presence of the rear brakeman, who with his pistol entered the car where the trespassers were and was shot after they warned him to keep out, the failure of the head brakeman to notify him that the trespassers were armed was not negligence for which the railroad company was liable. *Southern Pac. Co. v. Stevenson* (Civ. App.) 218 S. W. 151.

**96. Sufficiency of warnings.**—Telling a crew fighting a fire "not to get too hot, not to stay there if they got too tired, and if they got too hot or tired to get out and let others relieve them," is a sufficient warning of the danger of becoming overheated. *Gulf, C. & S. F. Ry. Co. v. Bennett*, 110 Tex. 262, 219 S. W. 197.

**97. Proximate cause of injury.**—Any negligence in exposing an employé to danger of explosion from gasoline in a car in which he was requested to remedy a leak without informing him of danger by stating car contained unrefined naphtha could properly have been found a proximate cause of injury to employé when after loosening dome-cap on car gas and gasoline escaped and caught fire. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

#### VI. FELLOW SERVANTS

**100. Duty to provide adequate number.**—If railroad's foreman ordered plaintiff, assisting in lowering pipe into well by rope passing over a drum, to slacken rope, so that plaintiff's strength became inadequate, and he was injured, railroad was chargeable with actionable negligence. *Stephenville, N. & S. T. Ry. Co. v. Shelton* (Com. App.) 208 S. W. 915.

A railroad was not liable for injuries to a "fire knocker," resulting from over-exertion in closing an ash pan, by reason of its negligence in not keeping it in proper repair so that it would work easily, where the employé knew that the pan was out of order and hard to open and close, and was neither directed nor expected to overexert himself by attempting to close the pan himself without aid. *Hines v. Ross* (Civ. App.) 230 S. W. 1066.

**101. Competency—Duty and liability in general.**—It is the duty of a railroad to furnish an engineer of at least ordinary skill to operate a crane on a wrecker. *Texas & N. O. R. Co. v. Glass* (Civ. App.) 201 S. W. 730.

**107. Nature of act and performance of duties of master.**—In general.—Where it was the duty of wrecking foreman to order his crew to attach a cable to a box car, but of the men when they saw a loose roof to report it to him or remove it before a box car was raised by the cable, the failure of the crew to do either, was a breach of duty of the servants and not a negligent exercise of superintendence by the foreman; and, where the foreman was injured by a loose roof falling off of a box car being uprighted, by reason of such breach of duty, he could recover damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). *Wight v. Morgan* (Civ. App.) 220 S. W. 295.

**108. — Scope of employment.**—Where one servant is injured by another servant while the latter is in direct discharge of a duty, though in its performance making use of instrumentalities and using more force than expressly authorized or instructed, the master cannot escape liability on the ground of abuse of authority by the latter servant. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

Where Pullman porter remaining on his car under express orders was injured while being ejected by company's watchmen under inconsistent orders, it was not necessary to liability that it should have authorized specific acts of watchmen in carrying pistols or shooting plaintiff, if watchmen were acting within scope of their duties in putting porter off car. *Id.*

If defendant railway's guard, who had authority to detain persons going into and out of yards inclosing shop grounds of defendant railway, wrongfully detained and shot plaintiff, defendant's employé, defendant would be liable, although the particular act and detention was unauthorized. *Campbell v. Lancaster* (Civ. App.) 209 S. W. 269.

**111. Vice-principals and other representatives of master.**—Nature of act or omission, and performance of duties of master.—The selection by a railroad pumpman of a rope insufficient for hoisting timbers to repair a water spout, which rope broke causing in-



jury to a fireman, was negligence of the company. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149.

117½. **Proximate cause of injury.**—Negligence of railroad employé in entering a tank car with a torch, causing an explosion and a fire, cannot be regarded as the proximate cause of the death of another servant who was injured and overheated while subsequently fighting the fire. *Gulf, C. & S. F. Ry. Co. v. Bennett*, 110 Tex. 262, 219 S. W. 197.

#### IX. ACTIONS

126. **Parties entitled to recover.**—A minor daughter who married a few months after the death of her father, a locomotive fireman, is, where the railroad is liable under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), entitled to some damages at least up to the time of her marriage, and the denial of any recovery is error. *Davis v. Wight* (Civ. App.) 218 S. W. 26.

When a child reaches its majority, parent's legal duty to support it ceases, and, in the absence of proof, it cannot be presumed that such support will be continued so as to justify recovery under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for loss thereof through the parent's death. *Hines v. Walker* (Civ. App.) 225 S. W. 837.

130. **Weight and sufficiency of evidence in general—Existence of relation.**—Evidence held sufficient to support finding that railway conductor was defendant's employé and was engaged in the performance of the duties required of him by defendant when injured. *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247.

In employé's action for injuries, brought against several railroad companies as partners in operation of line where injury occurred, evidence held insufficient to show existence of relationship of partners between two of the railroads. *Chicago, R. I. & G. Ry. Co. v. Trout* (Com. App.) 206 S. W. 829.

In an action for injuries to a refinery company's employé endeavoring to stop a leak in a tank car at request of railroad's yardmaster, evidence held sufficient prima facie to sustain finding of relationship of master and servant between plaintiff and railroad. *Gulf, C. & S. F. Ry. Co. v. Clement* (Civ. App.) 220 S. W. 407.

131. — **Scope of employment.**—In an action for the death of a section foreman on the track with a motor at midnight, evidence held to sustain a finding that he was not a trespasser. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

From the fact that deceased was division superintendent of the road, it could be found he was acting within the scope of his authority in going between cars where switchmen were replacing drawhead, which had fallen out, separating a train. *Texas & P. Ry. Co. v. Howard* (Civ. App.) 200 S. W. 1159.

132. — **As to particular facts.**—In action under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for injuries to employee, evidence held to warrant finding that the injuries received caused paralysis. *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

Evidence as to the mental condition of an injured employee after he received his injury held sufficient to sustain a finding by the jury that the employee was mentally incompetent to make a settlement with the employer for the injuries received by him. *Smith v. Atchison, T. & S. F. Ry.* (Com. App.) 232 S. W. 290.

133. **Evidence as to cause of injury—In general.**—In an action for injuries to a railroad bridge painter knocked from the scaffold by a vehicle passing on the street below, evidence held to warrant a finding that defendant's negligence in failing to keep a lookout for vehicles was the proximate cause of plaintiff's injuries. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

134. — **Defective or dangerous appliances.**—Evidence in servant's action for injury from fall of trip hammer while not being operated, held sufficient to raise issue of it being broken or worn. *Southern Pac. Co. v. De La Cruz* (Civ. App.) 201 S. W. 423.

In employé's suit for injury in operating lever controlling interlocking plant at junction of tracks, evidence held sufficient to sustain jury's finding that failure of the lever to work was proximate cause of injury. *Houston E. & W. T. Ry. Co. v. Hickman* (Civ. App.) 207 S. W. 550.

135. — **Defects in cars and locomotives.**—Evidence held to warrant finding that the negligence of the railroad in permitting a defect in a locomotive step to exist was the proximate cause of the injury. *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 881.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and the Federal Safety Appliance Act (U. S. Comp. St. §§ 8605-8623) evidence held to sustain a finding that a defective coupler was the proximate cause of injury. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

138. — **Warnings and signals.**—In a suit by a section hand, ruptured while lifting a motor hand car, evidence held to warrant a finding that the proximate cause of his injury was the negligence of an assistant suddenly letting go of the car without warning. *St. Louis Southwestern Ry. Co. of Texas v. Lindsey* (Civ. App.) 209 S. W. 182.

Evidence held to show that permanent injury to a section foreman, poisoned by handling creosote ties, was the proximate result of negligence in failing to warn him of the danger. *Collins v. Pecos & N. T. Ry. Co.* (Com. App.) 212 S. W. 477.

Evidence held sufficient to support a finding that the death of a flagman run over by a switch engine was proximately caused by the fireman's negligence, either in failing to give due warning or to discover the flagman's danger in time to avert injury. *Pecos & N. T. Ry. Co. v. Suitor*, 110 Tex. 250, 213 S. W. 1034.

142. **Evidence as to master's negligence—Defective or dangerous places.**—Evidence in action for injury to station agent, held not to show railroad's negligence in not covering ditch or taking proper means to prevent any one from falling or stepping into it. *Missouri, K. & T. Ry. Co. of Texas v. Graham* (Com. App.) 209 S. W. 399.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for injuries from collapse of water tank while he was on top pouring cinders into it to stop a leak, evidence held to support a finding of negligence in failing to provide him with a safe place in which to work. *Houston & T. C. R. Co. v. Long* (Civ. App.) 219 S. W. 212.

143. — **Cars and locomotives.**—Plaintiff's testimony that he made repeated attempts and failed to open a coupler knuckle, by pulling and jerking the lever or by pulling it with his hands, shows violation of the federal Safety Appliance Act of March 2, 1893. *Texas & P. Ry. Co. v. Sprole* (Civ. App.) 202 S. W. 985.

In an action for injuries to a locomotive fireman by slipping on the oil tank of the locomotive, a finding that it was not "usual and customary" for oil and grease to be on such engines held sustained by the evidence. *Gulf, C. & S. F. Ry. Co. v. Crow* (Civ. App.) 220 S. W. 237.

In an action by a locomotive fireman for injuries from slipping on grease on the oil tank, evidence held sufficient to sustain a finding of negligence on the part of the railroad. *Id.*

In an action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for death of a brakeman when a car ahead of him dumped coal on the track, evidence held sufficient to raise the issue of accident. *Colorado & S. Ry. Co. v. Rowe* (Civ. App.) 224 S. W. 928.

144. — **Tracks and roadbeds.**—In an action by a locomotive engineer for injuries in a derailment on a newly made roadbed, evidence held to support a finding of negligence by the jury. *Wight v. Bell* (Civ. App.) 218 S. W. 532.

145. — **Operation of trains, cars and locomotives.**—In an action for death of one on track with a motor at midnight, evidence held to sustain a finding that the track was not so curved that the headlight did not show deceased, and that the trainmen should have seen deceased or his lantern in time to stop. *Baker v. Loftin* (Civ. App.) 198 S. W. 159.

Evidence held to support finding of want of care of engineer who moved cars against standing cars, where train had separated, killing employé assisting in replacing drawhead. *Texas & P. Ry. Co. v. Howard* (Civ. App.) 200 S. W. 1159.

Evidence in action for killing of head brakeman of freight train on passing track, held to support finding of negligence in backing train. *Schaff v. Scoggin* (Civ. App.) 202 S. W. 758.

In a switchman's action for injuries when he fell from a wrecking car, evidence as to the engineer's negligence in speeding up the engine and train with a jerk that threw plaintiff off held sufficient to sustain verdict for plaintiff. *Baker v. Grace* (Civ. App.) 213 S. W. 299.

Evidence held to support a finding that there was a failure on the part of those operating a switch engine to exercise ordinary care to prevent injury to the flagman struck by the engine, which approached without warning. *Pecos & N. T. Ry. Co. v. Sultor*, 110 Tex. 250, 218 S. W. 1034.

Evidence that poles on a car in a work train on which a workman was riding when injured were held in place on one side by short standards only, though long ones had been furnished for use after the car was loaded, and that the train was moving at a high speed, considering the roughness of the track, when one of the poles rolled off, held to support a finding of negligence in loading the car and moving the train. *Chicago, R. I. & G. Ry. Co. v. Trout* (Civ. App.) 224 S. W. 472.

In an action for a railroad employé's death in a derailment, evidence held to justify jury in finding that the accident would not have occurred but for defendant's negligence in running the train at an unsafe speed and laying the track improperly. *Hines v. Kelley* (Civ. App.) 226 S. W. 493.

146. — **Negligence in giving orders.**—Evidence held to sustain finding that railroad receiver's foreman of section hands was guilty of negligence in ordering plaintiff, a minor, to ride on a hand car overcrowded with eight other men. *Chicago, R. I. & P. Ry. Co. v. Lopez* (Civ. App.) 209 S. W. 192.

147. — **Knowledge by master of defect or danger.**—In an action against a railroad for injuries from fall from a bridge by becoming overbalanced while pulling a spike, the head of which broke off, evidence held insufficient to warrant a finding that defendant had notice of the defect. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 198 S. W. 598.

149. — **Warnings and instructions.**—In a railroad employé's action for injuries by being knocked from a scaffold by a passing wagon while painting a bridge over a street, evidence held to authorize a finding that the foreman, keeping lookout for vehicles, was negligent in leaving the bridge without notifying plaintiff or his fellow workmen. *Texas & N. O. R. Co. v. Gericke* (Civ. App.) 214 S. W. 668.

156. **Damages.**—That the servant, after his injuries, showed a mental condition which he described as "the blues," was an element of damages allowable. *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614.

Mental suffering, which an injured person experiences from brooding over and regarding his crippled condition, is not too remote, but is a proper subject for damages in a servant's action for injuries. *Id.*

In railroad servant's action for injuries under federal Employers' Liability Act, court properly submitted as element of damage pain of body and mind, though no direct

evidence of pain of mind was offered. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and the federal Safety Appliance Act (U. S. Comp. St. §§ 8605-8623) for death of a servant, damages were properly awarded for conscious suffering prior to death, where there was evidence that deceased lived an hour or two after being injured and was conscious and was suffering. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

Under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), damages recoverable by deceased's children are restricted to the benefits they might have expected to receive during minority, unless proof is made of unusual facts showing that child might reasonably expect support after reaching majority. *Hines v. Walker* (Civ. App.) 225 S. W. 837.

It is proper in action, under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for death of a son, to inquire into the financial and physical condition of the beneficiaries. *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

158. **Excessiveness of verdict.**—Verdict for personal injuries held not excessive. *Texas & P. Ry. Co. v. Schelb* (Civ. App.) 196 S. W. 881; *Chicago, R. I. & G. Ry. Co. v. Smith* (Civ. App.) 197 S. W. 614; *Texas & P. Ry. Co. v. Williams* (Civ. App.) 200 S. W. 1149; *Missouri, K. & T. Ry. Co. of Texas v. Haven* (Civ. App.) 200 S. W. 1152; *San Antonio, U. & G. R. Co. v. Dawson* (Civ. App.) 201 S. W. 247; *Galveston, H. & S. A. Ry. Co. v. Hopkins* (Civ. App.) 202 S. W. 222; *St. Louis, B. & M. Ry. Co. v. Webber* (Civ. App.) 202 S. W. 519; *Galveston, H. & S. A. Ry. Co. v. Butts* (Civ. App.) 209 S. W. 419; *El Paso & S. W. R. Co. v. Lovick* (Civ. App.) 210 S. W. 283; *Baker v. Grace* (Civ. App.) 213 S. W. 299; *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870; *Gulf, C. & S. F. Ry. Co. v. Crow* (Civ. App.) 220 S. W. 237; *Payne v. Harris* (Civ. App.) 228 S. W. 350; *Ft. Worth & D. C. Ry. Co. v. Smithers* (Civ. App.) 228 S. W. 637.

A verdict for death held not excessive. *Galveston, H. & S. A. Ry. Co. v. Bremer* (Civ. App.) 217 S. W. 253; *Texas & P. Ry. Co. v. Howard* (Civ. App.) 200 S. W. 1159; *Gulf, C. & S. F. Ry. Co. v. Carpenter* (Civ. App.) 201 S. W. 270; *Galveston, H. & S. A. Ry. Co. v. Hill* (Civ. App.) 202 S. W. 358; *Gulf, C. & S. F. Ry. Co. v. Hicks* (Civ. App.) 202 S. W. 778; *Lancaster v. Carroll* (Civ. App.) 211 S. W. 797; *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870; *Hines v. Mills* (Civ. App.) 218 S. W. 777.

Verdict for death held excessive. *Gulf, C. & S. F. Ry. Co. v. Saint* (Civ. App.) 204 S. W. 1021; *Texas & N. O. R. Co. v. Glass* (Civ. App.) 201 S. W. 730; *Atchison, T. & S. F. Ry. Co. v. Francis* (Civ. App.) 227 S. W. 342.

In servant's action for injuries, verdict held excessive. *Texas & P. Ry. Co. v. Williams* (Civ. App.) 196 S. W. 230; *Baker v. Bell* (Civ. App.) 219 S. W. 245.

Public policy does not demand that verdict in railroad servant's action for injuries should not be as large as \$20,000 on any grounds, though federal Employers' Liability Act is virtually compensation statute, and fixes liability for defective appliances, regardless of negligence. *Galveston, H. & S. A. Ry. Co. v. Hopkins* (Civ. App.) 202 S. W. 222.

Verdict for \$7,500 in favor of a railroad brakeman, who sustained only a partial loss of the two outside fingers of the left hand, which loss disqualified him from continuing in service on standard railroads, was excessive by only \$2,500. *Lancaster v. Hynes* (Civ. App.) 214 S. W. 957.

### Art. 6649. Contributory negligence; rule as to.

**Federal Employers' Liability Act.**—U. S. Comp. St. § 8659, makes inapplicable the doctrine of contributory negligence to cases of injury to railroad employes in interstate commerce by reason of violation of the federal Safety Appliance Acts (U. S. Comp. St. §§ 8605-8619, 8621-8623). *Lancaster v. Hynes* (Civ. App.) 214 S. W. 957.

In an action based upon the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), in connection with the Federal Safety Appliance Act (U. S. Comp. St. §§ 8605-8623), contributory negligence is not available as a defense, where a violation of the Safety Appliance Act was the concurring proximate cause of the death or injury. *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870.

In an action under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and Safety Appliance Act (U. S. Comp. St. §§ 8605-8623) testimony relating to contributory negligence and assumed risk on the part of the deceased is properly excluded. *Id.*

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), contributory negligence is not a complete bar to recovery; the act providing that the amount of damage resulting from the injured employe's negligence shall be deducted from the amount resulting from defendant railroad's negligence. *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (Com. App.) 228 S. W. 1087.

**Application and effect of statute—Contributory negligence.**—In action for injuries to locomotive fireman when he slipped on metal apron between engine and tender which he had caused to become slippery in sprinkling coal, evidence held sufficient to sustain finding of contributory negligence resulting in deduction from the damages. *Hodnett v. Texas & P. Ry. Co.* (Civ. App.) 204 S. W. 380.

Where the court correctly charged the jury in accordance with this article, the refusal of a special issue requiring the jury to find the total amount of damage suffered and the amount of the diminution was not error, particularly where there was no assertion that the amount awarded was excessive. *St. Louis, S. F. & T. Ry. Co. v. Reichert* (Civ. App.) 227 S. W. 550.

— **Effect on assumption of risk rule.**—Art. 6645, does not merge the defense of assumed risk into that of contributory negligence, the doctrine of comparative negligence founded on this article, not applying where plaintiff is barred from any recovery

for injuries by assumption of risk. *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131.

#### Art. 6650. Assumed risk, rule as to.

**Federal Employers' Liability Act.**—See *McAdoo v. McCoy* (Civ. App.) 215 S. W. 870; note under art. 6649.

**Effect of assuming risk on contributory negligence.**—See *Swann v. Texas & P. Ry. Co.* (Civ. App.) 200 S. W. 1131; note under art. 6649.

#### Art. 6651. Contract changing liability void.

**Contracts exempting from liability.**—Pullman porter's employment contract, assuming "all risks of accident or casualties while employed on or about cars" of the company "incident to such employment," would not relieve company from liability for injury to porter suffered in resisting being ejected from his car by watchmen who had been instructed by company to put off any one found on car, porter having been instructed to remain on car and not notified of conflicting instructions. *Pullman Co. v. Ransaw* (Civ. App.) 203 S. W. 122.

— **Under Federal Employers' Liability Act.**—Under Federal Employers' Liability Act, §§ 1, 5, written contract of employment between railroad and employé, in so far as it provided that road should not be liable for injuries, unless employé gave notice in writing of his claim, was void. *Panhandle & S. F. Ry. Co. v. Brooks* (Civ. App.) 199 S. W. 665.

Federal Employers' Liability Act, § 5 (U. S. Comp. St. § 8661), makes void a contract by interstate railroad employé to give notice of injury and claim for damages within 30 days or his right to recover therefor would be barred. *Panhandle & S. F. Ry. Co. v. Brooks* (Com. App.) 222 S. W. 186, affirming judgment (Civ. App.) 199 S. W. 665.

**Release of claims—Fraud or mistake.**—In action by section foreman for injuries, evidence held to authorize finding that representations that plaintiff was well, made by defendant railroad's physicians, were intended to influence plaintiff in making settlement with defendant's claim agent and signing release. *Missouri, K. & T. Ry. Co. of Texas v. Haven* (Civ. App.) 200 S. W. 1152.

In such action evidence held to authorize finding that physicians, who treated plaintiff, were agents and employés of defendant railroad, authorized to advise plaintiff as to probability of his recovery from injuries. *Id.*

Condition of plaintiff's leg was not matter equally open to him and the physician. *Id.* Statement of the physicians, that plaintiff "was all right and well," were statements of fact, upon which plaintiff had right to rely in settling his claim and signing release. *Id.*

If statements of the physician were false and made to induce plaintiff to settle his claim, that statements were innocently made would not deprive plaintiff of right to have release set aside. *Id.*

Advice of physician to settle, or his false representations as to extent of injuries, are not grounds for setting aside release, where physician had nothing to do with obtaining releases, and claim agent did not knowingly take advantage of injured person's confidence in physician. *Chicago, R. I. & G. Ry. Co. v. Taylor* (Civ. App.) 203 S. W. 90.

Where after he was injured an employee was not competent mentally to make a settlement, the argument and tactics of the claim agent in securing such settlement would justify its cancellation, though they were not sufficient to constitute fraud if used against a man in possession of his normal mental powers. *Smith v. Atchison, T. & S. F. Ry.* (Com. App.) 232 S. W. 290.

— **Rescission.**—That an injured employee had invested part of money received from the employer in settlement in a farm does not establish an exception to the rule that one who has spent the money need not tender its return if he offers to have the amount credited upon any judgment he might recover, and therefore does not require a tender before suit to cancel the settlement and recover the damages. *Smith v. Atchison, T. & S. F. Ry.* (Com. App.) 232 S. W. 290.

Where the employer took the position that its settlement with its employee was valid and conclusive, so that any offer by the employee to return the amount paid him in settlement would have been refused, it cannot insist that a preliminary tender was a prerequisite to his action to cancel the settlement and recover the damages. *Id.*

— **Construction and effect.**—Where a servant was injured and on returning to work applied for pay for the time he was absent, and after negotiating for some time the master agreed to pay him half time, and the servant accepted the same, it must be held, in the absence of an agreement to the contrary or evidence that payment of half wages was a voluntary payment, that there was an accord and satisfaction of the servant's entire cause of action, and he could not thereafter recover for pain and suffering or subsequent loss of time. *Missouri, K. & T. R. Co. v. Morgan* (Com. App.) 210 S. W. 512.

## CHAPTER FIFTEEN

## RAILROAD COMMISSION OF TEXAS

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| <p>Art.<br/>6654. Powers and duties, etc.<br/>6656. Rates to be held conclusive, etc.<br/>6657. When railway dissatisfied, may, etc.<br/>6658. Burden of proof, etc.<br/>6670. "Unjust discrimination" defined.<br/>6671. Damages; penalty; venue in cases of discrimination.<br/>6672. Penalty not otherwise provided.<br/>6675. All violations of duty to be reported.<br/>6676. "Railroad," etc., defined; intra-state shipments; one train daily.</p> <p>AUTHORITY AND DUTIES OF COMMISSION OVER OTHER SUBJECTS</p> <p>6677f. Objections to decisions, etc.; actions and appeals.<br/>6678. Railroad to furnish cars when demanded.</p> | <p>Art.<br/>6680. Penalty for failure to furnish.<br/>6682. To deliver loaded cars in reasonable time.<br/>6687. Shall furnish freight facilities and interchange cars with connecting roads.<br/>6688. To interchange cars at junction points.<br/>6689. Railroad commission to make rules and regulations.<br/>6690. Liable for damages, when.<br/>6693. Duty to provide suitable freight and passenger depots.<br/>6695. Commission may order construction of union depots.<br/>6715. To build sidings, etc., when.<br/>6716i. Arrangement of tracks and depot buildings.</p> |
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**Article 6654. [4562] Powers and duties.**

See *Texas & P. Ry. Co. v. Shaw* (Civ. App.) 218 S. W. 814.

**Jurisdiction of commission.**—See *Angelina & N. R. R. Co. v. Railroad Commission of Texas* (Civ. App.) 212 S. W. 703; note under art. 6658.

**Power to regulate railroads.**—Common carriers being created for public purposes are subject to regulation by the states creating them under certain defined constitutional limitations, such regulation including the matter of facilities and the fixing of rates. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

**Fixing rates—In general.**—In mandamus to compel railroad to furnish express company facilities under arts. 6616, 6617, court was not empowered to determine what constituted a reasonable rate for such facilities; the establishment of rates being a legislative and not a judicial function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

— **For connecting lines.**—Under this article, §§ 5, 6, an order permitting a carrier, shipping coal purchased by it from a point on another line to a point on its own line, to participate in a division of the through rate, held valid; such order applying only to shipments actually hauled to the point of destination and not stopped at the junction point. *Railroad Commission of Texas v. Rio Grande & E. P. Ry. Co.* (Sup.) 230 S. W. 974.

Where the Railroad Commission established a joint through rate from one point to another, and where the terminal carrier purchased coal at the point of commencement for shipment between such points without an agreement with initial carrier as to division of the through rate, the commission's order, dividing the through rate for shipment of such coal in proportion to the local rates of the carriers, held valid, as against contention that terminal railroad was not entitled to a revenue prorate for hauling its own coal over its own line. *Texas-Mexican Ry. Co. v. Rio Grande & E. P. Ry. Co.* (Sup.) 231 S. W. 308.

Such terminal carrier was not entitled to switching charges on cars stopped by it at the intermediate point where initial carrier's line terminated and its own line commenced, without informing initial carrier as to the cars so stopped and the number or identity thereof. *Id.*

**Art. 6656. [4564] Rates to be held conclusive until, etc.**

**Conclusiveness of rates and orders.**—Every shipper in interstate commerce is charged with notice of the terms of interstate tariffs governing his shipment. *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 222 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, and judgment modified *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Sup.) 226 S. W. 140.

— **Effect of special contracts.**—That railroad had made contract with express company fixing its rate for facilities furnished the company at certain per cent. of its gross receipts with a guaranteed minimum payment did not estop it from denying reasonableness of similar rate fixed by court for facilities to be furnished another express company doing a much smaller business in a much smaller territory without such a guaranty as to minimum payment. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

**Interstate shipment.**—Where the tariffs filed for interstate transportation of cotton fixed *Wichita Falls* as the only concentration point at which cotton might be stopped in transit for compression or conditioning, but further provided that if accident or other cause renders any compress unavailable the carrier reserves the right to use any other available compress, the carrier, where the compress at *Wichita Falls* was unable to take

sand out of the cotton, might contract for conditioning of the cotton at Ft. Worth, the conditioning of the cotton being for the benefit of the carrier; and hence the carrier, having so contracted, cannot recover more than the regular rate to Galveston. *Schaff v. Kennedy* (Civ. App.) 220 S. W. 223.

No interstate carrier can waive a requirement of the Interstate Commerce Act, or stipulation of contract made pursuant thereto. *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 222 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, and judgment modified (Sup.) *Shroyer v. Chicago, R. I. & G. Ry. Co.*, 226 S. W. 140.

Representatives of interstate carrier cannot, by conversations, letters, and negotiations extending beyond time limited for suit by contract pursuant to the Interstate Commerce Act, estop the carrier to assert and invoke the limitation against the shipper. *Id.*

The Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) prohibits the making of new oral agreements between the shipper and the carrier which are contrary to the schedules or tariffs on file with the Interstate Commerce Commission. *City Nat. Bank of El Paso v. El Paso & N. E. Ry. Co.* (Civ. App.) 225 S. W. 391.

### Art. 6657. [4565] When railway dissatisfied, may file petition, etc.

See *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337; *Railroad Commission of Texas v. Rio Grande & E. P. Ry. Co.* (Sup.) 230 S. W. 974.

**Review of rates and orders—Scope of inquiry.**—Courts may inquire into the reasonableness of the requirements as to facilities and of the rates as fixed, and if found unreasonable restrain their enforcement; but they cannot go further and determine facilities and establish rates deemed reasonable, the establishment of facilities and rates being a legislative function. *Missouri, K. & T. Ry. Co. of Texas v. Empire Express Co.* (Com. App.) 221 S. W. 590, reversing judgment (Civ. App.) 173 S. W. 222.

**Conclusiveness of court's decision.**—A judgment setting aside order of Board of Railroad Commissioners without prejudice to a former order or right to make such future orders as it may deem just and reasonable held not to foreclose board from proceeding under a subsequent order providing apportionment of costs of building a union depot differently from order set aside. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 199 S. W. 829.

**Failure to ask review.**—Under this article and art. 6672 held that, where a railroad company ordered by the Commission to stop certain trains at a county seat instead of instituting a suit to test the validity of the order saw fit to await proceedings against it by the state, it was proper to impose a penalty for each failure to stop. *Gulf, C. & S. F. Ry. Co. v. State of Texas*, 246 U. S. 58, 38 Sup. Ct. 236, 62 L. Ed. 574.

### Art. 6658. [4566] Burden of proof.

See *Kohler v. United Irr. Co.* (Civ. App.) 222 S. W. 337.

**Burden of proof on plaintiff.**—Under art. 6654, subd. 12, and this article, the burden rests upon a railroad company, assailing an order of the Railroad Commission requiring it to maintain a depot at a certain station, to show the unreasonableness of the exercise of the power vested in commission by statute. *Angelina & N. R. R. Co. v. Railroad Commission of Texas* (Civ. App.) 212 S. W. 703.

### Art. 6670. [4574] "Unjust discrimination" defined.

See *Quannah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

**Construction of statute in general.**—Under Const. art. 10, § 2, prohibiting unjust discrimination and this article, exemptions from the operation of the Anti-Pass Law (Acts 30th Leg. c. 42, as amended by Acts 32d Leg. c. 83), contained in section 2, are void except as to employes and their families, etc.; necessary caretakers; indigent poor; Confederate veterans; persons injured in wrecks, and physicians and nurses attending them; persons and property carried in general epidemic; articles sent to orphan homes, etc.; special rates authorized by the railroad commission; exchange privileges to bona fide officers and employes, and exchange of mileage for advertising space. *State v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 197 S. W. 1006.

The doctrine that, if a common carrier does not charge one person more than the law permits, its rendition of similar service for others without charge is not unjust discrimination, does not apply in construing Const. art. 10, § 2, prohibiting unjust discrimination. *Id.*

**Actions—in general.**—Injunction held properly refused to restrain defendant from bringing a multiplicity of actions in the justice court against complainant, for damages for unjust discrimination, contrary to the statute, where it also appeared that defendant had sued complainant in the county court for the penalty prescribed for the violation of said provisions, and that, from the judgment in this case, an appeal would lie to the court of appeals. *Texas & P. Ry. Co. v. Kuteman*, 79 Tex. 465, 14 S. W. 693.

Under Const. art. 4, § 22, art. 10, § 2, and Acts 30th Leg. c. 42, § 9, Attorney General was authorized to sue to enjoin railroads of the state from granting passes to persons under unconstitutional exception in the Anti-Pass Law (Acts 30th Leg. c. 42, as amended by Acts 32d Leg. c. 83). *State v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 197 S. W. 1006.

**Art. 6671. [4575] Damages; penalty; venue in cases of discrimination.**

See *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

**Actions for damages.**—Assuming that, before a shipper can recover the penalty for failure to maintain a freight depot at which his goods could be delivered to connecting carrier under this article, he must show pecuniary damage, such damage is shown in the interest upon the value of goods shipped and withheld. *Quanah, A. & P. Ry. Co. v. Warren* (Civ. App.) 198 S. W. 814, 816.

Under this article, penalty for failure to maintain freight depots at junction points, is independent of the common-law right of action for refusing to deliver goods, and the remedy may be pursued without reference to actual damages. *Id.*

**Art. 6672. [4576] Penalty not otherwise provided.**

**Penalties—For separate offenses.**—Under this article, and art. 6657, where a railroad company ordered by the Commission to stop certain trains at a county seat instead of instituting a suit to test the validity of the order saw fit to await proceedings against it by the state, it was proper to impose a penalty for each failure to stop. *Gulf, C. & S. F. Ry. Co. v. State of Texas*, 246 U. S. 58, 38 Sup. Ct. 236, 62 L. Ed. 574.

**Art. 6675. [4579] All violations of duty to be reported to attorney general.**

**Actions—Where brought.**—Injunction suit by state to compel railway company to obey orders of Railroad Commission not declared void by any court was properly brought in a state court; *Judicial Code* (Act Cong. March 3, 1911, c. 231, 36 Stat. 1148, 1149 [U. S. Comp. St. §§ 993, 997]), §§ 207, 208, not applying. *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878.

**Art. 6676. [4580] "Road," "railroad," "railroad companies," etc., defined. Law applies only to railroads in this state. One train a day to be run.**

See *St. Louis Southwestern Ry. Co. v. White, Jackson & Co.* (Civ. App.) 211 S. W. 315.

**Interstate commerce.**—Under Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 1, 3, 24 Stat. 379, 380 (U. S. Comp. St. §§ 8563, 8565), Interstate Commerce Commission had no jurisdiction to regulate intrastate rates, although having an injurious effect upon interstate commerce. *Abilene & S. Ry. Co. v. State* (Civ. App.) 199 S. W. 878.

Where shipper contracted with one railroad in Arkansas to ship stock to Texarkana, where he received them personally and drove them across state line, and entered into contract with another railroad to ship them to another point in Texas, latter railroad could not claim that there was continuous shipment so as to entitle it to interstate rate. *St. Louis Southwestern Ry. Co. of Texas v. Stinson* (Civ. App.) 204 S. W. 476.

Maize shipped from one point in Texas through Oklahoma to another point in Texas was subject to the provisions of the federal Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.). *St. Louis Southwestern Ry. Co. of Texas v. Shields Grain & Coal Co.* (Civ. App.) 220 S. W. 183.

Under the Interstate Commerce Act and the Carmack Amendment thereto (U. S. Comp. St. §§ 8604a, 8604aa) no discrimination will be permitted, directly or indirectly, by interstate carriers as between shippers. *Shroyer v. Chicago, R. I. & G. Ry. Co.* (Com. App.) 222 S. W. 1095, reversing judgment (Civ. App.) *Chicago, R. I. & G. Ry. Co. v. Shroyer*, 197 S. W. 773, and judgment modified (Sup.) *Shroyer v. Chicago, R. I. & G. Ry. Co.*, 226 S. W. 140.

A shipment of cattle originating in Mexico carried to El Paso, Tex., is a foreign shipment, as the cattle were transported through a port of entry, notwithstanding the shipment was carried only a short distance in Texas. *Mexico Northwestern Ry. Co. v. Williams* (Com. App.) 229 S. W. 476.

**Stopping trains at county seat towns.**—Under this article, an order of the Railroad Commission requiring a railroad to stop two interstate trains at a county seat having a population of 1,500, and at which two other trains each way stopped daily, held not to impose an unreasonable burden on interstate commerce. *Gulf, C. & S. F. Ry. Co. v. State of Texas*, 246 U. S. 58, 38 Sup. Ct. 236, 62 L. Ed. 574.

Though this article is not directed against interstate trains as such, the Railroad Commission was not deprived of power to require stopping of interstate trains at a county seat, thereby incidentally interfering with such trains, by section 1 of the Hepburn Amendment to Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. § 8563]), and Act June 18, 1910, c. 309, § 7, 36 Stat. 544 (U. S. Comp. St. § 8563), requiring carriers to make reasonable regulations affecting the facilities for transportation and giving the Interstate Commerce Commission jurisdiction over such matters. *Id.*

**AUTHORITY AND DUTIES OF COMMISSION OVER OTHER SUBJECTS****Art. 6677f. Objections to decisions, etc.; actions and appeals.**

**Party at interest.**—A lumber company located upon the main line of a railroad company's track at a distance from other railroads is an interested party in a proceed-

ing before the Railroad Commission by the company for permission to abandon such tracks and enter the city over the tracks of another road, under this article. *Jeff Bland Lumber & Building Co. v. Railroad Commission of Texas* (Civ. App.) 203 S. W. 402.

#### Art. 6678. [4497] Railroad to furnish cars when demanded.

See note under art. 6680.

**Time for supplying cars.**—Generally, when cars are required by shipper, reasonable notice should be given by him, and a reasonable time allowed the company in which to procure cars. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

**Particular kind of car.**—It was carrier's duty to furnish shipper a suitable car in which to transport its peanuts, whether they were green and uncured or dried and well cured; shipper being entitled to compensation for damages by reason of carrier's negligence. *Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas* (Com. App.) 221 S. W. 270, reversing judgment (Civ. App.) 184 S. W. 1070.

#### Art. 6680. [4499] Penalty for failure to furnish.

**Repeal.**—Art. 709 is repealed by implication by this article and art. 6554. *San Antonio & N. P. Ry. Co. v. Bailey* (App.) 15 S. W. 203.

**Defenses.**—Where railroad accepts perishable goods with express or implied notice of the perishable character thereof, it is precluded, upon its failure to furnish cars, from asserting that it did not have the means or facilities for performing the duty it took upon itself; it being no defense that carrier did not own or control such cars or equipment. *Ft. Worth & D. C. Ry. Co. v. Strickland* (Civ. App.) 208 S. W. 410.

An irregularity in shipper's application for car for shipment of poultry was waived by carrier, where trainmaster received order, acted on it, and finally furnished the car on the application. *Id.*

In action for failure to furnish car within a reasonable time after shipper's application in violation of duty under Interstate Commerce Act (U. S. Comp. St. § 8563, subd. 2), held, that the railroad's agent at one station had authority to receive application for car for shipment at another station. *Id.*

**Action for breach of contract.**—See note under art. 6690.

#### Art. 6682. To deliver loaded cars in reasonable time.

**Consignee's liability—Demurrage.**—Consignees held bound to unload within reasonable time and to have no right to retain possession of car and peddle goods therefrom at retail, and, failing to unload within reasonable time, are liable for demurrage and reasonable expenses. *Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co.* (Civ. App.) 200 S. W. 420.

#### Art. 6687. Shall furnish freight facilities, interchange cars, etc.

**Duty to furnish facilities.**—The duty of railway common carriers to furnish suitable cars is absolute, in view of this article. *St. Louis Southwestern Ry. Co. of Texas v. Morehead* (Civ. App.) 207 S. W. 336.

Carrier, having contracted to deliver a shipment of stock to certain parties at a certain point, could not delegate its duty to provide proper facilities for delivering the stock in question to a switching company and thereby escape liability for the negligence of the switching company, under this article. *Ft. Worth & R. G. Ry. Co. v. Hasse* (Civ. App.) 226 S. W. 448.

— **Defective car.**—A railroad is not responsible for a cause of action accruing after the Director General of Railroads took charge and after the promulgation of General Order No. 50, and while its line of railway was still in the hands of the federal government, and is in no way responsible for negligent acts of the servants in furnishing a leaky car for a shipment of chops. *Houston, E. & W. T. Ry. Co. v. Tanner* (Civ. App.) 227 S. W. 713.

**Interchange of cars and freight.**—Under this and related articles, defendant railroad has burden of showing that its failure to forward was excused by not receiving empty cars. *Quanah, A. & P. Ry. Co. v. Bone* (Civ. App.) 199 S. W. 332.

A carrier transferring goods within time fixed by commission is not liable, although it might reasonably have done so sooner. *Id.*

In action against carrier for refusing to forward goods via a connecting line, an erroneous statement of route in billing does not excuse defendant, who knew such statement was erroneous and refused to forward for other reasons. *Id.*

Under this article, it is the duty of the connecting carrier to which a loaded car of stock is delivered to receive it as loaded, if suitable, and forward it; the initial carrier having the privilege of furnishing its own cars beyond the end of its line. *St. Louis Southwestern Ry. Co. of Texas v. Morehead* (Civ. App.) 207 S. W. 336.

#### Art. 6688. To interchange cars at junction points.

**Presumption of agreement.**—Where there is no evidence that defendant initial carrier required connecting carrier to furnish an unloaded car, as required by this article, the court on appeal may, in aid of judgment below, assume that defendant's loaded car was delivered to connecting carrier pursuant to an agreement. *St. Louis Southwestern Ry. Co. of Texas v. Morehead* (Civ. App.) 207 S. W. 336.



**Art. 6689. Commission to make rules and regulations.**

**Demurrage.**—Though cars were bunched through no fault of the carrier but owing to washouts over which it had no control, it could not collect demurrage for the free time which the rules grant the shipper under such conditions, making it impossible to get cars for loading and unloading, and which demurrage the rules also stipulate shall be refunded. *Payne v. White House Lumber Co.* (Civ. App.) 231 S. W. 417.

**Art. 6690. Liable for damages, when.**

**Actions for damages.**—Evidence held sufficient to sustain a finding that a shipper of hogs had no knowledge of a shortage in cars at the time he placed his hogs in railroad stock pens. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

**Liability for breach of special contract.**—An action against a railroad company for breach of a parol agreement to furnish cars at a time specified is not an action for the penalty prescribed by art. 6680, for a failure to supply cars on written application, and is maintainable. *Receivers of Missouri, K. & T. Ry. Co. v. Graves* (App.) 16 S. W. 102.

Though art. 6680 imposes a penalty on railroad companies for failure to furnish freight-cars after demand therefor in writing, an action will lie for the breach of an oral contract to furnish cars. *Missouri Pac. Ry. Co. v. Harmonson* (App.) 16 S. W. 539.

A carrier knowing of a car shortage cannot evade its obligation to furnish cars for hogs where it so contracted, where it did not notify the shipper of such shortage, to the shipper's damage, by showing that it would have been a discrimination against other shippers. *Texas Midland R. R. v. O'Kelley* (Civ. App.) 203 S. W. 152.

A railroad is not liable for damages for failure to furnish car on seller's breach of contract requiring him to deliver goods f. o. b. cars at certain station within certain time, where seller had canceled order for car prior to expiration of time within which he could have made delivery under his contract with buyer. *Hallam v. Duckworth* (Civ. App.) 209 S. W. 222

In action for breach of carrier's contract to deliver cars to orchard for shipment of peaches, evidence held insufficient to show that plaintiffs' damages certainly would have been diminished had they delivered fruit at station of defendant carrier or at that of another carrier. *Texas & N. O. Ry. Co. v. Weems* (Com. App.) 222 S. W. 972, affirming judgment (Civ. App.) 184 S. W. 1103.

In such action, evidence held sufficient to authorize finding of making of contract substantially as alleged by plaintiffs. *Id.*

**Art. 6693. Duty to provide suitable freight and passenger depots.**

**Affecting deliveries to connecting carrier.**—See note to art. 6589.

**Enjoining enforcement of order.**—In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building at certain place, the only question as to the unjustness and unreasonableness of the order, in view of this article, is whether sum required to be expended is reasonable. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

In action to enjoin enforcement of Railroad Commission's order requiring construction of depot building, spur tracks, and sidings, special issue as to reasonableness of order was properly applied to both building and sidings, since it will not be assumed that sidings and spur tracks are indispensable to all stations. *Id.*

Evidence held to support verdict finding Railroad Commission's order directing construction of depot building, sidings, and spur tracks at expense of from \$250 to \$500 to be unfair and unreasonable to railroad. *Id.*

In passing upon reasonableness of Railroad Commission's order requiring construction of depot building at certain place, court will contrast expense of complying with order with inconvenience and hardships imposed on the public by reason of absence of facilities ordered. *Id.*

Under art. 6654, subd. 12, and this article, the burden rests upon a railroad company, assailing an order of the Railroad Commission requiring it to maintain a depot at a certain station, to show the unreasonableness of the exercise of the power vested in commission by statute. *Angelina & N. R. R. Co. v. Railroad Commission of Texas* (Civ. App.) 212 S. W. 703.

**Depots and agents.**—Under the statutes a place may become a "station" either by designation by the railroad, or by designation by statute, or by being established as a siding or stopping place to receive and discharge passengers and freight. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

The duty imposed upon a railroad by this article, carries with it by necessary implication the furnishing of agents at such stations, and the Railroad Commission has power to secure compliance therewith. *Angelina & N. R. R. Co. v. Railroad Commission of Texas* (Civ. App.) 212 S. W. 703.

**Art. 6695. Commission may order construction of union depots.**

**Cost and location of building.**—Where railroads objected to a union depot location fixed by the Railroad Commission, it devolved upon them to show a more suitable and less costly site, and, failing to do so, the issue was not raised by the evidence, and the court should have so instructed the jury. *State v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 199 S. W. 829.

The apportionment between three railroads of the costs of a union depot upon the basis of the user held proper. *Id.*

**Art. 6715. To build sidings, etc., when.**

**Reasonableness of order.**—The reasonableness and justness of Railroad Commission's order requiring construction of depot building and sidings and spur tracks, whether made pursuant to art. 6552 or this article, depends upon the facts of the particular case. *Railroad Commission of Texas v. Pecos & N. T. Ry. Co.* (Civ. App.) 212 S. W. 535.

**Art. 6716i. Arrangement of tracks and depot buildings.**—The authority is hereby conferred upon the Railroad Commission of Texas to inquire into the proposed or existing arrangement of railroad tracks, and depot buildings, at railroad stations in this State to determine whether or not proposed or existing arrangements of such tracks, switches and depot buildings is or may be dangerous to the public and to determine whether or not the public interest demands or may demand a re-arrangement or relocation of such tracks, switches and depot buildings to be made, and to determine whether or not such rearrangement or relocation can be made upon terms and conditions reasonable and just to the person, firm, corporation or receiver owning or operating such tracks, switches and depot buildings, and the Railroad Commission may if the aforesaid question can, under the facts, be resolved affirmatively, thereupon give notice to such persons, firm, corporation or receiver, and after public hearing and investigation, may require the person, firm, corporation or receiver, owning or operating such tracks, switches and depot buildings at such points to arrange, or re-arrange, or relocate the same in accordance with the specifications made by the Railroad Commission. Provided however, that no such arrangement, re-arrangement, or relocation, shall be authorized, or required within the limits of any incorporated city or town without the express consent of the governing body of such city or town. [Acts 1918, 35th Leg. 4th C. S., ch. 93, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

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## CHAPTER SIXTEEN

### ISSUANCE OF STOCKS AND BONDS REGULATED

Art. 6717. State vested with regulation of issue of bonds, stocks, etc.	Art. 6722. Authority to issue bonds to be secured.
6718. Prohibiting incumbrance above value.	6724. Prerequisites to issue of bonds. 6727. Certificates, bonds, etc., void.

**Article 6717. [4584a] Regulation of issue of stocks, bonds, etc., by railroads vested in state.**

**Operation and effect.**—Where note given by plaintiff to railway company for stock was turned over by it to defendant as collateral to note of company, plaintiff, who paid collateral note to defendant under mistaken belief induced by representations of defendant's agents that defendant was rightful and innocent holder, was entitled to recover money paid, the company's note being void for failure to comply with this and related articles. *Lumpkin v. Brown* (Civ. App.) 206 S. W. 217.

Where note given by railway company for money borrowed was void for failure of officers of company to comply with this and following articles, defendant holder would have no right to enforce notes received by company for stock and pledged by it as collateral, although defendant had a cause of action against company on implied promise to pay money received. *Id.*

This and the succeeding related articles, cannot be evaded on ground that the railroad actually received money raised through execution of a note secured, among others, by stock subscription notes secured by deeds of trust on land, an indebtedness void under the statutes. *Lumpkin v. Brown* (Com. App.) 229 S. W. 498.

They do not render void the creation of indebtedness without the consent of the Commission which does not operate as a lien on property essential to or of use in operation of the road. *Id.*

Where a note executed by a railroad company secured by stock subscription notes secured by deeds of trust was void under this and following articles, as a transaction had without the consent of the Railroad Commission, and the stock subscriber paid his note to the bank holding it for collection on the advice of his attorney without knowledge of the illegal character of the indebtedness, and on the mistaken belief it was

in the hands of an innocent holder for value, the stock subscriber is not estopped to demand return of the money paid on discovery of the violation of the statutes. *Id.*

**Art. 6718. [4584b] Issue of incumbrance above value of the road prohibited; except, etc.**

See *Lumpkin v. Brown* (Com. App.) 229 S. W. 498; note under art. 6717.

**Art. 6722. [4584f] Authority to issue bonds before completion of roads must be obtained, etc.**

See *Lumpkin v. Brown* (Com. App.) 229 S. W. 498; note under art. 6717.

**Art. 6724. [4584h] Prerequisites to the issue by railroad companies of bonds, etc.**

**Application.**—This article does not apply to the lien created by law for labor, though the amount due therefor is represented by notes. *Bryan College Interurban Ry. Co. v. Kropp* (Civ. App.) 197 S. W. 733.

**Art. 6727. [4584k] Certificates, bonds, etc., void.**

See *Lumpkin v. Brown* (Com. App.) 229 S. W. 498; note art. 6717.

## CHAPTER EIGHTEEN

### STREET RAILROADS

#### DECISIONS RELATING TO STREET RAILROADS IN GENERAL

##### II. REGULATION AND OPERATION

**9½. Right to discontinue operation.**—A street railroad cannot be prevented, not even by the city itself, from removing or abandoning track, in absence of provision in franchise. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807.

Where street railroad's franchise provided that no tracks should be removed or operation of railroad thereon abandoned without the consent of the city, the railroad could remove track and abandon operation on procuring city's consent, notwithstanding opposition of abutting owners on streets affected by such removal. *Id.*

**11. Care required in operation of road.**—It is the duty of those operating street cars to use ordinary care to avoid injuring persons using the streets. *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739.

**12. Right to use streets.**—While a street railroad does not have the exclusive right to use its tracks upon a city street, yet its rights to their use between crossings is so far superior as to require of travelers a higher degree of caution. *Ferrell v. Beaumont Traction Co.* (Civ. App.) 207 S. W. 654.

While the right of a steam railroad to use its tracks is superior to that of other persons, and one going upon the track at a crossing in front of a moving train ordinarily becomes a trespasser, such rule does not apply to street railroads in cities. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

Franchise granting the right to operate in the city a street railway system "comprising the property now owned and operated" by named existing companies, and such extensions and additions as should be made in accordance with the provisions of such franchise, held not to restrict the right to such streets as were at the time used for such purposes. *Jones v. Dallas Ry. Co.* (Civ. App.) 224 S. W. 807.

Such franchise held to empower the city to authorize an extension by resolution without an additional franchise adopted after three readings and 60 days suspension with opportunity for popular vote as required by Dallas City Charter, the right to construct and operate an addition or extension being not a right to be conferred by a franchise within article 2, § 8, subs. 1-4, but a privilege conferred by the original franchise. *Id.*

**13. Defects in tracks or equipment and obstructions in streets.**—Where a street railroad franchise provided that the traction company should hold the city harmless for damages to property or injuries to persons by reason of the construction of the railroad, the traction company was liable to the city for a judgment against the city in favor of a pedestrian, injured by city's passive neglect to repair a culvert, crushed by a wagon used by traction company in hauling gravel for the construction of the road. *City of Polytechnic v. Redmon* (Civ. App.) 217 S. W. 730.

Such franchise imposed a liability on the traction company, even though the driver of the wagon was an independent contractor. *Id.*

**18. Injuries to persons on or near tracks—Signals and lookouts.**—An ordinance providing that drivers shall look out for and give right of way to vehicles approaching from the driver's right does not relieve a motorman from the duty to look out for an automobile approaching from his left. *El Paso Electric Ry. Co. v. Benjamin* (Civ. App.) 202 S. W. 996.

**22. Contributory negligence—In general.**—In the absence of a city ordinance requiring pedestrians to cross streets only at places indicated, it is not negligence per se to undertake to cross a street at other places than street intersections. *El Paso Electric Ry. Co. v. Allen* (Civ. App.) 208 S. W. 739.

One who without warning found her child's life in imminent danger, her clothes being afire by reason of the negligence of a third person, was not guilty of contributory negligence in putting out the fire with her hands. *Wichita Falls Traction Co. v. Hibbs* (Civ. App.) 211 S. W. 287.

**23. — Drivers of vehicles and persons therein.**—Where plaintiff at driver's invitation jumped upon the run board of an automobile upon a city street between crossings, and before he could enter the automobile it was struck by a street car, which was in plain view, and plaintiff did not attempt to keep any lookout, he was guilty of contributory negligence. *Ferrell v. Beaumont Traction Co.* (Civ. App.) 207 S. W. 654.

It is negligence per se to drive an automobile upon a street in violation of an ordinance requiring the use of a mirror to indicate to the driver vehicles following the car, where the automobile was so inclosed by curtains that the driver could not see to the rear. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

Negligence of a driver of an automobile will not be imputed to one riding as a passenger. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

**25. Proximate cause of injury.**—Where a child's clothing caught fire from a charcoal stove negligently left in the street and the mother burnt her hands in extinguishing the fire, negligence in leaving the stove was the proximate and efficient cause of the mother's injuries. *Wichita Falls Traction Co. v. Hibbs* (Civ. App.) 211 S. W. 287.

Negligence on the part of the plaintiff will not bar recovery for injuries resulting from the negligent act of the defendant, unless plaintiff's negligence was the proximate cause of the injury. *Dallas Ry. Co. v. Eaton* (Civ. App.) 222 S. W. 318.

**26. Injury avoidable notwithstanding contributory negligence.**—No recovery can be had under the last clear chance doctrine in the absence of proof that defendant's motorman discovered deceased's peril in time, by the exercise of due care and the use of the means at hand, to have prevented injury. *Southern Traction Co. v. Rogers* (Civ. App.) 201 S. W. 199.

In action against railroad for death of a person on the track, under the discovered peril doctrine, negligence in failing to discover deceased's perilous situation is immaterial. *Id.*

A street car company does not have the exclusive right to the use of the street and its operatives are bound to prevent collision with automobiles if possible after discovering peril. *Houston Electric Co. v. Schmidt* (Civ. App.) 203 S. W. 617.

Before the doctrine of negligence after discovered peril can apply, it must be shown that the person alleged to have been negligent actually discovered the peril. *Nicholson v. Houston Electric Co.* (Civ. App.) 220 S. W. 632.

Contributory negligence of the owner of an automobile struck by a street car at a street intersection does not bar recovery for injury resulting from failure on the part of the motorman, after he discovered the danger, to use proper care to avoid the collision; the automobile owner having done all he could to get his automobile out of the way of the street car as soon as he discovered it. *Southwestern Gas & Electric Co. v. Grant* (Civ. App.) 223 S. W. 544.

The motorman of a street car, after discovering the peril of the driver of a horse and buggy on the track, is required only to exercise that degree of care which a person of ordinary prudence would use under the same or similar circumstances, by the use of all the means at his command consistent with the safety of the car and its passengers, to avoid the injury. *Paris Transit Co. v. Fath* (Com. App.) 231 S. W. 1030.

**27. Sufficiency of evidence.**—Evidence held sufficient to sustain a finding that a street car actually struck a wagon loaded with hay and caused it to turn over. *Corpus Christi Street & Interurban Ry. Co. v. Kjellberg* (Civ. App.) 201 S. W. 1032.

Evidence held sufficient to sustain a verdict that the motorman was negligent after discovering plaintiff's peril. *Houston Electric Co. v. Schmidt* (Civ. App.) 203 S. W. 617.

Evidence held to show that plaintiff's injury, resulting from his jumping upon the run board of an automobile just before its collision with a street car, was caused by contributory negligence in not seeing the car, and not by mistake of judgment. *Ferrell v. Beaumont Traction Co.* (Civ. App.) 207 S. W. 654.

Evidence held sufficient to support jury's finding that deceased was killed by collision of the automobile he was driving with defendant's street car. *El Paso Electric Ry. Co. v. Terrazas* (Civ. App.) 208 S. W. 387.

A finding that it was negligence to operate a street car at a speed of 25 miles per hour near a crossing held warranted by the evidence. *Beaumont Traction Co. v. Arnold* (Civ. App.) 211 S. W. 275.

In an action by one injured while riding in an automobile which collided with a street car, evidence held to sustain a finding that the street car was operated at a dangerous rate of speed. *Texas Electric Ry. Co. v. Crump* (Civ. App.) 212 S. W. 827.

In an action for personal injuries, evidence held to show damages. *Id.*

In an action for injuries to an automobile passenger, crushed between two street cars evidence held not to sustain allegations of violation of street car company's rules as to speed of meeting cars, or that cars were negligently operated at dangerous speed. *Nicholson v. Houston Electric Co.* (Civ. App.) 220 S. W. 632.

In action against street railroad for damages to automobile driven upon track in front of moving car, evidence held to support railroad's claim that accident was caused by contributory negligence. *San Antonio Public Service Co. v. Tracy* (Civ. App.) 221 S. W. 637.

Evidence held to justify a finding that defendant was the owner of the tracks upon which the collision occurred, so as to warrant an inference that the street car belonged to defendant. *Texas Electric Ry. v. Whitmore* (Civ. App.) 222 S. W. 644.

28½. Amount of damages.—Where plaintiff was 33 years old and earning about \$90 per month at the time of injury after which he was helpless and unable to work at all, an award of \$3,000 will not be set aside as excessive. *Houston Electric Co. v. Schmidt* (Civ. App.) 203 S. W. 617.

## CHAPTER EIGHTEEN A

### STATE RAILROAD

Art.	Art.
6745g–6745o. [Superseded.]	6745s. If board cannot sell or lease road it may operate same.
6745p. Board of managers.	6745t. Reports by board.
6745q. Prison commissioners to deliver road to board.	6745u. Disbursements.
6745r. Board of managers authorized to sell or lease road.	6745v. Deposit of funds.
6745rr. Other powers.	6745vv. Application of revenues.
	6745w. Report as to sale or lease; reports in case of operation.

#### Articles 6745g–6745o. [Superseded.]

**Explanatory.**—Superseded by Acts 1921, 37th Leg., ch. 26, set forth post as arts. 6745p–6745w.

**Liability for injuries.**—The state, as an employer operating state's railroad, is bound to furnish employes with a safe place in which to work. *State v. Elliott* (Civ. App.) 212 S. W. 695.

Where the state owned and operated a railroad under Laws 30th Leg. c. 74; Laws 31st Leg. (2d Ex. Sess.) c. 24; Laws 33d Leg. c. 139 (Civ. St. 1914, arts. 6745a–6745f), and employed labor, it occupies to such employes the relations of an ordinary employer; and, where an employe was injured through the negligence of agents having supervision and management of the road, the state is liable, though it cannot be sued without permission. *Id.*

Where the Legislature, in passing an act giving an employe of the state railroad permission to sue for injury, provided that limitations should not begin to run until the passage of the act, such act was not under the ban interdicting retroactive statutes. *Id.*

As a state cannot be sued without permission, limitations against an action by employe on a state railroad, who was injured by those having the management of the road, do not begin to run until permission to sue is granted. *Id.*

**Art. 6745p. Board of managers.**—The Lieutenant Governor of the State of Texas is hereby authorized to appoint two men who are experienced in the management and practical operation of railroads, who with the Lieutenant Governor of the State of Texas shall constitute the Board of Managers of the Texas State Railroad, which Board shall exercise full and plenary control and management of the Texas State Railroad. The members of said Board shall serve without pay except such actual and necessary expenses incurred while in the performance of their duties, as hereinafter defined, such expenses to be paid out of the appropriation hereinafter made, in the manner now provided for by law. [Acts 1921, 37th Leg., ch. 26, § 1.]

**Explanatory.**—This act supersedes Acts 1917, 35th Leg., ch. 180, and Acts 1920, 36th Leg., 3d C. S., ch. 30.

Sec. 9 repeals all laws in conflict. Act took effect March 12, 1921.

**Art. 6745q. Prison Commissioners to deliver road to board.**—Immediately after the taking effect of this Act it shall be the duty of the Board of Prison Commissioners of the State of Texas, upon demand of the Board of Managers of the Texas State Railroad, to deliver the possession of said railroad, together with all equipment, supplies, choses, books, records and documents of every character, and all property of whatever kind belonging to the said Railroad, to the Board of Managers, created by this Act. [*Id.*, § 2.]

**Art. 6745r. Board of Managers authorized to sell or lease road.**—The Board of Managers is hereby authorized, upon approval of the Governor of the State of Texas, and given full authority to sell or lease said railroad for the highest amount and upon the best terms obtainable, to any person, firm, or corporation, and in the event said Railroad is sold to execute and deliver to the purchaser thereof a deed to the right of way and to all other lands owned by the State of Texas and used in connection with said railroad and to do any and all things necessary to convey the title of said railroad right of way, rolling stock, and all other property and choses of whatever kind belonging to said railroad to the purchaser, and in the event the Board of Managers shall lease said railroad, it shall have the authority to execute such a lease agreement as it may deem to the best interest and welfare of the State of Texas, subject, however, to the approval of the Governor of the State of Texas; provided that in the event of the sale of said railroad the proceeds thereof shall be first applied to the payment of the bonds and accrued interest thereon, owned by the Public School Fund of the State of Texas and against said railroad. Any balance shall be paid into the Treasury of the State. [Id., § 3.]

**Art. 6745rr. Other powers.**—In addition to the powers otherwise vested in said Board of Managers with respect to the Texas State Railroad, said Board of Managers is hereby authorized and empowered to make and enter into any other contract or contracts, agreement or agreements with respect to said railroad, or any property, right, franchise, privilege, or other matter or thing belonging thereto or constituting any part thereof, and not inconsistent with law, whether of sale, option of sale, trackage agreement, or of any other nature or character whatsoever, as in the judgment of the Board of Managers will be to the best interest of said railroad, the people and interests to be served thereby, and the State. [Acts 1921, 37th Leg., 2d C. S., ch. 4, § 1, adding § 3a to Acts 1921, 37th Leg., ch. 26.]

Took effect Aug. 25, 1921.

**Art. 6745s. If board cannot sell or lease road it may operate same.**—If the Board of Managers cannot sell said railroad or lease the same to an advantage, then it is hereby authorized to continue to operate the same upon the most economical bases possible, and until such time as the Board may be able to find a satisfactory purchaser for said railroad or lease the same to an advantage, and for the purpose of rehabilitating said railroad and putting the same in shape so that traffic may move over the same in safety, there is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, the sum of Twenty-five Thousand (\$25,000.00) Dollars to be used in the payment for repairs and operation from the date of the taking effect of this Act, which with the operating revenue derived from the railroad, to be paid by warrants, drawn upon the State Treasury, by the Comptroller upon order of the Board of Managers. And said Board of Managers shall have at their disposal for the purpose of improving and repairing said Texas Railroad, fifty (50) able-bodied convicts to be furnished by the Prison Commission of Texas, and to be used at any time during the first year of said management of said Texas Railroad by the Board of Managers, created by this Bill. The Board of Managers are hereby directed to make report of their action in the premises to the next Called Session of the Thirty-seventh (37th) Legislature. [Acts 1921, 37th Leg., ch. 26, § 4.]

**Art. 6745t. Reports by board.**—Such Board of Managers shall make reports to the Comptroller of all receipts, expenditures and disbursements, which reports shall be prepared not later than the tenth (10th) day of each month and shall cover the operations of said railroad for the preceding calendar month. They shall be accompanied by a remittance to the Comptroller of all monies so received by such Board of Managers in the course of its operations during such month. [Id., § 5.]

**Art. 6745u. Disbursements.**—All disbursements and payments of every nature whatsoever, including interline balances shall be paid by warrant of the Comptroller upon the Treasury drawn by him upon due order of the Board of Managers. Interline balances shall be carried by the Comptroller as a separate trust fund for the benefit of connecting lines entitled to revenue funds collected by said railroad. [Id., § 6.]

**Art. 6745v. Deposit of funds.**—All current funds received by the Board of Managers or any station agent of such railroad shall be forthwith transmitted to such State bank as may be designated by the Board of Managers as a depository of such funds. Remittance of such funds to the Comptroller shall be made by the check of the Chairman of the Board of Managers upon such bank. [Id., § 7.]

**Art. 6745vv. Application of revenues.**—Any money accruing or arising on account of said railroad shall be applied in the discharge or payment of such indebtedness, claims or demands as may have accrued or arisen on account of said Texas State Railroad since March 12, 1921, and as may be authorized by law to be paid therefrom, including personal expenses actually and necessarily incurred by any member of the Board of Managers in the discharge of his duties as such, such clerical or other help or employment as in the judgment of the Board of Managers it may be necessary to incur in properly handling, caring for, managing and otherwise transacting any duty or business arising on account of or by reason of said Texas State Railroad, as well as any other cost or expense properly and necessarily incurred by said Board of Managers with respect to the duties enjoined upon it by law concerning said railroad; and should there at any time be on hand a sum of money which in the judgment of the Board of Managers is in excess of the amount necessary to meet such disbursements, payment or expenditures with respect to said railroad as are authorized by law, said Board of Managers is authorized to apply such excess to the payment of matured interest coupons representing the interest due on the bonds of said railroad that are owned by the public free school fund of this State, and after discharging such interest as may from time to time be due on said bonds, any amount of such excess thereafter remaining on hand may be applied to the payment of said bonds as they have or may mature, such payments to be made by warrants drawn by the Comptroller upon order of the board of managers. [Acts 1921, 37th Leg., 2d C. S., ch. 4, § 1, adding § 7a to Acts 1921, 37th Leg., ch. 26.]

**Art. 6745w. Report as to sale or lease; reports in case of operation.**—Such Board of Managers shall make full report of any sale or lease of such railroad to the Governor. In case of the operation of such railroad by such Board, full reports of all expenses, disbursements and income shall be made by it to the Governor, on the first days of July and January of each year. In case of the lease of such railroad the rentals shall be collected and audited by the Board, and a full report thereof likewise made to the Governor semi-annually.

The Governor shall submit all such reports to the Legislature at each Session next succeeding the receipts thereof by him. [Acts 1921, 37th Leg., ch. 26, § 8.]

## SPECIAL AND TEMPORARY ACTS

Acts 1920, 36th Leg. 3d C. S., ch. 37, makes an appropriation for payment of indebtedness of the Texas State Railroad, and provides for presentation of claims to the Board of Prison Commissioners. It is omitted as temporary.

Acts 1921, 37th Leg. 2d C. S., ch. 3, confirms and ratifies an arrangement made by the board of managers of the Texas State Railroad with the Texas & New Orleans R. R. Co., looking to the operation of such railroad. Approved August 25, 1921.

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**CHAPTER NINETEEN**  
**GENERAL PROVISIONS**

**Article 6753. Conductors to exclude passengers from wrong car.**

**Knowledge as element of violation.**—There can be no violation of this article, in the absence of actual knowledge that a person was in the wrong compartment, and the knowledge must be that of the conductor of the train, and not the porter, brakeman, or any other employé. *Texas & P. Ry. Co. v. Baker* (Com. App.) 215 S. W. 556.

**Injuries from failure to separate.**—Under this article, a negro cannot recover damages from a carrier for an assault by a white person riding in the coach set aside for negroes, unless it is shown that the conductor had actual knowledge of the presence of the white passenger in the negro coach in time to have avoided the assault resulting in the injury. *Texas & P. Ry. Co. v. Baker* (Com. App.) 215 S. W. 556.

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**TITLE 116**

**RANGERS—STATE**

<p><b>Art.</b> 6754. Organization. 6755. Companies. 6756. Compensation. 6757. Quartermaster. 6758. Under command of Governor. 6759. Term of service. 6760. Quartermaster to purchase supplies. 6761. Members to furnish equipment, etc. 6762. Arms and equipment.</p>	<p><b>Art.</b> 6763. Subsistence and quarters. 6764. Clothed with powers of peace officers. 6765. Arrests. 6766. Regulations. 6766½. Qualifications of members.</p> <p style="text-align: center;"><b>RANGER HOME GUARD</b></p> <p>6766a-6766e. [Superseded.]</p>
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**Article 6754. Organization.**—The ranger force authorized to be organized by the Governor is for the purpose of protecting the frontier against marauding or thieving parties, and for the suppression of lawlessness and crime throughout the State, and to aid in the enforcement of the laws of the State. [Acts 1901, p. 41, § 1; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6754, Rev. Civ. St.]

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

**Art. 6755. Companies.**—The ranger force shall consist of not to exceed one headquarters company and four companies of mounted men, except in cases of emergency, when the Governor shall have authority to increase the force to meet extraordinary conditions.

The headquarters company shall consist of one captain, who shall be designated the senior captain of the force, one sergeant, and not to exceed four privates.

Each separate mounted company shall consist of not to exceed one captain, one sergeant and fifteen privates. The captains and the quartermaster shall be appointed by the Governor and shall be removed at his pleasure; unless so removed by the Governor they shall serve for two years and until their successors are appointed and qualified.



The enlisted men and non-commissioned officers of each company shall be appointed by the Governor, acting by and through the Adjutant General, who shall pass upon the qualifications of such men, and so far as practicable shall make such appointment upon the recommendation of the captain, under whom such men are to serve. The enlisted men and non-commissioned officers shall serve for two years; unless sooner removed by the Governor or the Adjutant General for cause. [Acts 1901, p. 41, § 2; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6755, Rev. Civ. St.]

**Art. 6756. Compensation.**—The pay of officers and men shall be as follows: Captains \$150.00 each per month; sergeants \$100.00 each per month and privates \$90.00 each per month, except as herein otherwise provided. The payment shall be made monthly at such times and in such manner as the Adjutant General of the State may prescribe.

The officers and enlisted men on the ranger force shall receive in addition to their regular salary an increase of five per cent after the first two years of continuous service and five per cent for each additional year not to exceed in all twenty per cent of their salary as above provided. For the violation or breach of such rules and regulations for the governing of the ranger force as may be prescribed by the Adjutant General and approved by the Governor, officers and enlisted men shall forfeit their right to participate in the increase or longevity pay, or any portion thereof provided for herein. [Acts 1901, p. 41, § 3; Acts 1917, 35th Leg. 1st C. S., ch. 36, § 3; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6756, Rev. Civ. St.]

**Art. 6757. Quartermaster.**—The Governor shall appoint a quartermaster for the ranger force, who shall discharge the duties of a quartermaster, commissary and paymaster, and shall have the rank and pay of a captain. [Acts 1901, p. 41, § 4; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6757, Rev. Civ. St.]

**Art. 6758. Under command of Governor.**—This force shall always be under the command of the Governor; to be operated under his direction in such manner, in such detachments, and in such localities as the Governor may direct, acting by and through the Adjutant General. [Acts 1901, p. 41, § 5; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6758, Rev. Civ. St.]

**Art. 6759. Term of service.**—The Governor is authorized to keep this force, or so much thereof as he may deem necessary in the field as long as in his judgment there may be necessity for such a force; and men who may be enlisted in such service shall do so for such term not to exceed two years subject to disbandment in whole or in part at any time and reassemblage or reorganization of the whole force, or such portion thereof as may be deemed necessary by order of the Governor. [Acts 1901, p. 41, § 6; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6759, Rev. Civ. St.]

**Art. 6760. Quartermaster to purchase supplies.**—The quartermaster when directed by the Adjutant General shall purchase all supplies for the ranger force, and shall make a certificate on the voucher of the party or parties from whom the supplies are purchased to the fact that the account is correct and just, and the articles purchased were at the lowest market prices. [Acts 1901, p. 41, § 7; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6760, Rev. Civ. St.]

**Art. 6761. Members to furnish equipment, etc.**—Each officer, non-commissioned officer and private of said force shall furnish himself with

a suitable horse, horse equipment, clothing, etc.; provided, that if his horse is killed in action it shall be paid for by the State at a fair market value at the time when killed. [Acts 1901, p. 41, § 8; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6761, Rev. Civ. St.]

**Art. 6762. Arms and equipment.**—The State shall furnish each member of said force with one improved carbine and pistol at cost, the price of which shall be deducted from the first money due such officer or man, and shall furnish said force with rations of subsistence, camp equipage and ammunition for the officers and men, and also forage for horses. [Acts 1901, p. 41, § 9; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6762, Rev. Civ. St.]

**Art. 6763. Subsistence and quarters.**—In addition to the pay allowed to each officer and man of this force, they shall be allowed not to exceed \$30.00 per month for subsistence when at their station, and when on duty outside of his district each member of said force shall be allowed his actual necessary expenses for subsistence and quarters, to be paid on a sworn account showing the actual amount expended, not to exceed \$3.00 per day. In addition thereto each member shall be allowed his actual railroad expenses when traveling under orders.

Provided further, that when any company of said force furnishes motor transportation without expense to the State, they shall be allowed \$50.00 per month per company for repairs and upkeep for said motor vehicle. [Acts 1901, p. 41, § 10; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6763, Rev. Civ. St.]

**Art. 6764. Clothed with powers of peace officers.**—The officers, non-commissioned officers and privates of this force shall be clothed with all the powers of peace officers, and shall aid the regular civil authorities in the execution of the laws. They shall have authority to make arrests, and to execute process in criminal cases, and in such cases they shall be governed by law regulating and defining the powers and duties of sheriffs when in discharge of similar duties; except that they shall have the power and shall be authorized to make arrests and to execute all process in criminal cases in any county in the State. They shall, before entering on the discharge of these duties, take an oath before some authority legally authorized to administer the same, that each of them will faithfully perform his duties in accordance with law. In order to arrest and bring to justice men who have banded together for the purpose of committing robbery, or other felonies, and to prevent the execution of the laws, the officers, non-commissioned officers and privates of said force may accept the services of such citizens as shall volunteer to aid them; but while so engaged such citizens shall not receive pay from the State for such services. [Acts 1901, p. 41, § 11; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6764, Rev. Civ. St.]

**Art. 6765. Arrests.**—When said force, or any member or members thereof, shall arrest any person charged with the commission of a criminal offense, they shall forthwith convey said person to the county where he or they stand charged with the commission of an offense, and shall deliver him or them to the proper officer, taking his receipt therefor, and all necessary expenses thus incurred will be paid by the State. [Acts 1901, p. 41, § 12; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6765, Rev. Civ. St.]

**Art. 6766. Regulations.**—The Governor and Adjutant General shall cause to be made such regulations for the government and control of the organization herein provided for, for the enlistment and employment

of non-commissioned officers and privates as they may deem necessary, to the end that the force so provided for shall be as effective as possible; provided that when any complaint is made to the Adjutant General charging any ranger with misconduct or violation of the law, the Adjutant General will have the right to institute proceedings before any magistrate in the county where the offense is alleged to have been committed. Upon application of the Adjutant General said magistrate shall issue process for witnesses to appear and testify under oath, which testimony shall be reduced to writing by a stenographer and transmitted by the court to the Adjutant General, who shall take such action as the facts warrant. The cost of such proceedings including fee of \$3.00 of the magistrate and fifteen cents for each one hundred words of testimony so taken and transcribed shall be paid by the Comptroller of Public Accounts upon approval by the Adjutant General out of funds appropriated for enforcement of law.

Provided further, that it shall be the duty of any citizen who knows of any such misconduct or violation of the law on the part of any member of the ranger force to at once notify the Adjutant General in writing of misconduct, and it shall be the duty of the Adjutant General to at once conduct such examination and to take such action thereon as the facts make necessary, and he shall without delay submit all of such evidence and his actions thereon to the Governor for his approval or disapproval. [Acts 1901, p. 41, § 13; Acts 1919, 36th Leg., ch. 144, § 1, amending art. 6766, Rev. Civ. St.]

**Art. 6766½. Qualifications of members.**—All officers and men selected under this Act shall be men of good moral character, shall furnish satisfactory evidence thereof, sober, of sound judgment and shall conform to such qualifications as the Governor shall prescribe for appointment, and all applications for appointment to the ranger force shall be made to the Governor, who shall pass upon the qualifications of each applicant for a position on such force. Provided, however, that no person shall be appointed to the ranger force who is not a citizen of the United States and of Texas, and preference shall always be given to discharged soldiers holding certificates of honorable discharge from the United States Army. [Acts 1919, 36th Leg., ch. 144, § 1, adding art. 6766a, to Rev. Civ. St.]

**Explanatory.**—The title and enacting part of the act provides for adding an article to be numbered "6767." The article as it appears in the body of the act bears the number "6766a."

#### RANGER HOME GUARD

**Arts. 6766a-6766e.** [Superseded.]

**Explanatory.**—Superseded by Acts 1919, 36th Leg., ch. 144, set forth ante, arts. 6754-6766a, and expired by limitation.

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## TITLE 117

### RECORDS

#### CHAPTER TWO

#### SUPPLYING LOST RECORDS, ETC.

**Article 6784 [4600] Original deeds, etc., recorded again, when.**

When original not filed in time former record ceases to be constructive notice.—Where deeds are not re-recorded after the destruction of the records, the first record does not constitute notice as against a bona fide purchaser. *Weber v. Moss* (Civ. App.) 21 S. W. 609.

## TITLE 118

### REGISTRATION

Chap.

1. Recorders and their duties.
2. Acknowledgment and proof of deeds, etc., for record.

Chap.

3. Instruments authorized to be recorded, and the effect of recording.
5. General provisions.

### CHAPTER ONE

#### RECORDERS AND THEIR DUTIES

Art.

6789. Shall keep memorandum and give receipt.
6790. Shall record without delay in the order presented.

Art.

6791. Record shall take effect, when.
6796. Separate record books.

**Article 6789. [4605] Shall keep a memorandum and give receipts, etc.**

See Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272.

**Art. 6790. [4606] Shall record without delay in the order presented.**

Cited, Spence v. Brown (Civ. App.) 22 S. W. 983.

**Application to judgment abstracts.**—Since Rev. St. 1879, tit. 61, c. 1, prescribing the manner in which liens under judgments may be acquired, was evidently intended to be complete within itself, it is unaffected by Rev. St. 1879, tit. 86, c. 1, art. 4298, providing that each recorder shall record every "instrument of writing" authorized to be recorded by him, and deposited with him for record, "with the acknowledgments, proofs, affidavits and certificates written or printed on the same," etc., even if the language of such section is broad enough to apply to the record of an abstract of a judgment for the purpose of acquiring a lien. Spence v. Brown, 86 Tex. 430, 25 S. W. 413.

**Art. 6791. [4607] Record shall take effect from date of deposit.**

See Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40.

**Notice from time of deposit, though not recorded.**—Where an abstract of judgment is filed for record prior to the deposit of a deed, and is recorded the day after the deposit of said deed, but before the deed is actually recorded, held, under Rev. St. 1879, art. 3159, providing that "an abstract of judgment shall operate as a lien, from the date of its record and index, on all real estate," etc., and by virtue of Rev. St. 1879, art. 4299, declaring that deeds "shall be deemed recorded from the time they are deposited with the proper officer for record, if properly authenticated," the party claiming under the deed has a title good against the lien of the judgment. Belbaze v. Ratto, 69 Tex. 636, 7 S. W. 501.

**When instrument is deemed filed or recorded.**—An instrument is entitled to record upon its arrival or deposit in the county clerk's office, whether sent by mail or messenger, or handed to the clerk elsewhere and carried there by him. Jones v. MacCorquodale (Civ. App.) 218 S. W. 59, 62; Same v. Maes (Civ. App.) 218 S. W. 59, 62.

That persons presenting for filing in the county clerk's office applications for oil and mineral permits deposited them on the counter, without formally accosting or requesting the deputy to file them, until after another applicant had made such request, entitled him to no priority, as under this article, an instrument is filed when deposited for that purpose in the county clerk's office. Id.

**Mortgage recorded in book of deeds.**—Under Rev. St. 1879, art. 4334, providing that mortgages shall be valid from the time they are filed for record, and the like provisions of articles 4299, 4332, an absolute deed intended as a mortgage, but recorded in a book of deeds, is valid against purchasers and creditors, though art. 4304 provides that mortgages shall be recorded in separate books. Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272.

**Art. 6796. [4612] Mortgages, etc., to be recorded in separate book.**

**Mechanics' liens.**—Rev. St. 1879, art. 4304, does not contemplate that liens shall be recorded separately from each other. The registration, therefore, of a mechanic's lien in a book in which mortgages are recorded, is proper. Quinn v. Logan, 67 Tex. 600, 4 S. W. 247.

**Contract for lien.**—Where an instrument, like a contract for a lien on a homestead, does not require recording to make it valid between the parties, the filing of it with the clerk makes it notice to subsequent purchasers, and it is immaterial that it is recorded in a book with deeds. Lignoski v. Crooker, 86 Tex. 324, 24 S. W. 278.

CHAPTER TWO

ACKNOWLEDGMENT AND PROOF OF DEEDS, ETC., FOR RECORD

Art. 6797. Before whom acknowledgment may be made in this state.	Art. 6803. Certificate of officer.
6798. Without this state and within the United States.	6804. Form of certificate of acknowledgment.
6800. Acknowledgment, how made.	6805. Form of acknowledgment by a married woman.
6801. Party must be known or proven.	6806. Proof of instrument by witness.
6802. Acknowledgment of married woman, when and how taken.	6807. Witness must be personally known to the officer.

**Article 6797. [4613] Before whom acknowledgments may be made in this state.**

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Disqualification of officer.**—See *Hamilton County Development Co. v. Sullivan* (Civ. App.) 220 S. W. 116.

Evidence held insufficient to show that a notary was financially interested in a transaction so as to be disqualified to take an acknowledgment. *Creosoted Wood Block Paving Co. v. McKay* (Civ. App.) 211 S. W. 822.

A grantee directly interested in the deed was not competent to take the acknowledgment of either of the grantors, husband and wife; and acknowledgments taken by him were invalid, and gave no force whatever to the instrument. *Vauter v. Greenwood* (Civ. App.) 212 S. W. 269.

**Art. 6798. [4614] Without this state and within the United States.**

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Art. 6800. [4616] Acknowledgment, how made.**

See *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501; *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Certificate—Requisites and sufficiency.**—Certificate of acknowledgment not bearing seal of notary was insufficient to admit deed to record, and such deed was inadmissible in evidence in support of five years statute of limitation in trespass to try title. *McDonald v. Stanfield* (Civ. App.) 197 S. W. 892.

**Art. 6801. [4617] Party must be known or proven.**

See *Salmon v. Huff*, 80 Tex. 133, 15 S. W. 1047; *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

**Proof of identity.**—A deed cannot be read in evidence as a recorded instrument if the certificate of acknowledgment fails to show that the person making it was known to the officer, or his identity proved. *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576; *Frost v. Erath Cattle Co.*, 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831.

Where a tax deed is signed, "B., Tax Collector of C. County," a certificate reciting "Personally appeared B., tax collector of said county, to me well known and acknowledged," etc., is sufficient. *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120.

Under this article, where notary public has not personal knowledge of identity of party who makes acknowledgment before him, he takes such acknowledgment at his own risk, unless he complies with the statute as to proof of identity by oath or affirmation of credible witness. *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

In action by buyer of land against notary on ground he relied on false certificate of acknowledgment of notary to deed to grantor, and thereby failed to get title which he would have gotten if certificate had been true, title to land was mere incident, and, it not being disputed by defendant notary, plaintiff did not need to show that if certificate had been true he would have acquired good title because party purporting to have acknowledged was owner. *Id.*

**Art. 6802. [4618] Acknowledgment of married woman, when and how taken.**

See *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

Cited, *Thompson v. Johnson*, 84 Tex. 548, 19 S. W. 784; *Hynson v. Gulf Production Co.* (Civ. App.) 232 S. W. 873.

**In general.**—The leading purpose of the statute was to secure freedom of will and action on the part of the wife. *Angier v. Coward*, 79 Tex. 551, 15 S. W. 698.

Where oil lease executed by husband and wife, covering their homestead, was signed and acknowledged by the wife merely for the purpose of enabling lessee to secure

other leases, and without intent on her part to convey her rights in the homestead, and lessee had notice thereof, the lease was inoperative as a conveyance of an interest in the homestead, in view of arts. 1115, 6802, and 6805. *McEntire v. Thomason* (Civ. App.) 210 S. W. 563.

**Necessity of acknowledgment.**—No title to homestead passed by quitclaim deed executed by husband alone, in violation of arts. 1115, 4621, 6802, 6803, and Const. art. 16, § 50. *Clark v. Tulley* (Civ. App.) 200 S. W. 605.

**Explanation by officer.**—Deed executed by married woman to her separate land did not pass title, where it does not appear from acknowledgment that deed was explained to her, and that she willingly signed it and declared that she did not wish to retract. *Smith's Heirs v. Hirsch* (Civ. App.) 197 S. W. 754.

In an action to cancel a deed to a homestead where the contents of the deed were not explained to grantor's wife by the notary taking her acknowledgment as required by statute, that fact of itself would be sufficient to authorize cancellation. *Stephenson v. Arceneaux* (Civ. App.) 227 S. W. 729.

— **Privily and apart.**—See *Waller v. Dickson* (Civ. App.) 229 S. W. 893.

Where a deed conveying land which was wife's separate property was signed by husband and wife, and it did not appear that the wife was examined privily and apart from her husband, the conveyance was void. *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49.

In the conveyance of the homestead, the wife has until the very last moment of her privy examination within which to retract her contract or act in conveying the homestead. *Maynard v. Gilliam* (Civ. App.) 225 S. W. 818.

The requirement of the statute that the acknowledgment of a married woman "shall be privily and apart from her husband" is met if at the time the husband is not within distance to hear, or in any other matter exercise a possible influence over her by his presence or nearness. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

**Rights of married women where acknowledgment is defective or procured by fraud.**—In a suit to cancel an oil lease, a finding that defendants were without notice of a defective acknowledgment by plaintiff wife held sustained by the evidence, notwithstanding evidence that one of defendants was present at the time the acknowledgment was taken, and that notary did not remain with plaintiff's wife after the departure of plaintiff husband and lessee. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

### Art. 6803. [4619] Certificate of officer.

See note under art. 6800; *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**In general.**—No title to homestead passed by quitclaim deed executed by husband alone, in violation of arts. 1115, 4621, 6802, 6803, and Const. art. 16, § 50. *Clark v. Tulley* (Civ. App.) 200 S. W. 605.

**Necessity of proper certificate.**—In partition suit of property conveyed to plaintiff by a divorced woman, but claimed by her to be conveyed to plaintiff merely as trustee to recover possession from her former husband, but alleged by plaintiff to constitute an absolute conveyance, whether the certificate of acknowledgment was valid was immaterial, since, if title otherwise passed, failure of acknowledgment would not render it inoperative. *Allen v. Williams* (Civ. App.) 218 S. W. 135.

**Conclusiveness and impeachment of certificate.**—A certificate of acknowledgment in due form is conclusive in the absence of fraud or imposition. *Fagan v. Texas Co.* (Civ. App.) 220 S. W. 346; *Texas Co. v. Keeter* (Civ. App.) 219 S. W. 521.

A married woman is not estopped by the certificate of a notary to deny her want of knowledge of the terms of a lease which she was led to believe by the grantee and notary was different from the one actually signed and different from the one she had agreed to make. *Davis v. Burkholder* (Civ. App.) 218 S. W. 1101.

A certificate of a notary regular in form cannot be impeached in the absence of allegations connecting the grantee with notice of failure of the officer to perform his duty in taking the acknowledgment or allegations of fraud with which the grantee is connected. *Crabb v. Bell* (Civ. App.) 220 S. W. 623.

The rule that a notary's certificate, regular in form, cannot be impeached except where the grantee has notice of the officer's failure to perform his duty, or for the grantee's fraud, does not apply where the purchaser is charged with notice before he pays the purchase money that the certificate does not speak the truth and that the acknowledgment of a married woman, one of the grantors, was not taken as required by law. *Id.*

In an action by a wife to cancel a deed executed by her and her husband, evidence held sufficient to support a finding that notary public took plaintiff's acknowledgment as required by law and as stated in the certificate. *Dendinger v. Martin* (Civ. App.) 221 S. W. 1095.

Where a married woman executes a conveyance of her separate property or homestead, and such conveyance is accompanied with a certificate of acknowledgment regular in every respect, then the instrument is operative as against a purchaser in good faith who has paid a valuable consideration therefor, although notary has not properly explained the instrument to the married woman, and had her declare that she did not desire to retract it, as required by statute. *Richmond v. Hog Creek Oil Co.* (Civ. App.) 229 S. W. 563.

**Art. 6804. [4620] Form of certificate of acknowledgment.**

See *Salmon v. Huff*, 80 Tex. 133, 15 S. W. 1047; *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Certificate—Requisites and sufficiency—In general.**—A certificate which literally complies with this form, except in using "T" instead of the words "Before me," is good, and entitles the deed to be recorded. *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501.

**Art. 6805. [4621] Form of acknowledgment by a married woman.**

See *McEntire v. Thomason* (Civ. App.) 210 S. W. 563; *Dupuy v. Dicks* (Civ. App.) 218 S. W. 49; *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

**Matters which must be certified.**—A certificate of acknowledgment which does not state substantially all the facts prescribed is not sufficient to give validity to the instrument. *Jones v. Robbins*, 74 Tex. 615, 12 S. W. 824.

— **Identity.**—Where a tax deed is signed, "B., Tax Collector of C. County," a certificate reciting "Personally appeared B., tax collector of said county, to me well known and acknowledged," etc., is sufficient. *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120.

Court properly admitted deed from husband and wife, notary's certificate to wife's acknowledgment falling to state she was known to him, or that proof was made of her identity; certificate in question having been made May 2, 1879, before the statute requiring such statement took effect. *Fortenberry v. Cruse* (Civ. App.) 199 S. W. 523.

— **Examined privily and apart.**—Under Rev. St. 1879, art. 4313, a certificate which merely recites that "the grantors appeared before me in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the use and purposes therein set forth, including the release and waiver of the rights of homestead," is defective, and, in the absence of evidence that the wife was examined according to the statute, the heirs of the wife are not estopped to deny title in one who holds by purchase of the grantee. *Williams v. Ellingsworth*, 75 Tex. 480, 12 S. W. 746.

Certificate of acknowledgment of married women, dated in 1859, held sufficient as to separate examination and explanation of transaction. (Per Brooke, J.) *Lewis v. Houston Oil Co. of Texas* (Civ. App.) 198 S. W. 607.

An instrument, executed by the heirs, confirming a distribution of the property by the executor, cannot operate as a conveyance of an interest of a married woman in the property, where she was not examined separate from her husband in taking her acknowledgment, as required by arts. 6805, 1114. *Waller v. Dickson* (Civ. App.) 229 S. W. 893.

**Art. 6806. [4622] Proof of instrument by witness.**

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

**Art. 6807. [4623] Witness must be personally known to officer.**

Cited, *Brittain v. Monsur* (Civ. App.) 195 S. W. 911.

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## CHAPTER THREE

### INSTRUMENTS AUTHORIZED TO BE RECORDED, AND THE EFFECT OF RECORDING

Art. 6821. Patents and grants may be recorded without proof.	Art. 6833. Transfer of judgments to be recorded.
6822. Copies of archives recorded.	6835. Partition to be recorded.
6823. What may be recorded.	6837. Suit for land, notice to be filed.
6824. All sales to be void as to creditors and purchasers unless registered.	6838. Record of, how made.
6826. English language to be used.	6839. Transfers without notice valid.
6828. Deeds valid, etc., against subsequent creditors from, etc.	6840. Effect of notice.
6829. Marriage contract valid, when.	6841. Titles to chattels, where recorded.
6832. Judgments to be recorded.	6842. Record of any grant, etc., when notice.

**Article 6821. [4637] Patents and grants may be recorded without proof.**

Cited, *Le Doux v. Johnson* (Civ. App.) 23 S. W. 902.

**Art. 6822. [4638] Copies of archives recorded.**

Cited, *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300.

**Certified copy of county record.**—Under Rev. St. 1879, art. 4330, where a transfer of a bounty warrant issued for military service was recorded in the general land office, and a certified copy of such record was registered in the county wherein the land was situ-

ated, a certified copy of the county records was admissible in evidence. *Tevis v. Collier*, 84 Tex. 638, 19 S. W. 801.

### Art. 6823. [4639] What may be recorded.

**In general.**—The recordation of a deed is not essential to its validity. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

The policy of the registration laws requires that the public records disclose all matters affecting land titles. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

**What may be recorded—Deeds, conveyances, mortgages, etc.**—Deed reserving vendor's lien and purchase-money note reciting that it was secured by such lien are entitled to registration under this article. *Price v. Traders' Nat. Bank* (Civ. App.) 195 S. W. 934.

A conveyance of a donation certificate before location thereunder was properly recorded after location of the land, under this article. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

— **Instrument of adoption.**—Art. 1 contemplates that an instrument of adoption shall be recorded, and therefore it must be either duly authenticated or acknowledged in the manner required for the proof of deeds for registration. *Royal Neighbors of America v. Fletcher* (Civ. App.) 230 S. W. 476.

— **Assignment of rents and royalties.**—The assignment of money rentals and royalties due for certain years under an oil lease was not subject to the registration laws, nor the law merchant, not being a "deed, conveyance, or instrument concerning lands or tenements," within the meaning of the registration statute, being personal property, a nonnegotiable chose in action. *Farmers' & Merchants' State Bank of Ranger v. Tullis* (Civ. App.) 211 S. W. 847.

— **Assignment of vendor's lien notes.**—See *Etheridge v. Campbell* (Com. App.) 215 S. W. 441; *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

— **Assignment of purchaser's interest in land contract.**—Instrument assigning purchaser's interest under a contract for the sale of lands held an instrument "concerning lands" within this article, and, being properly acknowledged, to be entitled to record. *J. M. Frost & Sons v. Cramer* (Civ. App.) 199 S. W. 838.

### Art. 6824. [4640] All sales, etc., to be void as to creditors and purchasers, unless registered.

Cited, *Falls Land & Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479.

2. **Laws do not apply to trusts, etc., arising by operation of law.**—That wife has advanced funds from her separate estate to pay for land does not give her right which may not be defeated by unauthorized sale of land to bona fide purchaser for value, regardless of fact that her equity was not susceptible of record. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

Where a judgment was rendered against a husband, holding title to wife's land under resulting trust, and another, who as to the debt was a surety only, the surety taking note of husband secured by a trust deed on the wife's land without notice and paying the judgment was a bona fide purchaser as against the wife, but not as to balance of a note which had been given by the husband prior to the trust deed and mentioned therein as being secured. *Chalk v. Daggett* (Civ. App.) 204 S. W. 1057.

3. **Patents not within article.**—In a proceeding by the state and purchasers from it, in trespass to try title, opposed by claimants under a Mexican grant, where such grant was void, its record, with the field notes accompanying it, in the county, or the filing of a copy of it and the field notes in the Land Office, afforded no character of notice to such purchasers, and a resurvey, based upon the void grant, was wholly without authority and the filing of the field notes thereof could not operate as notice, so that, even if diligently pursued, such knowledge could only lead to ascertainment of the void grant, and the purchasers from the state are innocent. *Kenedy Pasture Co. v. State* (Sup.) 231 S. W. 683.

4. **"Creditors and purchasers for a valuable consideration without notice."**—Rev. St. 1879, art. 4332, applies to bona fide purchasers at sale specially ordered by the court. *Ward v. League* (Civ. App.) 24 S. W. 986.

A creditor who has fixed a lien upon land by the levy of attachment or other judicial process or by the filing of abstract of judgment in the deed records, is a "creditor" within this article. *Diltz v. Dodson* (Civ. App.) 207 S. W. 356.

5. **Bona fide purchasers—In general.**—Purchaser of land sold on alias execution under judgment recovered by vendors against vendee and assigned, abstract of judgment being legally issued and filed for record, held not in position of one who finds record title in judgment debtor, and fixes lien on his property which would be effective, though debtor may have conveyed to another by unrecorded deed, being in position of claiming lien on property not shown by record to be debtor's. *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 552, 991.

If as a matter of fact property was a rural homestead at the time it was sold at sheriff's sale, no issue of innocent purchaser could arise as between the original owner and vendee of the purchaser at the sheriff's sale. *O'Fiel v. Janes* (Civ. App.) 220 S. W. 371.

An assignee of a lease, not so worded as to constitute an interest in land, but merely giving to lessee the right to go on the land and to bore for oil and gas and sulphur, and to extract such minerals, if found, from the soil, does not have the rights of an innocent purchaser for value. *Varnes v. Dean* (Civ. App.) 228 S. W. 1017.



**6. Mode and form of conveyance—In general.**—Under a special warranty deed warranting the title "by, through, or under me, but not otherwise," but purporting "to convey the land," a grantee may become a purchaser unaffected by undisclosed equities. *Johnson v. Marti* (Civ. App.) 214 S. W. 726.

Under a general assignment for the benefit of creditors, all the property of the debtor, except that exempt from forced sale, passes to the assignee, whether included in the inventory or not, and parties dealing with the property who are not in possession of facts sufficient to put them upon inquiry, have a right to rely upon the record as to its true ownership, so that the transfer of vendor's lien notes, which is within the registration statutes, and which notes purchaser failed to register, will not sustain a claim of transferee's right to the ownership against the innocent purchaser under the general assignment. *Etheridge v. Campbell* (Com. App.) 215 S. W. 441.

An oil lease giving the lessee right to drill for oil within six months, and, in the alternative, to pay 25 cents an acre rentals per annum, confers a mere right or equity, and sublessees, as against the lessors attacking the original lease, cannot claim that they are within the rule of protection of purchasers for value without notice of the vice in the original consideration in the original lease, since such rule extends only to cases where the purchasers have taken a conveyance. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

Where the vendor of land, having assigned to T. vendor's lien notes with the lien securing their payment "together with the superior title," acted as T.'s agent in procuring from the purchaser of the land a conveyance by quitclaim to T. in satisfaction of the notes held by T., but the vendor, in fraud of his principal, T., prior to procuring the quitclaim, procured from the purchaser, without any consideration, a gas and oil lease in the name of E., which lease did not convey the minerals in place, but amounted merely to a grant of the right or option to prospect upon the land for oil, gas, and other minerals and to reduce those minerals to possession and ownership, assignees of this lease could not claim as innocent purchasers, both because they themselves were the assignees, not of an interest in land, but of a mere option, and also because the purchaser under whom they claimed did not have the superior legal title, but merely held under an executory contract, so that his title was equitable. *Taylor v. Turner* (Civ. App.) 230 S. W. 1031.

**7. — Quitclaim.**—A deed warranting title only against persons claiming under the grantors is a conveyance of the title, and not merely a quitclaim, so that a grantee thereunder can claim the protection due an innocent purchaser. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

**8. Notice—In general.**—One purchasing land is not bound by a trust agreement between his grantor and a third person, where he has neither actual nor constructive notice thereof. *Johnson v. Marti* (Civ. App.) 214 S. W. 726.

**9. — Actual notice.**—One who purchased with knowledge that a deed absolute in form to his grantor was in fact intended as security for a debt occupied no better position than his grantor, and acquired no title to the land. *Hays v. Morris* (Civ. App.) 204 S. W. 672.

First wife of decedent claiming land in trespass to try title in the right of her son against the second wife held not a bona fide purchaser in good faith, having notice when she purchased her son's interest of the second wife's claim, and not having paid valuable consideration. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

**10. — Effect of notice.**—A purchaser's title is unaffected by notice of a claim under a contract; claimant, by reason of forfeiture of contract, having no title or right enforceable against the vendor. *Wilson v. Robertson* (Civ. App.) 223 S. W. 285.

One who purchased oil and mineral lease with constructive notice of outstanding purchase-money notes against the land could not hold the minerals in the absence of an offer to redeem by paying off the notes. *Taylor v. Turner* (Civ. App.) 230 S. W. 1031.

**11. — Constructive notice and facts putting on inquiry.**—Company having purchased purchaser's equity in land was chargeable with notice of vendor's title and rights. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Where owner of homestead not fully paid for contracted for erection of house, and being unable to meet his payments, arranged with contractor for taking of title in his name to be subsequently transferred to owner incumbered with vendor's lien, that deed from original vendor to contractor had not been recorded was not sufficient to put bank purchasing vendor's lien note on notice of irregularity in title. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

If a lessee under an oil and gas lease had notice prior to execution of the lease that a third person was claiming the land under an unrecorded contract of sale, an assignee of the lease was charged with such notice. *Aurelius v. Stewart* (Civ. App.) 219 S. W. 863.

Purchaser of a vendor's lien note was not chargeable with knowledge of an agent of the seller that the note was given in a simulated sale of a homestead. *Harrison v. First State Bank of Lewisville* (Civ. App.) 224 S. W. 269.

Knowledge by attorneys acquiring an undivided interest in land for legal services of existence on the land of an expensive pumping plant and pipe line, and that third persons were exercising absolute control over the plant and all the rights of ownership, and using a road, was sufficient to put a prudent man on inquiry, and the inference arises that the attorneys obtained information as to the interest which such third person had in the land, such as a perpetual easement or license. *Markley v. Christen* (Civ. App.) 226 S. W. 150.

Purchaser at sale under judgment foreclosing a vendor's lien is not an innocent purchaser, he having acted wholly through an agent, and so been charged with his knowledge that the owners of the land had not been cited nor represented in the action by an attorney having authority to do so. *Levy v. Roper* (Civ. App.) 230 S. W. 514.

Notice to a purchaser of land that there was a clerical defect in the description of land contained in the judgment, which was part of his chain of title, does not charge him with notice that the judgment was erroneous in so far as it divested the interest of an heir. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

12. — **Recitals in conveyance.**—See art. 6842, and notes.

Assignees of an interest in a recorded oil and gas lease can rely on the recital of payment of consideration in the lease, though in fact the consideration was never paid. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

13. — **Records and facts of which record is notice and unrecorded instruments.**—See art. 6842, and notes.

Though under this article, the failure to record a mortgage would not affect its validity, and though under most circumstances a mortgage to secure a valid debt cannot be held fraudulent, a mortgage given with the understanding that it would not be recorded lest other creditors take action, and in order that the contracting of new debts might not be interfered with, might be set aside as in fraud of creditors. *Cooper Grocery Co. v. Penland*, 247 Fed. 480, 159 C. C. A. 534.

Under Rev. St. 1879, art. 4334, providing that mortgages shall be valid from the time they are filed for record, and the like provisions of arts. 4299, 4332, an absolute deed intended as a mortgage, but recorded in a book of deeds, is valid against purchasers and creditors, though art. 4304 provides that mortgages shall be recorded in separate books. *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272.

Under Rev. St. 1879, art. 4332, a written agreement by a grantee of land to reconvey on certain conditions, which agreement was not filed for record, does not affect a lien acquired by levy, by a judgment creditor against the holder of the legal title without notice of such agreement; and, where the creditor purchases at the sheriff's sale made under the levy, he will take title as against the persons entitled to the reconveyance, though he had notice of the agreement before the sheriff's certificate was issued. *Stephens v. Keating* (Sup.) 17 S. W. 37.

Under Rev. St. 1879, art. 4332, a judgment in condemnation proceedings by a railway company must be recorded in order to protect the company from the claims of a subsequent purchaser from the landowner. *Parker v. Ft. Worth & D. C. Ry. Co.*, 84 Tex. 333, 19 S. W. 518.

A forged deed is void and ineffective, and reliance upon it by a purchaser cannot affect the rights of the owner of the property. *Alamo Trust Co. v. Cunningham* (Civ. App.) 203 S. W. 413.

The common-law rule that a judgment lien attaches only to such estate in land as is owned by judgment debtor at the time the abstract of judgment was filed, notwithstanding a prior unrecorded deed, has been abrogated by this article. *Diltz v. Dodson* (Civ. App.) 207 S. W. 356.

When a deed is executed and delivered, the title to the land vests in the grantee, whether the deed is recorded or not. *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 552.

Under art. 5616, despite article 1104, purchaser of land sold on alias execution under judgment recovered by vendors against vendee and assigned, abstract of judgment being legally issued and filed for record, held to take subject to title previously conveyed away by vendee by deed not filed for record until more than three weeks after abstract of judgment was filed, recorded, and indexed, as record of abstract of judgment creates lien only on property actually owned by judgment debtor. *Id.*

If purchaser of land did not know prior to purchase that deed to his grantor was a mortgage, he was in law an innocent purchaser for value as against heirs of mortgagor. *Meyer v. Sheffield* (Civ. App.) 208 S. W. 679.

An unrecorded instrument, releasing portions of land from vendor's lien, does not affect rights of subsequent purchaser of note secured by lien, who had no actual notice of release. *Biswell v. Gladney* (Com. App.) 213 S. W. 256.

Where the record disclosed that grantor acquired his title in a sale under a trust deed, purchaser could not be said to claim through another, who claimed under a deed from the original owner and had deeded the same to the grantor; the last deed not being recorded or known to the purchaser. *Johnson v. Marti* (Civ. App.) 214 S. W. 726.

In view of arts. 6824, 6842, 6857, a purchaser of land must take notice of conveyances of such land recorded in a county from which a new county in which the land is situated was taken. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

Where plaintiffs and defendants in trespass to try title hold under different chains of title, the issue of innocent purchaser does not arise, though plaintiffs' chain of title was not recorded. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Where R. gave plaintiff power of attorney to recover and perfect title to land sold under foreclosure and convey him an undivided interest therein and plaintiff purchased the land from the mortgagee, his subsequent purchase of R.'s interest without knowledge of defendant's claim under an unrecorded federal court judgment gave him title to all of the land as an innocent purchaser, notwithstanding R.'s knowledge of defendant's claim. *Norton v. Ball* (Civ. App.) 225 S. W. 581.

A lease not recorded until after innocent parties had purchased property is void as to such bona fide purchasers. *Requa v. Joseph* (Civ. App.) 225 S. W. 585.

A trust deed which was not recorded in the mortgage and lien records of the county is nevertheless a valid lien as between the parties and all other persons who do not occupy the position of innocent purchasers or lienholders for a valuable consideration. *Shaw v. Jackson* (Civ. App.) 227 S. W. 520.

Since the failure to record an assignment of a note and vendor's lien securing it leaves the assignor, according to the record, with only his lien in the land which is not subject to attachment, such failure does not give the attaching creditor of the assignor any right superior to the assignee, even if the assignment is an instrument whose re-

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 cording is not only authorized under art. 6823, but is required under art. 6824 to be effectual against creditors and subsequent purchasers. *Traders' Nat. Bank v. Price* (Com. App.) 228 S. W. 160.

An unrecorded deed to A., who sold the timber on the land, was in the chain of title of persons claiming under the timber deed, and a timber deed to A. which he had refused to accept was not in their chain of title, and they were therefore not innocent purchasers of an outstanding claim to the land under a subsequent conveyance from A.'s grantor. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

One refusing to accept a timber deed and obtaining a deed to the land which was not recorded and was subsequently lost was not charged with constructive knowledge of the unauthorized filing of the timber deed by some one else. *Id.*

A writing purporting to be a memorandum designating what the parties were to do as a consideration for an assignment theretofore made of an oil and gas lease is insufficient as a lease, and cannot be recorded under this article, because not containing evidence of an absolute right to land, but merely a chance of title, and it will not support a plea of innocent purchaser by one purchasing from the assignee in such case, and neither will a verbal assignment. *Atlantic Oil Producing Co. v. Dawkins* (Civ. App.) 230 S. W. 525.

Parties purchasing land from the state were not under the duty of searching through the records of ancient towns of foreign country for evidence of an adverse right, which was only discovered long after their rights accrued by extraordinary effort, in the archives of a Mexican town, for there can be no presumption of notice, where inquiry, pursued with ordinary diligence, would have been futile. *Kenedy Pasture Co. v. State* (Sup.) 231 S. W. 683.

In trespass to try title, wherein an oil company intervened as an innocent purchaser for value without notice, held, that the oil company was charged with notice of proceedings under which its lessor obtained title on foreclosure, and of any invalidity in the order of sale therein. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

14. — **Possession.**—Although the possession by a tenant in common is consistent with the recorded title, that does not relieve a purchaser from the duty to inquire from the possessor the nature of his claim and possession. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

Plaintiff taking a deed from vendor's executor to land of which defendants had visible and continuous possession for more than 30 years was put on notice as to defendant's interest therein, and was not a bona fide purchaser, although defendant's deed from such deceased vendor was not recorded. *Id.*

Every person dealing with land must take notice of the actual possession. *Lasater v. Jamison* (Civ. App.) 203 S. W. 1151.

By possession of land by persons, inquiry of whom would disclose they were tenants of married woman, notice that it is her separate property is given purchaser from grantee of such woman's husband. Rev. St. 1911, art. 4261. *Markley v. Martin* (Civ. App.) 204 S. W. 123.

Defendant purchasing from D. land conveyed to plaintiff, and then by her husband to D., had notice from possession by one who was plaintiff's tenant, and whom he knew was not D.'s tenant, that it was plaintiff's separate property. *Markley v. Mussett* (Civ. App.) 204 S. W. 126.

Where holder of homestead not fully paid for had title taken in person contracting to erect house thereon, who subsequently conveyed to the owner subject to a vendor's lien. original owner's possession of premises was not sufficient to give bank purchasing vendor's lien note constructive notice of his homestead rights. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

Where purchasers knew that defendants, as lessees, were in actual possession of premises and cultivating the land, they were put on notice of the extent of defendants' rights therein. *Gilroy v. Rowley* (Civ. App.) 210 S. W. 623.

Regardless of what the recorded title would show as to the ownership of land, possession is also evidence of title, and notice to a prospective purchaser of such title as the possessor has. *Cooper v. Hinman* (Civ. App.) 212 S. W. 972.

The defense of innocent purchaser of the legal paper title is not available against the owner of a title by limitation, in view of Rev. St. 1911, art. 5679. *Bryan v. Ross* (Civ. App.) 214 S. W. 524.

Open, exclusive, and visible possession of land, either through himself or his agent and employes, maintained by the holder of an unrecorded deed when the lien of the grantor's judgment creditor attaches by filing and indexing of an abstract of judgment against the grantor, is notice to the judgment creditor of the right under which the land is held. *Newman v. Phalen* (Civ. App.) 214 S. W. 958.

A purchaser from a vendee, whose vendor remains in possession, is not bound to go beyond the deed from such vendor conveying the title, where it has been properly executed and registered. *Brooker v. Wright* (Civ. App.) 216 S. W. 196.

The possession of a tenant of vendor's grantor, as a matter of law, merely puts proposed vendee upon "inquiry," and affects him with notice of such facts as would be the exercise of due diligence, have brought home to an ordinarily prudent man knowledge of the real facts. *Id.*

Where plaintiff, knowing that others had open and notorious possession of a portion of the premises, acquired a claim to lands, for the purpose of asserting in judicial proceedings title so acquired, he cannot be deemed a bona fide purchaser, though the deeds under which defendants claimed title were not recorded. *Martinez v. Bruni* (Civ. App.) 216 S. W. 655.

Though defendants might be regarded as tenants in common of plaintiff's grantor, their visible and notorious possession was sufficient to put plaintiff on notice and prevent

him from being a bona fide purchaser, even though the conveyances under which defendants claimed were unrecorded. *Id.*

In order for possession of premises to be such constructive notice as to place a prospective purchaser upon inquiry, as a matter of law, as to any claim to title in the land held by the occupant or his landlord, the possession must be actual, open, and visible, and not merely constructive. *Aurelius v. Stewart* (Civ. App.) 219 S. W. 863.

Generally possession of land affords constructive notice of rights of party in possession, and this is equally true where the possession is by tenant. *Harris v. Hamilton* (Com. App.) 221 S. W. 273, reversing judgment (Civ. App.) 185 S. W. 409.

Where a purchaser of land has actual knowledge that the possession of his vendor's grantor is not "by sufferance of the grantee," but is by virtue of some right remaining in such grantor inconsistent with the terms of his deed, the purchaser has constructive notice of the rights of such grantor. *Id.*

Where a person has in fact held land long enough to give him title by limitation, it is good against a claimant under paper title, although at the time of the purchase the land is vacant and there is no trace of the prior adverse possession. *Houston Oil Co. of Texas v. Olive Sternenberg & Co.* (Com. App.) 222 S. W. 534, affirming judgment (Civ. App.) 200 S. W. 232. Same v. *Patterson* (Com. App.) 222 S. W. 538, affirming judgment (Civ. App.) 199 S. W. 1140.

**15. Consideration.—In general.**—The mere fact that an oil company, sublessee of part of an oil lease, paid valuable consideration for its sublease, without proof of want of notice or knowledge of the defense of want of consideration to which the original lease was subject, or other circumstances showing good faith in the sublessee company, was not sufficient to establish the defense of innocent purchaser for value from the original lessee as against the original lessors setting up the want of consideration for the lease. *Hitson v. Gilman* (Civ. App.) 220 S. W. 140.

If payment of oil lease rentals by sublessees merely afforded consideration for the option given the original lessee to extend the period within which he would be required to drill for oil, such payment of rentals did not constitute the sublessees innocent purchasers for value, without notice of the infirmity in the original lease that it was not supported by consideration, and thereby protected as against the lessors. *Id.*

Where R. gave plaintiff a power of attorney to recover and perfect the record title to land which had been sold under foreclosure and, in consideration of his services and expenses, conveyed him an undivided half interest in the land, and plaintiff performed such services and purchased the land from the mortgagee without knowledge of defendant's claim under an unrecorded judgment of the United States District Court, such services were a sufficient consideration to support plaintiff's claim of innocent purchase of one-half of the land, though the purchase from the mortgagee was also for R.'s benefit and R. had knowledge of the proceedings and judgment in the federal court. *Norton v. Ball* (Civ. App.) 225 S. W. 581.

**16. — Payment of value.**—In trespass to try title purchasers claiming under state may be purchasers for value, although they have paid only one-fortieth of purchase price. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

That plaintiffs paid \$12 for all the other land of a tract, and paid only \$2 for the land in question, indicates they had knowledge that their grantor was selling the land of his landlord, and they were charged with knowledge that he had no record title. *Rio Bravo Oil Co. v. Sanford* (Civ. App.) 217 S. W. 219.

To entitle subsequent vendee to have prior unregistered conveyance postponed to his subsequent conveyance, it must appear that he purchased in good faith without notice, actual or constructive, of prior vendee, purchase money being actually paid, recital in deed not being sufficient. *Ackers v. Frazier* (Civ. App.) 220 S. W. 426.

To be protected as a bona fide purchaser, purchaser must have paid value for the land. *Conn v. Southwestern Settlement & Development Co.* (Civ. App.) 222 S. W. 612.

**19. Title and rights acquired by bona fide purchasers and equities and defenses against them.**—A claim of homestead in property conveyed by warranty deed duly recorded, the property, being surrendered to the vendee, is without foundation as against innocent purchasers. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

The vendor is under no duty to record his deed to preserve his vendor's lien thereunder from loss by another's innocent purchase in reliance on a deed forged by the vendee. *Alamo Trust Co. v. Cunningham* (Civ. App.) 203 S. W. 413.

While attempt to unlawfully incumber homestead may be invalid as between parties to original contract and those having notice, homestead right will not be enforced against innocent holder for value of debt and lien thus created. *Martin v. Granger* (Civ. App.) 204 S. W. 666.

In the absence of notice to the contrary, purchaser has the right to assume that the deed to his vendor correctly stated all of the unpaid consideration for which it was executed, and where a note described in the deed makes no reference to a provision for attorney's fees, in the absence of actual notice, judgment for foreclosure against the purchaser cannot include such attorney's fees. *Gray v. Fenimore* (Com. App.) 215 S. W. 956.

Oil lease, where sufficient to transfer interest in land, and therefore assignable, will not be canceled as to innocent purchaser, who paid a valuable consideration for the lease without notice of any infirmity. *McKay v. Lucas* (Civ. App.) 220 S. W. 172.

Notwithstanding Const. art. 16, § 50, an innocent purchaser for value of a vendor's lien note, given in a simulated sale of a homestead, acquires the right to enforce the lien. *Harrison v. First Nat. Bank of Lewisville* (Civ. App.) 224 S. W. 269.

A bona fide purchaser cannot be held as a constructive trustee, regardless of the fraud of his vendor. *Reeves v. Shook* (Civ. App.) 225 S. W. 429.

Where defendant wife owned as her own separate property certain acreage, stand-

ing in the name of one S., and this acreage was conveyed by S. to C. at her request, in exchange for C.'s conveyance to defendant husband of the property in controversy, which defendants proceeded to occupy as their homestead, but the deed from C. retained a vendor's lien upon the land to secure a recited purchase-money note for \$2,000 in favor of S., made at defendant husband's request, which note in fact represented no part of the purchase price, but was to pay an antecedent personal debt owed S. by defendant husband, a purchaser, who had no knowledge of the facts other than appeared by the note, deed, and records, was protected against the defense that the note, not being for any part of the purchase price, was invalid against the wife's claim of homestead. *Hayner v. Chittim* (Civ. App.) 228 S. W. 279.

Where the lien of a judgment was valid to the extent of the balance owned by the judgment creditor, though the equitable assignee of the other interest had knowledge of an unrecorded deed, by his purchase of the judgment, such assignee acquired such balance and the lien as it existed in the hands of the judgment creditor. *Ives v. Culton* (Com. App.) 229 S. W. 321.

Where a deed was never validly delivered, it did not become operative, and, though the grantee obtained possession, one purchasing from him cannot defeat the grantor's rights on the theory of bona fide purchase. *Haggood v. City Nat. Bank* (Civ. App.) 230 S. W. 775.

Where the owners of an oil and gas lease authorized an agent to sell the same and deposited an assignment with a bank, the title did not pass where on the dishonor of the check of the purported purchaser the owners repudiated the transaction, and so notified the bank, but the agent through false statements procured possession of the assignment and had it recorded; for there was no delivery, and the owners declined to accept payment from the agent; hence even a bona fide purchaser from the agent had no rights superior to the owners. *Id.*

**20. Evidence.**—Evidence held to show that plaintiff, a subsequent vendee, had notice before he purchased that a deed of the actual occupant and claimants was, though in form absolute, a mortgage. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

In statutory trespass to try title, defendants, heirs of widow from whom plaintiff's grantor acquired title, setting up that widow's deed was mortgage and known to have been such by plaintiff when he purchased, evidence tending to prove defense held insufficient to sustain verdict for defendants. *Meyer v. Sheffield* (Civ. App.) 208 S. W. 679.

In an action on a vendor's lien note, evidence held to show that the purchaser of part of the property, who had paid the purchase price upon being shown a release of the lien, was an innocent purchaser not affected by the fact that the vendor's lien note had not in fact been paid. *First State Bank of Abilene v. Shaw* (Civ. App.) 214 S. W. 442.

In trespass to try title by a prior purchaser against a junior purchaser from the common source, evidence held insufficient to show that defendant junior purchaser's predecessor was an innocent purchaser without notice from the common source of title. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

**21. — Presumptions and burden of proof.**—See notes under art. 3687, rule 12.

**24. Mortgagees as bona fide purchasers—Notice and effect of notice in general.**—A subsequent mortgagee, or purchaser under such a mortgage, was not an innocent purchaser as against an outstanding vendor's lien note, knowledge of which could have been acquired by using reasonable diligence. *Benton v. Jones* (Civ. App.) 220 S. W. 193.

**25. — Record as notice.**—See art. 6842, and notes.

Where, when note and deed of trust were given, deed of purchaser from mortgagor was not of record, and mortgagees had no notice of her title or claim, as against mortgagees, she is in no better position than had she purchased on date on which she filed deed for record, subsequently to recordation of deed of trust. *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293.

**27. — Rights acquired in general.**—Payee, accepting note to secure husband's debt and deed of trust on wife's land to secure note, without knowledge that wife at time of execution of deed of trust was insane, was not protected as an innocent purchaser. *White v. Holland* (Civ. App.) 229 S. W. 611.

### Art. 6826. [4640a] English language to be used.

Instrument executed prior to enactment of statute.—This article has no application to the introduction in evidence of an instrument in writing executed long prior to the adoption of the statute. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

### Art. 6828. [4642] Deed, etc., valid, against subsequent creditors from, etc.

See *Lewis v. San Antonio Belt & Terminal Ry. Co.* (Civ. App.) 208 S. W. 552.

In general.—Under Rev. St. 1879, art. 4334, and the like provisions of arts. 4299, 4332, an absolute deed intended as a mortgage, but recorded in a book of deeds, is valid against purchasers and creditors, though art. 4304 provides that mortgages shall be recorded in separate books. *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272.

Since the passage of Rev. St. 1879, art. 4292, a destroyed record of a deed which has not been re-recorded within four years does not operate as constructive notice to a subsequent purchaser, under Rev. St. 1879, art. 4334, that deeds shall take effect, as against subsequent purchasers, from the time they are "delivered to the clerk to be recorded." *O'Neal v. Pettus*, 79 Tex. 254, 14 S. W. 1065.

Where an instrument, like a contract for a lien on a homestead, does not require recording to make it valid between the parties, the filing of it with the clerk makes it

notice to subsequent purchasers, and it is immaterial that it is recorded in a book with deeds. *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. 278.

Under the provisions of Rev. St. 1879, art. 4333, that all deeds shall be recorded in the county where the land, "or a part thereof," is situated, and art. 4334, that any conveyance delivered to be recorded shall take effect as to all subsequent purchasers, and as to all creditors, from the time of delivery, a deed of trust describing the land as being in one county, when a part of it is actually in another county, if recorded in the former county, gives sufficient notice to creditors levying execution on the land outside such county. *Brown v. Lazarus*, 5 Civ. App. 81, 25 S. W. 71.

As a general rule subsequent creditor who acquired claim with knowledge or notice of conveyance sought to be annulled cannot attack it as fraudulent, and subsequent creditors of husband would not be heard to say that they had no notice of prior recorded conveyances to husband's wife and daughter. *Sikes v. First State Bank of Deatur* (Civ. App.) 197 S. W. 227.

Where husband in making a conveyance to his wife intended to defraud his creditors, and immediately had the deed recorded at the county seat of county where the land lay, a considerable distance from the places of business of his creditors, the record of the instrument did not under arts. 6828, 6842, constitute such constructive notice to subsequent creditors that they could not attack the deed. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

#### Art. 6829. [4643] Marriage contract, when valid.

Cited, *Le Doux v. Johnson* (Civ. App.) 23 S. W. 902.

#### Art. 6832. [4646] Judgments to be recorded when.

Cited, *Spence v. Brown* (Civ. App.) 22 S. W. 983.

Repeal.—Rev. St. 1879, arts. 4298, 4338, requiring the record of judgments with the certificates of authenticity attached thereto, are not impliedly repealed by arts. 3153-3163, providing for the record of abstracts of judgments, so as to make them a lien. *Spence v. Brown* (Civ. App.) 24 S. W. 309.

#### Art. 6833. [4647] Transfers of judgment to be recorded, etc.

See *Wichita Falls Electric Co. v. Chancellor & Bryan* (Civ. App.) 229 S. W. 649.

Does not apply to transfer before suit.—This article has no application to cause of action on which suit has not been filed. *Browne v. King* (Civ. App.) 196 S. W. 884.

#### Art. 6835. [4649] Partition to be recorded.

See *Callahan v. Hendrix*, 79 Tex. 494, 15 S. W. 593.

Construction and application.—Where the judgment of the district court under which plaintiff claims title was not recorded with the county clerk of the county where the land was situated, as required by Rev. St. 1879, art. 4339, until after defendant purchased the land from parties holding under apparent chain of title from the patentee, paying a valuable consideration therefor, under the bona fide belief that he was buying from the true owners, defendant's title is unaffected by the judgment. *Corley v. Renz* (Civ. App.) 24 S. W. 935.

Decree competent evidence, though not recorded, when.—The failure to record a judgment determining title to property in the deed records of the county, under the provisions of this article, does not prevent the introduction in evidence of the judgment as a muniment of title. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

#### Art. 6837. Suit for land; notice to be filed.

**Lis pendens—In general.**—The filing of a petition in involuntary bankruptcy by proper parties, making the jurisdictional allegations, operates as *lis pendens*, and is notice to all creditors. *Coppard v. Gardner* (Civ. App.) 199 S. W. 650.

*Lis pendens* notice required by this article, to contain "a description of the land affected," held, in view of description in deeds and petition, to sufficiently identify the land by its description. *Pope v. Beauchamp* (Com. App.) 206 S. W. 928.

— **Effect of recording of transfer.**—*Elder v. Craddock* (Civ. App.) 223 S. W. 314.

— **Termination.**—A *lis pendens* operates only during pendency of the suit, and only as to matters involved therein, and terminates upon settlement of the suit. *Johnson v. Marti* (Civ. App.) 214 S. W. 726.

— **Operation and effect.**—Where a wife's suit against her divorced husband to set aside a settlement of their property rights and a conveyance of land to the husband pursuant thereto was pending when a creditor of the husband, which subsequently purchased the land at sheriff's sale, acquired an attachment lien thereon, it was charged with notice under the rule of *lis pendens*, and could not claim to be an innocent holder without notice. *Kuehn v. Kuehn* (Civ. App.) 232 S. W. 918.

— **Purchasers pendente lite.**—A *lis pendens* notice places the purchaser of the property on inquiry as to the real facts, and charges him with notice of what an investigation would have disclosed. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

One purchasing land pending suit in trespass to try title was not an "innocent purchaser." *Roberts v. Dreyer* (Civ. App.) 200 S. W. 1097.

Vendor's lien reserved by purchase-money note being substantially a mortgage, purchaser of the note is, as to the lien, charged with notice of recorded *lis pendens* in suit to cancel conveyances for fraud. *Pope v. Beauchamp* (Com. App.) 206 S. W. 923.

One who purchased a note long after maturity, and after suit was begun thereon, would be a *pendente lite* purchaser, and his *pendens* would apply to her. *Warren v. Parlin-Orendorff Implement Co.* (Civ. App.) 207 S. W. 586.

The purchaser of land, on whom a prior purchaser from the same party holding an unrecorded deed served an injunction petition that the prior purchaser and record lessee of the lands was owner of them, bought at his peril where he failed to make full and complete inquiry as to the basis of the claimed title of the other and prior purchaser and lessee. *Kelly v. Blakeney* (Com. App.) 212 S. W. 651.

The common-law rule that a purchaser *pendente lite* was bound by a judgment against his predecessor does not apply to the purchaser of a negotiable instrument, who acquires good title if he had no actual notice of the pending suit. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

This article was intended to protect purchasers, and does not change the common-law rule that a *bona fide* purchaser of a negotiable note secured by vendor's lien acquired good title to the note and to the lien. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

Under art. 7758, making a judgment for recovery of real estate conclusive against all persons claiming under a party by title arising after the commencement of the action, a judgment against a lessee canceling a mineral lease is not conclusive against an assignee of the lease who procured his assignment before the suit was begun, so that the *lis pendens* notice filed therein did not affect him. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

Where plaintiff's predecessor in title after foreclosing vendor's lien notes mortgaged the premises, the mortgage being assigned to plaintiff, who bought in the property on foreclosure sale had under proceedings brought after notice of *lis pendens* of an action by defendants' grantor against plaintiff's predecessor in title to recover the property on the theory that he was not the owner of the vendor's lien notes, plaintiff being a purchaser *pendente lite*, is bound by the judgment in favor of defendants' grantor. *Allen-West Commission Co. v. Gibson* (Civ. App.) 228 S. W. 342.

— **Rights and liabilities of purchasers.**—Where letters in evidence fixed the amount due from an owner to a corporation constructing an irrigation plant and subsequently intervener in garnishment proceedings against contractor purchased the construction contract, the rights of the parties were fixed before purchase, and intervener could recover no more than the amount fixed by such agreement. *Hall v. Nunn Electric Co.* (Civ. App.) 214 S. W. 452.

The vendor's lien securing a negotiable purchase-money note, like a mortgage, is incidental to the note and accompanies it in all transfers and a *bona fide* purchase of the note discharges, not only the note, but also the lien, from equities against them in payee's hands, so that a *bona fide* purchaser of the note pending a suit by a former owner of the land to recover the land on the ground of fraud acquires a lien valid against the land after its recovery by the former owner, despite the fact that *lis pendens* notice was filed in such suit under this article. *Pope v. Beauchamp*, 110 Tex. 271, 219 S. W. 447.

### Art. 6838. Record of, how made.

**Index.**—To render *lis pendens* notice effectual, it need not be indexed by the clerk as required by this article; it being expressly provided by art. 6840 that it shall be effective from time of its filing. *Pope v. Beauchamp* (Com. App.) 206 S. W. 928.

### Art. 6839. Transfers without notice, valid.

**Failure to file *lis pendens*.**—In trespass to try title, failure of plaintiff to record a *lis pendens* did not affect his rights, where defendant was in possession of the premises in controversy at the time plaintiff executed a deed after the institution of the suit to a third party, thus effecting the purchases with constructive notice as effectually as would have been the recording of *lis pendens* notice, under arts. 6839, 6840. *Elder v. Craddock* (Civ. App.) 223 S. W. 314.

### Art. 6840. Effect of notice.

**Effect of notice by other means.**—This article does not deal with the rights of persons with either actual or constructive notice of equities, and filing notice is unnecessary as against a subsequent purchaser or incumbrancer with actual or constructive notice; so that, where a purchaser of land had notice of vendor's lien thereon, the right to foreclose such lien against such purchaser in suit to revive a prior judgment on the vendor's lien note for the purpose of foreclosing the lien was not affected by the fact that, in the suit in which the judgment was recovered, no *lis pendens* notice was filed in the county where the land was situated. *Ater v. Knight* (Civ. App.) 218 S. W. 648. See, also, *Elder v. Craddock* (Civ. App.) 223 S. W. 314.

**Index.**—See *Pope v. Beauchamp* (Com. App.) 206 S. W. 928.

### Art. 6841. [4651] Titles to chattels, where recorded.

**Removal to another county.**—In view of art. 5655, the chattel mortgage act did not repeal this article, which requires registration in the county to which the property might be removed, so that where a mortgage was filed in the county of the mortgagor's residence, and he moved to another county, taking the property with him, with the consent of the mortgagee, the mortgage was void as to subsequent purchasers, unless within four months it was filed in the county to which the property was removed. *Reed v. Spikes* (App.) 15 S. W. 122.

Under this article, where mortgage on mules was given to the sellers thereof by the buyers, and the mules were moved to Louisiana, where the lien of the mortgage was recorded, the sellers' liens become inferior to the liens of a bank, acquired after the mules were brought back into another county of Texas and recorded there before the sellers' mortgage was recorded; the recording of the mortgage by the sellers in the county into which the mules were brought back not having been within four months after the removal of the mules from another county where the lien was first recorded, into Louisiana, on the original sale. *Hart Bros. v. Kirkes* (Civ. App.) 225 S. W. 870.

**Consent or knowledge of removal by mortgagee.**—Rev. St. 1879, art. 4341, does not apply in case of a removal without the mortgagee's consent. *Vickers v. Carnahan*, 4 Civ. App. 305, 23 S. W. 338. And the statute is inapplicable to property removed without mortgagee's consent, but with his knowledge. *Guaranty State Bank of Tyler v. Reeves* (Civ. App.) 213 S. W. 285.

### Art. 6842. [4652] Record of any grant, etc., when notice.

**Record as notice**—In general.—One who acquired deed to land after deeds of other parties, through long course of years, had been recorded and specifically described property, was not innocent purchaser. *McDougal v. Conn* (Civ. App.) 195 S. W. 627.

Where deed reserving vendor's lien for purchase-money note was recorded, and such lien assigned by unrecorded instrument, the original deed was notice to vendor's creditors only until purchase-money note was outlawed, and liens of judgments against vendor secured after note was barred by statute of limitations are superior to assignee's rights under vendor's lien. *Price v. Traders' Nat. Bank* (Civ. App.) 195 S. W. 934.

Under arts. 6828, 6842, held, that subsequent creditors of husband would not be heard to say that they had no notice of prior recorded conveyances to husband's wife and daughter. *Sikes v. First State Bank of Decatur* (Civ. App.) 197 S. W. 227.

As a general rule subsequent creditor who acquired claim with knowledge or notice of conveyance sought to be annulled cannot attack it as fraudulent. *Id.*

Where husband in making a conveyance to his wife intended to defraud his creditors, and immediately had the deed recorded at the county seat of county where the land lay, a considerable distance from the places of business of his creditors, the record of the instrument did not under arts. 6828, 6842, constitute such constructive notice to subsequent creditors that they could not attack the deed. *Quarles v. Hardin* (Civ. App.) 197 S. W. 1112.

After deed was recorded, subsequent purchasers were charged with constructive notice of deed and record. *Houston Oil Co. of Texas v. Lane* (Civ. App.) 200 S. W. 216.

Since a landowner need not constantly examine records to guard against instruments affecting his title, he is not to be charged with notice of registration of hostile deed to his tenant, where his possession is not disturbed. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

The fact that the trust deed by one partner to a third person in payment of his individual debts was recorded did not have the effect, when the other partner accepted a deed to the same interest, of a waiver of his rights to have the partnership assets applied to the payment of partnership debts. *Sherk v. First Nat. Bank* (Com. App.) 206 S. W. 507.

In a suit to foreclose vendor's lien on lands, where a conveyance of two incumbered parcels on its face spread the vendor's lien on both, held that a peremptory instruction in favor of successors in interest of a grantee and against plaintiff, the holder of notes, secured by the vendor's lien, was properly denied. *Lanham v. West* (Civ. App.) 209 S. W. 258.

A mortgagee is not charged with constructive notice of a subsequent recorded deed, conveying part of land involved. *Biswell v. Gladney* (Com. App.) 213 S. W. 256.

A fact disclosed by acknowledgment of a recorded power of attorney has same effect as if it appeared elsewhere in instrument, so far as notice to land purchaser of defect in chain of title is concerned. *Griggs v. Houston Oil Co. of Texas* (Com. App.) 213 S. W. 261.

One purchasing property from a mortgagor subsequent to the execution and filing of the mortgage takes subject to the mortgage. *Price Oil Mill Co. v. Madisonville Oil Mill & Fertilizer Co.* (Civ. App.) 214 S. W. 708.

Where a deed expressly reserving lien to secure the series of notes executed by the purchaser grantee was duly recorded, third persons were charged by the record with notice of the lien on the land so created, and, in buying a second series of vendor's lien notes from the husband of the original grantor and vendor after a reconveyance to and resale by her, they took subject to the lien of the outstanding first purchase-money notes, and recitals in the recorded deed of reconveyance from the purchaser grantee to the grantor, in a recorded transfer of part of the notes to a college, and in the recorded deed to the subsequent purchaser, were material only in determining their effect on the notice from record of the original deed, and, not being tantamount to a declaration of payment of the notes and release or extinguishment of the lien, the fact that transfers of part of the first series of notes were not recorded was immaterial. *H. O. Wooten Grocer Co. v. Lubbock State Bank* (Com. App.) 215 S. W. 335.

Recitals in deed of reconveyance from the purchaser of land to the seller held not to be construed as declarations of payment, satisfaction, or cancellation of the vendor's lien notes and release or extinguishment of the lien, so as to entitle purchaser of subsequent series of vendor's lien notes to regard the first vendor's lien notes as satisfied. *Id.*

In view of arts. 6824, 6842, 6857, a purchaser of land must take notice of conveyances of such land recorded in a county from which a new county in which the land is situated was taken. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.



Registration of a deed of trust and a chattel mortgage, valid in their description of the property and otherwise, which created liens on the property in controversy, constituted constructive notice to parties seeking protection as innocent purchasers through an execution sale subsequently made upon a judgment. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

Where the owner of a large parcel of land conveyed 50 acres and the deed was recorded, a subsequent purchaser from such landowner has constructive notice of the conveyance. *Davies v. Rutland* (Civ. App.) 219 S. W. 235.

As between mortgagor and mortgagees, the lien given by the original mortgage or deed of trust was preserved by each of the subsequent deeds of trust executed on renewals of the debt, and such instruments having all been properly recorded, the lien is valid as against any subsequent purchaser. *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293.

In partition where a cotenant in possession claimed by adverse possession, the registration of a deed under which he held was constructive notice to his cotenants of the existence of the deed. *Terry v. Terry* (Civ. App.) 228 S. W. 299.

— **Facts of which record is notice.**—Purchasers are only charged with notice of facts exhibited by record, and not with such as might have been ascertained by such inquiries as examination of record might have induced prudent man to make. *Houston Oil Co. of Texas v. Lane* (Civ. App.) 200 S. W. 216.

Every purchaser of land is chargeable with all that real estate records show in claim of title under which he claims, including all recitations therein. *Id.*

Where record showed a conveyance to "Elizabeth O. Griggs," and that she later gave a power of attorney in which she was described as "Mrs. Elizabeth O. Griggs," there is no constructive notice to a purchaser that she had a husband living when land was conveyed to her. *Griggs v. Houston Oil Co. of Texas* (Com. App.) 213 S. W. 261.

Land purchasers are charged with knowledge of all facts appearing in recorded instruments, and where circumstances appear in chain of title sufficient to put a reasonably prudent man on inquiry, the purchaser is charged with knowledge of facts which might have been discovered by reasonable inquiry. *Id.*

A purchaser of land from heirs, whom purchaser believed to have only an undivided interest, must take notice of statements in prior recorded conveyance from an ancestor of the heirs setting forth facts showing the true ownership of the land. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 322.

Where duly recorded deed recited vendor's lien was retained to secure purchase-money note, a subsequent purchaser was chargeable with notice of the lien. *Ater v. Knight* (Civ. App.) 218 S. W. 648.

A reference in a sheriff's return in an attachment action to a deed from "F. L. Perry" to "J. P. McCasland" was not notice to a subsequent incumbrancer of a deed from "E. F. Perry" to "I. P. McCasland," in the absence of a showing that "E. F." Perry was known as "F. L." Perry or that "I. R." McCasland was known as "J. P." McCasland. *Lemm v. Kramer* (Civ. App.) 224 S. W. 560.

Recording of an oil and gas lease prior to its assignment gives constructive notice to the assignees of the conditions in the lease, and such assignees are charged with knowledge that the conditions for development or payment of rent had not been performed. *Hickernell v. Gregory* (Civ. App.) 224 S. W. 691.

Though the primary purpose of the registration statute may be to protect innocent purchasers for value, it is also intended to protect all whose rights are disclosed by the record, so that the record of a deed reserving the minerals under the tract conveyed is constructive notice that the title to the minerals was vested in the grantor. *Wallace v. Hoyt* (Civ. App.) 225 S. W. 425.

One who claims a tract of land under chain of title derived from the state has constructive notice of every fact disclosed by the chain of title, although he had not read the instruments constituting that chain, and therefore has constructive knowledge of reservation of mineral rights in a deed to a remote grantor. *Id.*

Where land was sold with a reservation of mineral rights, a subsequent registration of oil leases held insufficient to constitute notice of adverse possession, in view of this article. *Lyles v. Dodge* (Civ. App.) 228 S. W. 316.

Deed executed by the ancestor of certain defendants in plaintiff bank's suit in trespass to try title, and by others, to plaintiff bank's predecessor, held to disclose such facts as required such predecessor and subsequent purchasers under him to make proper inquiry as to what persons owned an interest in the land, which inquiry, had it been pursued, would have advised such predecessor of the equities owned by defendants. *Yates v. Buffalo State Bank* (Civ. App.) 229 S. W. 619.

A junior purchaser of land is chargeable not only with notice of the contents of a registered deed in the chain of title, but when the mesne conveyances contain that which should put a prudent person on inquiry he is chargeable with notice of whatever such inquiry would have revealed. *Id.*

Although the records may have shown facts which charged a purchaser of property with notice that a minor was the heir of a former owner, that fact does not charge him with notice of error in a judgment vesting the title in his grantor to the exclusion of the heir. *Crow v. Van Ness* (Civ. App.) 232 S. W. 539.

— **Persons affected with notice and notice of instruments not in chain of title.**—Under party wall agreement, whereby one adjoining owner built it at his own cost, with provision that other should pay his share when he used it, such other's grantee with notice would be liable to pay for its use on theory that builder was absolute owner until such use. *McCormick v. Stoneheart* (Civ. App.) 195 S. W. 883.

The assignee of vendor's lien is not charged with constructive notice of a subsequent recorded deed conveying part of land involved. *Biswell v. Gladney* (Com. App.) 213 S. W. 256.

Although the literal terms of arts. 6842, 6857, would require that all persons be held to know what appears on the face of a duly recorded instrument, registration of an instrument thereunder only carries notice of its contents to those bound to search for it, among whom are subsequent purchasers under the grantor in a recorded instrument. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

The grantee of land was not charged with constructive knowledge of a subsequent conveyance of the land by the grantor to a third person. *Fidelity Lumber Co. v. Adams* (Civ. App.) 230 S. W. 177.

— **Particular instruments.**—Patentees of land or their assignees cannot ignore a recorded conveyance of a donation certificate executed before the location of the land; such instrument having the legal effect to determine in whole or in part to whose benefit the patent itself inures. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

A subsequent purchaser of land charged with notice of a mortgage lien by record of the mortgagees' deed of trust is bound by any valid renewal and extension of the note between the mortgagor, her seller, and the mortgagees. *R. B. Templeman & Son v. Kempner* (Civ. App.) 223 S. W. 293.

## CHAPTER FIVE

### GENERAL PROVISIONS

Art.		Art.
6852.	Party may have action to correct error, etc.	6857. Old registration operative after creating new county.
6853.	May obtain judgment of proof of any instrument.	6858. Attachments to be recorded, when.

#### Article 6852. [4663] Party may have action to correct error, etc.

**Correction of certificate.**—If acknowledgment of a married woman's deed was actually made as required by statute, certificate can be corrected to conform to facts. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

#### Art. 6853. [4664] May obtain judgment of proof of any instrument.

**In general.**—Plaintiff, in an action against the heirs of his deceased grantor, under Rev. St. 1879, art. 4354, sought to prove for record an instrument purporting to have been executed by deceased, conveying certain lands to plaintiff. The instrument contained all the essential elements of a conveyance of real estate, except that it was not acknowledged by the grantor nor attested by subscribing witnesses, as required by Rev. St. 1879, art. 554. Held, that a demurrer to the petition was properly overruled, since the instrument, though it might not take effect as a conveyance, was effectual as a contract to convey, on which a conveyance could be enforced under Rev. St. 1879, art. 561, and as such was entitled to record. *Howard v. Zimpelman* (Sup.) 14 S. W. 59.

This article is without application to the case of a buyer of land who refuses to acknowledge contract of extension of vendor's lien; four years limited by arts. 5694, 5695, for continuance of the lien having elapsed, so that judgment, under art. 6853 would be a nullity. *McCracken v. Sullivan* (Civ. App.) 221 S. W. 336.

#### Art. 6857. [4668] Old registration operative after creating new county.

See *Lumpkin v. Muncey*, 66 Tex. 311, 17 S. W. 732.

**In general.**—Although the literal terms of arts. 6842, 6857, would require that all persons be held to know what appears on the face of a duly recorded instrument, registration of an instrument thereunder only carries notice of its contents to those bound to search for it, among whom are subsequent purchasers under the grantor in a recorded instrument. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S. W. 382.

In view of arts. 6824, 6842, 6857, a purchaser of land must take notice of conveyances of such land recorded in a county from which a new county in which the land is situated was taken. *Id.*

#### Art. 6858. [4669] Attachments to be recorded, when.

**Sufficiency of record.**—Under this article, where clerk duly indexed names of several parties to suit wherein land was attached, held that record was sufficient, though heading of writ when filed did not recite names of some of parties, name of defendant whose land was attached being given. *Farmers' Nat. Bank v. Collis* (Civ. App.) 197 S. W. 782.

**Levy in county other than where suit pending.**—Though not directly authorizing it, this article impliedly authorizes sheriff to certify a copy of writ of attachment levied in county other than that in which suit was pending. *Farmers' Nat. Bank v. Collis* (Civ. App.) 197 S. W. 782.

## TITLE 119

## ROADS, BRIDGES AND FERRIES

[See Appendix for list of local road laws.]

<p>Chap.</p> <ol style="list-style-type: none"> <li>1. Establishment of public roads.</li> <li>1a. State highway department.</li> <li>2. Appointment of overseers.</li> <li>3. Persons liable to work on roads and their rights and duties.</li> <li>4. Powers and duties of overseers.</li> <li>5. Road commissioners.</li> <li>6. Road superintendents.</li> <li>6a. Patrol system.</li> </ol>	<p>Chap.</p> <ol style="list-style-type: none"> <li>7. Road law for counties having forty thousand inhabitants or over.</li> <li>8. Drainage of public roads.</li> <li>8a. Motor and other vehicles.</li> <li>9. Bridges.</li> <li>9b. Paved roads.</li> <li>10. Ferries.</li> <li>11. Special road tax.</li> </ol>
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## CHAPTER ONE

## ESTABLISHMENT OF PUBLIC ROADS

<p>Art.</p> <ol style="list-style-type: none"> <li>6859. What roads declared public.</li> <li>6860. Commissioners' courts to open.</li> <li>6861. Not to be changed unless, etc.</li> <li>6862. Roads in towns, etc.</li> <li>6863. First class roads from county seat to county seat, etc.</li> <li>6864. Jury of view to be appointed, etc.</li> <li>6866. When damage excessive, etc.</li> <li>6871. General classification of roads.</li> <li>6872. First class roads, etc.</li> <li>6873. Second class, etc.</li> <li>6874. Third class, etc.</li> <li>6875. Application not until, etc.</li> <li>6876. How made, etc.</li> <li>6877. How laid out, etc.</li> <li>6880. Notice to owner, etc.</li> <li>6881. Statement of damages, etc.</li> <li>6882. If report approved, to be paid, etc.</li> </ol>	<p>Art.</p> <ol style="list-style-type: none"> <li>6883. May order opening, but damages to be paid first, etc.</li> <li>6884. Established if no objection made.</li> <li>6885. May change roads, when.</li> <li>6889-6896. [Note.]</li> <li>6899. Right to erect gates.</li> <li>6901. Commissioners as supervisors.</li> <li>6901a. Salaries of county commissioners.</li> <li>6901b. Same.</li> <li>6901c. Same.</li> <li>6901d. Same.</li> <li>6901e. United States census to govern determination of population.</li> <li>6901ee. Payment of salaries validated.</li> <li>6901f. Suit to recover money paid as salaries; defense.</li> <li>6901g. Same; when and how brought.</li> <li>6901h. Partial invalidity of act.</li> <li>6903. Reports, etc.</li> </ol>
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**Article 6859. [4670] What roads are declared to be public.**Cited, *Worthington v. Wade*, 82 Tex. 26, 17 S. W. 520.

**What are public roads in general.**—Whether a road is public depends in a measure on the particular facts, but it does not depend on its length, its terminus, nor the number of people who use it; it is a public road if there is a general right to use it for travel even if it ends in a cul-de-sac. *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (*Civ. App.*) *Moseley v. Bradford*, 190 S. W. 824.

**Prescription.**—An easement for a public road may be acquired on a portion of a railroad right of way by prescription. *Gulf, C. & S. F. Ry. Co. v. Bluit* (*Civ. App.*) 204 S. W. 441.

Where roadway on railroad right of way outside poles carrying telegraph wires was used generally by the public for hauling and travel for more than 20 years to the knowledge of the railroad, and was worked by the citizens, there was a public road by prescription. *Gulf, C. & S. F. Ry. Co. v. Bryant* (*Civ. App.*) 204 S. W. 443.

**Oil and gas lease.**—In view of Pen. Code 1911, art. 812, as to obstructing highways, a commissioners' court has no authority under arts. 1370, 2241, 6859, 6860, 6861, to lease any portion of the public highways for oil and gas wells, which will necessarily be obstructions thereof, notwithstanding such portion of the highway has been acquired by purchase and not condemnation, or the lessee also holds a lease from the owner of the fee of the land over which such portion of the highway runs as a right of way. *Boone v. Clark* (*Civ. App.*) 214 S. W. 607.

**Evidence of existence of highway.**—Evidence held insufficient to show that alleged road was a public way. *Espejo Land & Irrigation Co. v. Urbahn* (*Civ. App.*) 203 S. W. 920.

Evidence held to show acquisition of prescriptive right of way for public road in railroad right of way. *Gulf, C. & S. F. Ry. Co. v. Bluit* (*Civ. App.*) 204 S. W. 441.

**Art. 6860. [4671] Commissioners' courts to open, etc.**

Cited, *Rankin v. State*, 25 Tex. App. 694, 8 S. W. 932; *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

**In general.**—Arts. 6860, 6861, 6875, 6884, 6885, contemplate that roads shall be laid out and across the lands of citizens in answer to a public necessity therefor, and not for the benefit of private parties. *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

**Validity of special act intrenching on powers of commissioners' court.**—See *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

**Jurisdiction and powers of commissioners' court.**—See *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

**In view of Pen. Code 1911, art. 812, as to obstructing highways,** a commissioners' court has no authority under arts. 1370, 2241, 6859, 6860, 6861, to lease any portion of the public highways, for oil and gas wells, which will necessarily be obstructions thereof, notwithstanding such portion of the highway has been acquired by purchase and not condemnation, or the lessee also holds a lease from the owner of the fee of the land over which such portion of the highway runs as a right of way. *Boone v. Clark* (Civ. App.) 214 S. W. 607.

The question of the necessity of a public road is wholly for the determination of the petitioners, and where so determined by them and the commissioners' court, and where proper legal steps have been taken, the question is not subject to review by the district court in suit to enjoin opening of the road. *Culp v. Commissioners' Court of Coryell County* (Civ. App.) 214 S. W. 944.

When the commissioners' court approved a report of the jury of view in a proceeding to establish a road under arts. 6860, 6861, 6875, 6884, 6885, and adjourned for the term, their power to make a change in the road from that laid out by the jury of view ended, except as the power might again be invoked by proceedings in accordance with article 6875 and for the purposes specified in article 6861. *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

While the commissioners' court is vested by law with a wide discretion in the matter of opening and establishing public roads, it cannot transcend the powers given it over that subject by law. *Id.*

All the county commissioners of Navarro county were proper members of road board of district No. 1, it appearing that the road district embraced a portion of all the commissioners' precincts, and as such members were entitled to participate in all of the deliberations and actions of such board. *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Procedure in general.**—That a petition to open a second-class road be signed by at least eight freeholders is jurisdictional, under art. 6876, notwithstanding arts. 6860, 6871, empowering commissioners' court to open roads on its own motion. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

In proceeding to open a second-class road on application of freeholders, the 20 days' notice required by art. 6875, is jurisdictional, notwithstanding arts. 6860, 6871, empowering commissioners' court to open roads on its own motion. *Id.*

**Powers as to state highways running through road districts.**—See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Art. 6861. [4672] Shall not be changed, except, etc.**

See *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162; *Boone v. Clark* (Civ. App.) 214 S. W. 607.

**Changing location of road.**—When the commissioners' court approved a report of the jury of view in a proceeding to establish a road under arts. 6860, 6861, 6875, 6884, 6885, and adjourned for the term, their power to make a change in the road from that laid out by the jury of view ended, except as the power might again be invoked by proceedings in accordance with art. 6875 and for the purposes specified in art. 6861. *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

Where the board of permanent road commissioners of a county created under Sp. Laws 33d Leg. (1913) c. 60, in selection of route between two terminals, carefully considered the entire situation, and where there was no evidence of bad faith or perversity, or of moral delinquency, actuating the board or any of its members in receding from the tentative selection of one route and ultimately adopting another route, and where the selection of such other route caused the contribution by the state of \$106,000, which the state threatened to withdraw if the road was constructed along the route first selected, the change of routes was not an abuse of discretion, warranting interference, though first route would serve more people and the cost of maintenance would be less, but at most was a mistake of judgment, with which the court will not interfere; "discretion" being defined as the power or right to act officially according to what appears just and proper under the circumstances. Board of Permanent Road Com'rs of Hunt County v. Johnson (Civ. App.) 231 S. W. 859.

**Public necessity for road.**—See *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

**Art. 6862. [4673] Roads in towns and cities where no incorporation.**

Cited, *Norwood v. Gonzales County*, 79 Tex. 218, 14 S. W. 1057.

**Art. 6863. [4674] First class roads from county seat to county seat, etc.**

See *Currie v. Glasscock County* (Civ. App.) 212 S. W. 533; *Leathers v. Leon County* (Civ. App.) 228 S. W. 658.

**Art. 6864. [4675] Jury of view to be appointed.**

See *Currie v. Glascock County* (Civ. App.) 212 S. W. 533.

Cited, *Morriss v. Cassidy*, 78 Tex. 515, 15 S. W. 102; *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

**Appointment of jury.**—Act Feb 7, 1884, provides that it shall be the duty of each commissioners' court, within 90 days after passage of the act, on their own motion, to appoint a jury of view to lay out certain roads, and on the report of the jury of view such roads shall be declared public highways. Held that, while this made it the duty of the courts to act within 90 days, their power to act on their own motion was not limited to that time. *Evans v. Santana Live-Stock & Land Co.*, 81 Tex. 622, 17 S. W. 232.

**Art. 6866. [4677] When damages are excessive, etc.**

**Appeal bond.**—The road in question being laid out under arts. 6863, 6864, appeal to district court from award of jury of view is governed by art. 6866, which does not require bond to be filed in ten days after approval of award by commissioners' court, and not by art. 6882. *Currie v. Glasscock County* (Civ. App.) 212 S. W. 533.

**Art. 6871. [4682] To classify all public roads.**

Cited, *Gulf, C. & S. F. Ry. Co. v. Ellis*, 70 Tex. 307, 7 S. W. 722; *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

**In general.**—In proceeding to open a second-class road on application of freeholders, the 20 days' notice required by art. 6875, and petition signed by at least eight freeholders, are jurisdictional, notwithstanding arts. 6860, 6871, empowering commissioners' court to open roads on its own motion. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

An order, though made on court's own motion to establish a new road, the description therein locating the road's termination at any point in a line of more than 1,000 varas, is fatally defective, since the statutes do not lodge, in the jury of view, discretion to determine where the road shall end. *Live Oak County v. West* (Civ. App.) 206 S. W. 965.

**Art. 6872. [4683] First class roads.**

Cited, *Gulf, C. & S. F. Ry. Co. v. Ellis*, 70 Tex. 307, 7 S. W. 722; *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Art. 6873. [4684] Second class roads.**

Cited, *Gulf, C. & S. F. Ry. Co. v. Ellis*, 70 Tex. 307, 7 S. W. 722.

**Art. 6874. [4685] Third class roads.**

Cited, *Gulf, C. & S. F. Ry. Co. v. Ellis*, 70 Tex. 307, 7 S. W. 722.

**Art. 6875. [4686] Application for new road, etc., shall not be granted until notice has been given, etc.**

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting. Cited, *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

**Landowners and others interested entitled to hearing.**—This article, clearly contemplates that landowners affected by opening of a road, as well as others having an interest, may be heard relevant to the proposal, and court's action thereon, in proceedings of the court in its original action on the petition. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

**Notice.**—In proceeding to open a second-class road on application of freeholders, the 20 days' notice required by this article, is jurisdictional, notwithstanding arts. 6860, 6871, empowering commissioners' court to open roads on its own motion. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

An application and notice of intention to establish a highway, leaving its termination to be fixed at any place along a line of more than 1,000 varas, are not sufficiently definite to comply with this article. *Live Oak County v. West* (Civ. App.) 206 S. W. 965.

A road never located by a jury of view may be ordered closed without notice or hearing; but where a landowner's rights were not confined to general rights of public, but had been established by a judgment long prior to litigation, commissioners' court could not waive such rights for him nor authorize closing or obstructing of roadway without his consent. *Santa Fé Townsite Co. v. Norvell* (Civ. App.) 207 S. W. 960.

When the commissioners' court approved a report of the jury of view in a proceeding to establish a road under arts. 6860, 6861, 6875, 6884, 6885, and adjourned for the term, their power to make a change in the road from that laid out by the jury of view ended, except as the power might again be invoked by proceedings in accordance with art. 6875 and for the purposes specified in art. 6861. *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

— **Waiver.**—Notice provided for, which is personal to the landowner affected by laying out of a road, may be waived by him; but he cannot waive any requirement of statute in which the public generally is interested. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

In a proceeding to lay out a road, appearance by a landowner, to constitute a waiver of notice, must be such as secures to him the same opportunity and benefit he would have had if legal notice had been given. *Id.*

**Public necessity for road.**—See *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

### Art. 6876. [4687] Application, how made.

Cited, *Wooten v. Texas Bitulithic Co.* (Civ. App.) 212 S. W. 248.

**Application.**—That a petition to open a second-class road be signed by at least eight freeholders is jurisdictional, under this article, notwithstanding arts. 6860, 6871, empowering commissioners' court to open roads on its own motion. *Haverbekken v. Hale*, 109 Tex. 106, 204 S. W. 1162.

**Necessity of public use.**—The right of eminent domain under this article, implies that the purpose for which it may be exercised must be a public one, and not a mere private one; a "public use" being one which concerns the whole community in which it exists, as contradistinguished from a particular individual or number of individuals. *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

**Necessity for road.**—Where the owner of a tract subdivided it between his children, and prior to the subdivision there were public roads bounding it giving convenient access to the church, school, gin, mill, and store used by the occupants and private ways over the land intersecting the public roads, the parties living on any subdivision, who would otherwise be cut off by other subdivisions had the right to demand access to and the use of the prior existing private roads over other subdivisions, under the rule that partition of real estate among heirs carries with it by implication the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, and they could not sit by and permit themselves to be cut off by their kindred and then demand of the owner of an adjoining tract that he give them an outlet over his land, so that they had no legal right under this article, to have opened such a new road over such adjoining tract; it not being a road of necessity. *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

**Injunction.**—Where commissioners had no legal right to order a road opened across plaintiff's land under this article, he had a right to enjoin their action as being without jurisdiction by suit in district court; the remedy by appeal to the county court under article 6882 being inadequate. *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

### Art. 6877. [4688] How laid out.

**Validity of statute.**—Arts. 6877-6882 do not contemplate a taking of private property for a public use without adequate compensation being first made or secured, or otherwise than by due course of law. *Vogt v. Bexar County*, 5 Civ. App. 272, 23 S. W. 1044.

**Location of road.**—Comparative cheapness and desirability of construction of other routes held not to constitute a legal objection to construction of a road as located by the commissioners. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

Fact that more low, wet, and marshy land would be crossed in building a road as located by the road commissioners than if it were built on other routes held not to afford legal ground of complaint, despite provisions of local statute that no road should be laid out or constructed on such land, except where necessary to build directly across it. *Id.*

— **Effect of agreements.**—See *Tyree v. Road Dist. No. 5, Navarro County* (Civ. App.) 199 S. W. 644; *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

— **Individual interest of officers.**—The fact that two members of a board of road commissioners lived on a road as located by them does not affect the validity of the board's action in determining to build the road, if the determination of the board locating the road was honest and fair. *Tippett v. Gates* (Civ. App.) 223 S. W. 702.

### Art. 6880. [4691] Notice to owner.

**Necessity of notice.**—The notice required by statute for the opening of a road must be given the owner, and, if it is not given, the opening of the road may be enjoined. *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

**Persons entitled to notice.**—Proceedings for the opening of a road across lands owned by life tenant and remaindermen are binding against the life tenant if she was properly served, though the remaindermen were not served, and the life tenant is not entitled to injunction against the maintenance of the road. *Bradford v. Moseley* (Com. App.) 223 S. W. 171, reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

**Waiver of notice or objections.**—Where landowners were given notice in writing of time and place for laying out road, responding to which they attended upon, and filed with jury of view their claims for damages, and also went into commissioners' court, where their damages were determined de novo, contending for more than jury had allowed, and protesting against approval of report and appealing to county court, there was no such failure to comply with this article, as rendered proceedings of court null and void. *Lawrence v. Gordon* (Civ. App.) 209 S. W. 702.

**Necessity of record showing notice or waiver of notice.**—The notice required to be served on the landowner by Rev. St. 1879, art. 4370, is a jurisdictional fact, which

should affirmatively appear in the record; and, if the giving of such notice is not affirmatively shown, the proceedings are void. *Vogt v. Bexar County*, 5 Civ. App. 272, 23 S. W. 1044.

Where, in action to enjoin opening of road, no evidence is offered, other than recital in order of commissioners' court establishing road, to show that parties affected thereby were served with proper notice by jury of view, order is void. *Cooke County v. Dudenhafter* (Civ. App.) 196 S. W. 976.

**Sufficiency of notice.**—Where the court's order states that the jury of view is to lay out third-class road described in application and later refers to it as second-class road, held, that the order was for a second-class road, and that, where jury's notice referred to the order, the owner had notice of class of road burdening his land. *Live Oak County v. West* (Civ. App.) 206 S. W. 965.

### Art. 6881. [4692] Statement by owner of damages.

**Elements and measure of damages in general.**—Where construction of a road necessitated additional fencing and the establishment of an additional watering place to restore abutting land to former usefulness and value, for grazing purposes, the district court on appeal from award of jury of view erred in finding that there was no evidence of depreciated value of land not taken. *Currie v. Glasscock County* (Civ. App.) 212 S. W. 533.

Under the Constitution as amended in 1876 (Const. art. 1, § 17) to provide that a person's property shall not be taken or "damaged" for public use without adequate compensation, unless by his consent, damages to the land abutting on a highway from elevation of the roadway by a viaduct and approach thereto are recoverable. *Dallas County v. Barr* (Civ. App.) 231 S. W. 453.

A county is liable for the damage to property abutting on a highway from its elevation of the roadway. *Id.*

The measure of damages to abutting property by the elevation of a highway is the difference in the value of the land before and after the change. *Id.*

**Interest.**—Interest from time of injury to abutting property from elevation of highway is allowable as part of the damages, though at time of action they are unliquidated. *Dallas County v. Barr* (Civ. App.) 231 S. W. 453.

**Deduction for benefits.**—In proceeding to determine the amount of damages to land due to construction of a road by appellee county, increased and better road facilities could be taken into consideration as offsetting damages to land not taken. *Currie v. Glasscock County* (Civ. App.) 212 S. W. 533.

**Evidence of benefits and damages.**—In proceeding to determine the amount of damages due to construction of a road, failure of court to recognize evidence of value to tract as a whole, and evidence of decrease in value due to road, as of any probative force upon issue of damage to land not actually appropriated, was reversible error. *Currie v. Glasscock County* (Civ. App.) 212 S. W. 533.

In proceeding to determine the amount of damages due to construction of a road, evidence of the cost of additional fencing, establishing watering places, and other items of like nature necessitated by the laying of the road is admissible and entitled to be accorded its proper probative force in determining whether tract of land as a whole has been damaged. *Id.*

Evidence consisting of varying opinions as to value of land before and after elevation of highway held to support the jury's finding as to amount of damages therefrom to abutting property. *Dallas County v. Barr* (Civ. App.) 231 S. W. 453.

**Persons entitled to damages.**—Right of the grantee of land as abutting on a highway to damages thereto from the elevating of the roadway is not affected by the fact that prior to his deed the land for the highway had been conveyed in fee for highway purposes by the same grantor. *Dallas County v. Barr* (Civ. App.) 231 S. W. 453.

### Art. 6882. [4693] If report approved, damages to be paid, etc.

**Constitutionality.**—Arts. 6877-6882 do not contemplate a taking of private property for a public use without adequate compensation being first made or secured, or otherwise than by due course of law. *Vogt v. Bexar County*, 5 Civ. App. 272, 23 S. W. 1044.

**Approval of report.**—An entry in the records of the commissioners' courts, "passed pending settlement under contract on file," held not to hold open the court's approval of a report of the jury of view in a proceeding to establish a highway beyond a subsequent unqualified order of approval. *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

**Appeal.**—Amount in controversy as affecting jurisdiction of county court, see *Leathers v. Leon County* (Civ. App.) 228 S. W. 658.

The road in question being laid out under arts. 6863, 6864, appeal to district court from award of jury of view is governed by art. 6866, which does not require bond to be filed in ten days after approval of award by commissioners' court, and not by this article. *Currie v. Glasscock County* (Civ. App.) 212 S. W. 533.

The commissioners' courts are given discretion in the matter of opening roads, and that discretion, unless abused, cannot be reviewed, but if it is abused, the revisory power of the district court may be exercised. *Bradford v. Moseley* (Com. App.) 223 S. W. 171. Reversing judgment (Civ. App.) *Moseley v. Bradford*, 190 S. W. 824.

Finding by the commissioners' court that all statutory requirements were complied with, that due notice was given, and that the road was necessary are as binding on review as would have been the verdict of the jury. *Id.*

Under this article, it is not necessary that the landowner give an appeal bond. *Leathers v. Leon County* (Civ. App.) 228 S. W. 658.

**Restraining opening of road.**—Action of commissioners' court in proceeding to open highway, in determining that juror of view was a freeholder, and in refusing to award landowners more damages than did jury, held conclusive except as landowners questioned it in exercise of right of appeal under this article, and not to warrant injunction proceedings to restrain opening of road. *Lawrence v. Gordon* (Civ. App.) 209 S. W. 702.

County judges and county commissioners were properly enjoined from opening a road, where the commissioners' court did not dispose, by an order of the court, of damages awarded by jury to petitioner in proceedings to open such road, in view of the requirements of arts. 6882, 6883, since, by failure to dispose of such damages by court order, petitioner was deprived of opportunity to appeal, if he desired. *Howard v. Rushing* (Civ. App.) 213 S. W. 953.

Taxpayers may maintain injunction to restrain diversion of road funds. *Elder v. Hamilton* (Civ. App.) 227 S. W. 243.

Where commissioners had no legal right to order a road opened across plaintiff's land under art. 6876, he had a right to enjoin their action as being without jurisdiction by suit in district court; the remedy by appeal to the county court under art. 6882 being inadequate. *Leathers v. Craig* (Civ. App.) 228 S. W. 995.

**Art. 6883. [4694] Court may order opening of road, but damages assessed must be first paid, etc.**

See *Hopkins v. Cravey*, 85 Tex. 189, 19 S. W. 1067.

**Restraining opening of road until compensation is made.**—County judges and county commissioners were properly enjoined from opening a road, where the commissioners' court did not dispose, by an order of the court, of damages awarded by jury to petitioner in proceedings to open such road, in view of arts. 6882, 6883, since, by failure to dispose of such damages by court order, petitioner was deprived of opportunity to appeal, if he desired. *Howard v. Rushing* (Civ. App.) 213 S. W. 953.

**Art. 6884. [4695] Road shall be established, etc,**

See *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Art. 6885. [4696] May change roads, when.**

**Authority to change roads.**—When the commissioners' court approved a report of the jury of view in a proceeding to establish a road under arts. 6860, 6861, 6875, 6884, 6885, and adjourned for the term, their power to make a change in the road from that laid out by the jury of view ended, except as the power might again be invoked by proceedings in accordance with art. 6875 and for the purposes specified in art. 6861. *Dunlap v. Hardin* (Civ. App.) 223 S. W. 711.

**Arts. 6889–6896. [4700–4707].**

Cited, *Gulf, C. & S. F. Ry. Co. v. Ellis*, 70 Tex. 307, 7 S. W. 722.

**Art. 6899. [4710] Right to erect gates.**

**Nature of road.**—Under Rev. St. 1879, art. 4389, and in view of Rev. St. 1879, art. 4245, a railroad which runs through an inclosure and is crossed by a third-class road, is not required to place gates at the crossing. *Galveston, H. & S. A. Ry. Co. v. O'Neal* (App.) 16 S. W. 537.

**Criminal responsibility for obstructing road.**—See *Conner v. State*, 21 Tex. App. 176, 17 S. W. 157.

**Art. 6901. [4712] Commissioners as supervisors.**

See art. 6901e, and note thereunder.

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Constitutionality of local act.**—Under Const. art. 3, § 56, article 8, § 9, as amended, and arts. 3870, 6901, held, that Bexar County Road Law (Loc. & Sp. Acts 33d Leg. c. 77, § 5), providing for annual salary for commissioners of county for acting in all capacities, is unconstitutional, as an attempted regulation of county affairs by local and special act. *Altgelt v. Gutzeit*, 109 Tex. 123, 201 S. W. 400.

**Relation between district boards and commissioners' court.**—See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Art. 6901a. Salaries of county commissioners.**—Provided that in all counties containing a population of 100,000 and over, the County Commissioners of the several counties shall each receive a salary of \$2400.00 per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law; provided that in all counties containing a population of less than 29,000 the County Commissioners of the several counties shall each receive Four (\$4.00) Dollars per day for each day served as Commissioner and when acting as ex-officio road supervisors of their precincts they



shall each receive Four (\$4.00) Dollars for each day actually served in supervising the construction or repair of the public roads in their respective precincts; provided that each Commissioner shall in no event receive more than One Thousand (\$1,000.00) Dollars in any one year for such service. [Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1; Acts 1919, 36th Leg., ch. 98, § 1.]

**Explanatory.**—Added by Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1.  
Took effect 90 days after March 19, 1919, date of adjournment.

**Art. 6901b. Same.**—Provided that in all counties containing a population of 50,000 and not more than 100,000 population the county commissioners of the several counties shall each receive a salary of \$1800 per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem now allowed by law. [Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1.]

**Explanatory.**—Added by Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1. —

**Art. 6901c. Same.**—Provided that in all counties containing a population of 40,000 and not more than 50,000 population the county commissioners of the several counties shall each receive a salary of \$1500 per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law. [Id.]

**Explanatory.**—Added by Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1.

**Art. 6901d. Same.**—Provided that in all counties containing a population of not less than 29,000 and not more than 40,000 population the County Commissioners of the several counties shall each receive a salary of \$1,200.00 per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law. [Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1; Acts 1919, 36th Leg., ch. 98, § 1.]

**Explanatory.**—Added by Acts 1918, 35th Leg. 4th C. S., ch. 29, § 1.  
Took effect 90 days after March 19, 1919, date of adjournment.

**Art. 6901e. United States census to govern determination of population.**—The last United States census shall govern as to population in determining the compensations herein provided. [Acts 1918, 35th Leg. 4th C. S., ch. 29, § 2.]

Took effect March 22, 1918.

**Explanatory.**—Added by Acts 1918, 35th Leg. 4th C. S., ch. 29, § 2.  
While the title and the opening paragraph of section 1 of the act purport to add an article to be known as 6901e, the above provision is designated in section 2 of the act as "Article 6901," following art. 6901d. No other provision in the act is designated as art. 6901e.

**Art. 6901ee. Payment of salaries validated.**—It is hereby provided that where any commissioners' court operating under any road law heretofore passed by the Legislature has paid to any member of the county commissioners' court as salary or compensation the amount or amounts prescribed in such road law the act of such commissioners' court in so paying any such salary or compensation is hereby validated and all things approved. [Id., § 3.]

**Art. 6901f. Suit to recover money paid as salaries; defense.**—In any suit that may be brought to recover any moneys heretofore paid to county commissioners, in accordance with the terms and provisions of any special act regulating their salary, the reasonable value of their services as such commissioners may be shown in defense of such suit, and no recovery shall be had unless the amount theretofore paid to said commissioners, under said special act, shall be in excess of the reason-

able value of their services rendered in said capacity and only to the extent of such excess. [Id., § 3a.]

**Art. 6901g. Same; when and how brought.**—No suit shall be brought to recover from any county commissioner any salary heretofore paid to him under and by virtue of any special act of the Legislature regulating his salary, unless such suit is first authorized by the county judge of the county in which said commissioner served at the time he received such salary; and, provided, further, that no such suit shall be filed in any court unless the same is filed prior to the first day of January, 1919. [Id., § 3b.]

**Art. 6901h. Partial invalidity of act.**—If any part of this act be declared unconstitutional by the courts of this State, then it is provided that any other section of this Act shall not be in anywise affected thereby, and it is declared that the Legislature would have passed this Act insofar as the other sections are concerned irrespective of any section that may be declared unconstitutional. [Id., § 4.]

**Art. 6903. [4714] Reports, etc.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

## CHAPTER ONE A

### STATE HIGHWAY DEPARTMENT

**Arr. 6904½.** Department created.

**6904½k.** Allotment of state aid; amount; maintenance of roads constructed; failure to maintain.

**6904½n.** Expenditure of moneys contributed by United States government.

**Art.**

**6904½q.** Legislature shall make appropriations and to fix compensation of engineer and employes of highway department; contracts; expenditure of funds.

**Article 6904½.** Department created.

**Validity of municipal ordinance.**—San Antonio ordinance of August 27, 1917, regulating automobiles used for hire, is not invalid as in conflict with the state highway department act of 1917. *Craddock v. City of San Antonio* (Civ. App.) 198 S. W. 634.

**Art. 6904½k. Allotment of state aid; amount; maintenance of roads constructed.**—Whenever the Commissioners' Court of any county shall desire, and is prepared, to construct one or more miles of public roads constituting a part of the system of State Highways as designated by the Department, such court may make application for an allotment of State aid from the State Highway fund, and if such application is accompanied by plans, profiles and estimates prepared in accordance with the requirements of the State Highway Engineer, the Commission shall file such application in the order in which it is received; and when such roads shall be constructed according to specifications and under the supervision of the Highway Engineer, the commission shall make an allotment of aid from any moneys available in the State Highway fund, not to exceed one-fourth of the cost of construction; provided, that the aggregate sum contributed by the State to aid in building roads in any one county during any one year shall not be in excess of the whole cost of ten average miles of such road.

Provided, if any State Highway shall pass through any unorganized county or other territory in which the assessed valuations do not permit of the raising of the necessary funds to assure construction of the part of such State Highway, the Commission shall be authorized to con-

struct such part of the State Highway, from any moneys in the State Highway funds available for such purposes.

In counties in which the assessed valuation of property, in the judgment of the Commission, does not warrant the construction of sections of the system of State Highways necessary to provide the State with trunk roads, or to connect market centers of the State as provided in this Act, the Commission may, in its discretion, increase such allotment of State aid not to exceed one-half of the cost of construction not more than ten miles of such part of the system of State Highways in each of such counties in one year. All parts of the system of State Highways that may be constructed with State aid, as provided in this Section, shall be maintained at the expense of the county in which such part of the highway is located, in accordance with plans approved by the State Highway Department, and failure to maintain such sections of State Highway shall forfeit any further State aid until such maintenance work shall have been done. [Acts 1917, 35th Leg., ch. 190, § 12; Acts 1918, 35th Leg. 4th C. S., ch. 71, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Relative powers of commissioners' court and district boards.**—See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Commissioners' court may pledge good faith of county to maintain state highway.**—See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Commissioners' Court may appoint a road engineer whose compensation is payable by road district.**—See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Art. 6904½n. Expenditure of moneys contributed by United States government.**

See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.

**Art. 6904½q. Legislature shall make appropriations and to fix compensation of engineer and employes of highway department; contracts; expenditure of funds.**—That from and after the passage of this Act, it shall be the duty of the Legislature to make appropriations for, and it is hereby authorized to appropriate funds for the maintenance and running expenses of the Highway Department, and to fix the compensation of, the State Highway Engineer and all other employees of the State Highway Department, and to determine the number of such employees.

It shall be the duty of the State Board of Control to make contracts for equipment and supplies (including seals and number plates), required by law in the administration of the registration of licensed vehicles, and in the operation of said department, as provided in Chapter 190, of the General Laws of the Thirty-fifth Legislature, Regular Session [1918 Supp., art. 6904½ et seq]. All moneys herein authorized to be appropriated for the operation of the State Highway Department, and the purchase of equipment required by said Chapter 190, shall be paid from the State Highway Fund, authorized to be created by said Chapter 190; and all the remainder of said Highway Fund, not so appropriated for the maintenance and operation of the said department shall be expended by the State Highway Commission for the furtherance of public road construction and the establishment of a system of State highways, as contemplated and set forth in the provisions of Chapter 190, General Laws, of the Thirty-fifth Legislature, Regular Session, and Acts amendatory thereof. [Acts 1921, 37th Leg., ch. 50, § 1.]

**Explanatory.**—Sec. 2 of the act provides that the act shall not become effective until Sept. 1, 1921. Sec. 3 repeals all laws in conflict.

## CHAPTER TWO

## APPOINTMENT OF OVERSEERS

**Articles 6905-6918. [4716-4729].**

**Explanatory.**—Superseded as to certain counties by Acts 1921, 37th Leg. 1st C. S., ch. 42, post, arts. 6976½-6976½s.

## CHAPTER THREE

## PERSONS LIABLE TO WORK ON ROADS AND THEIR RIGHTS AND DUTIES

[See arts. 6976½-6976½s, post.]

Art.  
6919. Who liable to road duty.

Art.  
6923. Payment of money will exempt.

**Article 6919. [4730] Who liable to road duty.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Physical disability.**—Under this article, one afflicted with cancer, who had been advised by his physician not to do physical work, is an "invalid"; and hence where defendant and his physician testified that he was so afflicted and had been so advised, it was improper, in a prosecution for failure to work the road, to refuse to submit that issue to the jury. *Walling v. State* (Cr. App.) 232 S. W. 1115.

**Art. 6923. [4733] Payment of money will exempt.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

## CHAPTER FOUR

## POWERS AND DUTIES OF OVERSEERS

[Superseded as to certain counties by Acts 1921, 37th Leg. 1st C. S., ch. 42, post arts. 6976½-6976½s.]

Art.  
6928. Power to call out hands.

Art.  
6938. Index boards shall be placed where.

6934. Timber for causeways and bridges.

6944. Money shall be expended how.

6935, 6936. [Note.]

**Article 6928. [4738] Power to call out hands.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Effect of local act.**—While Loc. & Sp. Acts 1918 (4th Call. Sess.) c. 22, created the office of superintendent of public roads and bridges for Chambers county, providing in section 10 that the superintendent might call out persons liable to work on the public roads, yet, as the act declares that it should be cumulative of all general laws, the road overseer still had authority to call persons to work. *Walling v. State* (Cr. App.) 232 S. W. 1115.

**Art. 6934. [4744] Timber for causeways and bridges.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Arts. 6935, 6936. [4745, 4746].**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Art. 6938. Index boards shall be placed, where.**—It shall be the duty of overseers to place conspicuously and permanently at the forks of all public roads in their respective precincts, and at all roads crossing or leading away from such public roads, and at all places where public roads cross thereon, stating the most noted place to which each of said roads leads, and at county lines giving the names of the counties; and the commissioners' courts of the State are to furnish the funds nec-

essary to provide such index boards. Any overseer refusing or failing to comply with the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum of not less than ten (\$10.00) Dollars, nor more than twenty-five (\$25.00) Dollars. [Acts 1876, p. 68; Acts 1919, 36th Leg. 2d C. S., ch. 21, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 6944. [4754] Money shall be expended under order of court.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

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## CHAPTER FIVE

### ROAD COMMISSIONERS

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| <p>Art.<br/>6946. Commissioners' court may employ,<br/>etc.</p> | <p>Art.<br/>6949. Commissioners' court to see to ex-<br/>penditure of road fund.<br/>6950. May make rules and regulations.</p> |
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**Article 6946. [4756] Commissioners' court may employ, etc.**

**Constitutionality of local act.**—Assuming that citizen members of the permanent board of road commissioners of Limestone county road district No. 15, established and organized under Sp. Laws 36th Leg. (1919) c. 74, are officers, it cannot be said that the latter act violates Const. art. 16, § 30, in that the tenure of office is to be until the work is completed, since such constitutional provision can be read into the act so as to make it read, "And shall continue to serve not exceeding two years as members of said board," etc. *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.

**Art. 6949. [4759] Commissioners' court to see to expenditure of road fund.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

**Art. 6950. [4760] May make rules and regulations.**

Cited, *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

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## CHAPTER SIX

### ROAD SUPERINTENDENTS

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| <p>Art.<br/>6963. Commissioners' court may hire or<br/>purchase all machinery, etc., for<br/>working roads.</p> | <p>Art.<br/>6966. May improve roads and bridges by<br/>contract.</p> |
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**Article 6963. [4773] Commissioners' Court may hire or purchase all machinery, etc., for working roads.**

**Application of requirement as to sealed proposals.**—Harris County Road Law, §§ 9, 10, as to sealed proposals for contracts for county roads, does not apply to a contract for hire of man and team at \$4 a day, terminable at any time by either party, or to a purchase of claims of laborers hired by the day by the county. *Otto v. Harris County* (Civ. App.) 195 S. W. 610.

**Art. 6966. [4776] May improve roads and bridges by contract.**

**Not applicable to counties not adopting act.**—This article has no application to counties which have not adopted it by appointing a road superintendent. Art. 2241 empowers the commissioners' court of county which has not adopted article 6966 to build a road and create an indebtedness to be paid by interest-bearing warrants in future years, although a bond issue under articles 605, 610, for such purpose has been voted down in an election. *Lasater v. Lopez* (Civ. App.) 202 S. W. 1039.

## CHAPTER SIX A

## PATROL SYSTEM

- Art.  
6976½. Roads to be divided into sections.
- 6976½a. Budget; road maintenance fund; division among road sections; maintenance tax; outstanding warrants.
- 6976½aa. Classification of roads.
- 6976½b. Selection of road patrolmen; competitive bidding; vacancy; receipt for road equipment.
- 6976½bb. Duties of patrolmen; contract; penalty.
- 6976½c. Enforcement of road duty; bond; equipment; mode of working roads; direction of road superintendent; bridges.
- 6976½cc. Office of county road superintendent created; duties.
- 6976½d. Appointment of superintendent, oath and bond; county engineer shall be road superintendent.
- 6976½dd. Qualifications of superintendent; salary; duties and powers; forbidding use of highway at certain times; liability of persons using highway after notice.
- 6976½e. Reports by road superintendent; patrolman's report.
- 6976½ee. County subdivisions; instruction of patrolmen.
- 6976½f. Meetings of road superintendents; maintenance manuel.
- 6976½ff. Annulment of patrol contracts; removal of road superintendent.
- 6976½g. Purchase or hire of tools, etc., for improvement of roads.
- 6976½gg. County convicts to be employed on road work; costs and commutation of time.
- 6976½h. Use of convicts for permanent road work; appropriation of funds.
- 6976½hh. Acceptance of donations; drains.
- Art.  
6976½i. Definition of "road," "work," and "working."
- 6976½ii. Persons required to work on highways; exemptions.
- 6976½j. Same; residence.
- 6976½jj. Same; substitutes.
- 6976½k. Same; worker to supply his own tools.
- 6976½kk. Same; mode and time of labor.
- 6976½l. Patrolman may call out workers.
- 6976½ll. Persons not designated for road work may be called by patrolman.
- 6976½m. Notice to persons liable for road work.
- 6976½mm. Same; service; posting.
- 6976½n. Same; employment of person to summon hands.
- 6976½nn. Same; complaint against hands not responding.
- 6976½o. Appropriation of materials; compensation therefor.
- 6976½oo. Mode of constructing causeway; drains; assessment of damages.
- 6976½p. Workers may supply wagons, etc., instead of labor.
- 6976½pp. Mile posts.
- 6976½q. Same; duties of road superintendent; appropriation by commissioner's court.
- 6976½qq. Same; workers may be employed in making mile posts.
- 6976½r. County judge in certain counties may be appointed ex-officio road superintendent.
- 6976½rr. Not applicable to incorporated cities or towns adopting method of street work; such cities may adopt this act; special road laws and road districts.
- 6976½s. Excludes all other laws; counties exempted.

**Article 6976½. Roads to be divided into sections.**—That the public roads of each county shall be divided into sections of convenient length and size. That said section shall include not less than eight nor more than twenty miles of public road, and shall be numbered in numerical order, and shall be known on the road map of the county by such number. That the road superintendent, hereinafter provided for, shall locate, outline, and designate the boundaries of each section and all territory subject thereto, which designation shall be approved by the commissioners' court, and entered upon the minutes thereof, and such superintendent shall prepare a map, as now provided by law, and on which map he shall show the location of the territory and roads embraced within each section. [Acts 1921, 37th Leg. 1st C. S., ch. 42, § 1.]

Took effect Nov. 15, 1921.

**Art. 6976½a. Budget; road maintenance fund; division among road sections; maintenance tax; outstanding warrants.**—Before the employment of patrolmen for the different sections of the county, the commissioners-court shall make up a budget of its road and bridge fund, making a fair and conservative estimate of the county's income from all sources available for road maintenance. Said budget shall include an item making an estimate to cover the amount of funds neces-

sary for the maintenance of the bridges in the county, including the building or repair of any bridge let by contract, the cost of which would exceed \$100.00. The amount so estimated for the repair and upkeep of bridges shall be deducted from the total amount shown by such budget, and the balance shall constitute a road maintenance fund, to be expended under the patrol system herein provided for. Such sum shall then be divided among the several road sections of the county in proportion to the mileage and classification of such roads. First, second, and third class roads shall prorate in such division at the ratio of one, two, and three; that is, three times as much shall be set aside for the maintenance of a mile of first class road as shall be set aside for the maintenance of a mile of third class road. Provided further that where any first or second class road is, by nature of its situation and condition, in a high state of repair, or where same may be maintained from local sources, such as local district maintenance fund, so as not to require so great a proportion of the county maintenance fund, then the county commissioners, in conjunction with the road superintendent, may in their discretion prorate a lesser amount to the upkeep of a first or second class road and a correspondingly greater amount to such one or more roads of the inferior class as the conditions may require. That the said road maintenance fund, hereinabove referred to, shall include such funds as shall be derived from moneys paid for the privilege of being exempt from road duty, from the fifteen cents now authorized by law as a road tax, and from the further levy of an additional fifteen cents when voted for road maintenance, and such other funds as may by law become a part of the present road and bridge fund of the county, and that the road maintenance fund, or the road and bridge fund, shall never be so pledged for the future as to defeat the purpose of this Act by creating debts against the fund and thus destroying the means of operating upon the annual budget basis in applying the patrol system. Provided further, that where any subdivision of a county may have voted a maintenance tax, the funds derived therefrom shall be expended upon the roads within the said subdivision, in accordance with the terms of this Act, and same shall continue until a like maintenance tax is voted for the entire county. Where counties have pledged the proceeds of a maintenance tax to the payment of warrants running for a term of years so as to absorb or deplete the road maintenance fund, such warrants, where legally issued, should be, at the earliest practical date, paid off or funded into bonds issued in accordance with law, to the end that the maintenance tax shall henceforth go to the maintenance fund as contemplated herein. [Id., § 2.]

**Art. 6976 $\frac{1}{2}$ aa. Classification of roads.**—For the purpose of this division, the following classification shall be substantially observed by the road superintendent and the commissioners' court:

**First Class Roads:** All roads designated as State highways by the State Highway Commission shall be first class roads. One road leading in the direction of the county site of each adjoining county shall be a first class road, and such other roads as are subject to constant and heavy traffic may be by the commissioners' court of the respective counties classified as first class roads.

Second class roads shall include the main arteries of travel leading to first class roads and such other roads as are subject to a smaller or lesser degree of travel than first class roads.

Third class roads embrace the lesser arteries that connect up with the second and first class roads, and all other ways designated as public roads not included in first and second class roads. The class to

which a particular road belongs shall be shown upon the county map herein provided for. [Id., § 3.]

**Art. 6976½b. Selection of road patrolmen; competitive bidding; vacancy; receipt for road equipment.**—After the roads shall have been sectionized, as above provided, which shall be done before January 1, 1922, the commissioners' courts of the several counties shall convene on the first Tuesday in January of 1922, or on some later date not after March 1, 1922, to be named by the commissioners' court, and each year thereafter for the purpose of selecting road patrolmen for each section of road in the county, and prior to such meeting the road superintendent shall advertise the letting of the several jobs of patrolmen, which advertisement shall consist of a brief general statement, contained in some paper of general circulation published in the county to the effect that all contracts for patrolmen will be let at said time. That a map showing the different road sections and the amount allowed in the budget to pay for the maintenance of such section may be seen in the office of the road superintendent at the county site, and posted notices of the letting of such contracts shall also be posted at one or more public places within each road section. A party applying for the position of patrolman shall use substantially the following blank, which may be furnished by the road superintendent:

For \_\_\_\_\_ dollars, the amount allowed to Section \_\_\_\_\_, in the road maintenance budget of this county, I will patrol the roads in said section for \_\_\_\_\_ days during the year of 19—, with split log drag, or such other implements as shall be directed by the road superintendent.

I agree to enter into a contract to carry out all the duties of patrolman and to make bond to such effect.

Signed \_\_\_\_\_

The contest among the bidders shall be the amount of work proffered for the money on hand, and the one offering the greatest amount of work shall be awarded the contract. Provided the commissioners' court may for adequate cause reject all bids and readvertise for a patrolman. Provided that in case of a vacancy, the said county road superintendent may hire a patrolman for a period of 60 days for any road district, who shall perform as nearly as may be the duty therein imposed, and during the said 60 days the said county road superintendent shall again advertise for a patrolman as in the first instance. The said patrolman, or any hired substitute, upon entering upon the duties, shall execute a written receipt to the county road superintendent for all tools, property and equipments of every kind that shall be delivered to him, and at the end of his term he shall deliver an inventory showing what is on hand for the use of his successor and until said inventory or report is made the last payment due the said patrolman shall not be made by the county commissioners' court. [Id., § 4.]

**Art. 6976½bb. Duties of patrolmen; contract; penalty.**—The said patrolman so employed shall furnish one or more teams, as may be designated by the road superintendent, the compensation for which shall be included in his contract. The said contract shall state the minimum number of days that he shall put in upon the work of the roads during the year, and the minimum number during each month of the year. He shall be furnished with a list of the hands, or persons subject to road duty upon his section, and it shall be his duty to see that each of said hands who have not paid an exemption fee to the tax collector of the county shall put in at least five days' work upon the roads of his section. His failure to do this shall subject him to a penalty of not less than



\$25.00 for each offense, to be deducted from the compensation allowed him in his contract. [Id., § 5.]

**Art. 6976 $\frac{1}{2}$ c. Enforcement of road duty; bond; equipment; mode of working roads; direction of road superintendent; bridges.**—That the patrolman shall, under the direction of the superintendent, have power, and it is made his duty to see that all persons liable to road duty shall be called into service in such numbers and at such times as may be deemed necessary to effectively maintain and improve the roads of the several sections of the county.

The patrolman shall furnish bond in the sum of \$500.00, conditioned that he will carry out the terms of his contract under the direction of the road superintendent, and in accordance with law. The said patrolman shall provide himself with the necessary team or teams, or motor vehicle, in accordance with his bid and contract for the purpose of patrolling and maintaining the roads of his section. The county shall provide him with a drag and other necessary implements to maintain the hard surface roads and also to smooth out dirt roads while in a plastic condition, after each rain, and when not so employed, the patrolman shall, under the direction of the superintendent, haul gravel, sand or other material upon the muddy portions of the road, and clay, gravel or other material upon the sandy portions, and also to sod the embankments of new roads in Bermuda grass. He may employ any other help allowed him under this Act in his work. The number of days that such patrolman shall employ in patrolling the roads, and the times at which it shall be done shall be under the general direction of the road superintendent, distributing throughout the year the number of days called for in his contract. He shall also see to the building and repair of all bridges not let by contract. [Id., § 6.]

**Art. 6976 $\frac{1}{2}$ cc. Office of county road superintendent created; duties.**—The office of county road superintendent is hereby created in the several counties of the State, with such duties, compensation and liabilities as are herein imposed. The said superintendent shall devote his entire time to the construction and maintenance of the county roads. [Id., § 7.]

**Art. 6976 $\frac{1}{2}$ d. Appointment of superintendent, oath and bond; county engineer shall be road superintendent.**—That the commissioners' court of the several counties of the State shall, within ninety days after the passage of this Act, at a regular session or a called meeting thereof, appoint a county road superintendent of construction and maintenance, except as is otherwise herein expressly provided, who shall have charge of all public road maintenance, together with the building of bridges and culverts in his county. Each county road superintendent shall, within twenty days after his appointment, take and subscribe to the oath required by the Constitution, and enter into bond, payable to the county judge or his successor in office, with good and sufficient surety to be approved by the county judge, in the sum of \$5,000.00, conditioned upon the said superintendent's faithfully and effectively discharging and performing all the duties required by law, or imposed upon him by the commissioners' court of his county, at the time of his appointment, which bond shall be filed and recorded as other official bonds, and shall not be void from the first recovery but may be sued upon from time to time until the whole amount is exhausted. Provided that wherever a county now employs a county engineer, that said county shall be the

county road superintendent and draw only the salary provided for the engineer, so as to combine the two offices. [Id., § 8.]

**Art. 6976 $\frac{1}{2}$ dd. Qualifications of superintendent; salary; duties and powers; forbidding use of highway at certain times; liability of persons using highway after notice.**—Every road superintendent shall be a qualified voter and a resident of some county in the State of Texas; shall serve for two years unless removed, as herein provided, or until his successor is appointed and qualified. The said superintendent shall receive a salary to be determined by the commissioners' court of the county employing him and in proportion to the road mileage and assessed valuation of said county.

The said road superintendent shall, subject to the orders of the commissioners' court, and under the advice of the State Highway Commission, have general supervision of all public roads and highways of his county; shall superintend the laying out of new roads, and particularly of the maintenance and repair and general upkeep of the several highways and public roads of the county, except as is otherwise herein expressly provided. That he shall forthwith as now directed by law make or cause to be made a road map of the county showing the location, mileage, and classification of the different roads and highways and road sections in said county.

The county road superintendent of any county may have the authority, by posting notices on the highway when from wet weather or recent construction or repair such can not be safely used without probable serious damage to same, or when the bridges or culverts on same are unsafe, to forbid the use of such highway or any section thereof to any vehicle or loads of such weight or tires of such character as will unduly damage such highway. The notices provided for herein shall state the maximum load permitted and the time such use is prohibited and shall be posted upon the highway in such places as will enable the drivers to make detours to avoid the restricted highways or portions thereof.

Provided further, that if the owner or operator of any such vehicle feels himself aggrieved by such action, he may complain in writing to the county judge of such county, setting forth the nature of his grievance. Upon the filing of such complaint the county judge shall forthwith set down for hearing the issue thus raised for a certain day, not more than three days later, and shall give notice in writing to such road official of the day and purpose of such hearing, and at such hearing the county judge shall hear testimony offered by the parties respectively, and upon conclusion thereof shall render judgment sustaining, revoking or modifying such order theretofore made by the county road superintendent, and the judgment of the county judge shall be final as to the issues so raised.

If upon such hearing the judgment sustains the order of the county road superintendent, and it appears that any violation of same has been committed by the complainant since posting such notices, he shall be subject to the same penalty hereinafter provided for such offense as if same had been committed subsequent to the rendition of such judgment made upon such hearing.

The owner, operator, driver or mover of any vehicle, object or contrivance over a public highway or bridge shall be jointly and severally responsible for all damages which said highway or bridge may sustain as the result of negligent driving, operating or moving of such vehicle or as a result of operating same at a time forbidden by the road superintendent, and the amount of such damages may be recovered in an action by law by the county judge for the use of the county, and such recovery

shall go to the benefit of the damaged road. It is hereby made the duty of the county attorney to represent the county in the prosecution of such suits. [Id., § 9.]

**Explanatory.**—A part of this section, which imposes a criminal penalty, is set forth, post, as art. 822e, Penal Code.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posted notice.

**Art. 6976½e. Reports by road superintendent; patrolman's report.**—That the road superintendent shall make a report under oath to the commissioners' court at each regular term thereof, making a complete report of his doings and of the work performed in the different road sections of the county, showing the condition of the roads, reporting any bridges that are becoming dangerous or needing repairs, the number of miles of road that have been patrolled, and worked since the last report and such other information as the commissioners' court may desire. The road superintendent shall prepare a blank form of report card for the use of the patrolmen, and said card shall be filled out as a daily report from each patrolman, which he must make as a part of his duties, and same shall show, among other things, the date, hours worked, character of work done, help had, if any, and such other matters as deemed by the superintendent necessary and desirable. [Id., § 10.]

**Art. 6976½ee. County subdivisions; instruction of patrolmen.**—That the county superintendent shall divide the county into two or four general sub-divisions, and shall twice a year assemble all of the patrolmen in said sub-divisions and give them lessons and instruction in road maintenance, and shall name from among the patrolmen in said subdivision the particular patrolman who has achieved the best results and maintained his roads in the highest state of efficiency. The road superintendent shall spend not less than four days each week out upon the roads seeing the different patrolmen and advising them in their work, and shall as nearly as possible visit the roads of each patrolman as often as once every two weeks. [Id., § 11.]

**Art. 6976½f. Meetings of road superintendents; maintenance manual.**—That once each year the State Highway Commission shall arrange for a good road meet of all of the road superintendents in each Senatorial District, and it shall be the duty of said road superintendents to attend this meet and carry with them the patrolmen who have been granted the highest place for efficiency in their respective sub-divisions, and that at such meeting some member of the State Highway Commission or other person or persons, selected and invited, shall give instruction in road maintenance and repairs. That such meeting shall take place where an actual demonstration of road work shall be had by one of the patrolmen of the particular county. Provided further, that the State Highway Commission shall cause to be prepared and published a "Maintenance Manual" similar to that used in Wisconsin and other states, which shall give the patrolmen proper instruction in the care and upkeep of roads, which instructions, together with a copy of this Act, shall be printed and furnished in sufficient numbers to each county for the use of the several patrolmen therein. [Id., § 12.]

**Art. 6976½ff. Annulment of patrol contracts; removal of road superintendent.**—A patrolman may have his contract annulled for neglect of duty or non-compliance with the terms of such contract, and upon recommendation of the county road superintendent the commissioners' court may declare such contract forfeited, settle with the patrolman for services to that date, and advertise for a successor, and may maintain

any action against him and his bondsmen for any damage, loss or injury that the county has sustained by reason of the breach of his contract. The county road superintendent may be removed from office as now provided for by law for the removal of other officials. [Id., § 13.]

**Art. 6976 $\frac{1}{2}$ g. Purchase or hire of tools, etc., for improvement of roads.**—The commissioners' court of any county, upon the recommendation of the superintendent, is empowered and authorized to purchase or hire all necessary tools, implements, machinery, and labor required to maintain the roads herein provided for, and to build and permanently improve any other roads where same is deemed necessary and proper, not, however, to such an extent as to largely deplete the funds of the county for road maintenance, herein provided for. [Id., § 14.]

**Art. 6976 $\frac{1}{2}$ gg. County convicts to be employed on road work; costs and commutation of time.**—The commissioners' court shall require all county convicts not otherwise employed, to labor upon the public roads under such regulations as may be most expedient. Each county convict worked on the public roads in satisfaction of any fine and costs shall receive a credit thereon of fifty cents for each day that he may labor. And the commissioners' court shall order that the county pay to the officers of court as much as one-half of the costs due them when worked out upon the roads. But no such costs nor any part thereof shall ever be paid until such convict has worked out the entire amount of such fine and costs as provided by law, and then only upon a certificate from such county road superintendent to the effect that such costs have been so worked out. The commissioners' court may grant a reasonable commutation of time to a county convict as a reward for faithful services and good behavior, and such court shall make proper rules and regulations under which such commutation may be granted, which may be done by increasing the pay or compensation allowed to one dollar per day. [Id., § 15.]

**Art. 6976 $\frac{1}{2}$ h. Use of convicts for permanent road work; appropriation of funds.**—The road superintendent may use the convict gangs in doing permanent road work; that is, in grading and building roads of a more permanent character than that of the road maintenance herein provided for under the several patrolmen of the county, and such convict gangs shall have a separate foreman, and not be under the direction of a regular patrolman employed by the county under contract for road maintenance, but such convicts gangs, under their foreman may be sent to such portions of the county for the purpose of improving roads that have been found difficult to maintain and to such other places as the county road superintendent may direct. In case a county shall determine to do permanent road work either with convicts or otherwise, a reasonable amount of money may be set aside for such purpose in making up the budget of the road and bridge funds, such appropriation, however, shall in no event be such as to destroy or seriously cripple the system of road maintenance herein provided. [Id., § 16.]

**Art. 6976 $\frac{1}{2}$ hh. Acceptance of donations; drains.**—The commissioners' court may accept donations of money, land, teams, tools or labor, or any other kind of property or material, to aid in building or keeping up roads in the county, and said court or any road superintendent by and with the concurrence of the commissioners, may authorize any person to make a drain along any public road, the same to be done under the direction of the road superintendent. [Id., § 17.]

**Art. 6976 $\frac{1}{2}$ i.** Definition of "road," "work," and "working."—The term "road" as used in this chapter, includes roadbed, ditches, drains, bridges, culverts, and every part of such road, and the terms, "work" and "working" includes the opening and laying out of new roads, widening, constructing, draining, repairing, and everything else that may be done in and about any road. [Id., § 18.]

**Art. 6976 $\frac{1}{2}$ ii.** Persons required to work on highways; exemptions.—All able bodied male persons between the ages of twenty-one and fifty years shall be liable, and it is hereby made their duty to work upon, repair, and clean out the public roads under the provisions and regulations of this Act, and shall be subject to the call of the particular patrolman of the section in which they live as has been allotted by the commissioners' court, and shall labor at such time and with such tools as shall be required of them by the patrolman for the period of five days during each calendar year. Provided that the following persons shall be exempt from road duty: Ministers of the gospel in the active discharge of their ministerial duties, public school teachers while actively engaged in the school room, invalids and all other persons who shall have on or before the 31st day of January of each year paid to the tax collector of the county in which they live the sum of \$5.00. [Id., § 19.]

**Art. 6976 $\frac{1}{2}$ j.** Same; residence.—No person shall be compelled to work on a road who has not been residing in the county in which he is summoned to work for the space of fifteen days immediately preceding such summons. [Id., § 20.]

**Art. 6976 $\frac{1}{2}$ jj.** Same; substitutes.—Any person liable to road duty, and who has been summoned to do such duty, shall have the privilege to furnish an able bodied substitute to work in his place, which substitute shall be accepted by the patrolman if he is capable of performing a reasonable amount of work; otherwise, he shall not be accepted. [Id., § 21.]

**Art. 6976 $\frac{1}{2}$ k.** Same; worker to supply his own tools.—Each person summoned to work on the road shall take with him an axe, hoe, pick, spade, or such tool as may be desired and directed by the road patrolman to take with him, or if he have no such tool as he is directed by the road patrolman to take with him, he shall take such other suitable tool as he may have. [Id., § 22.]

**Art. 6976 $\frac{1}{2}$ kk.** Same; mode and time of labor.—It shall be the duty of each road hand to perform his duties as such in accordance with the directions of his road patrolman, and a day's work, within the meaning of this law, shall be eight hours' efficient service, when said service is voluntarily performed, and the said eight hours shall not include the time consumed in going to and returning from the work, nor any time that may be allowed at noon. [Id., § 23.]

**Art. 6976 $\frac{1}{2}$ l.** Patrolman may call out workers.—Patrolmen of roads shall have the power to call out all persons liable to work upon public roads at any time such road patrolman may deem it necessary, or when ordered by the superintendent or other competent authority, and such hands may be called out in detail, or the whole force at any one time, as may be deemed best, for the care of the public roads. [Id., § 24.]

**Art. 6976 $\frac{1}{2}$ ll.** Persons not designated for road work may be called by patrolman.—In case any person liable to work on roads shall not have been designated and apportioned by the commissioners' court, the

patrolman of the road nearest to which such person lives shall summon such person to work on such road the same as if such person had been designated and apportioned to such road patrolman. [Id., § 25.]

**Art. 6976 $\frac{1}{2}$ m. Notice to persons liable for road work.**—It shall be the duty of the patrolman to give three days' notice, by summons in person or in writing, to each person liable to road duty in said section, of the time and place when and where such person is required to appear to work on the road, and the number of days such person will be required to work. [Id., § 26.]

See 1918 Supp., arts. 6016 $\frac{1}{2}$ -6016 $\frac{1}{2}$ c.

**Art. 6976 $\frac{1}{2}$ mm. Same; service; posting.**—If the summons be in writing, it may be served by leaving the same at the usual place of abode of the person summoned, with some person residing at such place who is not less than ten years of age, or if no person ten years of age or over can be found at such place of abode, the patrolman may serve the same by posting it on the door of such place of abode. [Id., § 27.]

**Art. 6976 $\frac{1}{2}$ n. Same; employment of person to summon hands.**—The patrolman shall have the power to appoint some one to summon the hands to work on the roads, and such person shall be exempt from working on the roads as many days as he was actually engaged in summoning the hands. [Id., § 28.]

**Art. 6976 $\frac{1}{2}$ nn. Same; complaint against hands not responding.**—It shall be the duty of the patrolman, within ten days after he has had his road worked by those subject to road duty, to file with the county attorney of his county, or the justice of the peace of his section, a complaint in writing and under oath against each person subject to road duty who has been summoned to work and who has failed to work and who has failed to furnish a substitute, and also against each person so summoned who has refused to do a reasonable amount of work on the road or who has refused to perform the reasonable directions of the patrolman. [Id., § 29.]

**Art. 6976 $\frac{1}{2}$ o. Appropriation of materials; compensation therefor.**—When to the patrolman it may appear expedient to make causeways and build small bridges, or to gravel any public road, the timber, gravel, earth, stone, or other necessary material most convenient therefor may be used, but in such case, the owner of such timber, or gravel, earth, stone or other necessary material shall be paid out of the county treasury a fair compensation for the same, to be determined by the commissioners' court upon the application of such owner. [Id., § 30.]

**Art. 6976 $\frac{1}{2}$ oo. Mode of constructing causeway; drains; assessment of damages.**—The earth necessary to construct a causeway shall be taken from both sides, so as to make a drain on each side of such causeway. Whenever it is necessary to drain the water from any public road, the patrolman shall cut a ditch for that purpose, having due regard to the natural water flow, and with as little injury as possible to the adjacent land owner; provided, that in such cases, the commissioners' court shall cause the damage to such premises to be assessed and paid out of the general revenue of the county, and in case of a disagreement between the commissioners' court and such owner, the same may be settled by suit as in other cases. [Id., § 31.]

**Art. 6976 $\frac{1}{2}$ p. Workers may supply wagons, etc., instead of labor.**—When it may be necessary to use a wagon for any purpose in working

a road, or a plow or scraper, the patrolman of such road is authorized to exchange the labor of any hand or hands bound to work on such road, for the use of a wagon or wagons, plows or scrapers, and the necessary teams to operate the same, at reasonable rates, to be employed as aforesaid. [Id., § 32.]

**Art. 6976 $\frac{1}{2}$ pp. Mile posts.**—It shall be the duty of all road patrolmen to measure such parts of roads as are in their respective sections and set up posts of good, lasting timber or stone at the end of each mile leading from the court house or some other noted place, and to make on said posts in legible and enduring figures the distance in miles to said court house or other noted place, which may be shown upon a board securely fastened to said post. [Id., § 33.]

**Art. 6976 $\frac{1}{2}$ q. Same; duties of road superintendents; appropriation by commissioners' court.**—In order to secure uniformity and procure same at a minimum cost, the road superintendent of the county shall prescribe the form and character of the board to be used and supply each patrolman with the number of boards needed in his respective section, and in addition to the mile board placed at regular intervals along the roads, there shall be placed at every cross roads or fork a proper index or sign naming each particular road and when the said road is a State highway along which is used some particular sign or emblem to designate the course thereof then the said superintendent shall also see that these same signs are continued throughout the county along said highway. The funds to provide such mile boards shall be appropriated by the commissioners' court from the moneys paid into the hands of the tax collector by different persons of the county in paying for exemptions from road service, as hereinabove provided, and it is here made the duty of the tax collector to pay over to the county treasurer all moneys collected from this source, and the same shall be applied to the road and bridge fund of the particular county. [Id., § 34.]

**Art. 6976 $\frac{1}{2}$ qq. Same; workers may be employed in making mile posts.**—The patrolman is, with the consent and approval of the county road superintendent, authorized to exchange the labor of any hand or hands bound to work on his roads for making of mile board posts or other labor in connection therewith. [Id., § 35.]

**Art. 6976 $\frac{1}{2}$ r. County judge in certain counties may be appointed ex-officio road superintendent.**—The commissioners' court in counties having less than fifteen thousand population, and in counties having a road and bridge fund of less than \$12,000.00, may designate the county judge, or one of their number, as ex-officio road superintendent and pay him an additional salary by reason of such position, which salary shall not exceed \$800.00, nor be less than \$500.00 per annum. [Id., § 36.]

**Explanatory.**—Sec. 37 imposes a criminal penalty and is set forth, post, as art. 832a, Penal Code.

**Art. 6976 $\frac{1}{2}$ rr. Not applicable to incorporated cities or towns adopting method of street work; such cities may adopt this act; special road laws and road districts.**—The provisions of this chapter requiring personal service upon the public roads shall not apply to persons residing in an incorporated city or town, which has by proper ordinance adopted a method of street work within the limits of such city or town, unless the city government shall by appropriate ordinance adopt the provisions of this Act, in which event all the provisions hereof may be enforced and made effective within such town or city, and any and all persons shall be subject to street duty when called upon for such by

the street commissioner or other person in charge of the roads or streets of said town or city. And provided further, provisions of this Act may not apply to counties containing any city of more than One Hundred Thousand (100,000) inhabitants according to the census of 1920, which county may be operating under a special road law. Provided further, that where in any county a local road district has been heretofore created and has funds on hand for road building, then its expenditure is not affected by this Act, but same may be expended as under existing law and where such local road districts have voted a maintenance tax or otherwise raised a road maintenance fund, such fund must be expended in the district for which it was voted or originally designed, and any local board charged with the disbursement of such fund is hereby continued with all the powers originally designed and constituted under the law by which it was created. Such share of the county road maintenance fund as may be allotted to the sections within the special road districts shall be handled through the superintendent and patrolmen just as in other portions of the county, and the local board of commissioners, or governing body for such local district, may, if they so elect, have use of the patrolmen for the particular road district so as to unify the maintenance work. [Id., § 38.]

**Art. 6976½s. Excludes all other laws; counties exempted.**—The provisions of this chapter are designated to embody all of the statutes on the subject of road maintenance, and all laws and parts of laws in conflict herewith, whether special or general, are hereby repealed. Provided that none of the provisions of this Act shall apply to the counties of Grimes, Madison, Leon, Walker, Polk, San Jacinto, Montgomery, Grayson, Cook, Lamar, Fannin, San Patricio, Nueces, Kleberg, Kennedy, Wilbacy, Cameron, Hidalgo, Starr, Zapata, Webb, La Salle, Dimmitt, McMullen, Duval, Jim Wells, Jim Hogg, Brooks, Wharton, Matagorda, Brazoria, Galveston, Chambers, Aransas, Bee, Karnes, Wilson, Atascosa, Live Oak, De Witt, Victoria, Goliad, Refugio, Calhoun, Jackson, Frio, Williamson, Travis, Burnet, Lampasas, Brewster, Coke, Crockett, Culberson, Edwards, El Paso, Hudspeth, Irion, Jeff Davis, Kimble, Kinney, Mason, Maverick, Medina, Menard, Pecos, Presidio, Reagan, Reeves, Schleicher, Sterling, Sutton, Terrell, Tom Green, Uvalde, Val Verde, Zavalla, Real, Kerr, Kendall, Bandera, Gillespie, Wise, Denton, Montague, Bexar, Rockwall, Dallas, Wood, Smith, Van Zandt, Camp, Upshur, Erath, Comanche, Brown, Coleman, Runnels, Concho, McCulloch, San Saba, Mills, Llano, Navarro, Kaufman, Henderson, Jack, Young, Throckmorton, Clay, Archer, Wichita, Wilbarger, Baylor, Knox, Foard, Harde- man, King, Dickens, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Lub- bock, Hockley, Cochran, Crosby, Childress, Hall, Briscoe, Swisher, Castro, Parmer, Deaf Smith, Randall, Armstrong, Donley, Collings- worth, Wheeler, Gray, Carson, Potter, Oldham, Hartley, Moore, Hutch- inson, Roberts, Hemphill, Lipscomb, Ochiltree, Hansford, Sherman, Dal- lam, Caldwell, Hays, Comal, Blanco, Guadalupe, Gonzales, Harris, East- land, Angelina, Waller, Fort Bend, Washington, Coryell, Bosque, Titus, Ellis, Hood, Shelby, Panola, Callahan, McLennan, Falls, Freestone, Gregg, Hopkins, Delta, Franklin, Smith, Coryell, Limestone, Bosque, Bell, Red River, Jones, Shackelford, Hamilton, Lamar, Lynn, Dawson, Gaines, Yoakum, Borden, Terry, Andrews, Collin, Houston, Garza, Hill, Milam, Johnson, Blanco, Llano, Gillespie, Kendall, Polk, San Jacinto, Dallas, Throckmorton, Baylor, Haskell, Camp and Upshur, Jefferson, Orange, Brazos, Trinity, Matagorda, Burleson, Lee, Guadalupe, Nolan, Mitchell, Fisher, Cass, Newton, Jasper, Sabine, Parker, and Hunt. [Id., § 39.]



## CHAPTER SEVEN

## ROAD LAW FOR COUNTIES HAVING FORTY THOUSAND INHABITANTS OR OVER

[For list of local road laws, see Appendix.]

<p>Art. 6984. May take material for road work; compensation, condemnation proceedings.</p>	<p>Art. 6985. Same; county not to give bond; compensation of condemnation commissioners.</p>
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**Article 6984. May take material for road work; compensation; condemnation proceedings.**—When to the commissioners court it may appear expedient to build, repair or maintain any public road in their county, the timber, earth, stone, gravel or other necessary material most convenient therefor may be used whether such material is desired for the construction, repair or maintenance of the entire road system of the county or for any defined district or political subdivision of the county, and whether such road construction or road maintenance work is being provided for from the general road and bridge funds of the county, or from the proceeds of a county bond issue, or from the proceeds of any bonds, issued, or from special taxes voted by any defined district or political subdivision of the county, but in such case the owner of any such material shall be paid a fair and just compensation for such material as may be agreed upon by the owner thereof or his agent and the commissioners court; and in the event such material is needed for the general system of county highways, then payment shall be made from the road and bridge fund of the county, or from the proceeds of any county issue of bonds, and if such material is to be used for the benefit of any defined district or political subdivision of the county, then the cost of such defined district or subdivision arising through sale of bonds or the collection of special taxes; provided, however, that should said owner or his agent, and the said commissioners court fail to agree upon the compensation to be paid therefor, then the county, upon the order of said court, shall proceed to condemn the same in the manner that a railroad company can condemn land for right of way, and the same proceedings shall be had as if the proceedings were by a railroad company. [Acts 1901, p. 277, § 8; Acts 1920, 36th Leg. 3d C. S., ch. 26, § 1, amending art. 6984, Rev. Civ. St. 1911.]

**Explanatory.**—The title of the act reads as follows: "An Act to authorize any county for the purpose of constructing, maintaining and operating public roads, whether such roads are macadamized, graveled or paved, or built of other material, to use timber, earth, sand, stone, gravel or other necessary materials convenient therefor, and to provide for the condemnation of such road material, and prescribing condemnation proceedings and providing compensation for such material, and declaring an emergency." But the enacting part purports to amend arts. 6984 and 6985, Rev. Civ. St. 1911. Took effect 90 days after June 18, 1920, date of adjournment.

**Art. 6985. Same; county not to give bond; compensation of condemnation commissioners.**—The county shall not be required, in proceedings to determine the compensation to be paid for material to build, repair or maintain public roads, in any case to give bond for costs, and the commissioners appointed to condemn such property necessary as aforesaid shall receive for their services two dollars for each and every day that they may be necessarily engaged in the performance of their duties as such commissioners, to be paid out of the same fund from which payment is made for materials is paid, on the order of the commissioners court and the compensation awarded by said commissioners for the necessary material shall be paid to the owner or deposited with the county treasurer to the credit of such owner, and when so paid or de-

posited the county shall have the right to enter upon and use said material. If the owner of such material, or said county, is not satisfied with the compensation awarded said owner, he or said county may appeal therefrom as in cases of appeal in proceedings by railroad companies to condemn right-of-way; provided the commissioners appointed to condemn such road material, shall, after due hearing, fix a fair and reasonable value for such material; and if it has a market value, then such market value shall be determined and the market value fixed thereon as compensation to the owners, or if the material has no market value then its value shall be fixed at such sum as the evidence shows the material to be reasonably worth for the purposes for which it is used; and provided further that the value may be fixed either as a whole or in quantities, by the yard for earth, for sand, or broken stone, or by the perch for stone used for building walls or abutments, and per tree or per post or per foot where trees are suitable for lumber, for bridge material, for timber or in such quantities as may be needed upon estimates secured by or under the directions of the commissioners court of the county. [Acts 1901, p. 277, § 9; Acts 1920, 36th Leg. 3d C. S., ch. 26, § 2, amending art. 6985, Rev. Civ. St. 1911.]

Took effect 90 days after June 18, 1920, date of adjournment.  
See note under art. 6984.

## CHAPTER EIGHT

### DRAINAGE OF PUBLIC ROADS

#### Article 6993. Notices.

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

## CHAPTER EIGHT A

### MOTOR AND OTHER VEHICLES

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| <p><b>Art.</b><br/>7012½. Registration of motor vehicles; application; fees; definition of terms; rules; license for two or more counties.</p> <p>7012½l. Partial invalidity.</p> <p>7012½2. Repeal.</p> <p>7012½a. Entry in register, certificate; carrying certificate on vehicle; seal; not to apply to motor vehicles owned by state municipality, etc.</p> <p>7012½b. Registration number to be attached to motor vehicles; display of seal.</p> <p>7012½bb. Marking motor vehicles owned by state.</p> <p>7012½c. Time for registration; duration; apportionment of fee.</p> <p>7012½g. State highway fund; disbursement; distribution among counties; how expended by counties.</p> <p>7012½h. Municipal registration abolished; exception of vehicles for hire.</p> <p>7012½l. Repeal; partial invalidity.</p> <p>7012½j. Register and index of motor vehicles; public inspection; mailing lists to counties.</p> <p>7012½n. License to chauffeur; application; badge; record; report to county clerks, etc.</p> | <p><b>Art</b><br/>7012½tt. Applications for registration and license or transfer thereof to be filed with county tax collector; forms.</p> <p>7012½u. License fee to be paid to county tax collector; receipt for; proportionate part of fee.</p> <p>7012½v. County tax collector to transmit one-half of fees to State Highway Department; disposition of remainder.</p> <p>7012½vv. Repeal.</p> <p>7012½vvv. Partial invalidity of act.</p> <p>7012½w. Assignment of registration numbers; plates and seals.</p> <p>7012½x. [Omitted as temporary.]</p> <p>7012½y. Compensation to county tax collectors for services.</p> <p>7012½z. Acts repealed.</p> <p>7012¾. Special deputy sheriffs to enforce traffic laws; number; employment.</p> <p>7012¾a. Same; duties.</p> <p>7012¾b. Same; number; length of service; dismissal.</p> <p>7012¾c. Same; compensation.</p> <p>7012¾d. Same; fund from which compensation shall be paid.</p> <p>7012¾e. Same; to be known as Traffic Officers; co-operation with city, etc., police departments; arrests; complaints; fines.</p> <p>7012¾f. Same; repeal.</p> |
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**Article 7012½. Registration of motor vehicles; application; fees; definition of terms; weight of loads; trailers; tractors; motor buses; electric vehicles; disputed classifications; rear view mirrors; tires; special permits as to loads and tires; liability for injury to highway.—***Registration fees.* In order to provide funds to effectuate the provisions of this Act on and after January 1, 1922, and annually thereafter on and after the first day of January, every owner of a motor vehicle, tractor, trailer, or semi-trailer, or motorcycle in this State shall file in the office of the county tax collector of the county in which he resides or in which the vehicle he owns is being operated, on a blank provided by the State Highway Department, an application for the registration of each motor vehicle or motorcycle owned or controlled by him.

Each application shall be accompanied by the requisite fee for the number of unexpired quarters of the calendar year, which fee for the registration of a motorcycle for a full calendar year shall be Three (\$3.00) Dollars, and for the registration of a motor vehicle except those herein-after designated as "Commercial Motor Vehicles," shall be thirty-five (35c) cents per horse power, as determined by the standard gauging power employed by the Association of Licensed Automobile Manufacturers, but no motor vehicle shall be registered for a full year for a less sum than Seven (\$7.50) Dollars and fifty cents. The term motorcycle shall include only those motor-driven vehicles with less than four wheels and with the driver sitting astride.

A commercial motor vehicle, under the provisions of this Act, is any motor vehicle intended, designated or used for the transportation of property.

For each commercial motor vehicle the annual license fee shall be based upon the net carrying capacity of the vehicle, and tire equipment as follows: provided that commercial motor vehicles whose net carrying capacity is two thousand pounds or less shall pay on the basis of horsepower rating as provided herein, but shall be subject to all the provisions of this Act.

Net Carrying Capacity in Pounds	If Equipped With Pneumatic Tires	Solid Tires
2,001 to 3,000	\$ 30.00	\$ 36.00
3,001 to 4,000	40.00	48.00
4,001 to 5,000	50.00	60.00
5,001 to 6,000	65.00	78.00
6,001 to 7,000	80.00	96.00
7,001 to 8,000	100.00	120.00
8,001 to 9,000	120.00	144.00
9,001 to 10,000	150.00	180.00

No motor vehicle shall be licensed under this Act whose net carrying capacity is greater than eight thousand pounds, provided that the officers or persons charged with the supervision and care of any certain highway may make written application to the State Highway Commission, asking that motor vehicles having a greater carrying capacity than named in this Act be permitted to operate on and over the highway specifically named in the application; and the State Highway Commission shall after investigation and finding the highway named in the application of sufficient construction to carry without material injury a load greater than that named in this Act, then the State Highway Commission shall have the authority to issue to owners of motor vehicles a license authorizing a greater load than named in this Act. Said license shall state the amount of load that may be carried and also the section of highway over which said motor vehicle may carry such excess load.

(A) For each trailer or semi-trailer, drawn or designed to be drawn by a commercial motor vehicle or tractor, the annual license fee shall be based upon the tire equipment and gross weight of vehicle and capacity load as follows:

Equipped with	Per 100 Pounds Gross Weight of Vehicle and Capacity Load.
Pneumatic Tires.....	15c
Solid Rubber Tires.....	25c
Iron, steel or other hard tires.....	35c

Provided that semi-trailers equipped with iron, steel, or other hard tires shall pay at the rate of \$1.00 per 100 pounds of gross weight as specified under this section.

(B) The word "Tractor" where used in this Act shall be construed to mean: any self-propelled vehicle designed or used as a traveling power plant or for drawing other vehicles, but having no provision for carrying loads.

For each tractor, the annual license fee shall be based upon the weight of the tractor as follows:

	Annual License Fee
1 to 2,000 pounds.....	\$ 5.00
2,001 to 4,000 pounds.....	10.00
4,001 to 6,000 pounds.....	15.00
6,001 to 8,000 pounds.....	20.00
8,001 to 10,000 pounds.....	25.00

*Motor Buses.* Owners of passenger motor vehicles that have a seating capacity of more than seven passengers, shall pay in addition to the fee of thirty-five (35c) cents per horsepower an additional registration fee of one (\$1.00) dollar for each number of passengers the motor vehicle will seat in excess of seven passengers. \* \* \* [Here follows a provision imposing a fine. It is set forth, post, as art. 820b6, Penal Code.]

*Vehicles Not Subject to Registration.* Trucks or tractors used exclusively for agricultural purposes, fire engines, road rollers, steam shovels, and other road building and agricultural machinery shall not be required to be registered; provided that nothing in this section shall be construed to exempt from this Act motor vehicles, trailers, semi-trailers, and tractors used for road building purposes and privately owned; provided that trucks used exclusively for agricultural purposes shall be registered by horsepower as is now provided for registration of automobiles and shall be subject to all the provisions of this Act, except the payment of annual license fees.

(A) *Internal Combustion.* For all purposes of this Act the horsepower of any motor vehicle, except electric or steamdriven vehicles, shall be determined by the formula commonly known as the National Automobile Chamber of Commerce formula, being as follows:

Square the diameter of the bore of the cylinder in inches, multiply by the number of cylinders and divide by two and one-half.

(B) *Steam Vehicles.* For the purpose of this Act, the horsepower of any steam driven vehicle, shall be computed by the system of horsepower rating adopted by the United States Government.

(C) *Electric Vehicles.* For vehicles propelled by electricity the rating shall be the normal horsepower designated by the manufacturer of the electric motor or motors used therein.

*Basis of Weight Fees:* In the computation of fees for trailers and

semi-trailers the gross weight shall be the actual weight of the vehicle in pounds plus the manufacturer's rated load-carrying capacity; and in the computation of fees for commercial motor vehicles the net carrying capacity shall be the manufacturer's rated load-carrying capacity.

*Disputed Classifications:* The Highway Department shall have the authority, in disputed cases to determine the classification in which any vehicle belongs and the amount of fee which shall be paid therefor. No vehicle with a body wider than ninety (90) inches or of a total gross weight when loaded with a capacity load, of more than six hundred and fifty (650) pounds per inch width of tire, shall be licensed or be operated on the public highways, and no commercial motor vehicle or trailer operated hereunder shall ever carry more than ten per cent in excess tonnage over and above its registered carrying capacity.

No commercial motor vehicle shall be licensed or operated in this State until said vehicle shall have been equipped with a rear view mirror placed and maintained so that the driver shall at all times be able to see other vehicles approaching from the rear.

No commercial motor vehicle, trailer, semi-trailer, or tractor shall be operated upon the highways of this State if equipped with solid rubber tires less than one inch in thickness at any point from the surface to the rim, or if equipped with pneumatic tires when one or more of such tires has been removed. \* \* \* [Here follows a criminal penalty. It is set forth, post, as art. 820b7, Penal Code.] The maximum weights prescribed herein shall also apply to trailers, semi-trailers, and tractors.

Anything to the contrary notwithstanding, upon application in writing to the State Highway Department, said Department in its discretion may issue a special permit to the owner or operator of any vehicle allowing heavier or wider loads than named herein, to be moved or carried over and on the public highways and bridges. They may also issue such special permit to increase the permissible weight per inch of width of tire. Such permits shall be in writing and they may limit the time and use of operation over the said highways and bridges which may be traversed and may contain such special conditions and provisions and require such undertaking or other security as the said Department shall deem to be necessary to protect the public highways and bridges from injury, or provide indemnity from any injuries resulting from such operation. All such special permits shall be carried in the vehicle to which they refer and upon demand shall be open to inspection of any peace officer or employee charged with care or protection of public highways.

The county road superintendent of any county, or any road supervisor whose road is affected, may have the authority by posting notices on the highways, when from wet weather or recent construction or repairs such cannot be safely used without probable serious damage to same, or when the bridges or culverts on same are unsafe to forbid the use of such highway or any section thereof to any vehicle or load of such weight or tires of such character as will unduly damage such highway. The notices provided for herein shall state the maximum load permitted and the time such use is prohibited and shall be posted upon the highway in such places as will enable the drivers to make detours to avoid the restricted highways or portions thereof.

Provided further, that if the owner or operator of any such vehicle feels himself aggrieved by such action, he may complain in writing to the county judge of such county, setting forth the nature of his grievance. Upon the filing of such complaint the county judge shall forthwith set down for hearing the issue thus raised for a day certain, not

more than three days later, and shall give notice in writing to such road official of the day and purpose of such hearing, and at such hearing the county judge shall hear testimony offered by the parties respectively, and upon conclusion thereof shall render judgment sustaining, revoking, or modifying such order heretofore made by the county road superintendent, or road supervisor, and the judgment of the county judge shall be final as to the issues so raised.

If upon such hearing the judgment sustains the order of the county road superintendent, or road supervisor, and it appears that any violation of same has been committed by the complainant since posting such notices, he shall be subject to the same penalty hereinafter provided for such offense as if the same had been committed subsequent to the rendition of such judgment made upon such hearing. \* \* \* [Here follows provision for criminal penalty, set forth, post, as art. 820b8, Penal Code.]

The owner, operator, driver, or mover of any vehicle, object, or contrivance over a public highway or bridge shall be jointly and severally responsible for all damages which said highway or bridge may sustain as the result of negligent driving, operating or moving of such vehicle, or as a result of operating same at a time forbidden by the road superintendent, or road supervisor, and the amount of such damages may be recovered in an action by law by the county judge for the use of the county, and such recovery shall go to the benefit of the damaged road. It is hereby made the duty of the county attorney to represent the county in the prosecution of such suits. [Acts 1917, 35th Leg., ch. 190, § 16; Acts 1918, 35th Leg., 4th C. S., ch. 71, § 2 (§ 16); Acts 1919, 36th Leg., ch. 113, § 1 (§ 16); Acts 1921, 37th Leg., ch. 131, § 1 (§ 16); Acts 1921, 37th Leg., 1st C. S., ch. 52, § 1 (§ 16).]

Took effect Nov. 15, 1921. See 1918 Supp. arts. 6016½-6016½c, as to newspaper publication instead of posted notice.

Cited, Gill v. City of Dallas (Civ. App.) 209 S. W. 209.

**Constitutionality.**—Acts 35th Leg. c. 190, and chapter 207, as amended by Acts First Called Sess. 35th Leg. c. 31, creating state highway department and providing for licensing of motor vehicles, held not a revenue measure, though the license fees provided for greatly exceed expense of administering law. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

Any invalidity in Acts 35th Leg. c. 190, § 16, delegating to state highway department authority to formulate rules for determination of weights governing license fees for commercial vehicles, held, in view of section 27, not to invalidate those provisions imposing licenses on noncommercial vehicles. *Id.*

As license fees for motor vehicles provided by Acts 35th Leg. c. 190, would, if not validly appropriated, be covered into state treasury and await appropriation by some future Legislature, provisions for collection of fees cannot be attacked on ground that there was no valid appropriation. *Id.*

Where evidence did not show, and there was nothing in Acts 35th Leg. c. 190 and chapter 207 as amended by First Called Sess. 35th Leg. c. 31, providing for licensing of motor vehicles, to show that licenses were excessive, it must be presumed they were reasonable. *Id.*

License fees for operation of motor may be fixed according to horse power, though Const. art. 8, §§ 1, 2, requires uniformity of taxation and forbids assessment of property for taxes elsewhere than in county where it is situated. *Id.*

Title of Acts 35th Leg. c. 190, declaring that fees and charges should constitute part of fund for support of state highway commission, held sufficient under Const. art. 3, § 35, to support appropriation of license fees for use of highway department. *Id.*

**SECTION 16A, ADDED BY ACTS 1919, 36TH LEG., CH. 113, § 2, AS AMENDED BY ACTS 1921, 37TH LEG., CH. 131, § 2, AND REPEALED BY ACTS 1921, 37TH LEG. 1ST C. S., CH. 52, § 2**

**Explanatory.**—Acts 1921, 37th Leg. 1st C. S., ch. 52, § 2, attempts to repeal Acts 1921, 37th Leg., ch. 131, § 16a. The title of the act provides for "repealing section 16a added to chapter 190 of the General Laws of the Regular Session of the Thirty-Fifth Legislature by section 2 of chapter 113 of the Acts of the Regular Session of the Thirty-sixth Legislature, and amended by section 2 of chapter 131 of the General Laws of the Regular Session of the Thirty-seventh Legislature," but in the body of the act first mentioned, the legislative declaration is as follows:

"Sec. 2. That section 6a be added to chapter 190 of the General Laws of the Regular Session of the Thirty-fifth Legislature as amended by section 2 of chapter 113 of the General Laws of the Thirty-sixth Legislature, as amended by section 2 of chapter 131

of the General Laws of the Thirty-seventh Legislature be and the same is hereby expressly repealed."

The text of the provisions sought to be repealed, as the same was amended by Acts 1921, 37th Leg., ch. 131, § 2, is as follows:

"Sec. 16a. All commercial motor vehicles and trailers having a greater carrying capacity than one ton, shall, before said commercial motor vehicles or trailers are allowed to operate over the highways and roads of this State, be further registered and licensed as follows:

"The owner of any commercial motor vehicle or trailer having a net carrying capacity of more than one ton shall make application to the County Tax Collector of the county where said owner resides, or has his or its principal office or place of business, accompanied by the registration certificate, or certified copy thereof, showing said motor vehicle or trailer to be registered under existing laws as defined by Section 1 hereof, and which applications must show the carrying capacity in tons of said motor vehicle or trailer for the further license to operate said motor vehicle or trailer, which application shall be sworn to, and, as far as practicable, shall state the general route or routes and the estimated mileage thereof, in each county or counties, over which it is proposed to operate said motor vehicle or trailer, but such mileage shall not include the streets of any incorporated town or city. Upon receipt of said application when same is approved, the County Tax Collector shall issue a license in proper form prepared by the Highway Department to the owner of said motor vehicle or trailer, and said license shall at all times be displayed in a prominent place on the motor vehicle or trailer so licensed.

"(b) The owner of each commercial motor vehicle or trailer registered hereunder shall keep in a separate book or books kept for that purpose, an accurate account of the number of miles traveled by said motor vehicle and trailer attached thereto, if any, while being operated outside the limits of any incorporated city or town; and if said motor vehicle or trailer is operated in more than one county, an accurate account shall be kept of the miles so traveled in each county. Said books shall at all times be open for the inspection of the County Tax Collector, or the duly authorized agent of said Tax Collector, of the counties where said motor vehicle or trailer is licensed to operate, and said Tax Collector, or the authorized agent of either, shall have the right at any and all times to make an inspection of said books."

While the express repeal seems to be ineffective, the provision may be regarded as superseded or impliedly repealed by Acts 1921, 37th Leg. 1st C. S., ch. 52.

#### ACTS 1921, 37TH LEG. 1ST C. S., CH. 52

**Explanatory.**—Sections 3 and 5 of Acts 1921, 37th Leg. 1st C. S., ch. 52, amending the corresponding sections of Acts 1921, 37th Leg., ch. 131, impose criminal penalties, and are set forth, post, as arts. 820zz, 820zzz, Penal Code. Sec. 4 of Acts 1921, 37th Leg., ch. 131, is repealed by section 4 of Acts 1921, 37th Leg. 1st C. S., ch. 52.

**Art. 7012½1. Partial invalidity.**—In event any Section or provisions of this bill should for any reason be held unconstitutional by the courts of this State, the same shall not affect any other Section or provision of the bill, and the Legislature does hereby declare that it would have enacted each and all of the provisions of this bill without reference to any other Section or provision. [Acts 1921, 37th Leg. 1st C. S., ch. 52, § 6.]

**Art. 7012½2. Repeal.**—This Act shall not be construed to repeal any existing laws of this State relating to highways, except when in direct conflict therewith, and shall be cumulative of all such laws now in force. [Acts 1921, 37th Leg., ch. 131, § 6; Acts 1921, 37th Leg. 1st C. S., ch. 52, § 7.]

**Art. 7012½a. Entry in register; certificate; carrying certificate on vehicle; seal; not to apply to motor vehicles owned by state, municipality, etc.**

Cited, *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

**Art. 7012½b. Registration number to be attached to motor vehicles; display of seal.**—A license number plate or pair of license number plates, at the discretion of the State Highway Commission, hereby designated as State license numbers, bearing the license number assigned therefor, shall be issued for every motor vehicle being registered for the calendar year beginning January 1, 1923, or being registered for the first time in Texas subsequent to the year 1923, which number plate, if one is issued, shall be securely attached to the rear of the motor vehicle for which issued; or, in case a pair of plates if issued, they shall be se-

curely attached, one to the front and one to the rear of the motor vehicle for which they are issued.

Said plate or plates shall remain attached to the motor vehicle for which issued during its existence, or until such time as the Highway Commission shall order a re-numbering of all motor vehicles in the State.

There shall be issued for every motor vehicle registered in Texas for any year subsequent to the first calendar year a renumbering is ordered by the Highway Commission as provided in this Section, a numbered registration seal, which seal shall be attached to the front of the motor vehicle for which issued, to evidence payment of the license fee thereon for the year for which said seal is issued. Said seals shall be of distinctly different colors for each year.

Provided, that no seal shall be issued for the year a renumbering is ordered, as provided for herein, and that the new number plate, or pair of plates, issued for a motor vehicle being registered for that year shall be prima facie evidence that the license fee due on said motor vehicle has been paid for that year.

Provided, further, that the Highway Commission may, if they deem it advisable, use a plate or pair of plates annually in which case the seals provided for in above Section shall not be used.

In the event of the loss or destruction of a number plate or seal, the owner of a registered vehicle may obtain from the Highway Department through the county tax collector a replacement number plate or seal by filing with said tax collector an affidavit showing the fact and the payment of one (\$1.00) dollar for each replacement number. Provided, further that the form, size and color shall be prescribed by the Highway Department. [Acts 1917, 35th Leg., ch. 190, § 18; Acts 1921, 37th Leg. 1st C. S., ch. 44, § 1 (§ 18).]

**Explanatory.**—The latter part of the section as amended is set forth, post, as arts. 820b3, 820b4, and 820b5, Penal Code. The title of the act purports to amend section 18 of chapter 190 of Acts 1917, 35th Leg., but there is no enacting clause to that effect. The act took effect November 15, 1921.

**Failure to carry number as affecting liability for negligence.**—Failure of automobile driver to register car and place number thereon, held not to make him liable for damages in collision; there being no causal connection between such failure and the collision. *Mumme v. Sutherland* (Civ. App.) 198 S. W. 395.

**Art. 7012½bb.—Marking motor vehicles owned by state.**—That there shall be printed upon each side of every automobile, truck or other motor vehicle owned by the State of Texas, the word "Texas," followed by the title of the department, bureau, board, commission or official having the custody of such car, the letters of which inscription shall be not less than two inches in height, and it shall be the duty of the department, board, bureau, commission or official having the custody of such car to have such wording placed upon the vehicle, as is prescribed by this Act. [Acts 1921, 37th Leg., ch. 59, § 1.]

**Explanatory.**—For penal provisions, see arts. 820b1, 820b2, Penal Code, post. The act took effect 90 days after March 12, 1921, date of adjournment.

**Art. 7012½c.—Time for registration; duration; apportionment of fee.**—On and after January 1, 1918, registrations for motorcycles and motor vehicles under this Act shall begin with the 1st day of January of each year and end with the 31st day of December; and all applications for registration of motorcycles or motor vehicles filed on and after January 1st and before March 31st of any year shall be required to pay the annual fee; all applications filed on or after April 1st and before June 30th of any year shall be required to pay three-fourths the annual fee; all applications filed on or after July 1st and before September 30th of any year shall be required to pay one-half the annual fee; and all



applications for registration filed on or after October 1st and before December 31st of any year, shall be required to pay one-fourth the annual fee. [Acts 1917, 35th Leg., ch. 190, § 19; Acts 1918, 35th Leg. 4th C. S., ch. 71, § 3.]

Took effect 90 days after March 12, 1918, date of adjournment.

**Art. 7012½g. State highway fund; disbursement; distribution among counties; how expended by counties.**

**Constitutionality.**—In view of past construction, held that provision of this article, that funds derived by state highway commission from license fees for motor vehicles, etc., should be deposited in treasury in special fund was valid appropriation under Const. art. 8, § 6. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**Art. 7012½h. Municipal registration abolished; exception of vehicles for hire.**

**Validity of ordinances.**—Municipal ordinance, licensing operation of automobiles for hire, held not in conflict with Acts 35th Leg. p. 425, c. 190, in view of this article, and Acts 35th Leg. c. 207, § 23 (Penal Code, art. 820r, 1918 Supp.). *Ex parte Parr*, 200 S. W. 404.

Ordinance of Dallas of August 2, 1918, entitled one regulating local street transportation, and excluding from a certain zone regular lines of jitneys, held not in conflict with or repugnant to Acts 35th Leg. c. 190, creating a state highway department, or chapter 207, regulating operation of motor vehicles, in view of section 25 of the former (this article) and section 23 of the latter (1918 Supp. Penal Code, art. 820r), reserving to local authorities power to license and regulate the use and operation of vehicles for hire. *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

Plaintiffs' business of leasing or hiring driverless automobiles to the general public held to be of a public nature, to contemplate and in fact make use of the streets of defendant city, and to affect the public welfare, so as to be subject to license and reasonable regulation by the city, under this article, and chapter 207, § 23, subd. 2 (Vernon's Ann. Pen. Code Supp. 1918, art. 820r), and San Antonio charter, §§ 90, 98, 99. *City of San Antonio v. Besteiro* (Civ. App.) 209 S. W. 472.

**Art. 7012½i. Repeal; partial invalidity.**

**Partial invalidity of act.**—Any invalidity in Acts 35th Leg. c. 190, § 16, (ante, art. 7012½) delegating to state highway department authority to formulate rules for determination of weights governing license fees for commercial vehicles, held, in view of section 27, not to invalidate; those provisions imposing licenses on noncommercial vehicles. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**Art. 7012½j. Register and index of motor vehicles; public inspection; mailing lists to counties.**—Upon the receipt, by the Highway Department, of an application for registration of a motor vehicle, accompanied by the fee required by law to entitle such motor vehicle to registration, the Department shall file such application and shall numerically register such motor vehicle with the name, residence, and business address of the owner, together with the facts stated in such application, in a book to be kept for that purpose, under the distinctive number assigned to such motor vehicle by the said Department, which book shall be kept open to the inspection of the public during reasonable office hours.

The Department shall, on or before the 1st day of February of each year, make out and mail to the clerk of each County Court in this State, the Sheriff of each County, and to the Chief of Police of every incorporated city in the State, a full and accurate list, made up in numerical order, of all motor vehicles so registered, stating the distinctive numbers so assigned to them, the name, residence and business of the owner, manufacturer or dealer, as the case may be, the engine number and make of car, and at the expiration of every thirty (30) days thereafter, a similar list of all the additional registrations or changes in registration; such list to be kept on file by said County Clerks, Sheriffs and Chiefs of Police, in a conspicuous place in their respective offices, and to be open

to the inspection of the public during reasonable office hours. [Acts 1917, 35th Leg., ch. 207, § 1; Acts 1919, 36th Leg., ch. 161, § 1.]

See 1918 Supp., art. 7012½a. For criminal provisions of this act see Penal Code, arts. 820aa-820z, 826a, 1022a, 1259aa, 1259bb, 1259cc, 1621a.

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

**Constitutionality.**—See *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226; note under art. 7012½, ante.

**Art. 7012½n. License to chauffeur; application; badge; record; report to county clerks, etc.**

See *Matthews v. State*, 85 Cr. R. 469, 214 S. W. 339.

**Art. 7012½tt. Applications for registration and license or transfer thereof to be filed with county tax collector; forms.**—All applicants for registration and license or transfer thereof of motor vehicle or motorcycle, manufacturers or dealers therein, and chauffeurs now filed with the State Highway Department under the existing law shall after the taking effect of this Act be filed with the Collector of Taxes for the County of the residence of the applicant; such application to be made upon forms prescribed by the State Highway Department, a supply of which shall be furnished each Collector of Taxes at the expense of said Department. [Acts 1918, 35th Leg. 4th C. S., ch. 73, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 7012½u. License fee to be paid to county tax collector; receipt for; proportionate part of fee.**—Upon the filing of an application the applicant shall pay to the Tax Collector the amount of the license fee required by law for which amount the Tax Collector shall issue a receipt showing the name of the holder, the make of his car, the model and the number of the engine of same, which receipt shall be a protection to the holder against prosecution under any provision of the Highway Law regulating the registration of motor vehicles until the receipt by him of number plates and seals as is required by the Statutes of this State, which receipts shall be issued in triplicate, one to be delivered to the licensee, one forwarded to the State Highway Department by the Tax Collector, and one retained by him. The receipt herein provided for shall be furnished at the expense of the State Highway Department to the several collectors of Taxes, and shall be numbered consecutively for each County. It is provided, however, that upon the filing of an application for registration during any quarter of the year the registration fee to be paid thereof shall be such a proportion of the annual fee as the remaining quarters of the year added to the quarter in which the application was filed shall bear to the entire year. [Id., § 2.]

**Art. 7012½v. County tax collector to transmit one-half of fees to State Highway Department; disposition of remainder.**—It shall be the duty of the tax collector to transmit on Monday of each week to the State Highway Department at Austin one-half of the gross registration chauffeur or transfer fees collected during the preceding week. The remaining one-half shall be deposited by the tax collector, in the county depository of the county, to the credit of a special highway fund, to be expended under the provisions of law relating thereto. Provided, that all license fees collected on commercial and interurban commercial motor vehicles on a mileage basis shall be the property of the respective counties and be distributed as herein provided and be paid to the county treasurers of such counties by the officer collecting the same. [Acts 1918, 35th Leg. 4th C. S., ch. 73, § 3; Acts 1919, 36th Leg., ch. 113, § 4.]

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

**Art. 7012½vv. Repeal.**—This Act shall not be construed to repeal any existing laws of this State relating to highways, except when in di-

rect conflict therewith, and shall be cumulative of all such laws now in force. [Acts 1919, 36th Leg., ch. 113, § 5.]

**Art. 7012<sup>1</sup>/<sub>2</sub>vvv. Partial invalidity of act.**—In event any section or provisions of this bill should for any reason be held unconstitutional by the courts of this State, the same shall not affect any other section or provision of the bill, and the Legislature does hereby declare that it would have enacted each and all of the provisions of this bill without reference to any other section or provision. [Id., § 6.]

**Art. 7012<sup>1</sup>/<sub>2</sub>w. Assignment of registration numbers; plates and seals.**—With the remittance provided for in Section 3 hereof [Art. 7012<sup>1</sup>/<sub>2</sub>v], the Tax Collector shall forward to the State Highway Department the copies of receipts issued under Section 2 hereof [Art. 7012<sup>1</sup>/<sub>2</sub>u], and upon the receipt of such receipts the State Highway Department shall assign registration numbers to the persons whose name appear thereon, and shall at once forward, charges prepaid, to the Tax Collector, the required number plates and seals corresponding thereto, which shall be delivered by the Tax Collector without expense to him or the County, to those entitled thereto, upon application thereof by such owners; provided that on or before January of each year the Secretary of the State Highway Department shall forward to each Collector of Taxes in this State, carrying charges prepaid, a number of seals corresponding to the number of motor vehicle, and motorcycle registrations in their respective Counties for the previous year, which seals shall be delivered by the Collector of Taxes to the registrants, upon the payment of the license fee for the ensuing year. The number of seals so sent out shall be charged to the respective Collectors of Taxes in a book kept for that purpose by the State Highway Department and upon receipt of notification by the Collector of Taxes, together with a remittance provided for in this Act, such Collector shall be credited with the seals so distributed. The Collector of Taxes shall keep a record of all transfers, and report same weekly to the State Highway Department. [Acts 1918, 35th Leg. 4th C. S., ch. 73, § 4.]

**Art. 7012<sup>1</sup>/<sub>2</sub>x.** [Omitted as Temporary.]

**Explanatory.**—This provision being Acts 1919, 36th Leg. 2d C. S., ch. 50, § 1, superseding Acts 1919, 36th Leg. 2d C. S., ch. 49, and Acts 1918, 35th Leg. 4th C. S., ch. 73, § 5, appropriates motor vehicle registration fees and other moneys collected under the motor vehicle act to carrying out the provisions of such act.

**Art. 7012<sup>1</sup>/<sub>2</sub>y. Compensation to county tax collectors for services.**—As compensation for their services under this act, tax collectors shall receive two per cent of all amounts collected by them, but in no event shall any tax collector receive any sum exceeding the amount fixed as a maximum of their fees under Chapter 4, Title 58, of the Revised Civil Statutes of 1911, as amended by Acts 33rd Legislature, page 246. [Acts 1918, 35th Leg. 4th C. S., ch. 73, § 6; Acts 1919, 36th Leg., ch. 61, § 1.]

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

**Art. 7012<sup>1</sup>/<sub>2</sub>z. Acts repealed.**—This Act shall not be construed to repeal any existing laws of this State relating to Highways, except where in direct conflict therewith, and shall be cumulative of all such laws. [Acts 1918, 35th Leg. 4th C. S., ch. 73, § 7.]

**Art. 7012<sup>3</sup>/<sub>4</sub>. Special deputy sheriffs to enforce traffic laws; number; employment.**—To insure the adequate enforcement of the Traffic Laws of this State, and especially the Laws regulating the use of motor vehicles and motor cycles on the public highways, contained in the Acts of the 35th Legislature, creating the Highway Commission, and also the

Acts regulating the use of the public highways by motor vehicles and all other Laws amendatory thereof or supplementary thereto, now or hereafter enacted, the right is hereby conferred on the Commissioners' Court of each County to employ one or more Special Deputy Sheriffs for that purpose, who shall be, whenever practicable, motor cycle riders, and shall be assigned to work under the directions of the Sheriff of the County. [Acts 1919, 36th Leg., ch. 127, § 1.]

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

**Art. 7012<sup>3</sup>/<sub>4</sub>a. Same; duties.**—The special work of said officers shall be the efficient enforcement of the Traffic and Highway Laws of this State, and prompt arrest and prosecution of all offenders of any of said Laws, and to that end they shall diligently patrol the public highways and keep a vigilant look-out for all violators of said Law. [Id., § 2.]

**Art. 7012<sup>3</sup>/<sub>4</sub>b. Same; number; length of service; dismissal.**—The number of said officers and the length of their service shall be determined by the Commissioners' Court, acting in conjunction with the Sheriff of the County; and they shall be required to give bond and take oath of office as other Deputies. They may be dismissed from service on request of the Sheriff, whenever approved by the Commissioners' Court, or by the Commissioners' Court, upon their own initiative, whenever their services are no longer needed, or have not been satisfactory. Provided that no County shall be authorized to employ more than two regular deputies under this Act nor more than two additional deputies for special emergency, to aid said regular deputies in their work. [Id., § 3.]

**Art. 7012<sup>3</sup>/<sub>4</sub>c. Same; compensation.**—The compensation of said deputies shall be fixed by the Commissioners' Court prior to their selection, and in addition thereto said Commissioners' Court shall be authorized to provide, at the expense of the County, necessary equipment for said officers to enable them to discharge their duties. The pay of said deputies shall not be included in the settlements of the Sheriff in accounting for the fees of office, but shall be independent thereof. [Id., § 4.]

**Art. 7012<sup>3</sup>/<sub>4</sub>d. Same; fund from which compensation shall be paid.**—The Commissioners' Court of each County in this State shall be authorized to use so much of the County's portion of the registration fees on motor vehicles, derived from the operation of the Law creating the Highway Commission, as may be necessary for that purpose, provided that the said expenditure shall not exceed five (5%) per cent of said funds in any one year in counties whose funds from said registration fees amounts to Thirty-Thousand (\$30,000.00) Dollars or over, and not to exceed seven and one-half (7½) per cent of such fund in counties receiving a lesser amount from said sources. [Id., § 5.]

**Art. 7012<sup>3</sup>/<sub>4</sub>e. Same; to be known as Traffic Officers; co-operation with city, etc., police departments; arrests; complaints; fines.**—The said Special Deputies shall be known as the County Traffic Officers, and shall, at all times, co-operate with the police department of each city or town within the county, in the enforcement of said traffic laws in said city or town as well as in the other portions of the county. When arrests are made by said officers for offenses committed within the corporate limits of any city or town, complaints shall be filed before the City Court, or other proper Tribunal in said city or town, having jurisdiction over such offenses, and the fines arising therefrom shall be retained by such city or town for the maintenance of their streets, and to

aid in the enforcement of the Traffic Laws, or other Laws regulating the use of the public highway. The fines in all other cases, collected from the violators of said Highway or Traffic Laws, to go into the County Treasury, and may, in the discretion of the Commissioners' Court, be used in helping defray the expenses of maintaining said Traffic Officers. [Id., § 6.]

**Art. 7012¾f. Same; repeal.**—All laws in conflict herewith are hereby repealed. [Id., § 6a.]

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## CHAPTER NINE

### BRIDGES

Art. 7014. Commissioners' court may build bridges.	Art. 7015, 7016. [Note.]
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**Article 7014. [4792] Commissioners' court may build bridges.**

**Rights of contractor.**—Where plaintiff did not repair bridge within time provided by contract, if he could recover at all for what he paid for materials, it would have to be upon a quantum meruit. *Palo Pinto County v. Beene* (Civ. App.) 199 S. W. 866.

**Arts. 7015. 7016. [4793, 4794].**

Cited, *Victoria Co. v. Victoria Bridge Co.*, 68 Tex. 62, 4 S. W. 140.

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## CHAPTER NINE B

### PAVED ROADS

Art. 7020½. Commissioners' court may establish road districts.	Art. 7020½f. Same; election.
7020½a. Districts governed by bond law.	7020½g. Petition for creation of indebtedness; order and notice of election.
7020½b. Compensation to existing districts for bonds outstanding; procedure.	7020½h. Mode and conduct of election; duties of commissioners' court in event of favorable result.
7020½c. Exclusion of levee, drainage or improvement districts; adjustment of liabilities; fractional districts.	7020½i. Election to revoke or modify former result.
7020½d. How named; body corporate.	7020½j. Anticipation of funds by issuance of warrants.
7020½e. Counties, political subdivisions, districts, etc., may create indebtedness; limitation.	7020½k. Special road law counties.

**Article 7020½. Commissioners' court may establish road districts.**—The Commissioners' Courts of the several counties of this State may create within their counties road districts for the purpose of the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, and which may include one or more previously created political subdivisions or defined districts that have voted and issued road bonds, and, in addition thereto, other territory if deemed judicious, and which may exclude certain territory as hereinafter permitted; and such districts shall be created in the same manner that political sub-divisions or defined road districts are now authorized to be created by Chapter 2 of Title 18, Revised Civil Statutes of Texas of 1911, and all amendments thereto. [Acts 1921, 37th Leg., ch. 41, § 1.]

Took effect 90 days after March 12, 1921, date of adjournment.  
See notes under art. 6860.

**Art. 7020½a. Districts governed by bond law.**—Any road district created under the provisions of this Act shall be governed and controlled

by the provisions and limitations of Chapter 2, Title 18, Revised Civil Statutes of Texas of 1911, and all amendments thereto, except as herein otherwise provided. [Id., § 2.]

**Art. 7020 $\frac{1}{2}$ b. Compensation to existing districts for bonds outstanding; procedure.**—Any one or more political sub-divisions or defined road districts included within the limits of a road district under the provisions of this Act shall be fully and fairly compensated by the new district in an amount equal to the amount of district bonds outstanding against such sub-divisions or districts and which shall be done in the form and manner prescribed for the issuance of county road bonds under authority of Chapter 38, Acts of the Second Called Session of the Thirty-sixth Legislature [Arts. 637a–637hh], except the petition shall be signed by fifty or a majority of the resident property tax-paying voters of the new district and the bonds proposed to be issued shall be for the purchase or construction of roads in the included district or districts, and the further construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof, within and for the new district. [Id., § 3.]

**Art. 7020 $\frac{1}{2}$ c. Exclusion of levee, drainage or improvement districts; adjustment of liabilities; fractional districts.**—In the event any political sub-division or defined road district sought to be incorporated into the proposed new road district should embrace the whole or any part of any levee improvement district, drainage district, or any other improvement district, created under any laws passed pursuant to Section 52 of Article 3 of the Constitution, as it now exists, then the territory covered by such other district may be excluded from the new road district sought to be created under the provisions of this Act, but, except as herein specially permitted no fractional part of a previously created road district shall be included within the limits of a road district created under the provisions of this Act; provided, that in the issuance of bonds by the new district for the purpose prescribed by Section 3 hereof, that portion of the territory of the previously created sub-division or road district included within the other improvement districts hereinabove named shall not be subjected to the payment of such new district bonds, but said territory shall continue to be liable for its pro rata part of all road bonds issued by the previously created sub-division or road district as the assessed values thereof shall bear to the whole assessed values of such previously created sub-division or road district so encroached upon, as such assessed values are shown upon the last preceding county tax assessment rolls, and it is hereby made the duty of the Commissioners' Court annually to levy and to have assessed and collected a tax upon all taxable property within said territory sufficient to pay said territory's pro rata part of the interest on and the necessary sinking fund for the bonds issued by such previously created sub-division or road district, and all taxes collected for that purpose within such territory shall be placed in a separate fund to the credit of the interest and sinking fund account of such sub-division or district so encroached upon and shall be applied to the purposes named and no other. [Id., § 4.]

**Art. 7020 $\frac{1}{2}$ d. How named; body corporate.**—Each road district created under the provisions of this Act shall bear the name of the county in which it is located, and shall be definitely numbered, which may be the number of the road district incorporated therein which was first created, and a district so established shall become and be a body corporate with all the powers, rights and privileges conferred by this Act, or any other law, upon districts created for the purpose of the construc-

tion, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof. [Id., § 5.]

**Art. 7020<sup>1</sup>/<sub>2</sub>e. Counties, political subdivisions, districts, etc., may create indebtedness; limitation.**—Any county in this State, or any political sub-division or defined district thereof, heretofore created or hereafter to be created, acting under the provisions of Section 52 of Article 3 of the Constitution may upon a vote of two-thirds of the resident property taxpayers thereof, qualified to vote, voting at an election to determine the matter, create indebtedness for the purposes of maintaining the roads of such county or political sub-division or defined district to an amount which, in addition to other indebtedness incurred under the provisions of this Act, or any other Statute passed pursuant to said section of the Constitution, will not exceed one-fourth of the last assessed valuation of the real property situated in such county or political sub-division or defined district. [Id., § 6.]

**Art. 7020<sup>1</sup>/<sub>2</sub>f. Same; election.**—Whenever fifty, or more, or a majority of the resident qualified, property tax-paying voters of any county or political subdivision or defined district, such as is mentioned in the preceding Section, petition the Commissioners' Court of such county for an election to determine whether indebtedness specifically for maintenance of the roads of the county or political sub-division or defined district shall be incurred, it shall be the duty of such court to order an election within and for such county or political sub-division or defined district to determine whether such indebtedness shall be created and whether taxes shall be levied upon the taxable property in such county or political sub-division or defined district in payment thereof, provided the indebtedness sought to be created, in addition to all other indebtedness of such county or political sub-division or defined district, will not exceed one-fourth of the last assessed value of the real estate situated in such county, or political sub-division, or defined district. [Id., § 7.]

**Art. 7020<sup>1</sup>/<sub>2</sub>g. Petition for creation of indebtedness; order and notice of election.**—The petition for the creation of indebtedness for maintenance purposes may be for the creation of a specified amount of indebtedness annually, or for an amount annually that would be raised by taxes at a named rate according to the last assessed value of the property within such county or political sub-division or defined district; provided, that where a political sub-division or defined district has been created for the issuance of road bonds, the order and notice of the election herein provided for need not describe the boundaries of such political sub-division or defined district, but it shall be sufficient to identify the district by its number and the date of its creation and the number of the volume and page or pages of the minutes of the Commissioners Court in which is recorded the order creating and establishing such political sub-division or defined district. [Id., § 8.]

**Art. 7020<sup>1</sup>/<sub>2</sub>h. Mode and conduct of election; duties of Commissioners' Court in event of favorable result.**—The Commissioners' Court shall name the place or places for holding an election on the question of incurring indebtedness for maintenance purposes, and name a manager and two clerks for each polling place, and notice of such election shall be given, and other proceedings shall be had substantially as required by law for bond elections in road districts, and returns of such elections and declarations of results thereof shall be substantially as provided for road district bond elections, except the ballots at such elections shall read

“For Maintenance Indebtedness and Levy of Taxes in Payment Thereof,” or “Against Maintenance Indebtedness and the Levy of Taxes in Payment Thereof.” If such election results in favor of the proposition submitted, the Commissioners’ Court of the county may incur indebtedness annually for and on behalf of such county or political sub-division or defined district for the maintenance of the roads of such county or political sub-division or defined district to the amount voted, until authority so to do is revoked, or changed by another election, which may not be held until the expiration of five years from the date of the election authorizing such maintenance tax, and the Commissioners’ Court of the county, while such authority exists, shall annually levy, and cause to be assessed and collected, taxes upon the taxable property of such county or political sub-division or defined district at rates sufficient to produce the specific annual sum voted, or at the specific rate voted, or so much, or at such rate as will raise funds sufficient to satisfy the maintenance indebtedness created, or intended to be created, for the current year, the proceeds of which taxes shall be used for the purposes named. [Id., § 9.]

**Art. 7020 $\frac{1}{2}$ i. Election to revoke or modify former result.**—An election to revoke, modify or increase the right to incur maintenance indebtedness, when permissible, may be obtained and held substantially as here-in provided for an election to incur such indebtedness. [Id., § 10.]

**Art. 7020 $\frac{1}{2}$ j. Anticipation of funds by issuance of warrants.**—The amount to be raised by taxation for maintenance purposes may be anticipated during any current year by the issuance of warrants against the same, which may bear interest at a rate not to exceed eight per cent per annum from their date and be payable on or before the tenth day of April of the year next succeeding the year of issuance, which warrants may be disposed of to raise maintenance funds, or the same may be used in payment of maintenance work, but the amount of warrants to be issued in any one year, in anticipation of maintenance funds, shall never exceed 90% of the amount of such funds as would be raised by taxation levied during such year. [Id., § 11.]

**Art. 7020 $\frac{1}{2}$ k. Special road law counties.**—Any county operating under a special road law may avail itself of all of the provisions of this Act. [Id., § 12.]

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## CHAPTER TEN

### FERRIES

**Articles 7023, 7027, 7035.** [4799, 4803, 4811.]

See *Tugwell v. Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120.

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## CHAPTER ELEVEN

### SPECIAL ROAD TAX

**Art.**  
7042. Election for road tax, etc.

**Art.**  
7045. Duty of Commissioners’ Court.

**Article 7042. Election for road tax, etc.**

**Explanatory.**—Arts. 7042–7046 are limited in their scope by Acts 1921, 37th Leg., ch. 41, ante, arts. 7020 $\frac{1}{2}$ –7020 $\frac{1}{2}$ k, as far as the maintenance of paved roads is concerned.

**Power of legislature to levy local tax in one county.**—Const. art. 8, § 9, empowering the Legislature to pass local laws for the maintenance of public roads, did not author-



ize the Legislature to levy a local tax in one county for road purposes, contrary to other provisions of the Constitution limiting the power of the Legislature in levying taxes. *Meyenberg v. Ehlinger* (Civ. App.) 224 S. W. 312.

### Art. 7045. Duty of commissioners' court.

**Collection of tax.**—Loc. & Sp. Laws 36th Leg. (1919) c. 2, imposing a road tax on inhabitants of Fayette county, clearly indicates that the special tax is to be collected as other taxes, so that payment of the tax levied for the year 1920 cannot be compelled before February 1, 1921. *Meyenberg v. Ehlinger* (Civ. App.) 224 S. W. 312.

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## TITLE 120

### SALARIES

Chap.

1. Executive officers.
3. Judicial officers.

Chap.

4. Miscellaneous officers.
5. General provisions.

## CHAPTER ONE

### EXECUTIVE OFFICERS

**Article 7054. [4834] Adjutant General.**—From and after the 1st day of April 1918 the Adjutant General of the State of Texas shall receive an annual salary of Three Thousand Six Hundred Dollars (\$3,600.00) and each year thereafter he shall receive an annual salary of Three Thousand Six Hundred Dollars (\$3,600.00). [Act June 24, 1870; P. D. 7148; Acts 1918, 35th Leg. 4th C. S., ch. 37, § 1.]

See *Grandberry v. State*, 86 Cr. R. 232, 216 S. W. 164.

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## CHAPTER THREE

### JUDICIAL OFFICERS

Art.

7057. Justices of supreme court, judges of commission of appeals, judges of court of criminal appeals, judges

Art.

of courts of civil appeals, judges of district courts.  
7058, 7059. [Superseded.]

**Article 7057. Justices of supreme court, judges of commission of appeals, judges of court of criminal appeals, judges of courts of civil appeals, judges of district courts.**—From and after the passage of this Act, Judges of the Supreme Court, judges of the Commission of Appeals, and the judges of the Court of Criminal Appeals of this State shall each be paid an annual salary of Sixty Five Hundred dollars, payable in equal monthly instalments; that the judges of the several Courts of Civil Appeals of this State shall each be paid an annual salary of Five Thousand Dollars, payable in equal monthly instalments; and that the Judges of the District Courts of this State shall each be paid an annual salary of Four Thousand Dollars, payable in equal monthly instalments. [Acts 1913, p. 329, § 1, superseding Arts. 7057, 7058, Rev. St. 1911; Acts 1919, 36th Leg., ch. 32, § 1.]

**Explanatory.**—Sec. 2 of Acts 1919, 36th Leg., ch. 32, repeals all conflicting laws. The act took effect 90 days after March 19, 1919, date of adjournment.

**Validity of act.**—It appearing that the members of the Thirty-Sixth Legislature thought that Senate Bill No. 32 relating to salaries of judges, was not in substance the same as House Bill No. 21, relating to salaries of judges, which was defeated, the courts ought not to interfere and hold that the former was in substance the same as the latter and that the Legislature did not have power to pass it under Const. art. 3, § 34,

the question being one upon which the minds of reasonable men might differ. *King v. Terrell* (Civ. App.) 218 S. W. 42.

Since the Thirty-Sixth Legislature was lawfully in session, and had the inherent right to legislate upon the question of fixing the salaries of judges, the courts will presume that such Legislature had not incapacitated itself from enacting into law Senate Bill No. 32 by defeating at the same session a bill similar in substance, contrary to Const. art. 3, § 34, and will not suffer such presumption to be rebutted. *Id.*

**Art. 7058.** [Superseded.]

See art. 7057.

**Art. 7059.** [4839] [Superseded.]

See art. 7057; *King v. Terrell* (Civ. App.) 218 S. W. 42.

## CHAPTER FOUR

### MISCELLANEOUS OFFICERS

Art.

7066. [Superseded.]

7067. Salaries of superintendents of certain asylums.

7069, 7074. [Superseded.]

7075. Superintendent of public buildings.

Art.

7085f. Salaries of certain officers, etc.

7085g. Enumeration.

7085h. Same.

7085i. Repeal.

**Article 7066.** [4824] [Superseded.]

See arts. 7085f, 7085g.

**Art. 7067. Salaries of superintendents of certain asylums.**—The Superintendent of the Deaf, Dumb and Blind Institute for Colored Youths shall receive an annual salary of \$1,800.00 per year, providing that he or she shall receive provisions not exceeding in value \$500.00 per year, and fuel, lights, water, laundry and housing for himself or herself and immediate family. [Acts 1919, 36th Leg. 2d C. S., ch. 24, § 4.]

**Art. 7069.** [Superseded by Acts 1917, 35th Leg. 1st C. S., ch. 48, § 2 (1918 Supp. art. 7085b) and Acts 1919, 36th Leg. 2d C. S., ch. 24, § 3, post, art. 7085h.]

**Art. 7074.** [4830] [Superseded by Acts 1917, 35th Leg. 1st C. S., ch. 48, § 2 (1918 Supp. art. 7085b) fixing the salary of the revenue agent at \$2,100. Also repealed by Acts 1918, 35th Leg. 4th C. S., ch. 94, § 1, the repeal to take effect Jan. 15, 1919. See post, art. 7368a.]

**Art. 7075.** [4833] **Superintendent of public buildings.**—From and after the passage of this Act the salary of the Superintendent of Public Buildings and Grounds of the State of Texas shall be, and same is hereby fixed at the sum of twenty four hundred dollars per annum. [Acts 1889, p. 22; Acts 1918, 35th Leg. 4th C. S., ch. 74, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 7078.** [Superseded.]

See Art. 7085b, Supplement 1918.

**Art. 7085b.** [Superseded in part.]

See Arts. 4575a, 6086, 7150¼c, 7150¼d, 7150¼f, 7368a, 7368b.

**Art. 7085f. Salaries of certain officers, etc.**—From and after September 1, 1919, the following named officers, superintendents and employés in the employ of the State Government of the State of Texas, shall receive for their service as such officers, superintendents and employés, the following annual salaries, which are hereby fixed and established at the respective amounts herein set out. [Acts 1919, 36th Leg. 2d C. S., ch. 24, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 7085g. Enumeration.**—Superintendents of the Blind Institute, the Deaf and Dumb Institute, the Epileptic Colony, State Lunatic Asylum, Southwestern Insane Asylum, North Texas Hospital for the Insane, Northwest Texas Insane Asylum, Hospital for Negro Insane, Colony for the Feeble Minded, State Institution for the Training of Juveniles and the Head Physician of the State Pasteur Institute shall receive an annual salary for \$2,500.00 per year; provided that each shall receive provisions not to exceed \$500.00 per year, and fuel and lights, water, laundry and housing for himself and immediate family. [Id., § 2.]

**Art. 7085h. Same.**—The Superintendents of the Confederate Home, The Confederate Woman's Home and Superintendent Girls Training School shall each receive an annual salary of \$2,000.00 per year, providing that each shall receive provisions not exceeding in value \$500.00 per year, and fuel, lights, water, laundry and housing for himself or herself and immediate family. [Id., § 3.]

**Art. 7085i. Repeal.**—The terms hereof fixing and establishing the salaries and allowances of expenses and the other provisions of this Act shall be superior to those in any other Act or Statute of the State conflicting herewith and as to the specific provision of this Act such conflicting sections, provisions and terms of other and prior Acts and Statutes are hereby repealed. [Id., § 5.]

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## CHAPTER FIVE

### GENERAL PROVISIONS

Art. 7086.	Salaries shall not be changed during term.	Art. 7089.	Salary to be paid only, when.
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**Article 7086. [4853] Salaries shall not be changed during term.**

**Power to change salary.**—Relation between holder of public office and government is not that of employer and employé, and their rights are not to be determined by rules of contracts of employment; so that governing body under which public officer holds office may abolish office or change compensation during term of office of incumbent. *Carver v. Wheeler County* (Civ. App.) 200 S. W. 537.

**Beginning of term of office.**—County treasurer's term of office did not begin before election, within this article, though political complexion of county was so predominately Democratic that only real contest was in primaries. *Carver v. Wheeler County* (Civ. App.) 200 S. W. 537.

**Art. 7089. [4859] Salary to be paid only, when.**

**Unconstitutional office.**—An official appointed to an unconstitutional office is not entitled to compensation for services rendered. *Maud v. Terrell*, 109 Tex. 97, 200 S. W. 375.

## TITLE 121

## SEALS AND SCROLLS

**Article 7093. [4863] Unsealed instruments held to import consideration, etc.**

See *Ft. Worth & D. C. Ry. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686.

**Written contracts import consideration.**—In trespass to try title, bond for title, not reciting any consideration, was not evidence of title, where the payment of valuable consideration was not waived. *Robinson v. Randell* (Civ. App.) 211 S. W. 625.

A written instrument reciting a consideration imports one. *Miers & Rose v. Trevino* (Civ. App.) 213 S. W. 715.

A note, properly signed and delivered by a party, is prima facie evidence of its due execution, as well as its consideration. *Goree v. Uvalde Nat. Bank* (Civ. App.) 218 S. W. 620.

Where defendant's so-called option contract with plaintiff to lease her oil lands on its face disclosed that it was based on a money consideration, when plaintiff by her testimony refuted the acceptance of the consideration so stated in the instrument, she sufficiently raised the issue of want of consideration. *Texas Co. v. Dunn* (Civ. App.) 219 S. W. 300.

A written oil lease imports a consideration, and, if \$1 recited therein is not sufficient, other consideration might be presumed, in the absence of evidence to the contrary, to have been paid in order to uphold the written contract. *McKay v. Kilcrease* (Civ. App.) 220 S. W. 177.

**Effect of sworn plea.**—Under this article, and in view of art. 1906, which provides that the consideration of a written instrument can only be impeached by a sworn plea, the interposition, in an action on a note, of a sworn plea denying consideration, does not throw the burden of proving consideration on plaintiff. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157.

## TITLE 122

## SEQUESTRATION

## Art.

7094. In what cases to be issued.  
7095. Affidavit, and what it shall state.  
7096. Petition must be filed, when.  
7097. Bond for the writ.  
7099. Writ and its requisites.  
7103. Defendant may replevy by giving bond.  
7104. Bond in case of personal property.  
7105. In case of real estate.

## Art.

7106. Return of bond and judgment thereon.  
7107. How judgment may be discharged.  
7108. When the property has been injured.  
7109. Execution shall issue when.  
7110. Replevy by plaintiff; bond.  
7111. Bond shall be returned, and the proceeding thereon if forfeited.  
7112. Defendant not required to account for hire, etc., when.

**Article 7094. [4864] In what cases to be issued.**

See *Schuster v. Crawford* (Civ. App.) 199 S. W. 327.

Cited, *Spero v. Peters* (Civ. App.) 219 S. W. 514; cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

**Right of action and nature of remedy.**—Although one acquires possession of a chattel through an illegal transaction, he may sue a trespasser, taking possession thereof, to recover such possession. *Colburn v. Coburn* (Civ. App.) 211 S. W. 248.

While not recognizing common-law forms of action, yet, where personal property is sued for, the legal principles governing the action of detainee must be resorted to and the judgment in such an action, as well as under art. 2368, is in the alternative for the recovery of the property or its value, and where plaintiff's petition entitled him to recover possession of specific personal property, and there was a prayer for general relief, a motion to quash a writ of sequestration should have been denied. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

**Grounds for sequestration.**—Where a purchaser of a musical instrument gave a chattel mortgage for the unpaid balance of the price, the seller cannot sequester the property, but, to obtain possession in event of nonpayment, must foreclose the lien of the mortgage. *Kahn v. J. W. Carter Music Co.* (Civ. App.) 201 S. W. 1163.

Where a part owner wrongfully withheld personal property, another part owner could not bring action for the property, but should sue for a partition thereof. *Miller v. Fenton* (Civ. App.) 207 S. W. 631.

A tenant having removed a portion of the crop from the rented premises without consent of the landlord, and without accounting for his pro rata share thereof, reserved as rent, writ of sequestration legally issued. *Gaylor v. Monroe* (Civ. App.) 221 S. W. 330.

In trespass to try title to land on which an oil well had been drilled by defendant, who was in possession, and who was solvent, evidence being conflicting on the question of right to possession, plaintiffs held to have an adequate legal remedy by sequestration, under subdivision 4 of this article, and equity could not be called upon to give relief by appointment of receiver. *General Oil Co. v. Ferguson* (Civ. App.) 224 S. W. 261.

Under art. 1827, a petition must make a full and clear statement of the cause of action and other pertinent allegations deemed necessary to sustain the suit and also the nature of the relief demanded, and where there were allegations of ownership and delivery to defendant of automobiles and demand for their possession, accompanied by tender of storage charges and of special daily damages until return of the property, a demand for the properties was involved, although no specific demand therefor was made, and the writ of sequestration was warranted by the prayer for general relief, if the special prayer be totally rejected. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

**Action for damages.**—In action for damages for refusal to deliver automobiles stored in defendant's garage, sequestration was properly quashed, as arts. 7094, 7095, do not authorize writ in an action merely for damages. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441.

An original petition for the recovery of two automobiles and damages for their retention held not a mere petition for damages, but one for the possession of specific property warranting a writ of sequestration, in view of subd. 2. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

**Suit to recover personal property.**—In determining whether plaintiff sued for recovery of personal property, resort must be had to the whole petition, and the averments must be read in connection with the prayer, which must be consistent with the cause of action asserted, and the relief must be authorized by the pleaded facts and cannot be granted unless prayed for, and the specific relief asked is a controlling factor, in the absence of a prayer for general relief. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

**Evidence.**—Evidence in replevin case as to identity of diamond with imperfection, alleged once as "scratch" and again as "shiver," held sufficient to uphold finding on special issue that it was plaintiff's diamond. *Hall v. Collier* (Civ. App.) 200 S. W. 880.

**Conversion by creditor.**—Where a piano was taken by statutory procedure in a suit to foreclose a purchase-money contract lien and was placed in the possession of the sheriff and the cause was dismissed, and on the same day another suit was started and the sheriff retained the property under a new writ of sequestration without having returned it, there was no conversion by the creditor. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

### Art. 7095. [4865] Affidavit, and what it shall state.

**Sufficiency of affidavit in general.**—The words "will make use of its possession of said property to injure said property," in plaintiff's affidavit for sequestration, were substantial compliance with art. 7094, providing that the writ may issue where plaintiff fears that defendant "will injure such property." *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441; *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

The statute does not require affidavit for sequestration to state that the writ is not sued out to injure either defendant. *Joseph W. Moon Buggy Co. v. Moore-Hustead Co.* (Civ. App.) 196 S. W. 328.

In suit to foreclose deed of trust and builder's lien, allegations of application for sequestration that plaintiff feared defendants would injure the property and convert the rents, fruits, and revenues, held not inconsistent. *Dowdy v. Furtner* (Civ. App.) 198 S. W. 647.

Separate affidavit for sequestration in the alternative is objectionable for duplicity. *Schuster v. Crawford* (Civ. App.) 199 S. W. 327.

Sequestration affidavit reciting that affiant, who was described as plaintiff in specified suit, was sworn and stated he was owner of property "sued for as aforesaid," held sufficient, since quoted words, by referring to recital, make recital substantially sworn matter. *Richardson v. Cantrell* (Civ. App.) 201 S. W. 702.

Under statute requiring sequestration affiant to state that he fears defendant or person in possession of property will remove it from county, etc., an affidavit stating he feared defendant would do so held sufficient, although property was then in another's possession. *Id.*

Where petition in suit to foreclose a purchase-money contract lien alleged a debt of \$216.50, together with 10 per cent. thereof as attorney's fees, a recitation in an affidavit for a writ of sequestration that the debt was \$216.50 was not a material variance. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

**Description of property.**—In suit to foreclose purchase-money contract lien upon a piano, together with stool and scarf, an affidavit for sequestration sufficiently described the property as a piano. *De Arcy v. South Texas Music Co.* (Civ. App.) 208 S. W. 381.

**Value of property.**—Affidavit for sequestration of a number of buggies satisfies this article, requiring it to give the value of each article, where it gives the value of each which is different from the others, and groups those alike and gives their number and aggregate value. *Joseph W. Moon Buggy Co. v. Moore-Hustead Co.* (Civ. App.) 196 S. W. 328.

Where the holder of a secured note, given for the purchase price of three mules, sought to foreclose his mortgage lien and prayed a writ of sequestration for possession of the property, the writ must be quashed, where neither the affidavit nor the petition alleged the value of each item of the property. *Gandy v. Cornelius* (Civ. App.) 216 S. W. 467.

Under arts. 7094, 7095, 7097, 7103, plaintiff lessee suing a sublessee to recover possession of the premises in order to secure writ of sequestration was required to state in his affidavit the value of the property sought to be sequestered, and not the value of his leasehold interest therein, and defendant sublessee was not entitled to replevy the property, on levy of the writ of sequestration, by execution and delivery of bond for double the real value of plaintiff's interest. *Spero v. Peters* (Civ. App.) 219 S. W. 514.

**Affidavit regarded as surplusage.**—Where petition for sequestration alleged ejectment as ground and was sufficient, the filing of a separate affidavit upon a different ground which was insufficient could be regarded as surplusage and did not impair the sufficiency of the petition. *Schuster v. Crawford* (Civ. App.) 199 S. W. 327.

### Art. 7096. [4866] Petition must be filed, when.

**Sufficiency of petition.**—That the language of petition for sequestration with reference to ejectment is not in exact words of art. 7094, subd. 5, is not fatal, but it is sufficient if the language is synonymous therewith. *Schuster v. Crawford* (Civ. App.) 199 S. W. 327.

If two distinct grounds exist for issuance of writ of sequestration which are not inconsistent, they may be conjunctively alleged. *Id.*

Where petition for sequestration alleged ejectment as ground and was sufficient, the filing of a separate affidavit upon a different ground which was insufficient could be regarded as surplusage and did not impair the sufficiency of the petition. *Id.*

Under this article, the petition, and not the affidavit for sequestration, determines the nature of the action in determining whether court had jurisdiction to issue writ, and amendment of petition after issuance of writ does not cure defect. *White v. Texas Motorcar & Supply Co.* (Civ. App.) 203 S. W. 441.

### Art. 7097. [4867] Bond for the writ.

Cited, *Spero v. Peters* (Civ. App.) 219 S. W. 514.

**Approval of bond.**—Where clerk of court files sequestration bond and issues process thereon, his approval, though not indorsed on bond, will be presumed, in absence of showing that he did not approve bond and that the writ was improvidently issued. *Richardson v. Cantrell* (Civ. App.) 201 S. W. 702.

**Liability on bond.**—Plaintiff is not liable for the scratching of a sequestered piano, unless he took part in the handling of it, or directed it. *Miller v. Poff* (Civ. App.) 217 S. W. 399.

Where plaintiff took by sequestration property which he was entitled to take under a chattel mortgage, he is not liable in damages, though the ground of sequestration was not established. *Id.*

**Liability for wrongful sequestration.**—In action for damages for wrongful sequestration, judgment in original proceeding will not be held void on ground of disqualification of county judge because of relationship with surety on appeal bond. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

If grounds upon which writ of sequestration was secured were false or untrue, defendant is entitled to recover his actual damages, regardless of whether plaintiffs sincerely believed in truth thereof. *Id.*

In action against defendants who had obtained possession of plaintiff's premises by sequestration proceedings without making plaintiff a party thereto, the sequestration proceedings and the issuance and levy of the writ on the property is no defense. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

Soldier who was ejected from his premises by means of sequestration proceedings and was deprived of the protection to which he was entitled under Soldiers' & Sailors' Civil Relief Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078¼a-3078¼ss) could recover damages regardless of whether facts stated in affidavit for sequestration are true or false. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

While mortgagee's exercise by sequestration of a right given him by his mortgage to take possession of the mortgaged property, as the right to declare all notes due and take possession of the property upon feeling unsafe or insecure from any cause, could not make him liable as for wrongful sequestration, yet, if the mortgagee had not exercised its option to declare all the notes due because it felt unsafe and insecure, before sequestration was sued out and levied, and sued out sequestration on the ground alone of fear that the holder of the mortgaged property would injure the property during the pendency of suit, the mortgagee, if such ground in fact did not exist, could not escape liability for actual damages by showing that it had reasonable grounds to fear such consequences. *Central Transfer & Storage Co. v. Wichita Falls Motor Co.* (Civ. App.) 222 S. W. 688.

**Actions on bonds or for wrongful sequestration.**—When real or personal property had been levied on by a writ of execution, attachment, sequestration, or other such writ, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

**Damages in general.**—In a suit for damages for the wrongful sequestration of personal property shown to have a particular use to the owner, his peculiar damage

from its seizure and detention was recoverable. *Keppler v. Kelly* (Civ. App.) 201 S. W. 447.

On evidence in a suit for damages for wrongful sequestration of personal property, judgment for plaintiff for \$419.70, in view of the restoration of the property to plaintiff, held grossly excessive. *Id.*

Where mortgagee by illegal sequestration after property had been returned to mortgagor deprived mortgagor of use of part thereof, held mortgagor was entitled to set off reasonable value of use from such date to date of trial in action on notes secured by the mortgage. *Montgomery v. Gallas* (Civ. App.) 202 S. W. 993.

Where in trespass to try title it was determined that plaintiff's writ of sequestration was wrongfully issued and served, the taking of the property under such writ amounted to a conversion, and it was no defense to defendant's claim in reconvention for damages for wrongful sequestration that defendants were given an opportunity to harvest all crops that they had seeded and cultivated as lessees of the premises, for defendants had a right to refuse such offer. *Gilroy v. Rowley* (Civ. App.) 210 S. W. 623.

In action for trespass in wrongfully obtaining possession of plaintiff's property by sequestration proceedings, mental anguish occasioned by the trespass cannot be recovered as actual damages; although if the trespass were malicious or with evil intent, so that exemplary damages are recoverable, mental anguish may be considered in assessing such damages, under the rule permitting the jury, in assessing such damage, to consider damage too remote to be considered strictly compensatory. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

In action against defendants who had obtained possession of premises by sequestration proceedings without making plaintiff a party to the proceedings in violation of his rights as a soldier under Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078¼a-3078¼ss), plaintiff's measure of damages was not recovery of purchase money installments paid, but was the value of the use of premises and any special damage to the property. *Id.*

The value of defendant's time lost in attending court on the trial of a suit against him cannot be recovered as damages on quashing of writ of sequestration. *Kubena v. Mikulascik* (Civ. App.) 228 S. W. 1105.

On quashing of writ of sequestration, the defendant cannot recover attorney's fees as damages. *Id.*

**Value of property.**—A chattel mortgage on half of a crop of cotton to be raised on certain land, mortgagor to have cotton ginned and baled, held to contemplate that lien was to cover and apply to one-half of bales of cotton, that might be raised, and not an undivided one-half interest in crop, thus giving mortgagee right to elect which bales she should take or sell; and a second mortgagee, who had sequestered and sold the part of the crop before first mortgagee selected her bales, is liable in conversion to the extent of the full value of the part taken. *Citizens' Guaranty State Bank v. Johnson* (Civ. App.) 211 S. W. 271.

Where plaintiff wrongfully sequesters property and converts it pending suit, defendant is entitled as damages not only to value of property, but, where that is insufficient, to compensation for detention. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

In sequestration, where property is unlawfully seized and taken from the owner, it is proper to award a sufficient sum to compensate him for the injury occasioned by the detention of the property in addition to the value, where award of the value with interest is not sufficient. *Hyway Motor Co. v. Saulsbury* (Civ. App.) 223 S. W. 322.

In sequestration, as in attachment, if property is unlawfully seized and taken from the owner, he may recover damages sustained, ordinarily the value of the property so taken at the time of the seizure, with 6 per cent. interest from the time. *Id.*

Where defendant sequestered and replevied certain goats claimed by plaintiff to be his property, in conversion by plaintiff the measure of damages was the reasonable market value of the goats at the time of their seizure under the writ of sequestration, with 6 per cent. interest on such amount from the said date to the time of trial. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

**Exemplary damages.**—Ordinarily surety on sequestration and replevin bonds is not liable in case of wrongful sequestration for exemplary damages, but, where the malicious acts are instigated by him or where he acts jointly in the conversion of the property, he is responsible for exemplary damages in same degree as plaintiff. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

If plaintiffs, in securing writ of sequestration upon false grounds, acted maliciously and without probable cause for believing truth thereof, they are liable, in addition to actual damages, for vindictive or exemplary damages by way of punishment for their wrongful and oppressive use of court's process. *Id.*

Where plaintiff secured issuance of writ of sequestration upon false grounds and without probable cause, defendant is entitled to recover as exemplary damages attorney's fees, expenses, and loss of time resulting from the original action. *Id.*

Where no actual damages are recoverable by defendant on quashing of writ of sequestration, exemplary damages cannot be awarded. *Kubena v. Mikulascik* (Civ. App.) 228 S. W. 1105.

**Evidence.**—In action for damages for wrongful sequestration, the pleadings and judgments rendered in original action are admissible in evidence; the result of such action being basis of action for damages, and proof of its outcome being necessary to proof of damages suffered thereby. *Fred Mercer Dry Goods Co. v. Fikes* (Civ. App.) 211 S. W. 830.

**Art. 7099. [4869] Writ and its requisites.**

**Motion to quash.**—A motion to quash sequestration proceedings, on the ground that plaintiff did not sue for the recovery of personal property, but for damages for its conversion, is, in effect, a general demurrer to the petition, and the petition should be liberally construed and aided by all reasonable inferences and intendments when hearing the motion. *White v. Texas Motor Car & Supply Co.* (Com. App.) 228 S. W. 138.

**Effect of quashal of writ.**—Under the provision that the writ shall command the officer to hold the property "subject to the future order of the judge, court, or justice of the peace who issued the writ," the officer is justified in holding the property until ordered by the court to dispose of it, or until the final disposition of the cause, though an interlocutory order has been made quashing the sequestration, but not directing the officer what to do with the property. *Thompson v. Graves* (App.) 15 S. W. 38.

**Art. 7103. [4873] Defendant may replevy by giving bond.**

**Persons entitled to replevy.**—Owner of sequestered property who was not a party to the sequestration proceedings could not have replevied property under this article. *Bassham v. Evans* (Civ. App.) 216 S. W. 446.

**Amount of bond.**—Under arts. 7094, 7095, 7097, 7103, plaintiff lessee suing a sublessee to recover possession of the premises in order to secure writ of sequestration was required to state in his affidavit the value of the property sought to be sequestered, and not the value of his leasehold interest therein, and defendant sublessee was not entitled to replevy the property, on levy of the writ of sequestration, by execution and delivery of bond for double the real value of plaintiff's interest. *Spero v. Peters* (Civ. App.) 219 S. W. 514.

**Validity and quashal of bond and writ.**—Where plaintiff, in an action to foreclose a chattel mortgage on diamonds, sued out a writ of sequestration under which sheriff took the diamonds into possession, a bonding company, by executing a replevy bond and taking possession of the diamonds and delivering them to defendant's attorneys, did not become liable to plaintiff for conversion of the property, the sequestration proceedings being subsequently quashed, in view of this article. *General Bonding & Casualty Ins. Co. v. Harless* (Com. App.) 228 S. W. 124.

**Quashal of writ as affecting judgment against surety.**—Where it is apparent that plaintiff was not awarded judgment against the surety on defendant's replevy bond by virtue of the latter's contractual liability as surety on the bond, which was rendered null and void by quashal of the writ of sequestration sued out by plaintiff, judgment for plaintiff was not affected by quashal of the writ. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

**Art. 7104. [4874] Bond in case of personal property.**

**Liability on bond.**—Where in sequestration proceedings the sheriff subjects part of the property covered by the replevin bond to the debt, the sureties on the replevin bond are not thereby released from the remainder of the judgment. *Morgan v. Coleman* (Civ. App.) 204 S. W. 670.

In a replevin action, plaintiff was not limited to the value alleged; the market value at the time of trial being the measure of damages. *Tripplett v. Hendricks* (Civ. App.) 212 S. W. 754.

The court cannot render judgment against a surety on bond in replevin to secure possession of sequestered property for the costs of the suit, but the judgment creditor is entitled to recover as against the surety such costs as may be incurred in proper proceedings to collect the judgment. *Id.*

Plaintiff in sequestration, who exchanged his mule for the mare of a defendant claimed to have acted fraudulently, not being entitled to return of his mule as against a subsequent purchaser in possession without notice of the fraud, recovery will not be awarded to him, on the replevin bond signed by the fraudulent owner of the mare. *Cox v. Collom* (Civ. App.) 217 S. W. 1102.

The value of property sequestered and obtained by a defendant under a replevin bond is to be determined by its market value at the time of trial. *Litchfield v. Fitzpatrick* (Civ. App.) 224 S. W. 926.

In an action for conversion of certain goats sequestered and replevied by defendant, a verdict for plaintiff held not contrary to the evidence as to title. *Garcia v. Hernandez* (Civ. App.) 226 S. W. 1099.

— **Effect of quashing of writ.**—Quashal of a writ of sequestration sued out by plaintiff rendered null and void the replevy bond executed by the original defendant, and relieved of all liability the surety thereon. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

**Art. 7105. [4875] In case of real estate.**

**Liability of sureties.**—Plaintiff is entitled to rentals to accrue up to time possession should be delivered to plaintiff where authorized by the bond. *Fincher v. Wood* (Civ. App.) 223 S. W. 868.

**Art. 7106. [4876] Return of bond and judgment thereon.**

**In general.**—The question whether judgment should be rendered against sureties on replevin bond is exclusively for the court. *Gonzales v. Flores* (Civ. App.) 200 S. W. 351. Where plaintiff, seller of jewelry, recovered against surety on defendant's replevy



bond, writ of sequestration having been sued out, on theory that surety had converted property on which, he (the seller) had a valid mortgage lien, and did not recover on the replevy bond, usual judgment rendered when recovery is had on replevy bond was not called for and would not have been proper. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

In trespass to try title, where sequestration writ was issued and the property replevied, court, rendering judgment for plaintiff, was authorized to give judgment for rentals to accrue up to time possession of the property should be delivered to plaintiff, where authorized by replevy bond, in view of arts. 7106-7109. *Fincher v. Wood* (Civ. App.) 223 S. W. 868.

**Pleadings, findings and evidence to support judgment.**—Under this article, introduction of the bond in evidence is unnecessary, and such introduction without the application for writ of sequestration is harmless error. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

In suit to recover automobile, in alternative for purchase price, with foreclosure of lien, plaintiff suing out writ of sequestration and car being later replevied by defendant, failure of verdict and judgment for plaintiff against defendant and sureties on replevin bond to find value of automobile was reversible error. *Reeves v. Avina* (Civ. App.) 201 S. W. 729.

Under arts. 7103-7109, where a mortgagee seeks only to foreclose his lien on the property, if any portion is realty, and a replevy bond is given, all he is entitled to is to have the realty subjected to his debt; and if replevy bond was executed in the terms of the statute securing him against injury to, and for the rents of, the realty, the object can be accomplished without any finding or judgment concerning the value of the realty, which should be ignored in determining the extent of liability of the obligors on the replevy bond and their right to reduce it by returning the personal property. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

**Requisites of judgment.**—A judgment, approving a verdict in replevin which establishes the value of each article as shown by the verdict copied therein, complies sufficiently with the statute, especially when considered with the judgment provision authorizing return of property described in verdict or any portion thereof. *Gonzales v. Flores* (Civ. App.) 200 S. W. 851.

Where the replevin bond is copied into the judgment and recovery thereon decreed, it amounts to a finding that the bond is valid. *Id.*

Under arts. 7103-7109, where a mortgagee of realty and personalty sued to foreclose his lien and sequestered the property, and the successor of defendant mortgagor gave a replevy bond with sureties, decree awarding to plaintiff mortgagee the full amount of his debt against defendant mortgagor, also awarding recovery against the obligors on the replevy bond for the value of the personalty replevied as fixed by the verdict, with right in the obligors to deliver to the sheriff any portion of the personalty, and thereby relieve themselves from liability except for the value of such portion of the personalty as they failed to return to the sheriff, in no event to exceed plaintiff mortgagee's judgment against defendant mortgagor, fully protects the obligors in the replevy bond. *Thorndale Mercantile Co. v. Continental Gin Co.* (Civ. App.) 217 S. W. 1059.

**Operation and effect of judgment.**—The giving of replevy bond in sequestration proceedings and the rendition of judgment against the sureties thereon does not pass the title to the property to the defendant, or destroy plaintiff's right to subject the same to the payment of his debt. *Morgan v. Coleman* (Civ. App.) 204 S. W. 670.

### Art. 7107. [4877] Defendant may discharge judgment by return of property, etc.

See *Siddall v. Goggan*, 68 Tex. 708, 5 S. W. 668; *Krall v. Campbell Printing-Press & Mfg. Co.*, 79 Tex. 556, 15 S. W. 565.

**In general.**—The defendant and sureties in sequestration should have the privilege of returning the property, unless it is shown the property has been disposed of, or cannot be produced. *Tripplett v. Hendricks* (Civ. App.) 212 S. W. 754.

In trespass to try title, where sequestration writ was issued and the property replevied, court, rendering judgment for plaintiff, was authorized to give judgment for rentals to accrue up to time possession of the property should be delivered to plaintiff, where authorized by replevy bond, in view of arts. 7106-7109. *Fincher v. Wood* (Civ. App.) 223 S. W. 868.

**Validity.**—The provision authorizing sheriff to judge of reasonable amount of damage to property if damaged while in possession under replevin bond is void as undertaking to invest the sheriff with judicial power. *Morgan v. Coleman* (Civ. App.) 204 S. W. 670.

### Art. 7108. [4878] When the property has been injured, etc.

See *Fincher v. Wood* (Civ. App.) 223 S. W. 868.

**Liability of surety for loss of or injury to property.**—Where petition in sequestration showed that the property taken by defendant under replevin bond was not surrendered, plaintiff had a valid judgment against the surety for the amount of the debt, but no cause of action to recover for loss or injury to the property although the sheriff may have levied upon such property as he could find. *Morgan v. Coleman* (Civ. App.) 204 S. W. 670.

**Art. 7109. [4879] Execution shall issue, when.**

See *Krall v. Campbell Printing-Press & Mfg. Co.*, 79 Tex. 556, 15 S. W. 565; *Fincher v. Wood* (Civ. App.) 223 S. W. 868.

**Art. 7110. [4880] Plaintiff may replevy, when, and his bond.**

**Effect of dismissal of suit.**—See *Brooks v. Taylor* (Civ. App.) 214 S. W. 361.

**Art. 7111. [4881] Bond shall be returned, and the proceedings thereon if forfeited.**

Cited, *Sweeney v. Alderete* (Civ. App.) 196 S. W. 367.

**In general.**—Defendants, in suit for title and possession of property seeking judgment against plaintiff and sureties on replevin bond conditioned to have property forthcoming to abide decision of court and filed after he procured issuance and levy of writ of sequestration did not need to show they were owners of the property sequestered, where evidence showed it was taken from their possession and had not been returned. *Myrick v. Futch* (Civ. App.) 206 S. W. 861.

Petition by seller of jewelry against buyer and latter's surety on replevy bond given when property was replevied from seizure under writ of sequestration held not to seek to enforce surety's statutory liability on bond, but rather to seek recovery, either on the bond as a common-law obligation, or for conversion. *General Bonding & Casualty Ins. Co. v. Harless* (Civ. App.) 210 S. W. 307.

In suit involving liability for sequestration, the market value of each article or piece of property at the time of trial is the proper measure of damages, so that recitals in a plaintiff's petition, sequestration bond, writ of sequestration, and replevy bond, all filed 17 months before the trial, were inadmissible to establish such market value. *Vaughn v. Charpiot* (Civ. App.) 213 S. W. 950.

In action involving liability on replevy bond in sequestration case for depriving defendant of use of mules, etc., replevied, defendant's testimony as to what he was making per day in hauling, for which purpose he could have used the mules, held insufficient to establish the value of their use between their seizure and the trial, 17 months later. *Id.*

Contention that court erred in entering judgment on bond for value of sequestered property at date of trial, in that true measure of damages is value at time of sequestration, cannot be sustained. *Brooks v. Taylor* (Civ. App.) 214 S. W. 361.

Under arts. 7110, 7111, where plaintiff's suit is decided against him, it is the duty of the court to enter judgment for defendant on the bond, whether defendant has filed formal affirmative pleadings or not. *Id.*

**Dismissal by plaintiff.**—Where plaintiff dismisses suit for title and possession of property, he fails to establish his right thereto, and judgment necessarily must be in favor of defendants against him and the sureties on his replevin bond filed after issuance and levy of writ of sequestration. *Myrick v. Futch* (Civ. App.) 206 S. W. 861.

Where plaintiff in sequestration replevied, giving bond, required by art. 7110, conditioned for the forthcoming of the property, to abide the decision of the court, and later plaintiff dismissed, defendant had the right to judgment for the value of the property, although his answer consisted only of general demurrer and general denial, for under this article, providing for judgment on the replevy bond in case of decision against plaintiff, the suit had been "decided" against plaintiff by his voluntary act, and by virtue of such statute defendant's answer had the legal effect of affirmative pleading. *Brooks v. Taylor* (Civ. App.) 214 S. W. 361.

In action for possession of certain oats, claimed as rent, where petition, affidavit and bond for sequestration, writ, and replevy bond showed conclusively that plaintiff took or caused the oats to be taken from defendant's possession, and it was alleged by plaintiff that oats were a part of crop raised by defendant, held, defendant was entitled to judgment, without reference to where actual title was; plaintiff having voluntarily discontinued action. *Id.*

In action for rents, consisting of 275 bushels of oats, plaintiff having sequestered oats and subsequently replevied the same, giving a replevy bond, where case was dismissed merely as to plaintiff's cause of action, plaintiff and his bondsman were not entitled to service of citation, or to any given period or form of notice that case would be tried at the following term. *Id.*

Where plaintiff in sequestration replevied and took possession of the property and, before defendant had answered or was required to answer, dismissed the suit and paid the costs under art. 1898, the defendant, on seasonably filing answer, was entitled, notwithstanding plaintiff's dismissal of his suit, to proceed with his side of the case and to recover on replevin bond without the right on the part of the plaintiff to have the order of dismissal set aside and to prove its title to and possession of the property at the time of seizure; the suit, by reason of such dismissal, having been "decided against the plaintiff" within this article. *E. H. Bruyere Const. Co. v. Bewley* (Civ. App.) 229 S. W. 610.

**Art. 7112. [4882] Defendant not required to account for hire, etc., when.**

**Liability for rents.**—In replevin for possession of automobile, or for its value, and rent, plaintiff was not entitled to rent, where the judgment was for the value of the automobile, but was entitled to 6 per cent. on such sum from the date of taking. *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

Plaintiff in suit to recover title and possession of an automobile which plaintiff sequestered, being defendant in a cross-action to recover on purchase-money notes and foreclose chattel mortgage, this article applies, and protects plaintiff and the sureties on his replevin bond against being required to account for the fruits, hire, revenue, or rent of the automobile from the date it was replevied until the time of trial; the purpose of the statute being to protect a mortgagor. *Litchfield v. Fitzpatrick* (Civ. App.) 224 S. W. 926.

Under this article, judgment could not be rendered in favor of defendant against plaintiff mortgagor, who sequestered the property in controversy, or the sureties on his replevin bond, for the value of the fruits, hire, revenue, or rent of the property from the time of the bond to time of trial. *Id.*

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## TITLE 123

### SHERIFFS AND CONSTABLES

Chap.

1. Of sheriffs.

Chap.

2. Of constables.

#### CHAPTER ONE

#### OF SHERIFFS

##### ELECTION AND QUALIFICATION

Art.

7121. Oath and bond.

Art.

7126. Responsible for their acts.

7130. Shall execute all legal process.

7136a. Enforcement of United States explosives act; failure; punishment.

##### POWERS, DUTIES AND LIABILITIES

7125. May appoint deputies, etc.

##### ELECTION AND QUALIFICATION

#### Article 7121. [4892] Oath and bond.

See *Russey v. Wilson* (Civ. App.) 202 S. W. 974.

**Liability on bond—Money received.**—In a county's suit against its former sheriff and bondsmen to recover moneys illegally received by the sheriff during term of office, the bondsmen were not liable for the sums paid to the sheriff in good faith by order of the commissioners' court for hire of a guard at the county jail, even though the amounts paid were not authorized by law. *Cooper v. Johnson County* (Civ. App.) 212 S. W. 528.

##### POWERS, DUTIES AND LIABILITIES

#### Art. 7125. [4896] May appoint deputies, etc.

**De facto deputies.**—Where deceased, at a prior term, was appointed in writing deputy sheriff, and the sheriff continued him by oral appointment and he acted as deputy continuously for a number of years and was generally recognized as deputy, he was a de facto officer. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

**Criminal responsibility.**—Under the provision that every person appointed deputy-sheriff shall take and subscribe the oath of office which shall be indorsed on his appointment, together with the certificate of the officer administering the same, one charged with unlawfully carrying a pistol cannot defend on the ground that he is a deputy-sheriff, where his appointment bears no indorsement and he was a resident of another county at the time of such appointment, remaining there and making no pretense of being an officer on his arrest. *Blair v. State*, 26 Tex. App. 387, 9 S. W. 890.

The appointment of accused as a special deputy-sheriff to pursue and capture horse-thieves, and to carry fire-arms for that purpose, although not indorsed with the oath of office required by this article, is admissible in evidence in a prosecution for carrying a pistol; because, whether legal or not, it was strongly calculated to induce the accused to believe that he had the right to carry a pistol. *Lyle v. State*, 21 Tex. App. 153, 17 S. W. 425.

#### Art. 7126. [4897] Responsible for their acts.

Cited, *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749.

**Responsibility for official acts.**—A sheriff is liable for the wrongful acts of his deputy done in his official capacity. *Hays v. Creary*, 60 Tex. 445.

#### Art. 7130. [4901] Shall execute all legal process.

**Wrongful levy or other taking of property.**—A sheriff is not liable to the trustee in bankruptcy for conversion, although he sells property under levy after the bankruptcy

proceedings begin, unless he had notice thereof. *Coppard v. Gardner* (Civ. App.) 199 S. W. 650.

Notice to a sheriff having in his hands an execution that the judgment debtor is in bankruptcy must come through official channels, and a notice of intention to bring bankruptcy proceedings is insufficient. *Id.*

**Process or order of court as protection from liability.**—In the absence of fraud to which he is a party a sheriff may safely apply to satisfaction of an execution, fair on its face, money subject thereto, though told by the execution defendant that he had paid the judgment. *Branscum v. Reese* (Civ. App.) 219 S. W. 871.

**Art. 7136a. Enforcement of United States explosives act; failure; punishment.**—It is hereby made the duty of all the sheriffs and constables, their deputies, policemen, city marshals and all other peace officers of the State, to fully co-operate with and assist the officers of the United States whose duty it is to enforce the provisions of an Act of Congress approved October 6, 1917, entitled "An Act to prohibit the manufacture, distribution, storage, use and possession, in time of war, of explosives, providing regulations for the safe manufacture, distribution, storage, use and possession of the same, and for other purposes"; and it is also made the duty of said officers to promptly report any fact or circumstance coming to his knowledge in any way showing or indicating a violation of any of the provisions of said act of Congress, to the United States explosive inspector or other proper officers of the United States, charged with the duty of enforcing the provisions of said Act of Congress, and the willful failure or refusal of any such officer to discharge and perform the duties imposed by this Act shall constitute a misdemeanor involving official misconduct and on conviction he shall be punished by fine of not less than one hundred dollars nor more than one thousand dollars, and by removal from office, and it shall be the duty of the judge or court rendering said judgment of conviction to embody suitable provisions removing said offender from office. [Acts 1918, 35th. Leg. 4th C. S., ch. 70, § 1.]

For section 2 of this act see Code Cr. Proc. art. 632b.

Took effect 90 days after March 27, 1918, date of adjournment.

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## CHAPTER TWO

### OF CONSTABLES

Art.	Art.
1. ELECTION, QUALIFICATION, ETC.	2. POWERS, DUTIES AND LIABILITIES
7138. Only one deputy.	7145. Duties in general.
7140. Vacancies, how filled.	7147. Failure to execute or return process.
7141. Bond and oath.	

#### 1. ELECTION, QUALIFICATION, ETC.

**Article 7138. Only one deputy.**—Be it further provided that in justice precincts which do not contain a city of eight thousand or more inhabitants said constable may appoint no more than one deputy who shall qualify in such manner as is required by law. [Acts 1885, p. 17; Acts 1897, p. 194; Acts 1921, 37th Leg., ch. 64, § 1, amending art. 7138 Rev. Civ. St.]

#### **Art. 7140. [4910] Vacancies, how filled.**

**When vacancy exists.**—Where a legal and duly qualified constable is subsequently appointed town marshal of a legally incorporated town, and has duly qualified and acted as such, his office of constable is vacated, and he cannot thereafter execute writs of execution as constable, in view of Const. art. 16, § 40. *Torno v. Hochstetler* (Civ. App.) 221 S. W. 623.

**Art. 7141. [4911] Bond and oath.**

**Bond—Liability on.**—In action against constable's surety for a false imprisonment, evidence held to support finding constable arrested plaintiff on account of conduct he construed to constitute breach of peace, though he gave plaintiff opportunity to escape arrest. *National Surety Co. v. Masters* (Civ. App.) 200 S. W. 1123.

**2. POWERS, DUTIES AND LIABILITIES****Art. 7145. [4915] Duties in general.**

**Right to reward.**—Under this article, and Code Crim. Proc. arts. 43, 44, making it the duty of peace officers to preserve the peace and execute all process directed to them, searching for unknown criminals is not a part of their official duty, and a constable may recover a reward for the arrest and conviction of a criminal in his own precinct; the offer having been made publicly, and having induced the constable to make the search. *Kasling v. Morris*, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

**Art. 7147. [4917] Failure to execute or return process.**

**In general.**—Where a constable refused to execute a writ of sequestration, the justice by whom the writ was issued had authority to fine him the sum of \$39.19, to inure to the benefit of the plaintiff in the writ, and also to commit him to jail until such fine and costs were paid, though the statute confers no express authority to commit for such contempts. *Ex parte Robertson*, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207.

**TITLE 123 AA****STATE BOARD OF CONTROL****Art.**

7150 $\frac{1}{4}$ . Department created; members of board; seal; oaths and bonds of members of board.

7150 $\frac{1}{4}$ a. Terms of office and salaries of members of board.

7150 $\frac{1}{4}$ b. General duties of board; divisions enumerated.

7150 $\frac{1}{4}$ c. Board of Public Printing and State Expert Printer abolished.

7150 $\frac{1}{4}$ d. Office of state purchasing agent abolished.

7150 $\frac{1}{4}$ e. Division of auditing; chief auditor.

7150 $\frac{1}{4}$ f. Office of Superintendent of Public Buildings and Grounds and office of State Inspector of Masonry, Public Buildings and Works abolished; division of design, construction and maintenance.

**Art.**

7150 $\frac{1}{4}$ g. Chief of division of design, construction, and maintenance, heads of departments, etc., to submit itemized accounts of expenses and estimates of required appropriations.

7150 $\frac{1}{4}$ h. Boards of managers of certain institutions abolished.

7150 $\frac{1}{4}$ i. Chief of division of eleemosynary institutions.

7150 $\frac{1}{4}$ j. Creation of other divisions.

7150 $\frac{1}{4}$ k. Qualifications to appointment to offices by board.

7150 $\frac{1}{4}$ l. Chairman of board; quorum; minutes; secretary; office; traveling expenses.

7150 $\frac{1}{4}$ m. Mandamus; suits.

7150 $\frac{1}{4}$ n. Appropriations.

7150 $\frac{1}{4}$ o. Partial invalidity of act.

7150 $\frac{1}{4}$ p. Time of taking effect of act.

**Article 7150 $\frac{1}{4}$ . Department created; members of board; seal; oaths and bonds of members of board.**—There is hereby created a department of the State government to be known as the State Board of Control, which shall consist of three citizens of the State, to be appointed by the Governor, by and with the advice of the Senate. Said Board of Control shall have a seal, similar to that of the Secretary of State, except the same shall have, on the margin thereof, the words: "Office of the State Board of Control."

The members of this board shall be public officers, shall be required to take the oath of office, and each shall give bond in the sum of fifty thousand dollars, payable to the Governor of the State and his successors in office, for the use and benefit of the State of Texas, conditioned for the faithful performance of their duties, as defined in this act, and to be given in form drawn and prescribed by the Attorney General: the bond to be approved by the Governor and filed in the office of the Secretary of State. [Acts 1919, 36th Leg., ch. 167, § 1.]

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

**Constitutionality.**—This act does not violate Const. art. 16, § 30a, empowering the Legislature to provide by law that members of the board of trustees or managers of

certain institutions may hold office for six years, one-third of the members to be elected or appointed every two years, in such manner as the Legislature may determine, in so far as it relates to the management of insane asylums as against the objection that the members of the board of managers were constitutional officers. *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764, answers to certified questions conformed to (Civ. App.) 224 S. W. 1119.

**Art. 7150<sup>1</sup>/<sub>4</sub>a. Terms of office and salaries of members of board.**—The term of office of each member of the Board of Control shall be six years, except the members of the first board appointed hereunder, whose term shall be two, four and six years, respectively, and they shall decide by lots among themselves who is to have the two-year term, and the four-year term and who the six-year term; but after the expiration of the term of office of any member of the first board appointed hereunder, his successor shall hold for a term of six years; provided, that any member of said board may at any time be dismissed by the Governor for good cause, the reasons for such dismissal to be specified and filed with the Secretary of State.

The salaries of the members of the board shall be five thousand dollars per annum, payable monthly as other State officers are paid. [Id., § 2.]

**Art. 7150<sup>1</sup>/<sub>4</sub>b. General duties of board; divisions enumerated.**—The general duties of the Board of Control will be to administer the laws relating to the various departments, boards, institutions and public officers of the government hereinafter named, and to perform the additional duties and exercise the additional functions provided for in this act.

In order to facilitate the performance of their duties, the board will be authorized to combine under it the following subdivisions or divisions of its work, to-wit:

- (a) Division of Public Printing.
- (b) Division of Purchasing.
- (c) Division of Auditing.
- (d) Division of Design, Construction and Maintenance.
- (e) Division of Estimates and Appropriations.
- (f) Division of Eleemosynary Institutions.
- (g) And such other divisions of its work as the board may find necessary in the administration of the department here created. [Id., § 3.]

**Art. 7150<sup>1</sup>/<sub>4</sub>c. Board of Public Printing and State Expert Printer abolished.**—The Board of Public Printing, provided for in Revised Statutes, Article 6338, and the State Expert Printer, provided for in Article 6341, Revised Statutes, are hereby abolished and all laws relating to the public printing, contained in Title 110, Revised Civil Statutes of this State (1911) are hereby placed under the administration of the State Board of Control, and all the authority there conferred upon the Board of Public Printing of the State and State Expert Printer, in so far as not in conflict with this act, is hereby conferred upon the State Board of Control.

The board, in its administration of this division of its labors, shall, when it employs a chief in its Division of Public Printing, employ, for such position, an expert printer, who has had not less than five years' experience in a commercial printing office. [Id., § 4.]

**Art. 7150<sup>1</sup>/<sub>4</sub>d. Office of state purchasing agent abolished.**—The office of State Purchasing Agent is hereby abolished and all the laws relating to such office and conferring authority upon him, including Chapters 1 and 2 of Title 125, Revised Civil Statutes of this State (1911), are hereby made to apply to the State Board of Control, and the same shall be carried out and executed by the State Board of Control, in the same

manner as they were formerly executed and carried out by the State Purchasing Agent.

In the administration of this division of its work, the State Board of Control shall have authority to appoint a chief in its Division of Purchasing; provided, however, that the person selected for such position shall have had not less than five years' experience immediately preceding his appointment as a purchaser for a department store or wholesale establishment of recognized standard and successful experience, and no other person shall be eligible for such position, or be paid by the accounting officers of the State, in the event he should be placed in such position.

In addition to the duties now provided by statute for the State Purchasing Agent, which duties are made the duties of the board created by this act; it shall also be the duty of said board to purchase all the supplies used by all the departments of the State government and all the Normal Schools of the State, University of Texas, and the Agricultural and Mechanical College of Texas, and all other State schools heretofore or hereafter created, such purchase of supplies to include furniture and fixtures and to include all things except perishable goods, technical instruments and books.

These supplies shall be purchased by competitive bids, in the same manner as supplies are purchased by the Purchasing Agent for other institutions under the present statutes.

It is further provided, however, that in the purchase of supplies, furniture and fixtures, herein provided for and in the making of all purchases provided for by existing laws, which existing law is to be administered by the department created, the bidder therefor shall be required to file with their respective bids an affidavit, that neither the affiant, nor the firm, corporation, partnership or institution represented by him or her or any one for him, it or them, has within the past twelve months, violated any of the laws of this State relating to trusts or monopolies, which affidavit shall be prepared in form by the Attorney General, and shall embrace the various elements of the statutes of this State, forbidding trusts and monopolies; and, in addition, such affidavits shall show that neither the affiant nor his firm, corporation or partnership represented by him and making the bid has communicated, directly or indirectly, the bid made by such person, firm, corporation or partnership so bidding, to any competitor bidding on said contract or engaged in the same line of business.

Any person making a false statement in any such affidavit shall be deemed guilty of a felony and shall be punished as now prescribed for that offense; provided, however, that in addition to any other county having venue of such offense Travis county shall also have venue of the same, and such person, regardless of where the offense was committed, may be indicted by the grand jury of Travis county and be tried in Travis county. The bids for the sales of goods and the affidavits accompanying same as specified in this Section shall be filed by the said board, and shall be preserved for a period of twelve months thereafter as a record of said Board. [Id., § 5.]

See note under arts. 7339-7348, post.

**Art. 7150<sup>1</sup>/<sub>4</sub>e. Division of auditing; chief auditor.**—The board shall be authorized to place a chief auditor in charge of its division of auditing, and to employ such other auditors, bookkeepers and clerical help as may be necessary in the operation of said division or in carrying out the auditing duties conferred on the Board of Control.

For the performance of the duties imposed upon the board by this

section of the act, it shall be and is hereby authorized to employ auditors, book-keepers, and clerical help as hereinafter provided within the limits of the appropriations that may be made for the work of said board, which shall in no case be exceeded; provided, however, that the Board of Control shall prepare and furnish to the next biennial session of the Legislature, an itemized budget for use by the Legislature in making appropriations for said Board, and that thereafter no employé shall be employed for which an appropriation has not been made by the Legislature. [Id., § 6.]

**Art. 7150<sup>1</sup>/<sub>4</sub>f. Office of Superintendent of Public Buildings and Grounds and office of State Inspector of Masonry, Public Buildings and Works abolished; Division of Design, Construction, and Maintenance.—**The office of Superintendent of Public Buildings and Grounds, and the office of State Inspector of Masonry, Public Buildings and Works, are hereby abolished, and the authority conferred upon the Superintendent of Public Buildings and Grounds by the provisions of Chapter 1, Title 113, Revised Civil Statutes (1911), and all the authority conferred by law upon the State Inspector of Masonry, Public Buildings and Works, is hereby conferred upon the State Board of Control, and the laws heretofore administered through the offices hereby abolished shall be administered by the State Board of Control; Provided said Board of Control shall not have the authority to locate any public buildings in the State.

In the administration of said laws and the performance of the other duties herein assigned, the board shall have authority to select a chief of its Division of Design, Construction and Maintenance; the chief of such division when so selected, shall be an architect of not less than five years' experience, immediately preceding his selection, in the actual design, superintendency and construction of buildings. There may also be employed an expert of masonry, plumbing, electrical construction, landscape gardening and such other experts as may be necessary, but all to be under the control of the board, acting through its chief of this division, who must be an architect as herein provided.

In addition to the duties conferred upon the Board of Control by the laws heretofore referred to, and by this act, it shall be the duty of the board, through the chief of its Division of Design, Construction and Maintenance, to design all public buildings erected at the expense of the State, where designing is not otherwise provided for by law or by the appropriation bill; but in no instance shall plans be adopted or designs be adopted by the head of any department, board, institution, school or prison system of the State unless such design and plans have been approved by the Board of Control acting as herein provided.

It shall be the duty of the Board of Control, acting through this division of its branch, to design for each of the institutions, schools of the State or prison system, appropriate parks where needed, which design shall be carried out by the head of such department, institution, school or prison system, unless otherwise provided by law.

It shall be the duty of the Board of Control, through this division to furnish any school, institution, department of the State and the prison system, at any time, an expert to design and superintend any construction for landscape gardening provided for.

It is further provided that all State parks now under control or in the custody of the Superintendent of Public Buildings and Grounds, shall be under the control and custody of the State Board of Control and all laws relating to the same shall be executed and administered by the State Board of Control just as they have been executed and administered by the Superintendent of Public Buildings and Grounds. [Id., § 7.]



**Art. 7150<sup>1</sup>/<sub>4</sub>g. Chief of division of design, construction, and maintenance, heads of departments, etc., to submit itemized accounts of expenses and estimates of required appropriations.**—The Board of Control shall be authorized to select a division chief or head of this division of its work.

It shall be the duty of the head of each department, school, institution and of the prison system and of the head of any of the divisions or departments of government for which appropriations are made by the Legislature, to submit to the State Board of Control, not later than the fifteenth day of September of each year preceding the regular biennial session of the Legislature, an itemized account of all items of expenses for the preceding two years, and an estimate of the appropriations required by his department, school or institution, or by the prison system for the regular biennial appropriation made by the Legislature, which estimate shall be submitted itemized in such manner as may be practicable and as required by the Board of Control.

Upon the receipt of these estimates from the heads of the various departments and institutions and schools of the State it shall be the duty of the board to investigate and consider the same, and to give hearings to those submitting the same, and to obtain information from every available source, including the reports of its auditors and examiners, and after such hearings it shall be the duty of the Board of Control to make up an appropriation budget for the Legislature, which said budget shall be printed not later than December first of the year immediately preceding the meeting of the regular biennial session of the Legislature, at the expense of the Board of Control, and a copy thereof shall be mailed to each person who will be a member of the next session of the Legislature, to the Governor and to the heads of each department, institution, schools of the State, and to the prison commission; there shall also be delivered to the Speaker of the House and to the President of the Senate a sufficient number of copies for the use of all the members of the House and Senate during the session of the Legislature.

In addition the board shall cause to be printed such extra copies for public distribution as they may deem necessary to be sent by it to any person who calls or writes for same. In this connection it shall be the duty of the board to mail a copy to each county judge in the State and to each incorporated bank, whether State or National, to be kept by the officers named and the banks named for public inspection. [Id., § 8.]

**Art. 7150<sup>1</sup>/<sub>4</sub>h. Boards of managers of certain institutions abolished.**—The Board of managers for each and all of the asylums of this State, including the Blind Asylum, Lunatic Asylums, the Deaf and Dumb Asylum, State Orphan's Home, the Asylum for the Deaf, Dumb and Blind for Colored Youths, the State Colony for Feeble Minded, the board of trustees or managers for the Confederate Home, the State Epileptic Colony, the Confederate Woman's Home, the Home for Lepers and the Anti-tuberculosis Colony, and governing boards, trustees, or managers of the State Juvenile Training School and the Girls' Training School are each and all, whether especially named herein or not, abolished by this act, and all laws and statutes providing for the creation of such boards and their appointment are repealed.

And all statutes regulating and governing the Lunatic Asylum of this State, the Blind Asylum, the Deaf and Dumb Asylum, the Orphans Home, the Deaf and Dumb and Blind Asylum for Colored Youths, the State Colony for Feeble Minded, Confederate Home, the Epileptic Colony, Confederate Woman's Home, the Home for Lepers, and the State Tuberculosis Sanatorium, the State Juvenile Training School, and

the Girls' Training School, are made applicable to the Board of Control hereby created and the administration of all of said statutes relating to said institutions, including Title 10, Revised Civil Statutes of the State, (1911), including Chapter 163, Acts of the Regular Session of the Thirty-third Legislature, Chapter 36, General Laws, passed by the Regular Session of the Thirty-second Legislature; Chapter 77, General Laws, passed by the Regular Session of the Thirty-second Legislature, and Chapter 64, General Laws, passed by the Legislature, Session of the Thirty-third Legislature, and all other laws relating to the institutions named, whether here enumerated or not, are hereby made to relate to and govern the Board of Control hereby created, and the administration or each and all of said statutes, and the institutions and departments to which they relate, is hereby placed under the Board of Control created by this act; and the Board of Control hereby created shall exercise all the powers and authority heretofore conferred by law to the boards of managers and trustees of the various institutions and departments named under this section. [Id., § 9.]

**Art. 7150<sup>1</sup>/<sub>4</sub>i. Chief of division of eleemosynary institutions.**—The Board of Control shall have authority to employ a chief in the Division of Eleemosynary Institutions, but the person so selected shall be an acting practicing physician and surgeon who shall have been actively engaged in the practice of his profession for not less than ten years immediately preceding his appointment to such position, and in addition to the experience required; such physician shall be one of generally recognized eminence in his profession. [Id., § 10.]

**Art. 7150<sup>1</sup>/<sub>4</sub>j. Creation of other divisions.**—The Board of Control may, from time to time, create such other divisions of its work as may be necessary, and to appoint chiefs of such divisions, but no person shall be appointed chief of any division of work who has not had at least five years' actual experience immediately preceding his appointment in the work or a profession similar to that to which he is assigned by the Board of Control. [Id., § 11.]

**Art. 7150<sup>1</sup>/<sub>4</sub>k. Qualifications to appointment to offices by board.**—Wherever in this act certain qualifications are prescribed for an office, or any employment or appointment of the board and certain years of experience are required, the existence of such years of experience and such qualifications as a fact shall be a pre-requisite to such officer, appointee or employé being assigned to occupy this position, and be paid his compensation by the accounting officers of the State and the State Treasurer; and the selection of such person and the judgment of his qualifications by the Board of Control shall not alone determine the question but that is left to be determined as in fact, like any other fact may be determined, and may be contested by any taxpayer, in the district court of Travis county by an injunction suit against the Board of Control, against the Comptroller or against the Treasurer; and the Comptroller may refuse to issue warrants to any person he finds to be disqualified in this act, and the Treasurer may refuse to pay such warrants; provided, however, that the party claiming the right to the issuance of such warrants and the payment therefor may bring a mandamus suit against such officer in the Supreme Court as in other cases. [Id., § 12.]

**Art. 7150<sup>1</sup>/<sub>4</sub>l. Chairman of board; quorum; minutes; secretary; office; traveling expenses.**—The Board of Control shall immediately elect one of its own number chairman; a quorum of the board shall be

necessary in the transaction of business and two members shall always be necessary for the consideration of any question; they shall keep minutes of their proceedings, duly recorded in a book provided for that purpose. They shall have authority to employ a secretary and such other clerical help, stenographers, clerks, auditors, and bookkeepers as may be necessary in the administration of their department as herein provided within the limits of the appropriations that may be made for the work of said board, which shall in no case be exceeded.

The board shall occupy appropriate rooms in the Capitol or in the new Land Office, selected by them for their offices. They shall have authority to purchase such furniture, fixtures and stationery as may be necessary in the administration of their office. In addition to the salaries and compensation herein provided for they shall be entitled to their traveling expenses when absent from the city of Austin on official business. [Id., § 13.]

**Art. 7150¼m. Mandamus; suits.**—Mandamus suits may be brought against the board in the Supreme Court of the State, as against other public officers, but no suit shall be brought against the board of any other character except in the district court of Travis county, Texas, and no temporary injunction shall ever issue against the board, except upon notice and hearing. [Id., § 14.]

**Art. 7150¼n. Appropriations.**—All appropriations heretofore made for the various departments herein consolidated and placed under the State Board of Control, shall be available for expenditure hereunder in such manner as the State Board of Control may find necessary to effectuate the purpose of this act. [Id., § 15.]

**Art. 7150¼o. Partial invalidity of act.**—Should any section of this act be declared unconstitutional said decision shall not in any way affect the other sections and provisions of this law. [Id., § 15a.]

**Art. 7150¼p. Time of taking effect of act.**—The operation and taking effect of this Act is hereby deferred until the first day of January, A. D., 1920, and this act shall take effect and be in force from and after said first day of January, A. D., 1920. [Acts 1919, 36th Leg., ch. 167, § 16; Acts 1919, 36th Leg. 1st C. S., ch. 4, § 1.]

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## TITLE 123 B

### STATE COUNCIL OF DEFENSE

#### Articles 7150½-7150½e.

**Explanatory.**—Acts 1918, 35th Leg., 4 C. S., ch. 48, amends sec. 4 of the act composing this title, but as the act is temporary in its nature the amendatory act is omitted.

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## TITLE 123 C

### STATE TREE

**Article 7150¾. State tree.**—That the Pecan Tree be, and the same is hereby named and constituted the State Tree of Texas. [Acts 1919, 36th Leg., ch. 97, § 1.]

## TITLE 124

## STOCK LAWS

## Chap.

1. Of marks and brands.
2. Protection of live stock.
3. Of the sale, slaughter and shipment of animals.
4. Of estrays.
5. Of the mode of preventing hogs and certain other animals from running at large in counties and subdivisions.

## Chap.

6. Of the mode of preventing horses and certain other animals running at large in particular counties named.
7. Regulations for the protection of stock raisers in certain localities.
8. Live stock sanitary commission.
9. Veterinary medicine and surgery.
10. Cooperation with United States Bureau of Animal Industry.

## CHAPTER ONE

## OF MARKS AND BRANDS

## Art.

7151. Owners of stock to have mark and brand.
7156. Brands of minors.

## Art.

7160. Unrecorded brands no evidence; proviso.

**Article 7151. [4921] Owners of stock to have mark and brand.**

Cited, *Thompson v. State*, 26 Tex. App. 466, 9 S. W. 760; *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

**Change of brand.**—Although this article provides that a party shall have but one mark and brand for his cattle, this was not intended to prohibit a stock-owner from changing his mark and brand; and the records of different counties, showing different brands for the same cattle, are admissible when the evidence shows that the owner removed his cattle from one county to the other, and there registered a different brand because the former was claimed by other parties. *McClure v. Sheek's Heirs*, 68 Tex. 426, 4 S. W. 552.

**Art. 7156. [4926] Brands of minors.**

Cited, *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

**Art. 7160. [4930] Unrecorded brands no evidence; proviso.**

**Unrecorded brands as evidence.**—Where, on the trial of an indictment for larceny, the evidence of the alleged owner of the animal was to the effect that in the summer of 1883 he had lost a colt, 18 months old, and branded with a certain mark, which was not recorded, and that the animal found in the possession of defendant in September, 1886, he identified by this brand, and that there were no flesh-marks that he could swear to, except that it had a small neck, and its form, and that he knew it to be the same colt by the brand, and the small neck and form, held that, under Rev. St. 1879, art. 4561, the proof arising from flesh-marks was insufficient proof of ownership to sustain a conviction. *Romero v. State*, 24 Tex. App. 130, 5 S. W. 663.

On a trial for larceny, the only evidence of the ownership of the animal alleged to have been stolen was that it bore a certain brand. The record did not show whose was the brand, nor that it was recorded as required by Rev. St. 1879, art. 4561, although the bill of exceptions showed that defendant objected to the offered record of the brand, but did not set it out, nor show that it was read in evidence over the objection. Held, that a conviction could not be sustained. *Burke v. State*, 25 Tex. App. 172, 7 S. W. 873.

Under Rev. St. 1879, art. 4561, unrecorded brands are not evidence as to who has the management and control of the cattle. *McKenzie v. State*, 32 Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

Under this article, in prosecution for cattle theft properly certified copy of registration of alleged brand of owners of stolen cattle in county of their residence was admissible to prove ownership, whether as partners or jointly as individuals. *Gomez v. State*, 206 S. W. 86.

— **Identification.**—This article does not prevent proof of identity and ownership of cattle by a witness who testifies that from the brands, as flesh-marks upon certain hides, he knows that the hides came from off certain particular animals. *Tittle v. State*, 30 Tex. App. 597, 17 S. W. 1118.

## CHAPTER TWO

## PROTECTION OF LIVE STOCK

<p>Art. 7161. County judge to order inspection, etc.</p> <p>7169a. Eradication of wolves, coyotes, bobcats, and mountain lions; appropriation.</p> <p>7169b. Same; expenditure of appropriation.</p>	<p>Art. 7169c. Same; cooperation with United States biological survey.</p> <p>7169d. Same; county appropriations.</p> <p>7169e. Same; entry upon lands, etc.</p> <p>7169f. Same; sale of skins.</p> <p>7169g. Same; proceeds of sale of hides.</p> <p>7169h. Same; funds; expenditure of.</p>
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**Article 7161. [4931] County judge to order inspection, etc.**

**Legislative power.**—Under Const. art. 16, § 23, the Legislature can pass laws for the regulation of live stock affecting any given locality, and make it effective with or without submitting it to vote. *Mulkey v. State*, 33 Cr. R. 1, 201 S. W. 991.

**Art. 7169a. Eradication of wolves, coyotes, bobcats, and mountain lions; appropriation.**—For the purpose of eradicating wolves, coyotes, Bobcats and Mountain Lions, there is hereby appropriated out of any money in the treasury not otherwise appropriated, the sum of twenty-five thousand (\$25,000.00) dollars for each of the fiscal years nineteen hundred and nineteen and nineteen hundred and twenty. [Acts 1919, 36th Leg., ch. 107, § 1.]

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

**Art. 7169b. Same; expenditure of appropriation.**—The appropriation made by Section 1 of this Act [Art. 7169a] shall be expended by the Live Stock Sanitary Board of the State of Texas, said sums to be expended in co-operation with the Bureau of Biological Survey of the United States Department of Agriculture, but no part of said appropriation shall be paid for bounties. [Id., § 2.]

**Art. 7169c. Same; cooperation with United States biological survey.**—It shall be the duty of the Live Stock Sanitary Board to enter into definite co-operative agreements with the said Bureau of Biological Survey, prescribing the manner, terms and conditions of such co-operation and the amounts which the State and Federal Government will respectively contribute thereto. [Id., § 3.]

**Art. 7169d. Same; county appropriations.**—The Commissioners Court of any county within this State is empowered and authorized to appropriate money from the general fund available in the treasury of such county to assist in prosecuting within such county the predatory animal eradication work contemplated by this Act in co-operation with the State and Federal authorities. [Id., § 4.]

**Art. 7169e. Same; entry upon lands, etc.**—Any person or persons working under the direction of the Bureau of Biological Survey U. S. Department of Agriculture or working under the direction of the Live Stock Sanitary Board of the State of Texas or under the direction of the Commissioners court within any county within this State shall be authorized to enter upon public and private lands within this State for the purpose of carrying out the work of extermination of injurious predatory animals hereby named in this Act, provided that no person appointed by the Commissioner's Court shall have any authority to enter upon the public or private lands within this State in any county other than in the county where he shall have received his appointment. [Id., § 5.]

**Art. 7169f. Same; sale of skins.**—The Live Stock Sanitary Commission of Texas or its authorized representatives are hereby authorized

to sell at the best prevailing market prices hides of all predatory animals that may be killed under the authority of Chapter 107 of the Acts of the Regular Session, of the 36th Legislature [Arts. 7169a-7169e]. [Acts 1919, 36th Leg. 2d C. S., ch. 41, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 7169g. Same; proceeds of sale of hides.**—All sums of money received by any representatives of the Live Stock Sanitary Commission for the sale of such hides as provided for in Section 1 hereof [Art. 7169f], shall be remitted at once to the Live Stock Sanitary Commission by said representative. [Id., § 2.]

**Art. 7169h. Same; funds; expenditure of.**—All moneys received by the State Treasurer from the Live Stock Sanitary Commission as provided for by this Act shall be credited by the State Treasurer to the credit of the Live Stock Sanitary Commission of Texas, and set apart to be used by the Live Stock Sanitary Commission in the further eradication of predatory animals as provided for in Chapter 107 of the Act of the Regular Session of the 36th Legislature [Arts. 7169a-7169e], and such funds shall be drawn from the State Treasury by the Live Stock Sanitary Commission for said purposes at any time after such funds are deposited and it may be drawn by the Live Stock Sanitary Commission in any amount or amounts for said purposes not to exceed the amount on deposit. Such fund is in addition to any appropriation made or that may be made by the Legislature for eradicating predatory animals. [Id., § 3.]

### CHAPTER THREE

#### OF THE SALE, SLAUGHTER AND SHIPMENT OF ANIMALS

Art.  
7170. Bill of sale to be taken.  
7171. Possession, prima facie illegal, with-  
out.

Art.  
7172. Stock animals sold by marks, etc.

#### Article 7170. [4940] Bill of sale to be always taken.

**Application.**—Arts. 7170, 7171, have no extra territorial effect, where sale without state was accompanied by actual delivery, and property was afterwards brought into state. *Jurado v. Holmes* (Civ. App.) 200 S. W. 859.

**Sale of stock.**—In action for fraud in sale of a jack for breeding purposes, the proper measure of damages was the difference between the price paid for the animal and the actual value thereof, plus any sums expended by reason of the fraudulent representation. *Womack v. Hastings & Lagow* (Civ. App.) 200 S. W. 878.

In suit for fraud in sale of a jack, recovery cannot be had for profits. *Id.*

In action for fraud in sale of a jack for breeding purposes, recovery could not be had for feed and care of the animal after it was discovered by the purchaser that the jack was not available for purpose for which purchased. *Id.*

— **Rights and liabilities on sale of diseased stock.**—The fact that a seller, misrepresenting diseased cattle as sound, realized his profits in the form of a commission, did not of itself necessarily show that he was handling the cattle merely as broker and agent for plaintiff. *Graves v. Haynes* (Civ. App.) 214 S. W. 665.

Where plaintiff had known defendant for some time, had confidence in him, was assured by defendant that the cattle came from a safe county, and did not have the fever, and by such representations was induced to buy them not knowing them to be diseased, the defendant cannot, whether he be seller or plaintiff's agent, escape liability for such misrepresentations on the ground that he in good faith believed them to be true. *Id.*

If buyer of cattle represented to be free from tick fever believed the representations and relied on them and would not otherwise have purchased the cattle, he is entitled to recover damages, although he relied in part on what he saw when he inspected the cattle; but, if he relied in fact on what he saw he cannot recover. *Graves v. Haynes* (Com. App.) 231 S. W. 383.

**Art. 7171. [4941] Possession prima facie illegal, without.**

Cited, Rankin v. Bell, 85 Tex. 28, 19 S. W. 874.

**Rebuttal of presumption.**—Title may be shown to have passed, though there was no written transfer, by evidence of a bona fide sale on sufficient consideration. First Nat. Bank of Colorado v. Brown, 85 Tex. 80, 23 S. W. 862.

**No extra territorial effect.**—Arts. 7170, 7171, have no extra territorial effect, where sale without state was accompanied by actual delivery, and property was afterwards brought into state. Jurado v. Holmes (Civ. App.) 200 S. W. 859.

**Art. 7172. [4942] Stock animals sold by mark and brand, etc.**

**Application of law—Record.**—A creditor claiming property rights in cattle running on a range which he has purchased of his debtor, paying for the same partly in cash and partly by crediting the debtor with his account, without recording the transfer, acquires no title to the property under Rev. St. 1879, art. 4564. Black v. Vaughan, 70 Tex. 47, 7 S. W. 604.

**Sale and actual delivery.**—On a sale of cattle accompanied by actual delivery, though the purchaser returns the cattle to the range, the bill of sale is not required to be recorded, under Rev. St. 1879, art. 4564. Boutwell v. Hiltbold (App.) 15 S. W. 501.

Where there was actual delivery of the cattle, title passed, though the bill of sale, describing them by certain marks and brands, was not recorded. First Nat. Bank of Colorado v. Brown, 85 Tex. 80, 23 S. W. 862.

**CHAPTER FOUR****OF ESTRAYS****Article 7207. [4976] County clerk to send notice of estray, etc.**

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

**CHAPTER FIVE****OF THE MODE OF PREVENTING HOGS AND CERTAIN OTHER ANIMALS FROM RUNNING AT LARGE IN COUNTIES AND SUBDIVISIONS**

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| <p><b>Art.</b><br/>7209. Commissioners' court to order election.<br/>7210. Election may be ordered in subdivisions, when.<br/>7211. Requisites of petition.<br/>7212. Election, how ordered, etc.<br/>7213. Notice, how given, etc.<br/>7214. Requisites of order, etc.<br/>7215. Voting places.<br/>7216. Managers to be appointed, when.<br/>7217. Freeholders only to vote, etc.<br/>7218. Manner of voting, etc.<br/>7219. Returns of election.<br/>7220. Returns, how opened.<br/>7221. Proclamation of result, etc.<br/>7222. Stock may be impounded, when.<br/>7223-7228. [Note.]<br/>7234a. Elections validated.<br/>7234b. Limited free range for hogs in county or subdivision thereof; petition for election; number of signatures to.<br/>7234c. Same; number of petitioners in certain cases.</p> | <p><b>Art.</b><br/>7234d. Same; description of subdivision in petition.<br/>7234e. Same; order for, date, and conduct of election.<br/>7234f. Same; order for election by county judge; notice of election.<br/>7234g. Same; contents of order of county judge.<br/>7234h. Same; plans for holding election.<br/>7234i. Same; managers of election.<br/>7234j. Same; voters.<br/>7234k. Same; ballots.<br/>7234l. Same; returns of election.<br/>7234m. Same; counting returns.<br/>7234n. Same; declaration of result of election.<br/>7234o. Same; second election.<br/>7234p. Same; declaration of result of second election.<br/>7234q. Same; election for adoption of stock law and free range proposition held at same time.</p> |
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**Article 7209. [4978] Commissioners' court to order election.**

See Watkins v. Vaughn (Civ. App.) 216 S. W. 480; Cline v. State (Cr. App.) 227 S. W. 668.

**Filing petition.**—The petition for an election is fundamental and essential to the jurisdiction of the court in ordering an election on the adoption of the law prohibiting hogs, goats, and sheep from running at large within a county or subdivision. Coleman v. Hallum (Com. App.) 232 S. W. 296.

**Order for election.**—Where the order for an election on the adoption of the law preventing hogs, goats, "and" sheep from running at large stated that the petition requested such election, and included a copy of the petition praying for such an election, the statement in the conclusion of the order that the election was to be held to determine whether hogs, goats, "or" sheep shall be permitted to run at large was manifestly contrary to the intent of the court to order the election asked for, so that the word "or" can be construed to mean "and," as is permissible to effectuate the intention of the parties. *Coleman v. Hallum* (Com. App.) 232 S. W. 296.

**Liability of railroad company for killing hogs.**—Where art. 7235 et seq., relating to horses and cattle, has not been adopted in a county, a railroad operating an unfenced track therein, unless negligent, is not liable, under art. 6603, for hogs killed or injured while running at large in violation of title 124, c. 5, adopted in such county. *Ft. Worth & R. G. Ry. Co. v. Wilhite* (Civ. App.) 210 S. W. 765.

**Operation within city.**—Legislature, by special charter granted City of Dallas (Sp. Acts 30th Leg. c. 71), having given it right and authority to control, regulate, restrain, and prohibit running at large of stock within its bounds, as well as control of streets and public grounds, county cannot invade its territory in attempt to exercise authority by a local option election. *Cowand v. State*, 83 Cr. R. 298, 202 S. W. 961.

**Art. 7210. [4979] Election may be ordered in subdivisions, when.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7211. [4980] Requisites of petition.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Sufficiency of petition in general.**—Election for adoption of the stock law for subdivision of county was void; the statute requiring the petition for election to specify the classes of animals desired to be restrained and the order for election to conform to the petition, whereas the petition specified hogs, sheep, "and" goats, and the order hogs, sheep, "or" goats. *Hallum v. Coleman* (Civ. App.) 214 S. W. 989.

**Description.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 7211, it is imperative that a petition for a stock law election in a subdivision of a county shall particularly describe such subdivision and designate the boundaries thereof, and a petition, describing a subdivision as "beginning at a point on the west boundary line of Franklin county; the N. W. corner of general stock law district; thence east with the N. B. line general stock law to where same connects with," etc., was insufficient under this article. *Alsobrook v. State*, 86 Cr. R. 271, 216 S. W. 167.

**Art. 7212. [4981] Election, how ordered and conducted.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Application to city.**—Stock law election will not be held invalid because order of election included territory within corporate limits of city and two towns, conceding that election could not be enforced in incorporated territory. *Goforth v. Corley* (Civ. App.) 204 S. W. 243.

**Term of court.**—Where order for election for adoption of stock law in a subdivision of a county was made at the term of the commissioners' court during which the petition was filed, instead of at the next term, as required by the statute, election was void, and could not be vitalized by lapse of years. *Hallum v. Coleman* (Civ. App.) 214 S. W. 989.

The provision of this article, requiring the commissioner's court at its next regular term after the filing of a petition therefor to order an election, was intended only to prevent the court from delaying the calling of an election, and does not invalidate an order for such election made at the same term at which the petition was filed. *Coleman v. Hallum* (Com. App.) 232 S. W. 296.

**Art. 7213. [4982] Notice, how given.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7214. [4983] Requisites of the order.**

See *Watkins v. Vaughn* (Civ. App.) 216 S. W. 480.

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7215. [4984] Voting places.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Designation of place in order.**—Order of county judge for stock law election for a commissioner's precinct held to sufficiently designate places at which polls should be opened, as required by this article. *Goforth v. Corley* (Civ. App.) 204 S. W. 243.

**Art. 7216. [4985] Managers to be appointed, when.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.



**Art. 7217. [4986] Freeholders only to vote.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Freeholders.**—Qualified voters of all territory to be affected by operation of local option stock law are entitled to vote, and law cannot be legally enforced against such voters, not given opportunity to vote at election. *Cowand v. State*, 83 Cr. R. 298, 202 S. W. 961.

**Art. 7218. [4987] Manner of voting.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7219. [4988] Returns of election.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7220. [4989] Returns, how opened.**—The returns shall be opened, tabulated and counted by the Commissioners' Court of the County in the same manner as provided for all general elections in the State of Texas. [Acts 1876, p. 150, § 4; Acts 1919, 36th Leg. 2d C. S., ch. 59, § 1.]

See *Watkins v. Vaughn* (Civ. App.) 216 S. W. 480.

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7221. [4990] Proclamation of the result, and its effect.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Proclamation.**—Where plaintiff in suit for damages done to his crops by defendants' hogs did not allege or prove that his crops were protected by a good and lawful fence, he could not recover, where he failed to allege and prove that the county judge published or posted, as required by this article, notice of result of election, putting the special stock law into effect; it being necessary to allege and prove each of steps required by article 7209 et seq., where special stock law is relied upon. *Watkins v. Vaughn* (Civ. App.) 216 S. W. 480.

The proclamation of the county judge, declaring the result of an election adopting the law prohibiting hogs, goats, and sheep from running at large, raises the presumption that everything necessary to a legal election had been done, so that evidence such proclamation was issued is sufficient to show the validity of the election without evidence as to the manner of counting and tabulating the votes. *Coleman v. Hallum* (Com. App.) 232 S. W. 296.

**Art. 7222. [4991] Stock may be impounded, when.**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**In general.**—There is no general law prohibiting stock running at large. *Carvel v. Kusel* (Civ. App.) 205 S. W. 941.

**Injunction.**—The statutory remedy by impounding animals unlawfully running at large and selling them to pay for the damage done by them given by arts. 7222-7226, is of doubtful adequacy, since the damage might exceed the value of the animals, or the animals doing the damage might not be identified, and therefore such remedy does not prevent the granting of an injunction to restrain an owner from unlawfully permitting his hogs to run at large. *Coleman v. Hallum* (Com. App.) 232 S. W. 296.

**Arts. 7223-7228. [4992-4997].**

Cited, *Gilley v. Haddox* (App.) 15 S. W. 714.

**Art. 7234a. Elections validated.**—All elections held in any county in this State for the purpose of determining whether or not hogs, sheep or goats shall be permitted to run at large in such county or subdivision as provided in Chapter 5 of the Revised Civil Statutes of Texas, wherein the petition was filed, orders of the election made by the Commissioners' Court, notice thereof given, such election held and a majority of the freeholders voting at such election, voted in favor of same, and such election may have been invalidated by the failure of some ministerial officer to perform the duties required of him, be, and the same is hereby in all things validated, and shall be, by all of the courts of this State, held to be valid elections, just the same as if the officers charged with duty of opening, tabulating and counting the votes should have complied with the law, as provided in said Chapter 5 of the Revised Civil Statutes of Texas. [Acts 1919, 36th Leg. 2d C. S., ch. 59, § 2.]

Took effect July 28, 1919.

**Art. 7234b. Limited free range for hogs in county or subdivision thereof; petition for election; number of signatures to.**—Upon the written petition of fifty (50) freeholders of any county, or upon the petition of twenty (20) freeholders of any subdivision of any county, which county or subdivision has heretofore adopted, or may hereafter adopt, the hog law under the provisions of Chapter 5, Title 124, of the Revised Civil Statutes of Texas [Arts. 7209–7234], the commissioners' court of such county shall order an election to be held in said county or subdivision on some day named in the order, for the purpose of enabling the freeholders of such county or subdivision to determine whether hogs shall have a free range in said county or subdivision from the fifteenth day of November to the fifteenth day of February, of each year. [Acts 1919, 36th Leg., ch. 92, § 1.]

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

**Art. 7234c. Same; number of petitioners in certain cases.**—Whenever there is territory between two subdivisions of a county which have adopted the hog law, and in such intervening territory there is less than fifty (50) freeholders, an election shall be ordered on the petition of a majority of the freeholders residing in such intervening territory, and the election shall be held for the purpose named herein and under the terms of this Act. [Id., § 2.]

**Art. 7234d. Same; description of subdivision in petition.**—If the petition be from the freeholders of a subdivision of any county, such subdivision shall be particularly described and the boundaries thereof designated in the same manner as when originally established. [Id., § 3.]

**Art. 7234e. Same; order for, date, and conduct of election.**—Upon the filing of such petition, the commissioners' court, at a regular or special meeting thereof, shall pass an order directing an election to be held throughout the county or the particular subdivision thereof, as the case may be, on a day to be designated in the order, not less than thirty days from the date of such order; which election shall be held and conducted and the returns thereof made in accordance with the laws regulating general elections, in so far as the same are applicable. [Id., § 4.]

**Art. 7234f. Same; order for election by county judge; notice of election.**—Immediately after the passage of an order for an election by the commissioners' court, the county judge shall issue an order for such election and cause public notices thereof to be given for at least thirty days before the day of election, by publication of the order therefor in some newspaper published in the county, if there be one; if no newspaper be published in the county then by posting copies of such order at the court house door, and at some public place in each justice's precinct, if such election be ordered for the whole county, or at three public places in the subdivision, if the election be ordered for a subdivision. [Id., § 5.]

**Art. 7234g. Same; contents of order of county judge.**—The order of the county judge shall specify:

1. The petition and the action of the commissioners' court.
2. The class of animals it is proposed shall have the limited period of free range.
3. The time in which said animals are to have the limited period of free range.
4. The territorial limits to be affected.
5. The day of election.
6. The places at which polls are to be opened. [Id., § 6.]

**Art. 7234h. Same; plans for holding election.**—If the election is ordered for the whole county, the same shall be held at the usual voting places in the several election precincts; but, if the election is ordered for any particular subdivision the county judge shall designate the particular places in such subdivision at which the polls shall be opened. [Id., § 7.]

**Art. 7234i. Same; managers of election.**—If the election be for a subdivision of the county, the county judge shall, at the time he issues the order for such election, appoint proper persons as managers of said election, all of whom shall be freeholders of the county and qualified voters; and such managers may appoint their own clerks. [Id., § 8.]

**Art. 7234j. Same; voters.**—No person shall vote at an election under the provisions of this Act, unless he be a freeholder and is also a qualified voter under the constitution and laws of Texas. [Id., § 9.]

**Art. 7234k. Same; ballots.**—All votes at an election held under the provisions of this Act, shall be by ballot; and voters desiring to permit hogs to have a limited period of free range in hog law counties or districts as designated in the order, shall place upon their ballots the words, "For the limited period of free range for hogs," and those against limited period of free range for hogs shall place upon their ballots the words, "Against the limited period of free range for hogs." [Id., § 10.]

**Art. 7234l. Same; returns of election.**—On or before the 10th day after any election under the provisions of this Act, the persons holding such election shall make due return of all votes cast at their respective voting places for and against said proposition to the county judge of the county, who shall tabulate and count said returns and ascertain the result of said election. [Id., § 11.]

**Art. 7234m. Same; counting returns.**—The returns shall be opened, tabulated and counted by the county judge in the presence of the county clerk and at least one justice of the peace of the county, or two respectable freeholders of the county. [Id., § 12.]

**Art. 7234n. Same; declaration of result of election.**—If a majority of the votes cast at such election shall be "For the limited period of free range for hogs," the county judge shall immediately issue his proclamation declaring the result; which proclamation shall be posted at the court house door, and after the expiration of ten days from its issuance, it shall be lawful to permit hogs to run at large within the limits designated for the period of time between the fifteenth day of November of each year and the fifteenth day of the following February of each year, both days inclusive. [Id., § 13.]

**Art. 7234o. Same; second election.**—Whenever an election is held under the provisions of this Act for any county or subdivision, no other election for such purpose shall be held within such county or subdivision for the space of two years, but the defeat of the proposition for a county shall not prevent another election from being held immediately thereafter for any subdivision of such county; nor shall the defeat of the proposition for any subdivision prevent an election from being held immediately thereafter, for the entire county. [Id., § 14.]

**Art. 7234p. Same; declaration of result of second election.**—If, in a county or subdivision which has formerly adopted the limited period of free range for hogs, as provided for under the terms of this Act, a majority

of the legal votes cast at such election shall be "Against the limited period of free range for hogs," the county judge shall immediately issue his proclamation declaring the result; which proclamation shall be posted at the court house door, and after the expiration of ten days from its issuance, it shall be unlawful to permit hogs to run at large within the limits designated; if a majority of the legal votes cast at such election shall be, "For the limited period of free range for hogs," he shall so state in his proclamation, and the operation of the law shall be in no way affected by such election. [Id., § 15.]

**Art. 7234q. Same; election for adoption of stock law and free range proposition held at same time.**—When an election is called for any county or subdivision thereof for the purpose of voting upon the question of the adoption of the stock law or any part thereof, under provisions of Chapter 5, Title 124, of the Revised Civil Statutes of Texas [Arts. 7209–7234], if such county or subdivision has not already in operation the stock law or any part thereof, under the provisions of said Chapter and Title, it shall be lawful to submit at the same time and at the same election the question of the limited period of free range for hogs, as provided for in this Act, but said proposition must be submitted and voted upon as a separate proposition, and the votes cast, therein, and the returns thereof, and the judge's proclamation thereon, must be separate and distinct from that of the stock law proposition voted on at such election. [Id., § 16.]

## CHAPTER SIX

### OF THE MODE OF PREVENTING HORSES AND CERTAIN OTHER ANIMALS RUNNING AT LARGE IN PAR- TICULAR COUNTIES NAMED

Art.

7235. Election to put law into operation.

7235a. Election in Harris county.

7235b. Provisions applicable.

7239. Order for election.

Art.

7244. Qualifications of voters.

7251. Fees for impounding, notice.

7254. Lawful fence, what constitutes.

**Article 7235. Election to put law in operation; proviso.**—Upon the written petition of one hundred freeholders of any of the following counties: Anderson, Archer, Armstrong, Atascosa, Austin, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Border, Bosque, Bowie, Brazoria, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnett, Caldwell, Chambers, Calhoun, Callahan, Cameron, Camp, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coleman, Collin, Collingsworth, Colorado, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Dallam, Dallas, Dawson, Deaf Smith, Delta, Denton, De Witt, Dickers, Dimmitt, Donley, Eastland, Ector, Edwards, Ellis, El Paso, Erath, Fannin, Fayette, Floyd, Foard, Franklin, Fisher, Freestone, Gaines, Gregg, Guadalupe, Garza, Glasscock, Gillespie, Gonzales, Grimes, Grayson, Gray, Hale, Hamilton, Hansford, Harrison, Hays, Haskell, Hall, Hardeman, Hartley, Henderson, Hidalgo, Hill, Hood, Hopkins, Howard, Houston, Hockley, Hunt, Iron, Jackson, Jack, Jasper, Jeff Davis, Jefferson, Jim Hogg, Johnson, Jones, Karnes, Kaufman, Falls, Kimble, Knox, Kerr, Kendall, Kinney, Kieberg, Lamar, Lavaca, Lamb, Lampasas, Lee, Liberty, Limestone, Lynn, Lipscomb, Llano, Lubbock, Madison, Marion, Mason, McLennan, Matagorda, McCulloch, Menard, Moore, Martin, Maverick, Medina, Midland, Milam, Mills, Mitchell, Montague, Morris, Navarro, Nacogdoches, Newton, Nolan, Nueces, Ochiltree, Palo Pinto,

Panola, Parker, Pecos, Presidio, Rains, Randall, Red River, Reeves, Real, Robertson, Rockwall, Rusk, Runnels, Sabine, San Patricio, San Saba, Schleicher, Scurry, Shelby, Sherman, Smith, Somervell, Sterling, Starr, Sutton, Swisher, Tarrant, Tom Green, Taylor, Terrell, Throckmorton, Titus, Travis, Upshur, Victoria, Val Verde, Van Zandt, Washington, Williamson, Wilson, Wise, Ward, Wharton, Wood, Wheeler, Winkler, Wichita, Wilbarger, and Young, or upon the petition of fifty freeholders of any such sub-division of a county as may be described, and defined by the commissioners' court of any of the above named counties, the commissioners' court of said county shall order an election to be held in such county or such sub-division of a county as may be described in the petition and defined by the commissioners' court on the day named in the order for the purpose of enabling the freeholders of such county or such sub-division of a county as may be described in the petition and defined by the commissioners' court to determine whether horses, mules, jacks, jennets and cattle be permitted to run at large in such county or such sub-division of a county as may be described in the petition and defined by the commissioners' court; provided that where there is an application for an election to include an entire county there shall not be less than twelve freeholders from each justice precinct of said county as signers to the petition for such election; and provided further that the provisions of this section shall not apply to Archer County as a whole, but shall apply only to such sub-division thereof as may be designated in the manner herein provided and provided further that the provisions of this section shall not apply to Wharton County as a whole, but shall apply only to such sub-division thereof as may be designated in the manner herein provided; provided further that the provisions of said Act shall not apply to Nueces County as a whole, but shall apply only to such sub-divisions thereof as may be designated in the manner herein provided. Provided further that the provisions of this Act shall not apply to Lipscomb County as a whole, but shall apply only to such sub-divisions thereof as may be designated in the manner herein provided. Provided further, that the provisions of this Act shall not apply to Henderson County as a whole, but shall apply only to such sub-divisions thereof as may be designated in the manner herein provided. [Acts 1899, ch. 128; Acts 1901, ch. 24; Acts 1903, ch. 71; Acts 1905, chs. 23, 94; Acts 1907, chs. 11, 28, 57; Acts 1909, p. 121, § 1; Acts 1911, p. 172, § 1; Acts 1913, p. 131, § 1; Acts 1915, 34th Leg., ch. 26, § 1; Acts 1915, 34th Leg., ch. 99, § 1; Acts 1917, 35th Leg., ch. 131, § 1; Acts 1917, 35th Leg. 3d C. S., ch. 10, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 13, § 1; Acts 1919, 36th Leg. ch. 35, § 1; Acts 1919, 36th Leg., ch. 105, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 50, § 1; Acts 1921, 37th Leg., ch. 32, § 1; Acts 1921, 37th Leg. 1st. C. S., ch. 10, § 1.]

Took effect Nov. 15, 1921.

Cited, *Clarendon Land, Investment & Agency Co. v. McClelland* (Civ. App.) 21 S. W. 170; *Rodgers v. Tobias* (Civ. App.) 225 S. W. 804.

**Title of former act.**—Acts 33d Leg. c. 72 (Vernon's Sayles' Ann. Civ. St. 1914, art. 7235), amending Stock Law (Rev. St. 1911, art. 7235) in so far as it attempts to exclude Matagorda county from operation of article, held violative of constitutional provision as to title of statutes. *Ward Cattle & Pasture Co. v. Carpenter*, 109 Tex. 103, 200 S. W. 521.

**Qualifications of petitioners.**—A person who owned land and lived in the subdivision when he signed petition for stock law election under this article, but had moved just across the line out of the district when the petition was filed, was not a qualified signer at such time. A signer who, when his house burned in the district, with his children, his wife being dead, moved some 200 yards across the line of the district and lived with his mother, was not disqualified thereby to sign the petition; he having had the intention to return and build a house. Signer who had sold his land and moved out of the district when the petition was filed, was disqualified. Signer who, though he lived in the district, did not own any land in it, was disqualified. Signer who lived on part of his deceased father's homestead as heir, had such an interest in the land as made him

a legal signatory to the petition and voter at the election. *Reid v. King* (Civ. App.) 227 S. W. 960.

— **Evidence.**—Declarations of voters made before or after the election are incompetent to show that by reason of age or residence they were not qualified to vote. *Reid v. King* (Civ. App.) 227 S. W. 960.

Evidence held sufficient to sustain the trial court's finding that a given signer was qualified when the petition was filed, he having testified that he moved to the district "about" a date which would have qualified him, "about" signifying no certain date, but being a relative term giving a margin for moderate variation. *Id.*

Evidence held insufficient to meet contestants' burden to show that a particular signer was not a legally qualified signer and voter as a landowner. *Id.*

Evidence held insufficient to meet the burden of proof resting on contestants to show the disqualification of a particular person on the theory that he was a non-resident of the district. *Id.*

**Liability of railroad company for killing hogs.**—Where this article has not been adopted in a county, a railroad operating an unfenced track therein, unless negligent, is not liable, under art. 6603, for hogs killed or injured while running at large in violation of title 124, c. 5, adopted in such county. *Ft. Worth & R. G. Ry. Co. v. Wilhite* (Civ. App.) 210 S. W. 765.

**Art. 7235a. Election in Harris county.**—Upon the written petition of twenty (20) freeholders of any subdivision of Harris county as may be described in the petition and defined by the commissioners' court of Harris county, the commissioners' court of said county shall order an election to be held in such subdivision of said county as may be described in the petition and defined by the commissioners' court on the day named in the order, for the purpose of enabling the freeholders of such subdivision of Harris county as may be described in the petition and defined by the commissioners' court, to determine whether horses, mules, jacks, jennets and cattle shall be permitted to run at large in such subdivision of Harris county, as may be described in the petition and defined by the commissioners' court. [Acts 1913, p. 157, § 1; Acts 1919, 36th Leg., Sp. L. ch. 46, § 1.]

**Art. 7235b. Provisions applicable.**—Upon the filing of such petition, the order of the commissioners' court thereon, the holding of such election, the return thereof, and all other action in respect thereto shall be as prescribed in the general law, title 124, chapter 5, of the Revised Statutes of Texas of 1911. [Acts 1913, p. 157, § 2; Acts 1919, 36th Leg. Sp. L. ch. 46, § 2.]

**Art. 7239. Order for election.**

See *Reid v. King* (Civ. App.) 227 S. W. 960.

**Art. 7244. Qualifications of electors.**

See *Reid v. King* (Civ. App.) 227 S. W. 960; notes under art. 7235.

**Art. 7251. Fees for impounding; notice.**

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 7254. Lawful fence, what constitutes.**

Cited, *Clarendon Land, Investment & Agency Co. v. McClelland* (Civ. App.) 21 S. W. 170.

**Effect of statute.**—The statute prescribing what shall constitute a lawful fence, does not throw open to the use of the public the lands of persons failing to maintain such an inclosure. *Davis v. Davis*, 70 Tex. 123, 7 S. W. 326.

**TRESPASSING ANIMALS**

**Trespass by animals.**—When landowner joined his fence with railroad stock pens, he knew of their use, and took the risk of injury to crops from cattle placed in the pens breaking the fence and getting on his land; shippers owing no other duty than not negligently to use the pens, so as to cause injury. *Blakely-Settegast-Martin Cattle Co. v. Kidd* (Civ. App.) 223 S. W. 263.

Where the law requiring the owner of stock to keep them confined is not in force, the owner is not liable for trespass by the cattle on inclosed land of another, unless he knows the cattle are vicious, in the sense that they have the habit of breaking into inclosures which ordinarily restrain cattle of that class. *Id.*

Common-law rule requiring restraint of cattle by tethering or inclosure is not in force in this state. *Phillips v. Crow* (Civ. App.) 199 S. W. 851.

## CHAPTER SEVEN

REGULATIONS FOR THE PROTECTION OF STOCK RAISERS  
IN CERTAIN LOCALITIES

Art.		Art.
7274.	Bill of sale to be taken.	7305dd. Inspector for Potter County.
7276.	Certificate of inspection to be given.	7305g. Other counties exempted.
7278.	Road brand.	LOCAL OPTION AS TO HIDE AND AN-
7297.	Certificate of inspection.	IMAL INSPECTION
7305.	Exempted counties.	7306. Commissioners' court to order elec-
7305d.	Oldham county exempted and Pot- ter county made subject to act.	tion, when.

**Article 7274. [5020] Bill of sale to be taken.**

**Liability of carrier.**—Where a carrier, after it has contracted to furnish cars at a certain time for the shipment of cattle, and after the shipper has prepared to deliver them, having them inspected as fast as they can be loaded, stops the loading, and gives the cars to another shipper, who has already had his cattle inspected, it is liable to the first shipper for the damages caused by the delay, and is not relieved from liability by Crim. Code, art. 1413, making it a misdemeanor for a railroad agent to receive for shipment cattle that have not been inspected; nor by arts. 7274, 7276, 7297, requiring an inspection certificate and a bill of sale before the shipment of cattle. *Receivers of International & G. N. R. Co. v. Wright*, 2 Civ. App. 198, 21 S. W. 56.

**Art. 7276. [5022] Certificate of inspection to be given.**

**Liability of carrier.**—See *Receivers of International & G. N. R. Co. v. Wright*, 2 Civ. App. 198, 21 S. W. 56; note under art. 7274.

**Art. 7278. [5023a] Road brand.**

**Registration after removal.**—The record of a brand made after the removal of the cattle is unauthorized by law, and is inadmissible in evidence to prove ownership. *Crowell v. State*, 24 Tex. App. 404, 6 S. W. 318.

**Art. 7297. [5035] Certificate of inspection.**

**Liability of carrier.**—See *Receivers of International & G. N. R. Co. v. Wright*, 2 Civ. App. 198, 21 S. W. 56; note under art. 7274.

**Art. 7305. [5043] Counties exempted.**—The counties of Anderson, Angelina, Aransas, Archer, Armstrong, Atascosa, Austin, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Borden, Bowie, Bosque, Brazoria, Brazos, Brewster, Briscoe, Brown, Burleson, Burnet, Caldwell, Callahan, Calhoun, Cameron, Camp, Carson, Cass, Chambers, Cherokee, Childress, Clay, Cochran, Coke, Collin, Collingsworth, Colorado, Comal, Comanche, Cooke, Coryell, Cottle, Crockett, Crosby, Dallam, Delta, Denton, DeWitt, Dickens, Donley, Duval, Eastland, Ellis, El Paso, Erath, Falls, Fannin, Fayette, Floyd, Foard, Fort Bend, Franklin, Freestone, Frio, Galveston, Gillespie, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Guadalupe, Hall, Hamilton, Hardeman, Hardin, Harris, Harrison, Hartley, Hays, Hemphill, Henderson, Hidalgo, Hill, Hockley, Hood, Hopkins, Houston, Hunt, Irion, Jackson, Jack, Jasper, Jeff Davis, Jefferson, Johnson, Karnes, Kaufman, Kendall, Knox, Kinney, Lamar, Lamb, Lampasas, Lavaca, Leon, Liberty, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Marion, Mason, Medina, Maverick, McLennan, Midland, Milam, Mills, Mitchell, Montague, Montgomery, Morris, Motley, Nacogdoches, Navarro, Newton, Orange, Palo Pinto, Panola, Parker, Pecos, Polk, Presidio, Rains, Reagan, Red River, Refugio, Robertson, Rockwall, Rusk, Reeves, Sabine, San Augustine, San Jacinto, San Patricio, Schleicher, Shelby, Smith, Shackelford, Somervell, Starr, Scurry, Stephens, Sterling, Tarrant, Terrell, Terry, Throckmorton, Titus, Tom Green, Trinity, Tyler, Uvalde, Upshur, Upton, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Wharton, Wheeler, Williamson, Wilson, Wise, Winkler, and Young are

hereby exempted from the provisions of this Chapter and from all laws regulating the inspection of hides and animals. [Acts 1893, ch. 107; Acts 1895, ch. 43; Acts 1909, pp. 30, 113; Acts 1913, p. 85, § 1; Acts 1917, 35th Leg., ch. 114, § 1; Acts 1917, 35th Leg. 1st C. S., ch. 23, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 10, § 1; Acts 1921, 37th Leg., ch. 21, § 1.]

Took effect April 2, 1921.

**Art. 7305d. Oldham County exempted and Potter County made subject to act.**—That the county of Oldham be and the same is hereby exempt from the provisions and operations of Articles 7256 to 7305, inclusive, of Chapter 7, Title 124, Revised Civil Statutes of 1911, relating to the inspection of hides and animals, and the county of Potter is hereby declared to be subject to all the provisions of said Chapter 7, Title 124, Revised Civil Statutes of 1911. [Acts 1915, 34th Leg., ch. 142, § 1; Acts 1921, 37th Leg., ch. 36, § 1.]

**Art. 7305dd. Inspector for Potter County.**—The Commissioners' Court of Potter County is hereby authorized to appoint an inspector of hides and animals for said county, who shall serve until the next general election, and should a vacancy occur in said office, or should the Commissioners' Court fail to make such appointment, the sheriff of Potter County, shall discharge the duties of the office and shall receive and collect such fees as is provided for by the provisions of Article 3877, Revised Civil Statutes of 1911, or as may be provided for by law, which shall not be considered as fees of office, and need not be accounted in arriving at the maximum fees and compensation allowed to be retained by him under the law. [Acts 1921, 37th Leg., ch. 36, § 2.]

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

**Art. 7305g. Other counties exempted.**—That the county of Uvalde be and the same is hereby exempted from the provisions and operations of Articles 7256 to 7304 inclusive, of Chapter 7, Title 124 of the Revised Civil Statutes of 1911, and all Acts amendatory thereto, relative to the inspection of hides and animals. [Acts 1919, 36th Leg. 2d C. S., ch. 11, § 1.]

**Explanatory.**—Sec. 2 repeals all conflicting laws. The act took effect July 21, 1919.

#### LOCAL OPTION AS TO HIDE AND ANIMAL INSPECTION

**Art. 7306. Commissioners' court to order election, when.**

See 1918 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.

### CHAPTER EIGHT

#### LIVE STOCK SANITARY COMMISSION

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| <p><b>Art.</b><br/>7314. Duties of live stock sanitary commission; quarantine; etc.<br/>7314a. [Note.]<br/>7314b. Control of sale of veterinary biological products; eradication of fever-carrying tick and other contagious diseases; special quarantine districts; quarantine of pastures, etc.; prescribing method of dipping.<br/>7314d. Duties of commissioners' court and county judge.<br/>7314d1. Time of compliance by counties in designated zones not changed.</p> | <p><b>Art.</b><br/>7314dd. Duty of commission to make investigations and quarantine animals; duty of state veterinarian.<br/>7314e. Election in counties on question of tick eradication; quarantine.<br/>7314f. Zones or districts for tick eradication.<br/>7314ff. Zones or districts for tick eradication.<br/>7314fff. Same.<br/>7314g. Proclamations respecting quarantine in tick zones.<br/>7314h. Same; movement of animals in quarantined districts.</p> |
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Art.  
7314k1. Live Stock Sanitary Commission may direct dipping of cattle, etc.  
7314k2. Form and requisites of direction.  
7314k3. Service of direction; affidavit of protest; hearing and determination; injunction.  
7314k4. Inspection how made.  
7314k5. Rules and regulations.  
7314l. Publication or notice of quarantine order.

Art  
7314m. Same; filing copy of notice with county clerk; evidence.  
7314n. Seizure of animals being moved in quarantine districts; dipping or treating; compensation of sheriff; lien.  
7314q. Construction of act; repeal.  
7314r. Validation of elections.

### Article 7314. [5043c] Duties of Live Stock Sanitary Commission; quarantine, etc.

See *Ex parte Smallwood*, 87 Cr. R. 268, 221 S. W. 293.

Cited, *White v. State*, 87 Cr. R. 315, 221 S. W. 283; *Ex parte Leslie*, 87 Cr. R. 476, 223 S. W. 227.

**Constitutionality.**—Acts 35th Leg. c. 60, and Acts 33d Leg. c. 169, requiring all cattle to be dipped, whether infected with ticks or not, and whether kept on owner's premises or not, did not violate Const. art. 1, § 19, or Const. U. S. art. 14, § 1. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

The Legislature could make the provision of Acts 35th Leg. c. 60, relating to prevention of disease in live stock, apply where those of the repealed act (Acts 33d Leg.) formerly applied. *Id.*

The tick eradication statute held not unreasonable as against certain grounds urged. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

Art. 7312 et seq. (creating live stock sanitary board), as amended by Acts 35th Leg. (Reg. Sess.) c. 60, and Acts 35th Leg. (1st Called Sess.) c. 12 (Vernon's Ann. Civ. St. Supp. 1918, art. 7314 et seq.), is constitutional. *Serres v. Hammond* (Civ. App.) 214 S. W. 596.

Acts 35th Leg. (1917) c. 60, supplementing the act creating a Live Stock Sanitary Commission (Acts 1893, c. 56), and requiring the dipping of cattle to prevent diseases, is not invalid as prescribing unreasonable and excessive penalties for failure, the penalties ranging only from \$10 to \$200. *Page v. Tucker* (Civ. App.) 218 S. W. 584.

Acts 35th Leg. (1917) c. 60, which supplemented the act of creating a Live Stock Sanitary Commission for the state of Texas found in Acts 1893, c. 56, which was modified by Acts 33d Leg. (1913) c. 169 is not invalid under Const. art. 3, § 36, declaring that no law shall be revived or amended by reference to its title because it did not set out the earlier legislation; the latter act being complete and entire in itself. *Id.*

The tick eradication law of 1917, requiring dipping of cattle, is not void as authorizing injury to private property for public use without compensation, as the dipping process is harmless to the animals when properly handled, and removes the cause of disease. *Id.*

**Counties in which operative.**—Acts 35th Leg. c. 60, approved in 1917, relating to prevention of diseases in live stock, was intended to apply to counties where Acts 33d Leg. c. 169, had been adopted. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

The Tick Eradication Law requiring citizens to comply with rules and regulations of the Live Stock Sanitary Commission, is not a "local law" within the meaning of Const. art. 16, § 23; the only effect of the local option feature contained in section 7 of such act being to hasten the operation of the law as to a county voting thereunder. *Gandy v. State* (Cr. App.) 220 S. W. 339.

The Legislature has the power to enact a law by the terms of which the rules and regulations prescribed by the Live Stock Sanitary Commission, for the purpose of preventing disease and promoting health among such live stock, is binding upon the citizens, so far as the same appear reasonable in their terms and methods of enforcement, and the Tick Eradication Law (Acts 35th Leg. [1917] c. 60 [Vernon's Ann. Civ. St. Supp. 1918, art. 7314 et seq.]) is valid with or without the local option feature. *Id.*

The Tick Eradication Law (Acts 35th Leg. [1917] c. 60 [Vernon's Ann. Civ. St. Supp. 1918, art. 7314 et seq.]) is in force and effect in counties where no local election has been had under section 7 of such act. *Id.*

**Quarantine orders.**—In order to make a special quarantine order of the live stock sanitary commission of Texas effective, it must designate the territory or premises included in the order with sufficient particularity to enable the person or persons affected thereby to know the territory so quarantined, and an information or complaint charging a violation of the Tick Law within such specially designated territory or premises must contain such a description. *Smith v. State* (Cr. App.) 232 S. W. 522.

**Liability of carrier.**—Where plaintiff without dipping his cattle, in pasture in territory under quarantine, could not have taken them to defendant's station for interstate shipment, without violating quarantine regulations, defendant, because notifying plaintiff in advance that it would not transport them unless they were dipped, was not liable for the damage from dipping them, which plaintiff thereupon had done, irrespective of whether under regulations, under the national quarantine act, it would have been defendant's duty to receive them for shipment had they been moved and tendered for shipment without dipping. *Pecos & N. T. Ry. Co. v. Hall* (Com. App.) 222 S. W. 170, reversing judgment (Civ. App.) 189 S. W. 535.

A railway company was not liable to a shipper of cattle for negligence in causing bulls in a shipment to be castrated, where the carrier, intending to comply with quar-

antine regulations, refused to receive the bulls for shipment unless they were given, the tubercular test or castrated, and the shippers exercised their choice and themselves castrated the bulls. *Texas & P. Ry. Co. v. McDowell* (Civ. App.) 222 S. W. 1109.

**Injunction.**—Commissioners' court could not be enjoined from exercising power under Acts 35th Leg. c. 60, relating to prevention of diseases in live stock in force at time of application for writ, merely because Acts 33d Leg. c. 169, in force when order was made, did not authorize action. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

In suit to enjoin the inspector of a county from requiring cattle to be dipped pursuant to the Tick Eradication Statute, testimony that, instead of being harmful, the dipping of cattle is beneficial, even if inadmissible, held harmless to plaintiff cattle owners. *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

**Evidence of rules and regulations.**—In suit to enjoin a county inspector from requiring cattle to be dipped pursuant to the Tick Eradication Statute, certified copy of the rules and regulations of the Live Stock Sanitary Commission, not certified by any member of the Commission, but by the acting Secretary of State, held admissible. Admission of such certified copy, if erroneous, held not ground for reversal, when complained of by plaintiff cattle owners, who had the burden of proving their case. *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

**Judicial notice of rules and regulations.**—Under Tick Eradication and Quarantine Law, court and jury will take judicial notice of rules and regulations of live stock sanitary commission proclaimed by Governor, but judicial notice cannot be taken of rules and regulations not so proclaimed. *Mulkey v. State*, 83 Cr. R. 1, 201 S. W. 991.

Proof of violation of proclamation of Governor defining quarantine areas, etc., which did not purport to show that regulations had been prescribed by live stock sanitary commission, held not sufficient to support conviction of violation of rules and regulations of commission; for court cannot take judicial notice that rules proclaimed were those of commission. *Id.*

#### Art. 7314a.

See *Mulkey v. State*, 83 Cr. R. 1, 201 S. W. 991.

**Effect of federal regulations.**—State regulations for moving cattle from pasture in quarantined territory to station are not in conflict with and so not superseded by, federal regulations, under the national quarantine act, relating solely to their movement in interstate shipment. *Pecos & N. T. Ry. Co. v. Hall* (Com. App.) 222 S. W. 170, reversing judgment (Civ. App.) 189 S. W. 535.

**Art. 7314b. Control of sale of veterinary biological products; eradication of fever-carrying tick and other contagious diseases; special quarantine districts; quarantine of pastures, etc.; prescribing methods of dipping.**

**Constitutionality.**—Rev. St. 1911, art. 7312 et seq., and Acts 33d Leg. c. 169, § 3 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 7314b), giving the live stock sanitary commission authority to promulgate rules for quarantine areas, etc., are not invalid as delegation of legislative authority to administrative body. *Mulkey v. State*, 83 Cr. R. 1, 201 S. W. 991.

**Previous examination necessary.**—Under Acts 35th Leg. c. 60, §§ 2, 3, 4, regarding powers of sanitary live stock commission, held, that examination disclosing presence of fever-carrying ticks and necessity for dipping is prerequisite to authority to require cattle to be dipped. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

**Art. 7314d. Duties of commissioners' court and county judge.**—It shall be the duty of the county commissioners' courts to co-operate with and assist the Live Stock Sanitary Commission in protecting the live stock of their respective counties from all malignant, contagious, infectious or communicable diseases, whether such diseases exist within or outside the county, and otherwise protect the live stock interests of their counties. It shall be the duty of said commissioners' courts to co-operate with the Live Stock Sanitary Commission and the officers working under the authority or direction of said commission in the suppression and eradication of fever-carrying ticks, and all malignant, contagious, infectious or communicable diseases of live stock; provided when it becomes necessary to disinfect any premises, county or subdivision of the county infected with fever-carrying ticks, anthrax, hog cholera, glanders, foot and mouth diseases, bovine tuberculosis or contagious abortion, under order of the Live Stock Sanitary Commission, the county judge of the county where the said premises are located, shall have such disinfecting done at the expense of the county, and according to the rules and regulations of the Live Stock Sanitary Commission, and the said commissioners' courts are hereby authorized and empowered and directed to

appropriate moneys out of the general fund of their counties, to incur indebtedness by the issuance of warrants and to levy a tax to pay the interest thereof, and provide for a sinking fund in payment thereof for the purpose of purchasing, constructing or leasing necessary public dipping vats within their counties, and for the purchase of dipping material and other materials and for the hire of labor necessary to destroy the diseases and the carriers herein mentioned; provided, that for such permanent improvements, funds may be expended out of the general fund of the county; provided, further, that said warrants shall draw interest at a rate not exceeding six per cent per annum; and provided, further, that all warrants issued under this chapter shall run not exceeding twenty years from the date thereof. [Acts 1913, p. 353, § 5; Acts 1917, 35th Leg., ch. 60, § 3; Acts 1919, 36th Leg., ch. 44, § 1 (§ 3); Acts 1920, 36th Leg. 4th C. S., ch. 10, § 1 (§ 3).]

Took effect 90 days after Oct. 2, 1920, date of adjournment.

**Constitutionality.**—Acts 33d Leg. c. 169, authorizing commissioners' court to cooperate with live stock sanitary commission, authorized expenditure of all county money necessary and not inhibited by Const. art. 11, § 7. *Brazeale v. Strength* (Civ. App.) 196 S. W. 247.

Acts 35th Leg. c. 60, and Acts 33d Leg. c. 169, requiring expenditure by county for building of vats and dipping of cattle to prevent disease, does not violate Const. art. 11, § 7, relating to provision for sinking fund and interest. *Id.*

**Previous examination necessary.**—Under Acts 35th Leg. c. 60, §§ 2, 3, 4, regarding powers of sanitary live stock commission, held, that examination disclosing presence of fever-carrying ticks and necessity for dipping is prerequisite to authority to require cattle to be dipped. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

**Duty of owner in absence of free dipping vats.**—That free dipping vats have not been provided by the county does not excuse an owner of cattle from refusing to obey the tick eradication statute. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

**Criminal responsibility for failure to pay charges.**—Tick Eradication Law (Acts 35th Leg. [1917], c. 60, § 3 [Vernon's Ann. Civ. St. Supp. 1918, § 7314d]), as amended by Acts 36th Leg. (1919), c. 44, shows a legislative intention that facilities for the dipping of tick-infected cattle should be furnished at public expense, so that one required to pay a charge for the use of the facilities provided cannot be prosecuted for failure to dip cattle as ordered. *Walker v. State* (Cr. App.) 222 S. W. 569.

**Art. 7314d1. Time of compliance by counties in designated zones not changed.**—Provided the provisions of this Act shall in no wise change the time of those counties under the designation of Zones No. 1, No. 2 and No. 3 to comply with the provisions of this Act as amended, but the same shall remain in effect. [Acts 1919, 36th Leg., ch. 44, § 1, adding section 3a.]

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

**Art. 7314dd. Duty of commission to make investigations and quarantine animals; duty of state veterinarian.**

**Previous examination necessary.**—See *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

**Art. 7314e. Election in counties on question of tick eradication; quarantine.**

**Result of election.**—In a prosecution for violating the tick eradication statute, it was error to permit the county judge orally to testify as to the fact of the publication of the result of the election for taking up the work of tick eradication in the absence of a showing that such proof was necessary because of the loss or destruction of the certificate provided for by this article. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

**Governor's proclamation.**—A proclamation of the Governor, under this article, is not evidence that a local option was ever in fact held, but mere hearsay. *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340.

Courts will take judicial cognizance of a proclamation of the Governor given under this article, but will not take judicial cognizance of the fact that a local option election has been held under such section, or that such law is in force in any particular territory. *Id.*

**Counties subject to act.**—The Tick Eradication Law (Acts 35th Leg. [1917] c. 60 [Vernon's Ann. Civ. St. Supp. 1918, art. 7314 et seq.]) is in force and effect in counties where no local election has been had under section 7 of such act. *Gandy v. State* (Cr. App.) 220 S. W. 339.

**Release of county from operation of act.**—Under the Tick Eradication Law (Laws 1917, c. 60) § 7 (Vernon's Ann. Civ. St. Supp. 1918, art. 7314e), particularly in view of

sections 3 and 9, when such law is voted into existence by a county power to determine when the territory shall be released or declared free from ticks and the cattle permitted to be moved is confided to the Live Stock Sanitary Commission to be exercised by the promulgation of proper rules and regulations, which shall be made effective by proclamation of the Governor. *Godwin v. State*, 87 Cr. R. 632, 224 S. W. 896.

**Injunction.**—Allegation of fraud or misrepresentation by live stock inspector and those interested in securing passage of quarantine law as applied to county, in an election, held for that purpose, does not present legal ground for injunction restraining inspector from requiring cattle to be dipped. *Trimble v. Hawkins* (Civ. App.) 197 S. W. 224.

#### Art. 7314f. Zones or districts for tick eradication.

See *Godwin v. State*, 224 S. W. 896; note under art. 7314e.

**Constitutionality.**—The Tick Eradication Statute in its application to Coryell county, embraced within the quarantine zone, held not obnoxious to the Constitution, and not violative of the rights of cattle owners in the county, personal or property, because their cattle were free from statutory diseases or fever-carrying tick. *Lewis v. Harrison* (Civ. App.) 229 S. W. 691.

**Art. 7314ff. Zones or districts for tick eradication.**—That Chapter 60 of the General Laws of the State of Texas, passed at the Regular Session of the Thirty-Fifth Legislature of the State of Texas, being an Act supplementing the Act creating the Live Stock Sanitary Commission for the State of Texas, and which is known as the Eradication of the Cattle Ticks law, be so amended as that hereafter Val Verde County, in the State of Texas, shall be placed in Zone No. 2, as defined in said Act, instead of in Zone 1, as heretofore. [Acts 1917, 35th Leg. 2d C. S., ch. 4, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 7314fff. Same.**—That Chapter 60 of the General Laws of the State of Texas, passed at the Regular Session of the Thirty-fifth Legislature of the State of Texas, being an Act supplementing the Act creating the Live Stock Sanitary Commission for the State of Texas, and which is known as the eradication of the Cattle Ticks Law, be so amended as that hereafter Uvalde County and Medina County, in the State of Texas, shall be placed in Zone No. 3, as defined in said Act, instead of Zone No. 2 as heretofore. [Acts 1919, 36th Leg., 2d C. S., ch. 27, § 1.]

#### Art. 7314g. Proclamations respecting quarantine in tick zones.

See *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

**Sufficiency and effect of proclamation.**—See *Godwin v. State*, 224 S. W. 896.

In a prosecution for violating tick eradication statute, a supplemental proclamation of the Governor, declaring the county under tick quarantine, was not inadmissible as against the objection that it did not appear that the proclamation had been published in any newspaper, although it would have been inadmissible on objection that it was not a copy certified by the secretary of state, as prescribed by this article. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

A certified copy of a proclamation of the Governor would be sufficient to establish the existence of a quarantine under such sections, although such is not true of a proclamation under article 7314e. *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340.

Supplemental Proclamation No. 12 by the Governor of Texas, relative to the release of certain territory from the Tick Eradication Law held to have released cattle in the territory specified from quarantine only in so far as the quarantine forbade the movement of such cattle. *Godwin v. State*, 87 Cr. R. 632, 224 S. W. 896.

#### Art. 7314h. Same; movement of animals in quarantined districts.

See *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340; note under art. 7314g.

**Art. 7314k1. Live Stock Sanitary Commission may direct dipping of cattle, etc.**—The Live Stock Sanitary Commission, or its chairman, is hereby authorized and empowered to direct in writing any person, or persons, company, or corporation, owning, controlling, or caring for any cattle, horses, mules or asses, which are subject to being dipped under the provisions of this Act, to dip all or any of said cattle, horses, mules, or asses, under the supervision of an authorized inspector of such Commission, in an arsenical solution of a strength not less than seven

and one-half pounds, and not more than eight and one-half pounds of arsenic to each five hundred gallons of water in the said solution for the purpose of destroying, eradicating and removing said fever-carrying tick or exposure, subject to the provisions of this Act. Said dippings shall be administered at regular intervals but the Live Stock Sanitary Commission shall not require the dipping of cattle at more frequent intervals than every fourteen days. [Acts 1920, 36th Leg. 3d C. S., ch. 38, § 1 (§ 15a).]

**Art. 7314k2. Form and requisites of direction.**—The written direction issued by the Live Stock Sanitary Commission, or its chairman, requiring the dipping of cattle, as provided for in this Act, shall be dated, showing the date of its issuance, the name of the person, company, or corporation to whom the said directions are given, the approximate location of the premises on which the said live stock are located, the name of the county in which said premises are located, and it shall state in clear and intelligible language that the said cattle, horses, mules or asses, which the said person is therein directed to dip, have the fever-carrying tick upon them, or that they are exposed to the said fever-carrying tick, or are on a premise or other place on which the fever-carrying tick is known to exist, or that they have some time during the nine months next preceding the date of the issuance of said written direction hereinbefore provided been exposed to the said fever-carrying tick, or been on a premise or other place on which the fever-carrying tick is known to exist; and it shall direct the said person, company or corporation to dip the said live stock under the supervision of an authorized inspector of the Live Stock Sanitary Commission, in an arsenical solution of a strength of not less than seven and one-half pounds, nor more than eight and one-half pounds of arsenic to each five hundred gallons of water in the dipping solution in which the said live stock are to be dipped, and it shall designate the place, date and time that said dipping is to be done, and it shall be signed by the Live Stock Sanitary Commission or its chairman. [Id., § 1 (§ 15b).]

**Constitutionality.**—Acts 36th Leg. (1920) Third Called Sess. c. 38, § 15, authorizing the Live Stock Sanitary Commission to require the dipping of cattle exposed to fever-carrying tick within nine months prior to the passage of the act, and making violation of such direction a misdemeanor, is valid. *Walker v. State* (Cr. App.) 229 S. W. 513; *Lee v. Same* (Cr. App.) 229 S. W. 515.

**Art. 7314k3. Service of direction; affidavit of protest; hearing and determination; injunction.**—The said dipping direction, provided for in this Act, shall be delivered to the person, company, or corporation, owning, controlling, or caring for said cattle, horses, mules, or asses required to be dipped, at least fourteen full days before the date and time said dipping is to be administered. The person, company, or corporation, owning, controlling, or caring for said cattle, horses, mules, or asses, required to be dipped under the provision of this Act may file with the Live Stock Sanitary Commission, or its chairman, a written affidavit at any time within five days after receiving said written direction and not later, denying that said cattle, horses, mules or asses, are subject to being dipped under the provisions of law, or that for good and sufficient reason set out in said affidavit the said person, company, or corporation is entitled to have said dipping direction rescinded, or to have said dipping postponed, and requesting that the Live Stock Sanitary Commission, or its chairman, withhold the enforcement of said dipping direction and grant him, or them, a hearing on said matter, or make necessary investigation to determine the correctness of the statement contained in said affidavit. Upon the receipt of said affidavit the

Live Stock Sanitary Commission, or its chairman, shall within five days after receipt of such affidavit grant said affiant a hearing in the office of the chairman of said Commission if the affiant so desires it, and gives such affiant notice of such hearing by telegram or registered mail, and which hearing shall be set not less than four days after the service of said notice and the said Commission shall consider such *ex parte* affidavits as such owner or caretaker may file with said Commission in said hearing and said Commission and its chairman shall make such investigation in person, or through its authorized representatives, in reference to said statement as the said Commission, or chairman thereof, deem necessary, and if said statements are found to be correct the said dipping direction shall be rescinded by the said Commission, or its chairman; otherwise the said dipping direction shall be enforced on the date and at the time specified in said written direction. The said Commission, or its chairman, after having granted said hearing, or made said investigation, shall notify the said person, company, or corporation in writing of its findings, which said notice shall be delivered to the said person, company, or corporation, at least four full days before the day and time he or they are required to dip said cattle, horses, mules, or asses, by virtue of said written direction. If the said person, company, or corporation who has been directed to dip said cattle as hereinbefore provided for shall be dissatisfied with the findings of the Commission, he or they may apply to a court of proper venue and jurisdiction for injunctive or other relief and the Live Stock Sanitary Commission shall not enforce the said dipping order until the final disposition of said suit or action. [Id., § 1 (§ 15c).]

**Criminal responsibility.**—Under the provision that a person notified to dip his cattle may file a protest and may obtain an injunction if dissatisfied with the action of the Live Stock Sanitary Commission thereon, it is not necessary to show the taking of such steps in order to avail of defenses against a criminal prosecution. *Walker v. State* (Cr. App.) 229 S. W. 513; *Lee v. Same* (Cr. App.) 229 S. W. 515.

**Art. 7314k4. Inspections, how made.**—The ascertaining of the presence of the fever-carrying tick on any premise, place or live stock, or the ascertaining of exposure of premises, places, or live stock, to said fever-carrying tick, shall be done by authorized representative or inspectors, of the Live Stock Sanitary Commission, or by the said Commissioners. [Id., § 1 (§ 15d).]

**Art. 7314k5. Rules and regulations.**—The Live Stock Sanitary Commission is hereby authorized and empowered to make, adopt and promulgate, rules and regulations for carrying out and enforcing all the provisions of this Act. [Id., § 1 (§ 15e).]

**Art. 7314l. Publication or notice of quarantine order.**—Whenever the Live Stock Sanitary Commission shall have determined the fact that cattle, horses, mules, asses, sheep, hogs, goats, or other live stock, are infected with, or exposed to splenetic tick fever, bovine tuberculosis, anthrax, glanders, contagious abortion, hemorrhagic septicaemia, scabies, hog cholera, malta fever, or other similar, or dissimilar contagious, infectious, or communicable diseases, or to the agency of transmission thereof, recognized by the veterinary science as being contagious, infectious, or communicable, the said Commission shall designate the district, county, or part of county, or premises necessary to be quarantined, and notice of such quarantine shall be issued by the said Commission, or chairman thereof, as provided herein. Publication of such quarantine orders may be made in any newspaper within such area, or if no newspaper is published in such area, then the nearest newspaper thereto. In lieu of such publication the Live Stock Sanitary Commission may give

notice of such quarantine by posting a copy of such quarantine notice at the county court house door of the county in which said quarantine is to be effective. A written notice of such quarantine delivered to the owner or caretaker of live stock to be quarantined shall be sufficient notice of such quarantine, in lieu of notices above provided; provided that the owner or caretaker, of milch or dairy cows shall not be required to dip such cattle unless upon examination by an authorized inspector of the Live Stock Sanitary Commission, such cattle or a part of them are found to have the fever-carrying tick upon them, or are exposed to said fever-carrying tick, and if the said Live Stock Sanitary Commission shall so find, then said quarantine shall be effective as to the premises of such owner, and said person shall be subject to all the provisions of this Act, provided the term milch or dairy cows shall include only such cattle as are actually used for domestic or dairy purposes and does not include stocker or breeding cattle for other purposes. [Acts 1917, 35th Leg., ch. 60, § 17; Acts 1917, 35th Leg. 1st C. S., ch. 12, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 38, § 2 (§ 17).]

**Explanatory.**—Sec. 15 of the act is penal in its nature and is set forth as art. 1284k of the Penal Code, post. The act took effect June 17, 1920.

**Evidence.**—In prosecution for failure to comply with notice to dip cattle located in quarantined territory under Acts 35th Leg. (1917) c. 60, §§ 17, 18 (Vernon's Ann. Civ. St. Supp. 1918, arts. 7314l, 7314m), the evidence to sustain conviction must show that the quarantine had been established. *Dodson v. State*, 87 Cr. R. 152, 219 S. W. 1101.

**Art. 7314m. Same; filing copy of notice with county clerk; evidence.**

See *Dodson v. State*, 87 Cr. R. 152, 219 S. W. 1101.

**Service of notice on Sunday.**—Service of notice to dip cattle made on Sunday, was not illegal, despite art. 1816, there being no such provision in the Code of Criminal Procedure. *Williams v. State* (Cr. App.) 229 S. W. 545.

**Art. 7314n. Seizure of animals being moved in quarantine district; dipping or treating; compensation of sheriff; lien.**

**Constitutionality.**—This article is not subject to objection that it attempts to vest in the sheriff, acting under direction of the live stock sanitary commission, authority to enter upon plaintiff's premises and seize and mistreat plaintiff's cattle without due process of law and without compensation for, or protection against, injuries likely to result in such seizure and treatment, or as delegating to the live stock sanitary commission legislative authority and discretion. *Serres v. Hammond* (Civ. App.) 214 S. W. 596.

**Cattle need not be infested.**—Cattle need not be actually infested with ticks in order to make them subject to the tick eradication statute and to the requirement of the live stock sanitary commission that they be dipped; the requirements applying to all cattle within the specified quarantine zone. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

**Extent of inspection.**—To authorize official live stock inspectors to proceed with dipping of cattle under tick eradication laws, it is not necessary that each animal be inspected and some condition found to exist authorizing work of tick eradication, but before the live stock commission or its agents or inspectors are authorized to require dipping or to dip the cattle themselves, some investigation must be made disclosing existence of disease or presence of tick. *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

**Art. 7314q. Construction of act; repeal.**

See *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

**Art. 7314r. Validation of elections.**

**Validity and effect.**—In view of Const. art. 16, § 23, the Legislature had authority to validate, by this article, an election of April 3, 1917, whereby Dallas county determined, under Acts 33d Leg. c. 169 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 7314-7314e), that the county should take up the work of tick eradication, though chapter 169 before the election was held was repealed by Acts 35th Leg. c. 60 (Vernon's Ann. Civ. St. Supp. 1918, arts. 7314-7314q). *Castleman v. Rainey* (Civ. App.) 211 S. W. 630.

## CHAPTER NINE

## VETERINARY MEDICINE AND SURGERY

## Art.

7324a. Practitioners must comply with act.

7324b. State board of veterinary medical examiners.

7324c. Same; oaths of office; organization; meetings; quorum; rules and regulations.

7324d. Same; records to be kept.

7324e. Practice of veterinary medicine without registration of authority to practice.

7324f. Veterinary medical register; duties of district clerks.

7324g. Reciprocal arrangements with other states.

7324h. Applications for examination; qualifications of applicants; fee.

7324i. Fees of applicants for examination; disposition of.

7324j. Examination; scope and conduct of.

## Art.

7324k. Exceptions from operation of act.

7324l. Revocation of right to practice.

7324m. Refusal to admit to examinations or to issue certificates; grounds for.

7324n. What constitutes practice of veterinary medicine.

7324o. Applications by veterinarians previously licensed, etc.; fee; license.

7324p. Definitions.

7327q. Continuance in office of members of old board.

7324r. Veterinarians with certificates of permanent license.

7324s. Display and record of license.

7324t. Practicing in several counties without successive recording of license.

7324u. Repeal.

7324v. Partial invalidity of act.

**Article 7324a. Practitioners must comply with act.**—No person shall practice veterinary medicine or veterinary surgery in any of their branches, including veterinary, dentistry within this State, unless and until such persons shall have complied with the provisions of this Act. [Acts 1919, 36th Leg. 2d C. S., ch. 58, § 1.]

**Explanatory.**—Sec. 24 of this act, post, art. 7234u, repeals Acts 1911, p. 132, ch. 76. The act took effect 90 days after July 22, 1919, date of adjournment.

**Art. 7324b. State board of veterinary medical examiners.**—There shall be a board known as the "State Board of Veterinary Medical Examiners," said board to consist of 7 qualified veterinarians who shall have resided and practiced veterinary medicine and surgery under a diploma from a legal reputable College of veterinary medicine for more than five years prior to their appointment. Said Board shall be appointed by the Governor within ninety days after his inauguration from a list of eligible practitioners of veterinary medicine furnished the Governor by the Secretary of the State Veterinary Medical Association, and term of office of its members shall be two years, or until their successors shall be appointed and qualified. No member of the Board shall be a stockholder or a member of the faculty or a member of a board of trustees of any veterinary college. Vacancies occurring in the board shall be filled by the governor for the unexpired term. [Id., § 2.]

**Art. 7324c. Same; oaths of office; organization; meetings; quorum; rules and regulations.**—The members of said board shall qualify by taking the oath of office before any officer empowered to administer oaths in the county in which each shall respectively live. At the first meeting of said board after each bi-annual appointment, the board shall elect a president, vice president and secretary-treasurer four members shall constitute a quorum. Regular meetings shall be held at least twice each year at such time and places as shall be deemed most convenient for applicants for examination. Due notice of such meetings shall be given by publication in such papers as may be selected by the board. The board may prescribe rules, regulations and by-laws in harmony with the provisions of this Chapter, for its own government and proceedings for the examination of applicants for the practice of veterinary medicine and veterinary surgery. Said board or any member thereof shall have power to administer oaths for all purposes required in the discharge of its duties, and to adopt a seal to be affixed to all official documents. Spe-



cial meetings of said board may be held upon a call of four members of said board. [Id., § 3.]

**Art. 7324d. Same; records to be kept.**—The board of Examiners shall preserve a record of its proceedings in a book kept for that purpose, showing the name, age and place and duration of residence of each applicant, the time spent in study in medical schools, and the year and school from which degrees were granted, or in case where the applicant qualifies as having been engaged in the practice of veterinary medicine in Texas, prior to 1911, same shall show age, name and place and duration of residence and the number of years engaged in the practice of veterinary medicine in Texas. Said record shall show whether applicants were rejected on examination or licensed and shall be prima facie evidence of all matters contained therein. The secretary of the board shall transmit an official copy of said register to the Secretary of State for permanent record, certified copy of which with hand and seal of the Secretary of said board or of the Secretary of said board or of the Secretary of State be admitted in evidence in all courts. [Id., § 4.]

**Art. 7324e. Practice of veterinary medicine without registration of authority to practice.**—It shall be unlawful for anyone to practice veterinary medicine in any of its branches upon animals within the limits of this State, who has not registered in the district clerk's office of the county in which he resided, his authority for so practicing, as herein prescribed together with his age, post office address, place of birth and name of school of veterinary medicine from which he graduated. Provided that nothing in this Act shall prohibit any person, who has heretofore registered as a veterinary surgeon in the county of his residence according to the provisions of Chapter 76 of the Acts of the regular session of the Thirty-second Legislature who had previous to the year 1911 practiced veterinary medicine or veterinary surgery as his principal occupation for five years in the State of Texas prior to the year 1911, from practicing in the county of his residence only by securing a license from the State Board of Veterinary Medical Examiners by filing satisfactory evidence of his former compliance with the requirements of said Act, chapter 76, Acts of the regular session of the Thirty-second Legislature, together with an affidavit that he has practiced veterinary medicine or or veterinary surgery continuously for five years prior to 1911, in which affidavit he shall state the place where he has practiced veterinary medicine or veterinary surgery for five consecutive years immediately prior to 1911, together with his place of residence during said period. Upon the face of such license shall be printed the words, non-graduate. Provided further that after the passage of this Act, it shall be unlawful for any person to register under the five year practicing clause of this section, but the object of this provision is to permit persons who have heretofore lawfully registered to continue practicing under the five year clause. That in case if the oaths herein provided for are willfully false, it shall subject the person making same to conviction and punishment for false swearing. The fact of such oath shall be endorsed upon the certificate or license as the case may be, but if such person shall remove from such county of residence, he shall comply with all the requirements of this Act before he shall be allowed to practice. [Id., § 5.]

**Art. 7324f. Veterinary medical register; duties of district clerks.**—It is hereby made the duty of the district clerk of each county in this State to keep a book of suitable size to be known as the "Veterinary Medical Register" of such county and record therein the name and record of each veterinary practitioner who presents a certificate from the state

board of veterinary examiners. The clerk shall receive the sum of one dollar from each person so registered, which shall be his full compensation for all duties required under this Act. When any person registered in said book shall die, remove from the county or have his license revoked, it shall be the duty of said clerk to make note of the facts thereof at the bottom of the page containing the record of such person as closing the record. On the first of January of each year said clerk shall on request of the board, certify to the office of said board of veterinary medical examiners a correct list of the veterinarians then registered in the county, together with such other information as said board may require. A copy from said register pertaining to any person, certified by said clerk under the seal of said court, also a certificate issued by said officer certifying that any person named therein has or has not registered in said office as required by this Act shall be admitted as evidence in all trial courts. [Id., § 6.]

**Art. 7324g. Reciprocal arrangements with other States.**—The board of veterinary medical examiners may at its discretion arrange for reciprocity in license with the authorities of other states and territories having requirements equal to those established by this law. License may be granted applicants for license under such reciprocity upon payment of twenty dollars. [Id., § 7.]

**Art. 7324h. Applications for examination; qualifications of applicants; fee.**—All applicants to practice veterinary medicine in this State, not otherwise licensed under the provisions of this Act, must successfully pass an examination before the board of veterinary medical examiners. Applicants to be eligible for examination must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character, and graduates of bona fide reputable veterinary medical schools, and a bona fide veterinary medical school shall be one whose requirements for a degree and whose equipment is such as is at present required for recognition by the Bureau of Animal Industry of the United States Department of Agriculture, or the American Veterinary Medical Association. Application for examination must be made in writing under affidavits to the secretary of the board, accompanied by the sum of fifteen (15) dollars. Such applicants shall be given due notice of the date and place of examination. In case any applicant because of failure to pass examination be refused a license, such person may be permitted to take a second examination without additional fee. [Id., § 8.]

**Art. 7324i. Fees of applicants for examination; disposition of.**—The fund realized from the aforesaid fees shall be applied first to the payment of the necessary expenses of the board; any remaining funds shall be applied by order of the board to compensating members of the board at ten dollars per day provided that it shall be unlawful for the board or any member thereof in any manner or for any purpose to charge or obligate the state for the payment of any money and the members of said board shall look alone to the revenue derived from the operation of this Act for his compensation and for the expenses of conducting said board. [Id., § 9.]

**Art. 7324j. Examinations; scope and conduct of.**—All examinations shall be conducted in writing in such manner as shall be entirely fair and impartial. The applicants to be known by numbers without names or other methods of identification on examination papers by which members of the board may be able to identify such papers until

after the applicants have been granted licenses or rejected. Examinations shall be conducted on the scientific branches of veterinary medicine only, and shall include veterinary anatomy, veterinary pathology, chemistry, veterinary obstetrics, veterinary materia medica, veterinary sanitary science, veterinary practice, and veterinary jurisprudence, and veterinary physiology and bacteriology. Upon satisfactory examination under the rules of the board, applicants shall be granted license to practice veterinary medicine. All questions and answers with grades attached shall be preserved for one year and any person rejected shall be entitled to examine his said answers and the grades attached shall be preserved for one year and any person rejected shall be entitled to examine his said answers and the grades attached thereto. All applicants examined at the same time shall be given identical questions in each of the above branches. All certificates shall be attested by the seal of the board and signed by a majority of said board. [Id., § 10.]

**Art. 7324k. Exceptions from operation of act.**—Nothing in this law shall be so construed as to apply to commission or contract veterinarians in the employ of the United States or the Bureau of Animal Industry of the United States Department of Agriculture in the performance of their duties as such, but such shall not engage in private practice, nor to legally qualified veterinarians of other states called in consultation but who do not open offices. Nothing in this law shall be construed as to prohibit the sale by licensed druggists of remedies which they recommend for the cure of diseases of animals. [Id., § 11.]

**Art. 7324l. Revocation of right to practice.**—The right to practice veterinary medicine in this State may be revoked by any court of competent jurisdiction upon proof of the violation of the law in any regard thereto or for any cause for which the state board of veterinary medical examiners is authorized by law to refuse to admit to its examinations as hereinafter provided; and it shall be the duty of the several districts and county attorneys of this State to file and prosecute appropriate proceedings in the name of the State for violations thereof on request of any member of the said board. [Id., § 12.]

**Art. 7324m. Refusal to admit to examinations or to issue certificates; grounds for.**—The state board of veterinary medical examiners may refuse to admit to its examinations or to issue the certificate provided for by this act for any of the following causes:

The presentation to the board of any license certificate or diploma which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination.

Conviction of crime of the grade of felony, or one which involves moral turpitude.

Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public; or for habits of intemperance or drugs addiction calculated to endanger the lives of patients; provided that any applicant who may be refused admittance to examination before said board shall have his right of action to have such issue tried in the district court in the county in which some member of the board shall reside. [Id., § 13.]

**Art. 7324n. What constitutes practice of veterinary medicine.**—Any person shall be deemed as practicing veterinary medicine or veterinary surgery or dentistry who professes publicly to be a veterinary physician, surgeon or dentist, or who appends to his name any initials or title implying qualifications to practice veterinary medicine or who shall

treat, operate or prescribe for any physical ailment or deformity of any domestic animal for which he shall receive compensation, either direct or indirect, or any county demonstration or farm demonstration agent while in the employment of any county, state or federal government on a salary for treating or attempting to treat any animal for any disease, ailment or deformity. Nothing in this Act shall apply to persons not so employed gratuitously treating animals. It is further provided that the operations known as "Dehorning," "Castrating," or spraying shall not be construed as the practice of veterinary medicine or surgery nor the vaccination of cattle for blackleg as the practice of veterinary medicine. [Id., § 14.]

**Art. 7324o. Applications by veterinarians previously licensed, etc.; fee; license.**—Every person desiring to practice veterinary medicine or veterinary surgery within this state, whether under a license issued by a board upon examination, or by qualifying before the board of examiners as having practiced for more than five years prior to the year 1911 as provided for herein, as well as those who have been previously examined by the board of veterinary medical examiners under the Act of 1911, and who desire to continue in the practice of the profession of veterinary medicine shall within sixty days after the passage of this Act file with the Secretary of the board an application for renewal thereof, which application shall be accompanied by the fee hereinafter prescribed. If the board shall find that the applicant has been legally licensed or registered in this state, they shall issue to him a certificate attesting the fact. On or before the 1st day of March each year, each practicing veterinary physician in the state shall file with the secretary of the board of veterinary examiners his application for renewal of his license to practice. Said application shall be made on forms to be furnished by the board on which shall appear the name, age, and residence of the applicant, and whether practicing under a license issued by the board after examination or whether under the provisions of Chapter 76, Acts of 1911, as to practice of veterinary medicine for five years prior to 1911. All such applications shall be accompanied by a fee of one dollar. In case any person practicing veterinary medicine or veterinary surgery shall fail for a period of sixty days after the expiration of his license to make application to the board for its renewal, his name shall be erased from the register of licensed veterinarians, and before such person may again practice veterinary medicine he shall be required to take the examination before the board, unless, however, such person has been prevented from applying for renewal for good cause, of which the board shall be the judge of the sufficiency thereof. All license issued under the provisions of this Act shall expire on the 1st day of March of each year, and may be renewed by complying with the provisions of this Act. [Id., § 15.]

**Art. 7324p. Definitions.**—The terms veterinarians, veterinary medicine, veterinary surgery, veterinary physician and veterinary dentist as used in this Act shall be construed as synonymous. [Id., § 16.]

For sections 17 and 18 of this act, see post, Penal Code, arts. 799h, 799i.

**Art. 7324q. Continuance in office of members of old board.**—It is further provided that the members of the State Board of Veterinary Medical Examiners, appointed and acting under authority of Chapter 76, of the Acts of the regular session of the Thirty-second Legislature, shall continue in office, without re-appointment, after the passage of this Act, with full power and authority to exercise all the powers and duties of said office prescribed in this Act, until the appointment and qualification of members of said board under authority of this Act. [Id., § 19.]

**Art. 7324r. Veterinarians with certificates of permanent license.**—Nothing in this Act shall be construed as requiring veterinarians or veterinary surgeons who have successfully passed examination on the subjects prescribed in Article 7324e, revised Civil Statutes of 1914 and who have been granted certificate of permanent license by said Board of Veterinary Medical Examiners, to again submit themselves to examination. But such certificate of permanent license is valid to all intents and purposes, subject to all the provisions of this Act. [Id., § 20.]

**Art. 7324s. Display and record of license.**—Any person receiving a certificate of license from the Board of Veterinary Medical Examiners shall forthwith have it recorded in the office of the District Clerk of the County in which he makes his residence, and shall display it in his regular place of business. The date of recording shall be recorded thereon, and until the license is recorded the holder shall not exercise any of its rights or privileges therein conferred; and in case said license is not recorded within ninety days from its date of issuance, it shall become invalid. The District Clerk shall be paid his fee for recording such certificate by holder thereof. [Id., § 21.]

**Art. 7324t. Practicing in several counties without successive recording of license.**—Any veterinarian or veterinary surgeon who has successfully passed examination on the subjects prescribed in Article 7324e of the Revised Civil Statutes of 1914 or in section 10 of this Act [7324j], and who have been granted license by said Board to practice veterinary medicine, veterinary surgery or veterinary dentistry in this State, and has recorded his license as provided for in this Act, may go from one county to another county in this State on professional business and may practice veterinary medicine, veterinary surgery or veterinary dentistry in any county in this State to which he may go, without recording or registering said license in any county to which he may go or in which he may practice. Provided that any veterinarian or veterinary surgeon who has successfully passed the said examination and recorded his license as provided for in this Act, and who removes his residence from the county in which his license is recorded, shall again record his license in the county to which he removes his residence, in the same manner as the same was recorded in the County from which he removed his residence. Such veterinarian or veterinary surgeon shall have no authority to practice in any county to which he removes his residence until he has recorded said license as herein provided. [Id., § 22.]

For section 23 of this act, see Penal Code, art. 799j.

**Art. 7324u. Repeal.**—All laws and parts of laws heretofore passed by the Legislature governing the practice of veterinary medicine, veterinary surgery or veterinary dentistry are hereby expressly repealed, and especially Chapter 76, Acts of the regular session of the Thirty-second Legislature. [Id., § 24.]

**Art. 7324v. Partial invalidity of act.**—In case any article or part hereof is held unconstitutional, the same shall not affect the other sections or parts hereof. [Id., § 25.]

## CHAPTER TEN

## COOPERATION WITH UNITED STATES BUREAU OF ANIMAL INDUSTRY

Art.  
7324<sup>1</sup>/<sub>4</sub>. Cooperation with United States Bureau of Animal Industry for eradication of tuberculosis; payment for animals killed.

Art.  
7324<sup>1</sup>/<sub>4</sub>a. Value of cattle reacting to tuberculin test.

**Article 7324<sup>1</sup>/<sub>4</sub>. Cooperation with United States Bureau of Animal Industry for eradication of tuberculosis; payment for animals killed.**— It shall be the duty of the Live Stock Sanitary Commission to co-operate with the Bureau of Animal Industry, United States Department of Agriculture, for the eradication of tuberculosis among cattle within the State of Texas, and the said Live Stock Sanitary Commission is hereby authorized to pay to the owner or owners of cattle reacting to Tuberculin Test administered by veterinarians employed by the Live Stock Sanitary Commission or by the United States Bureau of Animal Industry as hereinafter provided. The owner shall sell as directed by the Live Stock Sanitary Commission such reactors for immediate slaughter at any public slaughtering establishment where Federal post mortem inspection is maintained. After such sale the Live Stock Sanitary Commission is authorized to pay such owners out of such funds as may be appropriated by the Legislature for that purpose an amount not to exceed one-third of the difference between the appraised value of such reactors and the amount received by the owner as salvage in the sale of such reactors. In no case shall any payment be made for more than \$25.00 for any grade animal or more than \$50.00 for any pure bred animal, nor shall any payment be made under the provisions of this Act unless and until the owner of such reactors has complied with the regulations and orders of the Live Stock Sanitary Commission; nor shall any amount be paid in the indemnification of such reactors in excess of the amount paid by the United States Bureau of Animal Industry on the same reactors. [Acts 1919, 36th Leg., ch. 148, § 1.]

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

**Art. 7324<sup>1</sup>/<sub>4</sub>a.—Value of cattle reacting to tuberculin test.**—The value of cattle that have reacted to the Tuberculin Test shall be determined in the following manner; The Live Stock Sanitary Commission or the Chairman thereof or other representative of the Live Stock Sanitary Commission authorized to act for such Commission shall select one appraiser, who together with an appraiser appointed by representative of the United States Bureau of Animal Industry shall go to the premises on which such reactors are located and appraise the value of such reactors. In case they are unable to agree a third appraiser agreed to by them and the owner of such reactors shall be designated. In case of such inability on the part of the first two appraisers to agree on the value of such reactors necessitating a third appraiser as hereinbefore provided for the value of such reactors shall be determined by the agreement of two of such appraisers as to such value. The appraisers hereinbefore provided shall render to the Live Stock Sanitary Commission immediately after such appraisement a written report as to the agreed value of such reactors. [Id., § 2.]

## TITLE 125

## SUPPLIES FOR PUBLIC INSTITUTIONS

Chap.

1. State purchasing agent for eleemosynary institutions.

Chap.

2. Of the mode of supplying fuel to the executive and other departments.

## CHAPTER ONE

## STATE PURCHASING AGENT FOR ELEEMOSYNARY INSTITUTIONS

## Articles 7325-7338.

**Explanatory.**—By Acts 1919, 36th Leg., ch. 167, § 5, ante, art. 7150¼d, the office of State Purchasing Agent is abolished, and the provisions of these articles are made applicable to the State Board of Control.

## CHAPTER TWO

## OF THE MODE OF SUPPLYING FUEL TO THE EXECUTIVE AND OTHER DEPARTMENTS

## Articles 7339-7348.

**Explanatory.**—This chapter was expressly repealed by Act March 23, 1915, ch. 126, § 2. But by Acts 1919, 36th Leg., ch. 167, § 5, set forth, ante, as art. 7150¼d, the chapter is made applicable to the State Board of Control, created by the latter act. Whether the Legislature intended to revive these provisions, as they are set forth in Vernon's Sayles' Civ. St. 1914, as arts. 7339-7348, is a matter for judicial construction.

**TITLE 126**

**TAXATION**

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| <p><b>Chap.</b><br/>                 1. Of the levy of taxes and payment of occupation taxes.<br/>                 2. Taxes based upon gross receipts.<br/>                 3. Franchise tax.<br/>                 4. State Intangible Tax Board.<br/>                 5. Tax on liquor dealers.<br/>                 6. Tax on sale of intoxicating liquors in local option territory.<br/>                 7. Tax on dealers in non-intoxicating malt liquors.<br/>                 8. Tax on persons soliciting orders or operating cold storage for intoxicating or non-intoxicating beverages in local option districts.<br/>                 9. Occupation tax on handling liquors C. O. D.<br/>                 10. Inheritance tax.</p> | <p><b>Chap.</b><br/>                 11. Of the property subject to taxation, and the mode of rendering the same.<br/>                 12. Of the assessment of taxes—election and qualification of assessor.<br/>                 13. Of the collection of taxes; election and qualification of collector.<br/>                 14. Of the assessment and collection of back taxes on unrendered lands.<br/>                 15. Delinquent taxes.<br/>                 17. Assessment and collection of taxes in certain cases.<br/>                 18. Of municipal taxes to pay subsidies in aid of railroads and other internal improvements.<br/>                 18a. Improvement district taxes to pay certain certificates of indebtedness.</p> |
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**CHAPTER ONE**

**OF THE LEVY OF TAXES AND PAYMENT OF OCCUPATION TAXES**

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| <p><b>Art.</b><br/>                 7354. Poll tax.<br/>                 7355. Occupation taxes.<br/>                     Sec. 26. Electric light companies.<br/>                     27. Waterworks companies.<br/>                     36. Moving picture shows.<br/>                 7356. Tax on dealers in cannon crackers, etc.<br/>                 7356a. Tax on emigrant agents.<br/>                 7357. County ad valorem, etc.</p> | <p><b>Art.</b><br/>                 7358. Taxes payable in what.<br/> <br/>                     <b>REVENUE AGENT</b><br/>                 7366-7368. [Repealed.]<br/>                 7368a. Laws repealed.<br/>                 7368b. Comptroller of Public Accounts to perform duties, etc., of State Revenue Agent.</p> |
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**Article 7354. [5048] Poll tax.**—There shall be levied and collected from every person between the ages of twenty-one and sixty years, resident within this State, on the first day of January of each year (Indians not taxed, and persons insane, blind, deaf or dumb, or those who have lost one hand or foot, excepted) an annual poll tax of one dollar and fifty cents, one dollar for the benefit of the free schools, and fifty cents for general revenue purposes; provided, that no county shall levy more than twenty-five cents poll tax for county purposes. [Acts 1882, p. 18; Acts 1920, 36th Leg. 4th C. S., ch. 6, § 1, amending art. 7354, Rev. Civ. St.]

Took effect Oct. 2, 1920.  
 See Earnest v. Woodlee (Civ. App.) 208 S. W. 963.

**Art. 7355. [5049] Occupation taxes.**

**Sec. 26. Electric Light Companies.** From each electric light company operating an electric light plant in a town or city of ten thousand inhabitants or more, thirty-five dollars; in a city or town of less than ten thousand and more than six hundred inhabitants, twenty dollars. [Acts 1897, 1 S. S., p. 49; Acts 1920, 36th Leg. 3d C. S., ch. 16, § 1.]

**Sec. 27. Water Works Companies.** From each water works company operating a water work plant in a town or city of ten thousand inhabitants or more, thirty-five dollars; in a city or town of less than ten thousand and more than six hundred inhabitants, twenty dollars. [Acts 1897, 1 S. S., p. 49; Acts 1920, 36th Leg. 3d C. S., ch. 16, § 1.]

**Explanatory.**—Sec. 2 repeals all laws in conflict. Act took effect 90 days after adjournment which occurred June 18, 1920.



**Sec. 36. Moving picture shows.**

**Information.**—Information charging violations of this section, held insufficient. *Harkey v. State*, 82 Cr. R. 66, 198 S. W. 301.

## DECISIONS RELATING TO ARTICLE IN GENERAL

See *Hegman v. State* (Cr. App.) 227 S. W. 954.

**Validity of statute in general.**—Courts will not enforce a law, nor can the Legislature pass one, which levies an occupation tax upon the business of selling an article in a district of the state in which its sale is prohibited. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

Callings that cannot be regulated except by license tax are those which cannot in their operation be dangerous to the public, but all others may be restricted. *Juhan v. State*, 86 Cr. R. 63, 216 S. W. 873.

**Art. 7356. Tax on dealers in cannon crackers, etc.**

**Recovery of tax paid.**—Where a foreigner, dealing in merchandise, but not selling cannon crackers or toy pistols, as described in this article, paid an illegal occupation tax under threats of prosecution, fines, and imprisonment, his action for recovery thereof was not subject to defense of voluntary payment. *City of Seguin v. Berman* (Civ. App.) 205 S. W. 990.

**Art. 7356a. Tax on emigrant agents.**—There is hereby levied, and there shall be collected from each and every person, firm or private employment agency who shall engage in or pursue the business of an emigrant agent, as that term is defined by the statutes of this State, an annual occupation tax in the sum of five hundred dollars, which tax shall be paid in advance by any person, firm, or private employment agency before engaging in or pursuing the business of emigrant agent. The tax hereby levied shall be in addition to any license fees which may be otherwise prescribed by statute. [Acts 1920, 36th Leg. 4th C. S., ch. 14, § 1.]

**Explanatory.**—Took effect 90 days after Oct. 2, 1920, date of adjournment. **Sec. 2** of the act is set forth, post, as art. 999½a, Penal Code.

**Art. 7357. [5050] County ad valorem, etc.**

See *Carroll v. Williams*, 109 Tex. 155, 202 S. W. 504.

**Art. 7358. [5051] Taxes payable in what.**

Cited, *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

## REVENUE AGENT

**Arts. 7366–7368.** [Repealed by Acts 1918, 35th Leg. 4th C. S., ch. 94, § 1, the repeal to take effect Jan. 15, 1919.]

**Explanatory.**—In view of art. 7368b, transferring the duties and functions of the State Revenue Agent to the Comptroller of Public Accounts, these articles may be regarded as live law so far as they direct action by the comptroller.

**Art. 7368a. Laws repealed.**—Any and all laws heretofore enacted by the Legislature of the State of Texas, appropriating moneys for the support and maintenance of the State Revenue Agent's office, be and the same are hereby repealed. [Acts 1918, 36th Leg. 4th C. S., ch. 94, § 2.]

**Explanatory.**—Sec. 1 of this act repeals arts. 7074, 7366, 7367, 7368, and 7392. **Sec. 3** provides that the act shall become effective Jan. 15, 1919.

**Art. 7368b. Comptroller of Public Accounts to perform duties, etc., of State Revenue Agent.**—From and after January 15, 1919, the Comptroller of Public Accounts of the State of Texas be, and he is hereby authorized and empowered to perform the duties and functions of office heretofore performed by the State Revenue Agent, and all records of the office, books, furniture, etc., shall be transferred by the State Revenue Agent to the office of the Comptroller of Public Accounts of the State of Texas when the provisions of this Act become effective, for safe keeping. [Id., § 4.]

## CHAPTER TWO

## TAXES BASED UPON GROSS RECEIPTS

Art. 7379. [Superseded.]	t. 7392b. Permits to transact business; issue; duration of.
7383. Oil well companies.	7392c. Suspension of permit on nonpayment of tax.
7383a. Same; records.	7392d. Effect of act.
7387a. Suspension of penalty.	
7392. [Repealed.]	
7392a. Persons, etc., subject to gross receipts tax required to have permit to transact business; issue of permit.	

**Article 7379.** [Superseded.]

**Explanatory.**—This article, imposing a tax upon the gross receipts of wholesale dealers in or distributors of intoxicating liquors, is superseded and rendered obsolete, it having been rendered inoperative by the amendment of art. 16, § 20, of the State Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, post, Penal Code, arts. 588¼-588¾tt, and by the Prohibition Amendment to the Constitution of the United States, and by the Volstead Act.

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Art. 7383. Oil well companies.**—Each and every individual, company, corporation or association, whether incorporated under the laws of this or any other State or territory or of the United States, or any foreign country which owns, controls, manages or leases any oil well within this State shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association showing the total amount of oil produced during the quarter next preceding and the average market value thereof during said quarter. Said individuals, companies, corporations and associations at the time of making said report shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date, equal to one and one-half (1½%) per cent of the total amount of oil produced in this State by said individuals, companies, corporations or associations respectively, during the quarter next preceding at the average market value thereof, as shown by said report. [Acts 1907, p. 479, § 15; Acts 1919, 36th Leg., ch. 77, § 1.]

Took effect March 17, 1919.

**Explanatory.**—The title and enacting part of the act purport merely to amend art. 7383. They make no reference to the adding of an article to be numbered 7383a, and the subject-matter of the latter article does not seem to be included in the title.

**Art. 7383a. Same; records.**—Each and every individual, company, corporation, or association, mentioned in Article 7383, as above set forth, shall cause to be made, and to be kept and preserved, a full and complete record of all oil produced during the time so engaged in its production and said record shall be open to the inspection of all tax officers of this State. [Acts 1919, 36th Leg., ch. 77, § 1.]

**Art. 7387a. Suspension of penalty.**—The penalty of ten per cent (10%) now imposed by law for non-payment of the taxes mentioned in Section 1 of this Act [Art. 7687c], on or before the thirty-first day of January of each year, be suspended for the time, beginning February 1, 1921, until October 15, 1921, and in lieu of the ten per cent (10%) as now provided five per cent (5%) penalty be imposed. [Acts 1921, 37th Leg., ch. 4, § 3.]

See note under art. 7687c.

**Art. 7392.** [Repealed by Acts 1918, 35th Leg. 4th C. S., ch. 94, § 1, the repeal to take effect Jan. 15, 1919.]

**Explanatory.**—In view of art. 7368b this provision may still have operative effect as pointing out the duties of the Comptroller of Public Accounts.

**Art. 7392a. Persons, etc., subject to gross receipts tax required to have permit to transact business; issue of permit.**—Every person, company, firm, partnership, corporation, or unincorporated company or association, engaged in any business within this State, upon which the laws of this State require the payment of a tax on gross receipts, shall after this Act become effective be required to have a permit to transact such business, to be issued by the Secretary of State, which permit shall be and remain posted, subject to the view of the public at the principal office of such person or concern to whom the same is issued. The permit shall be issued in such form as may be prescribed by the Attorney General, shall show the name of the person or concern to whom issued, the business to be transacted, and that the holder thereof has complied with this Act. [Acts 1918, 35th Leg. 4th C. S., ch. 84, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 7392b. Permits to transact business; issue; duration of.**—Permits to transact business shall be issued by the Secretary of State upon applications made upon forms prescribed by the Secretary of State, which applications shall show, to the satisfaction of the Secretary of State, the facts required to be shown in the permit; and shall show that the applicant has paid the gross receipts taxes prescribed by law, or that if the applicant is the vendee of a going business that his vendor has paid all his gross receipts taxes due, or to become due; such taxes are to be shown to be paid for the current quarter, or such other period of time as said taxes may be paid. The Secretary of State shall make such investigation as necessary to determine that such taxes have been paid and shall then issue a permit to transact business, authorizing the party to whom issued to transact business until the 31st day of December of the current year, after which date new permits for each year must be obtained, as in the first instance; provided, however, that those now engaged in business shall have sixty days after this Act becomes effective to obtain permits hereunder, but all those beginning business after this Act becomes effective must obtain a permit before transacting business. When a permit has been issued as herein provided, it shall be the duty of the Secretary of State to immediately certify such fact to the Comptroller of Public Accounts. [Id., § 2.]

**Art. 7392c. Suspension of permit on non-payment of tax.**—Within Thirty days after gross receipts taxes may become due by anyone transacting, or authorized to transact, business hereunder, if such tax remains unpaid, the Comptroller shall certify such fact to the Secretary of State, whose duty it shall be to notify the delinquent tax payers that his name has been certified to the Secretary of State as a delinquent and that unless the tax is paid to the Comptroller within ten days from the date of such notice the permit to transact business of the delinquent will be suspended by the Secretary of State. The notice herein provided for shall be given by the Secretary of State, mailing to the delinquent at his last known address a printed or written notice, and the mailing of such notice by the Secretary of State shall be a sufficient compliance of this Act. If the tax, with accrued penalties, is not paid within fifteen days after the mailing of the notice the Secretary of State shall note on his records that the permit to transact business of the delinquent has been suspended, giving the date upon which such action was taken by the Secretary of State. The Secretary of State shall then immediately

certify such suspension to the Comptroller and to the Attorney General. After the permit to transact business has been suspended it shall be unlawful for the delinquent to continue to transact business, and it shall be the duty of the Secretary of State to cause to be published in some daily or weekly paper, published in the county of the delinquent's place of business, or if there is no newspaper published in such county, then in some daily newspaper of Statewide circulation, notice that the delinquent's permit to transact business has been suspended. [Id., § 3.]

**Art. 7392d. Effect of act.**—This Act shall be cumulative of all other laws on the subject, except where in direct conflict therewith, in which instances this Act shall govern. [Id., § 5.]

### CHAPTER THREE

#### FRANCHISE TAX

**Art. 7393. Tax to be paid by domestic corporations.**

**7394. Tax to be paid by foreign corporations.**

**7397a. Reports to be filed; basis of tax.**

**7397b. Penalty for failure to make report.**

**Art.**

**7397c. Reports privileged, etc.**

**7397d. May be made by what officers; how executed, etc.**

**7397e. Repeal.**

**7399. Failure to pay tax; charter forfeited, when; penalty.**

**Article 7393. Tax to be paid by domestic corporations.**—Except as herein provided, each and every private domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this State, shall on or before the first day of May of each year, pay in advance to the Secretary of State a franchise tax for the year following which shall be computed as follows, viz: fifty cents on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, unless the total amount of capital stock of such corporation actually paid in, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be fifty cents on each one thousand dollars of capital stock of such corporation actually paid in, plus its surplus and undivided profits; provided, that such franchise tax shall not in any case be less than ten dollars; provided, that, where the authorized capital exceeds one million dollars, such franchise tax shall be fifty cents for each one thousand dollars up to and including one million dollars, and for each additional one thousand dollars in excess of one million dollars, it shall be twenty-five cents; ~~and~~ provided further, that where a domestic corporation does business outside the State, that the franchise tax of such corporation shall be computed upon that proportion of the authorized capital stock, plus the surplus and undivided profits, if any, of such corporation, as the total gross receipts of such corporation from its business done in Texas, bears to the total gross receipts of the corporation from all sources [Acts 1907, p. 503, § 1; Acts 1919, 36th Leg., ch. 60, § 1.]

Took effect March 13, 1919.

Cited, Ex parte Fulton, 86 Cr. R. 149, 215 S. W. 331; Ex parte Davis, 86 Cr. R. 168, 215 S. W. 341.

**Art. 7394. Tax to be paid by foreign corporations.**—Except as herein provided, each and every foreign corporation authorized, or that may hereafter be authorized, to do business in this State, shall, on or before the first day of May of each year pay in advance to the Secretary of State a franchise tax for the year following which shall be computed as follows: the authorized capital stock, surplus and undivided profits,

if any, of such corporation, the total gross receipts of such corporation from all its business and the total gross receipts from all of its business done in Texas for the calendar year immediately preceding shall be ascertained by the Secretary of State from sworn reports of the officers of such corporation or by such other method as may satisfy the Secretary of State and the capital stock of such corporation upon which the franchise tax herein provided is based shall be that proportion of the authorized capital stock, plus the surplus and undivided profits, if any, of such corporation, as the gross receipts from the Texas business of such corporation done within the State of Texas bears to the total gross receipts of such corporation from its entire business and the capital stock assignable to the Texas business and upon which the fees hereinafter provided shall be calculated and based being thus ascertained, the franchise tax which is hereby provided shall be computed as follows: one dollar on each one thousand dollars or fractional part thereof up to and including one hundred thousand dollars; fifty cents on each one thousand dollars or fractional part thereof in excess of one hundred thousand dollars up to and including one million dollars and twenty-five cents on each one thousand dollars or fractional part thereof in excess of one million dollars; provided that the minimum franchise tax to be paid by any foreign corporation shall be twenty five dollars; provided, however, that where such corporation has a surplus or undivided profits the same shall be added to the entire capital stock of such corporation and shall be taken and computed as a part thereof in determining the amount of such entire capital stock; provided that where a foreign corporation applying for a permit has theretofore done no business in Texas the franchise tax herein provided shall not be payable until the end of one year from the date of such permit at which time the franchise tax shall be computed upon that proportion of the authorized capital stock, plus the surplus and undivided profits, if any, of such corporation ascertained as above required as the gross receipts from its Texas business bears to the gross receipts of the corporation from its entire business done for the same period; and the second payment of such franchise tax shall be made for the period intervening between the date of such first payment and the first day of May following, the proportion of authorized capital stock, plus the surplus and undivided profits, if any, of such corporation, upon which the same shall be computed to be the same proportion that the gross receipts from the Texas business for such period bears to the gross receipts of the corporation from its entire business for the same period, and that thereafter such franchise tax shall be payable annually on the first day of May for the year succeeding computed upon that portion of the authorized capital stock, plus the surplus and undivided profits, if any, of such corporation which the gross receipts from the Texas business of such corporation bears to its entire gross receipts for the calendar year preceding as hereinabove provided. [Acts 1907, p. 503, § 2; Acts 1917, 35th Leg., ch. 84, § 1; Acts 1919, 36th Leg., ch. 42, § 1.]

**Explanatory.**—Sec. 2 of Acts 1919, 36th Leg. ch. 42, repeals all conflicting laws. The act took effect March 11, 1919.

See *Deveny v. Success Co.* (Civ. App.) 228 S. W. 295; notes to art. 7399.

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Constitutionality.**—This article, and art. 3837, as applied to an Illinois corporation engaged in both interstate and intrastate commerce, and having its domicile and principal establishment in Illinois, but having depots and warehouses in Texas, impose a direct burden on interstate commerce, and constitute a taking of property without due process. *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230.

**Art. 7397a. Reports to be filed; basis of tax.**—Except as herein provided, all corporations that are now required by law to pay an annual franchise tax, shall, between the first day of January and the fifteenth day of March of each and every year, be required to make a report to the Secretary of State, on blanks furnished by him, showing the condition of such corporation on the 31st day of December preceding; provided that the Secretary of State may, for good cause shown by any corporation, extend such time to any date up to the first day of May, which report shall give the authorized capital stock of the corporation, the capital stock actually paid in, the surplus and undivided profits of the corporation, if any, the name and addresses of all the officers and directors of the corporation, the amount of mortgages, bonded or other indebtedness of such corporation, and the amount of the last annual, semi-annual or quarterly dividend; provided, that domestic corporations having a permit or permits to do business outside the State, shall include in such report the gross receipts of such corporation from all sources and the gross receipts of the corporation from its business done in Texas, for the calendar year preceding; provided, that foreign corporations shall include in such report, the total gross receipts of the corporation from all sources and the gross receipts of the corporation in Texas for the calendar year preceding; and provided further, that where a foreign corporation has not theretofore done business in the State of Texas and is granted a permit to do business in Texas, it shall file its first report to the Secretary of State at the end of one year from the date of such permit. [Acts 1913, p. 327, § 1; Acts 1919, 36th Leg., ch. 46, § 2; Acts 1921, 37th Leg., ch. 90, § 2.]

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

**Art. 7397b. Penalty for failure to make report.**—Any corporation which shall fail or refuse to make the report as provided in Section 2 hereof [Art. 7397a] shall be assessed a penalty of ten per cent of the amount of franchise tax due by such corporation, payable to the Secretary of State, together with its franchise tax. [Acts 1913, p. 327, § 2; Acts 1919, 36th Leg., ch. 46, § 3; Acts 1921, 37th Leg., ch. 90, § 3.]

**Art. 7397c. Reports privileged, etc.**—The reports required by this Act shall be deemed to be privileged and not for the inspection of the general public, but any party or parties who are interested in the subject matter of any report may, upon valid request in writing made to the Secretary of State, secure a copy of same. [Acts 1913, p. 327, § 3; Acts 1919, 36th Leg., ch. 46, § 4; Acts 1921, 37th Leg., ch. 90, § 4.]

**Art. 7397d. May be made by what officers; how executed, etc.**—The following officers of each and every corporation shall be deemed competent to make the report required by this Act; the president, vice-president, secretary, treasurer or general manager, and all reports provided for in this Act shall be signed officially and sworn to before some officer authorized by law to administer oaths. [Acts 1913, p. 327, § 4; Acts 1919, 36th Leg., ch. 46, § 5; Acts 1921, 37th Leg., ch. 90, § 5.]

**Art. 7397e. Repeal.**—All laws and parts of laws in conflict with this Act are hereby repealed, but where this Act is not in conflict with any existing law, it shall be held to be amendatory thereof. [Acts 1913, p. 327, § 5; Acts 1919, 36th Leg., ch. 46, § 6; Acts 1921, 37th Leg., ch. 90, § 6.]

**Art. 7399. Failure to pay tax; charter forfeited, when; penalty.**

**Rule of construction.**—This article is more or less penal in its nature and is not entitled to a liberal or strained construction. *Deveny v. Success Co.* (Civ. App.) 228 S. W. 295.

**Sufficiency of forfeiture.**—Under this article, secretary of state must enter on margin of record in office words "Rights to do business forfeited," and date of entry, before company's right to sue or defend can be denied. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

**Effect of forfeiture.**—Ordinarily forfeiture of a charter by secretary of state for non-payment of franchise takes all authority away from the corporation to act. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

Under *Sayles' Ann. Civ. St. Supp.* 1906, arts. 5243i, 5243j, a release of land covered by an oil grant by the president of a corporation who had forfeited its right to do business by failure to pay its franchise tax was futile, as he could not do for the corporation what it was without legal capacity to do for itself. *Davis v. Texas Co.* (Civ. App.) 232 S. W. 549.

**Rights after forfeiture.**—When construed in connection with art. 1314, the forfeiture of a foreign corporation's permit under arts. 7394, 7399, does not prevent its recovery in an action brought by it before the forfeiture for breach of a contract while it was authorized to do business. *Deveny v. Success Co.* (Civ. App.) 228 S. W. 295.

**Non-payment of tax; effect.**—Failure of corporation to pay franchise tax does not ipso facto work dissolution. *Millsaps v. Johnson* (Civ. App.) 196 S. W. 202.

Under *Rev. St.* 1895, arts. 5243i, 5243j, corporation's failure to pay franchise tax does not bring about a forfeiture of its charter, but merely established a ground for forfeiture which could only be taken advantage of by the state and used as a basis for a judicial forfeiture. *Bunn v. City of Laredo* (Civ. App.) 213 S. W. 320.

## CHAPTER FOUR

### STATE INTANGIBLE TAX BOARD

Art.		Art.	
7407.	State tax, of whom composed; tax commissioner, appointment of.	7420.	Duties and powers of board in passing upon statement.
7414.	Tax on intangible assets; law applies to whom.	7426.	Persons complying with this chapter relieved of other taxes.

**Article 7407. State tax board, of whom composed; tax commissioner, appointment of.**

See *Druesdow v. Baker* (Com. App.) 229 S. W. 493.

**Art. 7414. Tax on intangible assets; law applies to whom.**

**Validity and construction in general.**—Amendment of railroad intangible tax law by Acts 30th Leg. (1st Ex. Sess.) c. 17, so as to provide for local tax on intangible assets "in addition to ad valorem taxes on intangible properties," held not void as providing dual tax. *Baker v. Druesdow* (Civ. App.) 197 S. W. 1043.

Since railroad's rolling stock and intangible assets have no actual situs in any particular county or district, it is within the lawful power of the Legislature to determine whether such property shall be embraced within the limits of a taxing district, and whether it shall be taxed for the purposes of such district. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

A railroad corporation has no constitutional right to have its intangible property taxed only at its place of domicile. *Id.*

This act neither requires nor authorizes double taxation of the intangibles of a railroad. *Druesdow v. Baker* (Com. App.) 229 S. W. 493.

**Companies subject to tax.**—Evidence held to show that railroad had no intangible property taxable in Texas, and that fixing of values on intangible property by state tax board was arbitrary finding of values that did not exist. *Baker v. Druesdow* (Civ. App.) 197 S. W. 1043.

That a railroad, through its inability to meet interest payments, has been placed in the hands of receivers pending foreclosure, is not conclusive evidence of the nonexistence of intangible values belonging to such railroad and taxable under this act. *Druesdow v. Baker* (Com. App.) 229 S. W. 493.

**Powers of county.**—Where a county, pursuant to Const. art. 3, § 52, as amended in 1904, and *Rev. St.* art. 628, voted special road bonds, the rolling stock and intangible assets of a railroad company passing through the county may be taxed for the purpose of paying the interest and providing a sinking fund for the redemption of the bond, in view of art. 7414 et seq. *Bell County v. Hines* (Civ. App.) 219 S. W. 556.

That a defined district provided for by Const. art. 3, § 52, as amended in 1904, which issued bonds for highways could not tax the rolling stock and intangible assets of a railroad company, does not prevent a county issuing road bonds pursuant to the section, from doing so, for art. 7414, provides that railroad companies shall pay local taxes to the county on intangible assets, etc., and such property is part of the property of the county. *Id.*

**Situs of intangibles.**—Intangible assets and rolling stock of railroad are of such a nature and character that they have no actual situs in any particular county or district. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Acts 30th Leg. (First Called Sess.) c. 17, did not have the effect of fixing a situs for rolling stock and intangible assets of railroad company. *Id.*

**Valuation for assessment.**—Art. 7420, does not require tax board to fix entire value of property by adding value of capital stock and mortgage indebtedness, but board must adopt that method unless it seems unfair or unjust. *Baker v. Druesedow* (Civ. App.) 197 S. W. 1043.

Under art. 7420, it is within power of court in proper cases to determine real value of railroad by capitalizing its net earnings at reasonable interest rate. *Id.*

Intangible values of railroad company are values of railroad property over and above value of its physical assets, which intangibles ordinarily result from profits of its business as actually conducted. *Id.*

Art. 7420 does not authorize state tax board arbitrarily to fix intangible values of railroad if rendition of physical property for taxation has been made at less than fair and just value. *Id.*

Where tangibles, including those of railway companies in a county, are, as a result of settled practice, systematically assessed below their true value, and the intangibles of the railroads assessed at their true value, a railroad is entitled to enjoin the collection of so much of the tax against it as was based on the assessment of its intangibles at a higher proportionate value than that of other property within the state on the ground such assessment is in violation of Const. art. 8, § 1. *Druesdow v. Baker* (Com. App.) 229 S. W. 493.

If the intangible assets of a railroad are assessed at their true full value and its tangible assets at less than their true value and below the value of the tangible property generally of the county, and such overvaluation of intangibles is equalized by the under-valuation of tangibles, it is not entitled to equitable relief. *Id.*

In suit to restrain the collection of taxes assessed against railroad under this act, evidence held to support the trial court's finding that in making the valuation complained of the State Tax Board acted in good faith and that the valuations were not affected by fraud, bad faith, or other improper motives. *Id.*

In such suit, evidence held to warrant the finding of the State Tax Board in fixing the value of the railroad's tangibles and intangibles. *Id.*

In such suit where the court found that the tangible properties had been assessed at less than one-half value, and that the intangible values apportioned to the county were \$600,000, making the total sum \$3,800,000, which were assessed at about 45 per cent., and that the total properties of the railroad in the county were assessed at less than 50 per cent. of their value, while other property was assessed at least 50 per cent., the further finding that there had been no discrimination against the railroad was proper, as was determination that there was no violation of the uniformity and equality taxation clause of the Constitution. *Id.*

— **Collateral attack.**—The decisions of the State Tax Board under this act, in the matter of valuations, are quasi judicial and a collateral attack cannot be justified in the absence of fraud, or something equivalent thereto; mere difference of opinion as to the reasonableness of valuation, etc., not warranting interference by the courts. *Druesdow v. Baker* (Com. App.) 229 S. W. 493.

**Enjoining collection.**—Mere fact that county board, in assessing railroad tangibles, made levy too low did not affect railroad's right to enjoin collection of tax on intangible property certified to county by state board. *Baker v. Druesedow* (Civ. App.) 197 S. W. 1043.

#### Art. 7420. Duties and powers of board in passing upon statement.

See *Baker v. Druesedow* (Civ. App.) 197 S. W. 1043; notes to art. 7414.

#### Art. 7426. Persons complying with this chapter relieved of other taxes.

See *Druesdow v. Baker* (Com. App.) 229 S. W. 493.  
Cited, *Bell County v. Hines* (Civ. App.) 219 S. W. 556.

## CHAPTER FIVE

### TAX ON LIQUOR DEALERS

#### Articles 7427-7466. [Superseded.]

**Explanatory.**—These articles, imposing a tax on liquor dealers, have been rendered inoperative by the amendment of art. 16, § 20, of the State Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, post, Penal Code, arts. 588¼-588½tt, and by the Prohibition amendment to the Constitution of the United States, and by the Volstead Act.

#### ARTICLE 7427

**Conflict in statutes.**—Pen. Code, art. 157, imposing license tax on dealers in nonintoxicating malt liquors, held not void under Const. art. 8, § 2, because this act imposes different tax on business of selling intoxicating malt liquors. *Claunch v. State*, 82 Cr. R. 355, 199 S. W. 483.



**Contracts—Validity of.**—Seller of whisky to defendant, not qualified to obtain license to operate saloon, who had procured another to obtain such license, defendant himself furnishing money and in fact owning business, could recover price of whisky, though knowing facts. *Bonnie & Co. v. Blankenship* (Civ. App.) 208 S. W. 934.

**Clubs.**—Enjoining sale, see *Country Club v. State*, 110 Tex. 40, 214 S. W. 296, 5 A. L. R. 1185; notes to art. 4674.

**Review of refusal of license.**—If action of city manager in refusing retail liquor dealer's license is arbitrary and unreasonable, courts will review and control such action by mandamus. *City of Brownsville v. Fernandez* (Civ. App.) 202 S. W. 112.

## ARTICLES 7428-7432

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

## ARTICLE 7434

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

## ARTICLE 7435

See *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.

## ARTICLE 7437

See *Koehler v. Dubose* (Civ. App.) 200 S. W. 238.  
Cited in dissenting opinion, *San Antonio & A. P. Ry. Co. v. Blair*, 108 Tex. 434, 196 S. W. 1153.

## ARTICLE 7446

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

## ARTICLE 7447

Cited, *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

## ARTICLE 7452

23. **Persons entitled to sue.**—Where there had been no legal proceeding awarding custody and control of a minor, and real father was still living, stepfather who, after her divorce had married the minor's mother, could not, maintain action, under this article, for selling or giving intoxicants to minor, in view of art. 4070. *Gallamore v. Glazier* (Civ. App.) 200 S. W. 854.

Since the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond is penal in its nature, the right of an independent school district, to sue for such forfeiture must be made very clear. *Devine Independent School Dist. v. Koehler* (Civ. App.) 212 S. W. 238.

An independent school district is not a "person" within the meaning of the statute giving the right to an aggrieved person to sue for the forfeiture on a liquor dealer's bond. *Id.*

25½. **Nature of suit.**—A retail liquor dealer's bond, given under this article, does not create between its makers and the state or any beneficiary a contractual relationship in such sense as to cause a vested right of action for penalties to flow from breaches of it; but action thereon is for purely statutory penalties. *State v. Mitchell*, 110 Tex. 498, 221 S. W. 925.

## CHAPTER SIX

TAX ON SALE OF INTOXICATING LIQUORS IN LOCAL  
OPTION TERRITORY

## Articles 7467-7475a. [Superseded.]

**Explanatory.**—These articles, imposing a tax on the sale of intoxicating liquors in local option territory, have been rendered inoperative by the amendment of art. 16, § 20, of the State Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, post, Penal Code, arts. 588¼-588¼tt, and by the Prohibition amendment to the Constitution of the United States, and by the Volstead Act.

## ARTICLE 7467

Cited, *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

## ARTICLE 7475

Cited, *State v. Mitchell*, 110 Tex. 498, 221 S. W. 925.

## CHAPTER SEVEN

## TAX ON DEALERS IN NON-INTOXICATING MALT LIQUORS

Art.  
7476. Amount of tax.

Art.  
7477. Application for license to state what; must be paid in advance.

**Article 7476. Amount of tax.**

See *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Repeal.**—Pen. Code 1911, art. 496, defining as a disorderly house a place in prohibition territory where nonintoxicating malt liquors are sold, is in direct conflict with and repeals arts. 157, 158, 160, levying an annual occupation tax on such business in prohibition territory, and no conviction can be had for failure to acquire the license. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Art. 7477. Application for license to state what; must be paid in advance.**

Cited, *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

## CHAPTER EIGHT

TAX ON PERSONS SOLICITING ORDERS OR OPERATING  
COLD STORAGE FOR INTOXICATING OR NON-  
INTOXICATING BEVERAGES IN LO-  
CAL OPTION DISTRICTS

**Articles 7479–7482. [Superseded.]**

**Explanatory.**—Superseded by the prohibition amendment and by Penal Code, Arts. 588¼ to 588¼tt.

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

## CHAPTER NINE

## OCCUPATION TAX ON HANDLING LIQUORS C. O. D.

**Articles 7483–7486. [Superseded.]**

**Explanatory.**—These articles, imposing an occupation tax on the handling of intoxicating liquors C. O. D., have been rendered inoperative by the amendment of art. 16, § 20, of the State Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, post, Penal Code, arts. 588¼–588¼tt and by the Prohibition amendment to the Constitution of the United States, and by the Volstead act.

## ARTICLE 7483

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

## CHAPTER TEN

### INHERITANCE TAX

<p>Art. 7487. Property subject to the tax. 7490. Inventory to be filed when; penalty. 7491. Report by county attorney to county judge; compensation; reports. 7492. Appraisers appointed; notice to be given, etc.</p>	<p>Art. 7493. County judge to regulate tax. 7494. Property withheld until tax paid. 7497. False reports; penalty. 7500. Tax refunded when. 7501. Final account not allowed until tax is paid.</p>
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#### Article 7487. Property subject to the tax.

**Validity.**—This act is not special, but a general, law, applying equally and uniformly to every class affected. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Exemption.**—Neither adopted person nor child of adopted person is "direct lineal descendant" of adopter, within this article. *State v. Yturria*, 109 Tex. 220, 204 S. W. 315, L. R. A. 1918F, 1079, reversing judgment (Civ. App.) 189 S. W. 291.

Exemption of property passing to certain specified classes from payment of inheritance tax and from lien securing it, under this article, confers on such classes a "privilege." *Id.*

In view of the adoption statute, property in Texas was not subject to inheritance tax, under this article, on passing by will to persons adopted by testator, but was subject to tax on passing by will to children of persons adopted by testator. *Id.*

**Art. 7490. Inventory; filing; penalty.**—Every executor, administrator, or trustee of the estate of a decedent, leaving property subject to taxation under this chapter, or other person coming into possession of any portion of such estate, whether such property passes by will or by the laws of descent and distribution, or otherwise, shall within three months after coming into possession of any of such property, make a report in duplicate, one of which shall be filed with the Comptroller and one with the county clerk of the county court of the county wherein such decedent resided at the time of his death, or wherein the principal part of such estate is located, giving the date of death of such decedent, the approximate value of his estate, if known, of the persons entitled to receive such estate; and within one year after coming into possession of any portion of such estate, such person or persons shall, if some other person has not previously done so, file with the Comptroller and with the said county clerk, said report to be preserved as a permanent record of said office pertaining to such estate, a complete inventory showing the condition of said estate and pay the taxes owing on said estate as provided in this chapter; and in case the tax is not paid within the time herein prescribed a penalty of 2 per cent a month for the first ten months and two per cent a month thereafter until such tax is paid, shall be added to such tax and collected as fixed penalty for the failure to promptly pay such tax; provided that a lien shall exist on all property belonging to said estate to secure the payment of such tax, penalties, and costs, and all persons acquiring any portion of said estate shall be charged with notice of the existence of any unpaid tax, penalties, and costs, which lien may be enforced in any suit brought for the collection of such tax, and penalties, and the county attorneys and the district attorneys of this state are authorized at any time after the expiration of the time above mentioned to institute suit in behalf of the State in any court of competent jurisdiction for the recovery of such tax and the penalties owing thereon under this chapter and he shall receive as compensation therefor 10 per cent on the amount of the taxes payable hereunder, not to exceed in any one case the sum of \$200.00, which fee shall be added, and collected from said estate, in addition to the taxes and penalties herein provided for, which compensation shall be in addition to all other fees and compensation provided by law; provided that the

aggregate of fees received under this chapter shall not exceed in any one year the sum of \$2,000.00 and any fees earned in addition to said sum shall be considered a portion of the tax and penalties collected, and be distributed in the same manner. [Acts 1907, p. 496, § 1; Acts 1919, 36th Leg., ch. 164, § 1.]

See post, art. 7497.

**Art. 7491. Report by county attorney to county judge; compensation; reports.**—It shall be the duty of the county attorney of each county of this State to carefully investigate and keep informed concerning estates subject to the payment of taxes under this chapter and if the notice required by the preceding article is not given within three months from the death of any person leaving an estate subject to the payment of taxes under this chapter, such county attorney shall report the condition of said estate to the county judge of the county in which said decedent resided at the time of his death, or where the principal part of his estate was located, and if such report is not made as required in the preceding article within six months from the death of such person, it shall be the duty of the county judge to appoint an administrator of said estate. For his services in making the investigation and making the report herein required, the county attorney shall receive a commission of eight per cent of the taxes payable under this chapter, not to exceed in any one estate the sum of \$60.00, and the county judge shall receive a commission of two per cent of the taxes collected under this chapter, not to exceed in any one estate the sum of \$15.00, which fees shall be cumulative of all other fees and compensation provided by law. Such compensation shall be paid by the Collector of taxes on the certificate of the county judge out of the taxes paid to him on property belonging to such estate. In case a report is filed by more than one county attorney, then the fee herein provided shall be allowed only to the county attorney who first filed said report. [Acts 1907, p. 496; Acts 1917, 35th Leg., ch. 166, § 1; Acts 1919, 36th Leg., ch. 164, § 1.]

See post, art. 7497.

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

See *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

**Administrator under original act—In general.**—Administrator appointed under Act of 1907, is governed by general statutes relating to administration of estates. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Under art. 3289, an inheritance tax administrator appointed under this article, is superseded by executor under probated foreign will. *Id.*

Under arts. 7487-7502, the county judge has authority to appoint a permanent administrator of the estate of a decedent, who has authority to administer the estate, and, among other things, to collect the inheritance tax, and not merely a special administrator. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

Despite arts. 7487-7502, and arts. 3623, 3624, as to allowance of reasonable attorney's fees, county judge held unauthorized to approve contract between administrator to collect inheritance tax and an attorney, which contract was fraudulent and unconscionable as calling for such payments to attorney by way of retainer and for services as would exploit estate for his benefit. *Id.*

— **Validity of statute.**—Arts. 7487-7502, providing for the collection of inheritance taxes, and for appointment of an administrator for that purpose and to act generally, if no application for letters testamentary or of administration shall be made, are constitutional. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

They do not unconstitutionally extend beyond title's scope because providing for appointment of administrator to collect inheritance taxes. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

The provision authorizing appointment of administrator does not deny due process of law contrary to federal Constitution. *Id.*

It is not invalid because not requiring that notice be given before appointment especially as property cannot be sold to satisfy tax without notice. *Id.*

**Art. 7492. Appraisers appointed; notice to be given, etc.**

See *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Validity.**—The provision of this act for appointment of appraisers in inheritance tax proceedings, is constitutional. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Art. 7493. County judge to regulate tax.**

**Review or correction of appraisal.**—Appraisers' report may be attacked before such court, although this act does not provide for appeal from report. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

Appeal may be taken to district court from inheritance tax orders made by appraisers or county court. *Id.*

Under art. 733, providing that county court's proceedings regarding decedent's estate may be reviewed by certiorari, writ may issue to correct inheritance tax proceedings in county court. *Id.*

**Personal judgment.**—Under this act, inheritance tax proceedings are purely in rem, and no personal judgment can be obtained. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Art. 7494. Property withheld until tax paid.**

Cited, *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Sale by administrator.**—Under the provision that property cannot be sold for taxes until notice is given, sufficiency of notice is judicial question. *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

A sale under this act is subject to requirements of arts. 3479-3507, relating to sale of decedents' property. *Id.*

Sale by administrator appointed to collect inheritance taxes pursuant to arts. 7487-7502, though approved by county judge, proceeds having been largely used to pay an attorney employed by unconscionable contract and in exploitation of the estate, held void; no attention having been paid to art. 7494, requiring previous ascertainment of amount of tax and sale having been sought improperly under arts. 3489, 3490. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

**Art. 7497. False reports; penalty.**—If any person charged with the duty of filing a report under this chapter, shall knowingly make a false report, he shall be liable for a penalty of not exceeding one thousand dollars, which shall be collected by any county attorney or district attorney in the name of the State, by suit in any court of competent jurisdiction, twenty per cent of which penalty shall be retained by said officer as attorneys fees and the remainder shall be distributed as the taxes collected under this chapter are distributed. [Acts 1907, p. 496; Acts 1919, 36th Leg., ch. 164, § 1.]

**Explanatory.**—Acts 1919, 36th Leg., ch. 164, sec. 1, expressly amends arts. 7490, 7491, and this article. The subject-matter of this amendment is entirely foreign to that of the amended article, which read as follows: "In case such tax shall not be paid to the collector of taxes within six months after the county judge has notified the amount thereof as hereinbefore provided, the collector shall commence an action to recover the amount of such tax against the executor, administrator or trustee, and the party to whom or for whose use the property has passed; provided, that the county judge may by certificate to the collector extend such time of payment whenever the circumstances of the case require."

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

Cited, *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

**Validity.**—This act is not unconstitutional as interfering with the rights of district or county attorneys, because the words allowing county tax collectors to "sue" and "commence an action" will be construed to mean to institute actions and assist where the attorneys so desire. *Maud v. Terrell*, 109 Tex. 97, 200 S. W. 375.

**Art. 7500. Tax refunded when.**

See *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

**Art. 7501. Final account not allowed until tax is paid.**

Cited, *Dodge v. Youngblood* (Civ. App.) 202 S. W. 116.

## CHAPTER ELEVEN

OF THE PROPERTY SUBJECT TO TAXATION AND THE  
MODE OF RENDERING THE SAME

Art.		Art.	
7503.	All property to be taxed.	7512.	Live stock, when and how rendered.
7504.	Real property includes what.	7514.	Vessels, where listed.
7505.	Personal property includes what.	7517.	Shall list under oath.
7506.	Definition of terms.	7518.	The statement and its requisites.
7507.	Exemptions from taxation.	7519.	Certain credits and stocks not to be listed.
	1. Schools and churches.	7520.	Rendition of real estate.
	1c. Art Leagues and Societies of Fine Arts.	7524.	Assessment by railroads.
	3. Public property.	7525.	Railroads to return sworn statements, when, etc.
	6. Public charities.	7527.	Assessments to be in owner's name.
7508.	When to be rendered.	7528.	Lien for taxes.
7510.	Where to be rendered.	7529.	Leasehold interest in public lands.
7510a.	Securities, etc., when taxed.		

**Article 7503. [5061] All property to be taxed.**

Cited, *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 932.

**In general.**—Taxation must be uniform, as well as equal, to meet the constitutional maxim. *Millhollon v. Stanton Independent School Dist.* (Civ. App.) 221 S. W. 1109.

**Power to tax.**—The power of taxation is an incident of sovereignty, and all questions in regard to it address themselves to the discretion of the legislative department, whose conclusions, within the limits of the Constitution, are final. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

**Art. 7504. [5062] Real property includes what.**

**In general.**—Under this article, a viaduct constructed by railroad companies over tracks is real property, and not property subject to taxation as personal property. *City of Texarkana v. Texas & P. Ry. Co.* (Civ. App.) 198 S. W. 804.

**Fixtures.**—Parties may by express agreement constructively sever fixtures from the soil so as to require treatment of the fixtures as personal property. *Westchester Fire Ins. Co. v. Roan* (Civ. App.) 215 S. W. 985.

**Art. 7505. [5063] Personal property includes what.**

Cited, *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689; *Campbell v. Wiggins*, 2 Civ. App. 1, 20 S. W. 730; *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

**Taxable personal property.**—Improvements placed on land of railroad by lessee with agreement that it was for use of lessee and could be removed was personal property for purpose of taxation. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

A state cannot tax personal property of a nonresident temporarily within its borders. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

**Nevada corporation** whose dredgeboat and equipment were in Texas and rendered for taxation by it held to have the burden of showing that the property was not taxable, and not to have sustained such burden. *Id.*

**Situs of property.**—A vessel plying between ports of different states engaged in coast-wise trade has its situs for taxation at the domicile of its owner, unless it has acquired an actual situs in another state. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

**Art. 7506. [5064] Definition of terms.**

**Singular as embracing plural.**—Under arts. 5502, 7506, a judgment reciting that service was had on "defendant" showed sufficiently that service was had on two defendants for the purpose of a collateral attack; it appearing that the defendants were throughout the judgment referred to in the singular. *Robinson v. Monning Dry Goods Co.* (Civ. App.) 211 S. W. 535.

**Art. 7507. [5065] Exemption from taxation.****1. Schools and churches.**

**Buildings used by religious societies.**—Const. art. 8, § 2, in exempting places of religious worship and institutions of purely public charities, must not be construed so as to exclude necessary grounds for entry into the buildings, and art. 7507, §§ 1, 6, is therefore constitutional. *Trinity Methodist Episcopal Church v. City of San Antonio* (Civ. App.) 201 S. W. 669.

**Parsonage or rectory,** used as residence for minister, is not exempt from taxation under Const. art. 8, § 2, or art. 7507, §§ 1, 6. *Id.*

There is clear and logical difference between place of worship and institution of public charity, and that one is used for other does not change its character, under Const. art. 8, § 2, and art. 7507, §§ 1, 6. *Id.*

**1c. Art Leagues and Societies of Fine Arts.**—That all property belonging to Art Leagues and Societies of Fine Arts, whether incorporated or not, which are devoted wholly and without charge to the promotion of education and learning, including Art Galleries and exhibits therein contained, the land upon which the same are situated, which is devoted exclusively to such purposes, and also all land, money, pictures and other works of art and all other personal property which may be necessary and in actual use for the purpose of carrying out the educational feature of this Act shall be exempt from taxation. [Acts 1921, 37th Leg., ch. 46, § 1.]

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

### 3. Public property.

**Public use.**—Property used for governmental purposes is not necessarily exempt; the test under the Constitution being whether it is devoted to a public use. Corporation of San Felipe De Austin v. State (Sup.) 229 S. W. 845.

Property of a municipality devoted to public uses is not taxable. *Id.*

Public land granted to a town for use by inhabitants as timber and grazing lands by the Mexican government, confirmed by acts of the Congress of the Republic in 1837 (Laws 1837, p. 21) and 1841 (Laws 1840-41, p. 46), where still so used by the inhabitants is exempt from state and county taxation under provision of Constitution exempting land devoted to a "public use." *Id.*

### 6. Public charities.

See *Trinity Methodist Episcopal Church v. City of San Antonio* (Civ. App.) 201 S. W. 669; notes to subd. 1.

**Validity.**—The provision of this article, exempting institutions of purely public charity from taxation, is not unconstitutional. *State v. Settegast* (Civ. App.) 227 S. W. 253.

Under Const. art. 8, § 2, as amended January 7, 1907, the Legislature may exempt from taxation institutions of purely public charity, and not merely the buildings used and owned by such institutions. *Id.*

**Property and institutions exempted.**—No building comes within the exemption from taxation authorized by Const. art. 8, § 2, unless it is both owned and used exclusively by an institution of purely public charity. *City of Houston v. Scottish Rite Benev. Ass'n.* (Sup.) 230 S. W. 978.

The Legislature might reasonably conclude that an institution was one of "purely public charity" within Const. art. 8, § 2, where, first, it made no gain or profit, second, it accomplished ends wholly benevolent, and, third, it benefited persons, indefinite in numbers and in personalities, by preventing them, through absolute gratuity, from becoming burdens to the state. *Id.*

It does not satisfy Const. art. 8, § 2, that the use of the building by others than the institution was permitted by the owner to obtain revenues to be devoted entirely to its work of public charity, nor is the requirement satisfied by the fact that those sharing the use pay no rent. *Id.*

To the extent that the property was used by lodges whose activities included fields other than charity, it was not and could not be used exclusively by an institution of purely public charity, within Const. art. 8, § 2. *Id.*

— **Hospitals.**—Hospital held "purely public charity," whose land and buildings were exempt from taxation under this subdivision, and Const. art. 8, § 2. *Scott v. All Saints Hospital* (Civ. App.) 203 S. W. 146.

In suit by hospital to restrain collection of taxes, evidence held not to show charge against patients able to pay was made for profit, but rather that it was made to carry out beneficent design of hospital. *Id.*

Trustees to whom property was bequeathed for the purpose of maintaining a public charity hospital for the gratuitous relief of residents of a specified county, constituted an "institution of purely public charity" where no private or pecuniary return was reserved to the giver or any other particular person, and the entire benefits were to go to the public generally. *State v. Settegast* (Civ. App.) 227 S. W. 253.

Trustees under a will who had organized themselves into a board and held property bequeathed to them for the establishment and maintenance of a hospital constituted an "institution of purely public charity" exempt from taxation, though the board had no members in the sense that lodges, mutual aid societies, and other organizations have, as this subdivision does not exclude other institutions, than those particularly defined therein. *Id.*

Such trustees were exempt from taxation on such property though they were accumulating a fund with which to build and operate a hospital and converting non-revenue-producing property into income-bearing assets, and did not yet have a hospital in operation. *Id.*

— **Beneficial associations.**—*Scottish Rite Benevolent Association*, held an institution of purely public charity within Const. art. 8, § 2, as a charity need not be universal to be public. *City of Houston v. Scottish Rite Benev. Ass'n* (Sup.) 230 S. W. 978.

A benevolent association whose lodge room was not only rented to other charitable institutions, but the first story of whose building was rented for commercial purposes, was not entitled to exemption from taxation on its property under this article, in view of Const. art. 8, § 2. *Concho Camp, No. 66, W. O. W., v. City of San Angelo (Civ. App.) 231 S. W. 1106.*

Local camp of voluntary benevolent order held not entitled to exemption from taxation, under this article, on account of its issuing insurance policies to its members, so that it was not an institution purely for public charity within Const. art. 8, § 2. *Id.*

**Enjoining collection of tax.**—A public charitable corporation assessed with taxes on personalty, from which it is not exempt, as well as with taxes on realty from which it is exempt, cannot enjoin collection of the entire tax. *Davis v. Santa Rosa Infirmary (Civ. App.) 220 S. W. 125.*

Where taxes on the land of an alleged public charity can be collected only through suit, and any invalidity of the taxes can be urged in defense, the charity prior to such suit is not entitled to injunction against collection, having an adequate legal remedy. *Id.*

#### DECISIONS RELATING TO ARTICLE IN GENERAL

Cited, *Davis v. Santa Rosa Infirmary (Civ. App.) 220 S. W. 125.*

**Power to exempt.**—The condemnation of exemption from taxation contained in Const. art. 8, § 2, carries with it condemnation of commutation of taxes. *Millers' Mut. Fire Ins. Co. v. City of Austin (Civ. App.) 210 S. W. 825.*

**Right to exemption in general.**—Burden is on one claiming exemptions from taxation to bring himself clearly within statute or Constitution. *Trinity Methodist Episcopal Church v. City of San Antonio (Civ. App.) 201 S. W. 669.*

In considering exemptions from taxation, law must be strictly construed. *Id.*

In view of Const. art. 8, § 2, for a statute imposing a certain tax to be construed as commuting other taxes the commutation must clearly appear from the terms of the law, and cannot be extended by construction or implication beyond the clear import of its terms. *Millers' Mut. Fire Ins. Co. v. City of Austin (Civ. App.) 210 S. W. 825.*

**United States bonds.**—The federal law rendering Liberty bonds and subdivisions of indebtedness exempt from taxation by states and cities is the paramount law, and if there is an impediment to the exercise of the power of the United States in the state Legislature or its administration, the courts will restrain or set aside any attempt to evade. *City of Waco v. Amicable Life Ins. Co. (Civ. App.) 230 S. W. 698.*

The effect of U. S. Comp. St. § 6816, providing that obligations of the United States shall be exempt from taxation, is that in any scheme of state or municipal taxation government bonds must be eliminated from consideration in any equation to reach the taxable property, or, at least when they are included, it compels a deduction as such for the amount of the bonds. *Id.*

#### Art. 7508. [5066] When property to be rendered.

**Liability for tax.**—The ownership of property on the 1st day of January of any year creates a liability on the part of the owner for taxes levied upon such property for that year. *Winters v. Independent School Dist. of Evant (Civ. App.) 208 S. W. 574.*

#### Art. 7510. [5068] Where to be rendered.

Cited, *City of Austin v. Great Southern Life Ins. Co. (Civ. App.) 211 S. W. 482.*

**Power of Legislature.**—Unless restrained by some constitutional provision, the Legislature may fix the situs for taxation of all personal property. *State v. Houston & T. C. Ry. Co. (Civ. App.) 209 S. W. 820.*

**Place of rendering for assessment.**—Personal property is subject to taxation in county or district where situated. *Cantwell v. Suttles (Civ. App.) 196 S. W. 656.*

A promissory note is tangible personal property to be taxed as other personal property where situated. *City of Austin v. Great Southern Life Ins. Co. (Civ. App.) 211 S. W. 482.*

That a taxpayer pays taxes on personal property in the wrong county does not prevent an assessment in the county where the property is actually situated. *Id.*

Under Const. art. 8, § 11, a bonding company was taxable by city of Austin on securities it was required to deposit with state treasurer, though it had its home office in another county, provisions of insurance situs act, attempting to fix situs of personalty at home office, being void. *Texas Fidelity & Bonding Co. v. City of Austin (Civ. App.) 211 S. W. 818.*

Under Const. art. 8, § 11, and arts. 7510, 7514, the proper place to tax personal property is the residence of the owner, provided it has not acquired a situs for purpose of taxation elsewhere, in which instance it is taxable where situated. *City of Galveston v. Haden (Civ. App.) 214 S. W. 766.*

**Unorganized counties.**—An unorganized county being in effect a part of the county to which it is so attached, the collection of taxes on such personalty of a non-resident may be enforced by the tax collector of the latter county, under Const. art. 8, §§ 1, 11, Rev. St. 1879, arts. 4669, 4673, 4676, and Laws 1879, c. 50, § 1. *Llano Cattle Co. v. Faught, 69 Tex. 402, 5 S. W. 494.*

**Art. 7510a. Securities, etc., when taxed.**—All securities, of every kind and character, and all moneys, required or permitted by law to be deposited by any person, firm residing in this State, or corporation or-



ganized under the laws of Texas, with the treasurer of the State of Texas, or other State officer or Department, shall be taxed in the County in which the person owning same resides, or where such firm has its place of business, or at the domicile of such corporation, and at no other place. [Acts 1918, 35th Leg., 4th C. S., ch. 40, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 7512. [5070] Live stock, when and how rendered.**

**Liability for tax.**—Under this act, the live stock is liable for taxes assessed thereon in each county, although taxes on the entire herd had been assessed and paid in the county in which the management of the business was conducted. *Nolan v. San Antonio Ranch Co.*, 81 Tex. 315, 16 S. W. 1064.

**Art. 7514. [5072] Vessels, where listed.**

See *City of Galveston v. Haden* (Civ. App.) 214 S. W. 766; notes to art. 7510. Cited, *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

**Art. 7517. [5075] Shall list under oath.**

Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026.

**Liability of person rendering property.**—Where defendant taxpayer rendered property for taxes as his own and duly swore to statements therein, including ownership, he was absolutely liable for taxes thereon. *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 932.

**Art. 7518. [5076] The statement and its requisites.**

See *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245.

Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026; *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 932.

**Sufficiency of statement.**—Agreed statement of facts held to sustain finding that property upon which taxes were due was defendant's property and was duly rendered and assessed, though inventory appeared to be made in wrong name. *North American Dredging Co. of Nevada v. State* (Civ. App.) 201 S. W. 1065.

**Art. 7519. [5077] Certain credits and stocks not to be listed.**

**Effect of corporation's failure to list.**—Under Rev. St. 1879, art. 4682, exempting corporation stock from taxation against the owner when the capital and property of the corporation are required to be taxed, the owner of stock in a state bank is not taxable therewith while the property of the bank is, under the law, taxable, although the bank does not return its property for taxation, as it should do. *Gillespie v. Gaston*, 67 Tex. 599, 4 S. W. 248.

**Art. 7520. [5078] Rendition of real estate.**

Cited, *Lynn v. State*, 33 Cr. R. 153, 25 S. W. 779.

**Art. 7524. [5082] Assessment by railroads.**

Cited, *Bell County v. Hines* (Civ. App.) 219 S. W. 556.

**Party to which property taxable.**—Where improvement on railroad's right of way became realty, it could only be taxed as property of railroad, not as property of railroad's lessee, which made it. *Armstrong v. Mission Independent School Dist.* (Civ. App.) 195 S. W. 895.

**Art. 7525. [5083] Railroads to return sworn statements, when, etc.**

Cited, *Bell County v. Hines* (Civ. App.) 219 S. W. 556.

**Where rolling stock taxable.**—In view of Const. art. 8, § 8, and this article, Legislature may empower navigation district to tax rolling stock and intangible property of railroad, notwithstanding Const. art. 8, § 11, providing that property shall be assessed "in the county where situated"; such property having no actual situs. *State v. Houston & T. C. Ry. Co.* (Civ. App.) 209 S. W. 820.

Navigation district, having power to tax property "within said \* \* \* district," has no power to tax rolling stock and intangible assets of railroad; such property not being within said district, in view of Const. art. 8, §§ 8, 11, and this article. Id.

**Art. 7527. [5085] Assessments in owner's name.**

**In general.**—Under this article, an assessment of property in the name of a deceased person was valid as against subsequent purchasers from heirs. *Young v. City of Marshall* (Civ. App.) 199 S. W. 1180.

**Art. 7528. [5086] Lien for taxes.**

**Liens.**—The general rule is that taxes are never a lien on property, unless expressly made so. *State v. Hunt* (Civ. App.) 207 S. W. 636.

Under Const. art. 8, § 15, and art. 7528, poll taxes and personal property taxes do not become a lien on the real property of the person against whom they were assessed, and cannot be enforced against a subsequent grantee of such property. *Id.*

— **Extinguishment.**—Where taxpayer tendered taxes due and kept his tender good, lien therefor was discharged, and in suit to collect taxes could not be foreclosed. *State v. Hoffman*, 109 Tex. 133, 201 S. W. 653.

**Subrogation of party paying tax.**—Where mortgagee is compelled to pay taxes to protect his lien, he is subrogated to the lien created by the tax assessment. *Lewis v. Powell* (Civ. App.) 205 S. W. 737.

**Liability of purchasers.**—The purchaser of land is chargeable with notice that the land has not been assessed if such is the fact, and he is not thereafter an innocent purchaser as against taxes for years during which the tax was not assessed against the land and should have been so assessed, in view of this article, permitting an assessment of omitted property. *City of San Antonio v. Terrill* (Civ. App.) 202 S. W. 361.

**Art. 7529. [5087] Leasehold interests in public lands.**

**In general.**—Land set apart by the state for the contractor, as payment for the construction of the new capitol of Texas, to be conveyed to him from time to time when earned in the progress of the work, is not subject to taxation, ~~under Rev. St. 1879, art. 4691,~~ as land "held under a contract for the purchase thereof, belonging to this state." *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245.

**CHAPTER TWELVE****OF THE ASSESSMENT OF TAXES—ELECTION AND QUALIFICATION OF THE ASSESSOR**

Art. 7535. Oath and bond.	Art. 7575. Assessor to furnish list of delinquents.
7536. Purview of the bond.	7576. And submit lists to board of equalization.
7538. Bond for county taxes.	7577. Shall make out rolls in triplicate.
7542. The oath.	7578. Also rolls of unrendered property.
7547. When assessments to be made.	7580. And return and oath.
7548. Irregular assessments, valid.	7581. All lists, etc., filed in the county clerk's office.
7550. If taxpayer refuses to list.	7583. Compensation.
7551. Duty of assessor in such cases.	7587a. Cancellation of subdivisions, applications for.
7552. Commissioner of general land office to furnish abstracts to assessors.	7587b. Same; order for; filing and recording.
7562. Manner and form of assessing.	7587c. Same; notice; publication.
7563. Assessment of property not rendered.	7587d. Same; delinquent taxes.
7564. Boards of equalization.	7587e. Same; land excepted.
7565. Assessment of real property for previous years.	
7566. Assessment of back taxes on personal property.	
7568. Assessor to follow instructions.	
7569. Equalization of assessments.	

**Article 7535. [5091] Oath and bond.**

Cited, *King v. Ireland*, 68 Tex. 682, 5 S. W. 499.

**Effect of irregularities.**—Assessments by an assessor were not void because assessor, who was appointed May 13, 1919, did not make his assessments until September, 1919, and did not swear to his roll until January, 1920, and did not execute his oath and bond until after the assessments were made, being mere irregularities and he being at least a de facto officer, and the office being de jure. *Blewett v. Richardson Independent School Dist.* (Civ. App.) 230 S. W. 256.

**Art. 7536. [5092] Purview of the bond.**

**Accounting for fees.**—The duty of accounting for the assessor's fees is within the condition of his bond. *Nichols v. Galveston County* (Sup.) 228 S. W. 547.

**Art. 7538. [5094] Bond for county taxes.**

Cited, *King v. Ireland*, 68 Tex. 682, 5 S. W. 499.

**Art. 7542. [5098] The oath.**

Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026; *Lynn v. State*, 33 Cr. R. 153, 25 S. W. 779.

**Art. 7547. [5103] When assessments to be made.**

See *Grayson County v. Cooper* (Civ. App.) 211 S. W. 249.

**Notice as element of due process.**—Where a law imposes a tax or assessment on property according to its value, notice of every step in the tax proceedings is not necessary; the owner is not deprived of property without due process of law if he has an opportunity to question the validity or the amount of such tax or assessment either before that amount is finally determined or in subsequent proceedings for its collection. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

**Art. 7548. [5104] Irregular assessments valid.**

See *Magnolia Cattle & Land Co. v. Love*, 2 Tex. Civ. App. 385, 21 S. W. 574.

**Delay in making assessment.**—See *Blewett v. Richardson Independent School Dist.* (Civ. App.) 230 S. W. 255; notes to art. 7535.

**Art. 7550. [5106] If taxpayer refuses to list.**

Cited, *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

**Art. 7551. [5107] Duty of assessor in such cases.**

Cited, *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

**Use of rendition for previous year.**—Where defendant taxpayer failed to render property as his or that of partnership, assessors had privilege of using defendant's rendition for previous year, and defendant was bound by sworn statement therein that property was his. *Pfeiffer v. City of San Antonio* (Civ. App.) 195 S. W. 922.

**Art. 7552. [5108] Commissioner of general land office to furnish abstracts to assessors.**

**Restraining assessment; averment as to abstract.**—Under Gen. Laws 1879, pp. 24, 28, where one claiming his lands to be in a certain county sought to restrain the assessor of another county from listing them, on the ground that they would thereby be subject to double taxation, that the petition was insufficient which did not aver that the abstract showed the land to be in the former county. *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336.

**Art. 7562. [5118] Manner and form of assessing.**

See *Dawson v. Ward*, 71 Tex. 72, 9 S. W. 106.

Cited, *Campbell v. Wiggins*, 2 Civ. App. 1, 20 S. W. 730; *Lynn v. State*, 33 Cr. R. 153, 25 S. W. 779.

**Art. 7563. [5119] Assessment of property not rendered.**

See *Dawson v. Ward*, 71 Tex. 72, 9 S. W. 106.

Cited, *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

**In general.**—It is only where property has not been rendered for taxation that it can be assessed and placed on the unrendered roll, and this must be done by the assessor (Rev. St. 1879, art. 4711); and the board of equalization has no authority to direct property which has been rendered for taxes by the owner to be listed by the assessor as unrendered property under another name. *Cook v. Galveston, H. & S. A. Ry. Co.*, 5 Civ. App. 644, 24 S. W. 544.

**Description of property.**—A vendee cannot insist upon a more accurate description for taxation than the description given in the conveyance to him. *City of San Antonio v. Terrill* (Civ. App.) 202 S. W. 361.

**Art. 7564. [5120] Boards of equalization.**

**Necessity of application to board for relief.**—Under 1 Sayles' Civil St. 1888, art. 1517a, where a party fails to allege in his petition that he has applied to the commissioners' court to correct an alleged irregularity and overvaluation, an injunction to restrain the collection of the alleged irregularly assessed taxes will be denied. *Swenson v. McLaren*, 2 Civ. App. 331, 21 S. W. 300.

**Art. 7565. [5120a] Assessment of real property for previous years.**

See *City of San Antonio v. Terrill* (Civ. App.) 202 S. W. 361.

**Art. 7566. [5121] Assessment of back taxes on personal property.**

Cited, *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

**Art. 7568. [5122] Assessor to follow instructions.**

**In general.**—Where the state comptroller has instructed the assessor not to tax railroad bridges separately, but to include all bed as railroad, and a railroad company has returned a bridge on its line of road as so much mileage of railroad, the board of equalization cannot order the assessor to place the bridge on the unrendered list as a bridge, at a greater valuation, under Rev. St. 1879, art. 4713. *Cook v. Galveston, H. & S. A. Ry. Co.*, 5 Civ. App. 644, 24 S. W. 544.

**Art. 7569. [5123] Equalization of assessments.**

**Waiver of irregularities.**—Irregularities, such as want of notice, are waived when, on notice, the property owners appear before the board of equalization and make no objection to the assessment, containing the valuation made by themselves to the county assessor, but only to the proposed raise therein by such board. *Welder v. Sinton Independent School Dist.* (Civ. App.) 218 S. W. 106.

**Art. 7575. [5125] Assessor to furnish list of delinquents.**

Cited, *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

**Art. 7576. [5126] And submit lists to board of equalization.**

Cited, *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336; *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

**Art. 7577. [5127] Shall make out rolls in triplicate.**

See *Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111.  
Cited, *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336; *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

**Art. 7578. [5128] Also rolls of unrendered property.**

Cited, *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336.

**Art. 7580. [5130] Return and oath.**

See *Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111.

**Necessity of affidavit.**—Under Galveston charter and this article, tax rolls, not verified by the affidavit of the assessor of the city of Galveston, the purported verification merely being signed by him and lacking any jurat or seal, held not to support a judgment for the taxes claimed due. *Friedner v. City of Galveston* (Civ. App.) 229 S. W. 950.

**Delay in verifying.**—Assessments were not void because assessor, who was appointed May 13, 1919, did not make his assessments until September, 1919, and did not swear to his roll until January, 1920, and did not execute his oath and bond until after the assessments were made, being mere irregularities. *Blewett v. Richardson Independent School Dist.* (Civ. App.) 230 S. W. 255.

**Art. 7581. [5131] All lists, etc., filed in county clerk's office.**

See *Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111.

**Art. 7583. Compensation.**

**Limitations against recovery of overpayment.**—As suit on assessor's official bond, for recovery of money voluntarily allowed and paid the assessor in excess of the maximum compensation allowable for his official services under arts. 7583-7585, and article 3885, was not for an act in violation of the duties covered by his bond, under arts. 3894, 3895, 7547, but an action in the nature of debt for money received, the two-year statute applied against the county. *Grayson County v. Cooper* (Civ. App.) 211 S. W. 249.

**Art. 7587a. Cancellation of subdivisions; applications for.**—Any person, firm, association or corporation owning lands in this State, which lands have been subdivided into lots and blocks or small subdivisions, may make application to the Commissioners' Court of the County wherein any such lands are located, for permission to cancel all or any portion of such subdivision or subdivisions, so as to throw the said lands back into acreage tracts as it existed before such subdivisions were made. [Acts 1919, 36th Leg., ch. 103, § 1.]

**Art. 7587b. Same; order for; filing and recording.**—When such application is made by the owner or owners, of such land, and it is shown that a cancellation of such subdivisions, or portion thereof, will not interfere with the established rights of any purchaser, or purchasers, owning any portion of such subdivisions, or if it be shown that said

person or persons agreed to such cancellation, said Commissioners' Court shall enter an order, which order cancelling said subdivision shall be spread upon the minutes of such Court, authorizing such owner, or owners, of such lands, to, by written instrument describing such subdivisions, or portions thereof, so cancelled as designated by said Commissioners' Court, and when such cancellation is filed and recorded in the Deed Records of such County, the Tax Assessor of such County shall assess such property as though it had never been sub-divided. [Id., § 2.]

**Art. 7587c. Same; notice; publication.**—When such application is filed with the Commissioners' Court, said Court shall cause notice to be given of such application by publishing such application in some newspaper, published in the English Language, in such County for at least three weeks prior to action thereon by said Commissioners' Court, action shall be taken on such petition or petitions at a regular term of said Commissioners' Court. Such notice, in addition to the publication of the application hereinabove provided for, shall command any person, or persons, interested in such lands, to appear at the time specified in such notice, to protest if desired against such action. [Id., § 3.]

**Art. 7587d. Same; delinquent taxes.**—Provided further if said lands are delinquent for taxes for any preceding year, or years, and such application is granted as hereinbefore provided, the owner, or owners, of said land, shall be permitted to pay such delinquent taxes upon an acreage basis, the same as if said lands had not been subdivided, and for the purpose of assessing lands for such preceding years the County Assessor of Taxes shall back assess such lands upon an acreage basis. [Id., § 4.]

**Art. 7587e. Same; land excepted.**—Provided this Act shall not apply to any lands or lots included in an incorporated city or town. [Id., § 5.]

## CHAPTER THIRTEEN

### OF THE COLLECTION OF TAXES; ELECTION AND QUALIFICATION OF THE COLLECTOR

Art. 7605. Election and term of collector.	Art. 7624. Forced collections to begin, when.
7610. Bond for county taxes; additional bond or security; expense of surety bond; determination of reasonableness of premium.	7626. When property about to be removed from county.
7613. Rolls to be a warrant.	7627. Tax lien superior to assignment, attachment, inheritance or devise, except.
7614. Collector for all taxes.	7630. All property liable for taxes.
7615. Collections, when to begin.	7631. Sales of property, how made.
7616. Shall keep office at county.	7632. If property is insufficient.
7617. Tax receipt and its requisites.	7634, 7635. [Note.]
7617a-7617d. [Note.]	7639. The tax deed and its requisites.
7618. Monthly reports; requisites of; etc.	7654. Compensation.
7619. Duties of clerk and collector.	7659. Payment of moneys.
7620. Report not to be approved, unless.	7662. Limitation not available to delinquent taxpayer.
7621. List of delinquents and insolvents to be made out.	

#### Article 7605. [5154] Election and term of collector.

**Determination of census.**—The national census which determines whether a county shall elect a tax collector under Const. art. 8, § 16, is so much of the last national census relating to the population of that county as had been completed and ready to be officially published. *Holcomb v. Spikes* (Civ. App.) 232 S. W. 891.

**Art. 7610. [5159] Bond for county taxes; additional bond or security; expense of surety bond; determination of reasonableness of premium.**

**Scope of bond.**—Taxes in hands of the tax collector are secured by his general county bond and not the bond required by art. 2605, "to secure the collection of said taxes." *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

**Art. 7613. [5162] Rolls to be a warrant.**

Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026.

**Art. 7614. [5163] Collector for all taxes.**

Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026; *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

**Art. 7615. [5164] Collections, when to begin.**

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting; *Earnest v. Woodlee* (Civ. App.) 203 S. W. 963.

Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026.

**Time for payment of taxes.**—Where plaintiff claimed title to land under the five-year statute of limitations, he was bound to show payment of taxes before they became delinquent under arts. 7615, 7616, et seq. *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

Where a vendor agreed to pay the taxes for the year 1917, vendor did not offer performance by tendering deed without offering to pay the amount of the taxes for 1917, where the taxes were due though not delinquent, under arts. 7615, 7624. *Echols v. Miller* (Civ. App.) 218 S. W. 48.

**Art. 7616. [5165] Shall keep office at county seat.**

See *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141; notes to art. 7615.  
Cited, *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026.

**Art. 7617. [5166] Tax receipt and its requisites.**—The collector of taxes, or his deputy, whenever any tax is paid, shall give to the person paying the same a receipt therefor, specifying the amount of State, county and district taxes, and the year or years for which such tax was assessed; said receipt shall also show the number of acres of land in each separate tract, number, abstract and name of original grantee, and any city or town lot and name of city or town, and total value of all property assessed; the said receipt shall have a duplicate, to be retained by the tax collector. The collector of taxes shall provide himself with a seal, on which shall be inscribed a star with five points, surrounded by the words "Collector of Taxes, ——— county" (the blank to be filled with the name of the county), and shall impress said seal on each receipt and duplicate given by him for taxes collected on real estate; and said receipt having the seal attached shall be admissible to record in the county in which the property is situated in same manner as deeds duly authenticated, and when so recorded shall be full and complete notice to all persons of the payment of said tax; provided it shall be the duty of the tax collector, when any taxes are paid, to insert in margin of the tax rolls the words and figures as follows:

"Taxes paid ——— day of ———" No. of receipt ——— (dates to be filled and receipt number to be given) and signed by the collector; and such entry shall be evidenced to all the world of the payment of such tax, and that such entries may be used in evidence on issues involving the payment of same.

Any county tax collector who shall fail to comply with any of the provisions of the law imposing the duty upon said tax collector to make the entry of taxes paid, upon the tax roll, as above described, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred (\$100.00) dollars, nor more than five

hundred (\$500.00) dollars. [Acts 1876, p. 261, § 10; Acts 1921, 37th Leg., ch. 67, § 1, amending art. 7617, Rev. Civ. St. 1911.]

Took effect 90 days after March 12, 1921, date of adjournment.  
Cited, Dutton v. Thompson, 35 Tex. 115, 19 S. W. 1026.

**Arts. 7617a-7617d.**

See Land v. Dunn (Civ. App.) 226 S. W. 801.

**Art. 7618. [5167] Monthly reports as to state taxes; requisites of; duties of county clerk; payment of money to State Treasurer; annual settlements; allowance of delinquent and insolvent list; forms, etc.; duties of comptroller.**

**Admissibility of records in evidence.**—Where reports of county taxes filed with commissioners' court and later destroyed were, as required by art. 7619, identical as to property covered and taxes collected with reports required to be filed with the state comptroller by this article, and, under art. 7621, a list of delinquents was filed also with the state, the records of the state taxes were admissible in the county's action for taxes collected and unlawfully retained. Powell v. Archer County (Civ. App.) 198 S. W. 1037.

**Art. 7619. [5168] Duties of clerk and collector.**

See Powell v. Archer County (Civ. App.) 198 S. W. 1037; note to art. 7618.  
Cited, Watson v. El Paso County (Civ. App.) 202 S. W. 126.

**Notice of defalcation.**—Negligence of county commissioners in passing on reports of tax collector does not necessarily constitute notice of his defalcation, so that, in the county's action for moneys unlawfully retained instruction declaring statutory duties, without requiring knowledge of facts as prerequisite to finding such negligence as would bar recovery under plea of limitation was properly refused. Powell v. Archer County (Civ. App.) 198 S. W. 1037.

**Art. 7620. [5169] Report not to be approved, unless.**

Cited, Powell v. Archer County (Civ. App.) 198 S. W. 1037.

**Art. 7621. [5170] List of delinquents and insolvents to be made out.**

See Powell v. Archer County (Civ. App.) 198 S. W. 1037; note to art. 7618.

**Proof of nonpayment of taxes.**—Under a city charter, arts. 7621, 7685, 7692, and 7699, relating to delinquent taxes, held applicable, and mere proof of assessment of taxes is not alone sufficient to show nonpayment after 20 years, but it must be shown by delinquent tax record or other evidence outside assessment. Leake v. City of Dallas (Civ. App.) 197 S. W. 472.

**Art. 7624. [5173] Forced collections to begin, when.**

See Echols v. Miller (Civ. App.) 218 S. W. 48; notes to art. 7615.

**Strict compliance with statute in making sale.**—If sale for taxes is had by summary proceedings, the purchaser must show strict compliance with the statutes, and not only show that everything prescribed by the statutes was done, but that it was done exactly as prescribed. Brown v. Bonougli (Sup.) 232 S. W. 490.

**Art. 7626. [5175] When property about to be removed from county.**

**Liability on bond.**—Where to satisfy independent school district's assessment, the tax collector levied on and advertised property for sale, to prevent which a purchaser at sale under deed of trust gave the bond required by this article, on the taxes becoming due the purchaser would be liable under the bond for the amount of taxes it was given to protect. Mission Independent School Dist. v. Armstrong (Com. App.) 222 S. W. 201, reversing judgment (Civ. App.) Armstrong v. Mission Independent School Dist., 195 S. W. 895.

**Art. 7627. [5175a] Tax lien superior to assignment, attachment, inheritance or devise, except.**

**Rights of purchaser.**—This article does not authorize seizure of personalty sold to bona fide purchaser after delivery to him. Armstrong v. Mission Independent School Dist. (Civ. App.) 195 S. W. 895.

**Art. 7630. [5176] All property liable for taxes.**

Cited, Davis v. Santa Rosa Infirmary (Civ. App.) 220 S. W. 125.

**Art. 7631. [5177] Sales of property, how made.**

See 1913 Supp., arts. 6016½-6016¾c, as to newspaper publication instead of posting.  
Cited, Davis v. Santa Rosa Infirmary (Civ. App.) 220 S. W. 125.

**Art. 7632. [5178] If property is insufficient.**

Cited, *Davis v. Santa Rosa Infirmary* (Civ. App.) 220 S. W. 125.

**Arts. 7634, 7635. [5180, 5181].**

See 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

**Art. 7639. [5185] The tax deed and its requisites.**

**Validity of tax deeds in general.**—In the absence of evidence showing that prerequisites to valid tax sale were complied with, tax deed thereunder was a nullity. *Werts' Heirs v. Vick* (Civ. App.) 203 S. W. 63.

**Art. 7654. Compensation.**

See *Curtin v. Harris County* (Civ. App.) 203 S. W. 453.

**Art. 7659. [5211] Payment of moneys.**

**Payment by check.**—A county treasurer is not authorized to accept a check from the tax collector, but, where the amount of the check has come under the control of the county, the right of action against the collector is extinguished. *Watson v. El Paso County* (Civ. App.) 202 S. W. 126.

**Art. 7662. [5212b] Limitation not available to delinquent taxpayer.**

**In general.**—Under this article, the statute of limitations does not apply as a defense against payment of taxes. *City of Austin v. Great Southern Life Ins. Co.* (Civ. App.) 211 S. W. 482.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Keeping tender good.**—Where taxpayer refused to pay illegal item, but tendered payment of those taxes validly due, it is necessary to keep tender good that money be paid into registry of court. *State v. Hoffman*, 109 Tex. 133, 201 S. W. 653.

## CHAPTER FOURTEEN

OF THE ASSESSMENT AND COLLECTION OF BACK TAXES  
ON UNRENDERED LANDS**Article 7663. [5213] Back taxes on unrendered lands.**

**Power to assess omitted property.**—If the owner of property does not render the same for taxation, it should be put on the unrendered roll; and, if this is not done for any year or series of years, back taxes may be collected for such time as they are not barred by limitation. *Winters v. Independent School Dist. of Evant* (Civ. App.) 208 S. W. 574.

Before an assessor can place omitted property on the assessment roll, there must be a law authorizing such assessment. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

## CHAPTER FIFTEEN

## DELINQUENT TAXES

Art.

7684. Delinquent taxes a lien on land.  
7685. Tax collector to list delinquent lands.  
7687. Delinquent tax lists to be published.  
7687a. Notice to owners of delinquency; contents; duplicates for district or county attorneys; receipts for payment.  
7687b. Notices how made up; supplemental tax list, etc.  
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7688. Suits to foreclose tax liens on delinquent lands.

Art.

- 7688a. Duty of county or district attorney to institute suit; fees; compensation of tax collector.  
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7689. Proceedings in suits to foreclose tax lien.  
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Art.	Art.
7698. Proceedings against delinquents, unknown or nonresident.	7700c. Same; credits to collectors; affidavits.
7699. Similar proceedings by cities or towns.	7700d. Same.
	7700e. Same.
7700b. Release of soldiers, etc., from penalties and costs for non-payment of taxes or assessments.	7700f. Same; custody of affidavits.

#### Article 7684. Delinquent taxes a lien on land.

\* See *State v. Liles* (Civ. App.) 212 S. W. 517.

#### Art. 7685. Lands delinquent to be listed by tax collector.

**Conclusiveness of lists.**—Under a city charter, arts. 7621, 7685, 7692, and 7699, relating to delinquent taxes, held applicable, and mere proof of assessment of taxes is not alone sufficient to show nonpayment after 20 years, but it must be shown by delinquent tax record or other evidence outside assessment. *Leake v. City of Dallas* (Civ. App.) 197 S. W. 472.

The delinquent tax rolls required by art. 7685 et seq., are prima facie evidence of nonpayment of taxes. *Garza v. City of San Antonio* (Com. App.) 231 S. W. 697.

#### Art. 7687. Delinquent tax list to be published.

See *Potter County v. Boesen* (Com. App.) 221 S. W. 948.

**Contracts for publication.**—A contract for the publication of the delinquent tax list, providing for payment "as delinquent taxes are paid into the hands of the tax collector," did not make compensation for publishing the list dependent on the collection of the tax, but merely fixed the time for payment. *Potter County v. Boesen* (Com. App.) 221 S. W. 948, affirming judgment (Civ. App.) 191 S. W. 787.

Under such contract the debt matured when the county had been given a reasonable time in which to exhaust the remedies provided for the collection of the tax. *Id.*

Where such contract was made in 1907, a reasonable time in which to have disposed of the tax litigation had expired when the claim for compensation was presented and rejected in 1913. *Id.*

Under the law it is the duty of the commissioners' court of the county to have the delinquent tax list published and to pay for such publication, and such obligation is not dependent on collection of the taxes. *Id.*

**Art. 7687a. Notice to owners of delinquency; contents; duplicates for district or county attorneys; receipts for payment.**—During the months of April and May each year, or as soon thereafter as practicable, the collector of taxes in each county of this State shall mail to the address of each record owner of any lands or lots situated in the county a notice showing the amount of taxes delinquent or past due and unpaid against all such lands and lots as shown by the delinquent tax record of the county on file in the office of the tax collector, a duplicate of which shall also have been filed in the office of the Comptroller of Public Accounts of the State of Texas and approved by such officer. Such notice shall also contain a brief description of the lands and lots appearing delinquent and the various sums or amounts due against such lands and lots for each year, they appear to be delinquent according to such records, and it shall also recite that unless the owner or owners of such lots or lands described therein shall pay to the tax collector the amount of taxes, interest, penalties and costs set forth in such notice within 90 days from the date of notice, then, and in that event, the county or district attorney will institute suits for the collection of such moneys and for the foreclosure of the Constitutional Lien existing against such lands and lots. And it shall also be the duty of the tax collector in every county of this State, as soon after mailing such notice as practicable, to furnish to the county or district attorney duplicates of all such notices mailed to the tax payers in accordance with the provisions of this Act, and also, lists of lands and lots located in the county appearing on the delinquent tax records in the name of "unknown" or "unknown owners" or in the name of persons whose correct address or place of residence in or out of the county said collector is unable, by the use of due diligence, to discover, or ascertain, against which taxes are delinquent, past due, and unpaid, and such lists or statements shall show the amount of state

and county taxes delinquent, past due, and unpaid, against each such tract or lot of land for each year they appear to be delinquent according to the delinquent tax records of the county and shall likewise contain a brief description of all such lands and lots. And it shall be the further duty of the tax collector to furnish on demand of any person or persons, firm or corporation like statements with reference to any particular lot or tract of land for whatever purpose desired, which shall be in all instances certified by him with the seal of his office attached. Whenever any person or persons, firm or corporation shall pay to the tax collector all of the taxes, interest, penalties and costs shown by the delinquent tax records of the county to be due and unpaid against any tract, lot, or parcel of land for all the years for which said taxes may be shown to be due and unpaid, prior to the institution of suit for the collection thereof, it shall be the duty of the tax collector to issue to such person or persons, firm or corporation, a receipt covering such payment as is now required by law. [Acts 1915, 34th Leg., ch. 147, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 64, § 1.]

See *Barber v. State* (Civ. App.) 212 S. W. 292; notes to art. 7688a.

**Notice to property owner.**—Notice from tax collector to "record owner" that taxes are delinquent and that tax lien will be foreclosed, required by this article, is a prerequisite to the right of the state to a foreclosure or recovery of the taxes. *Hunt v. State*, 110 Tex. 204, 217 S. W. 1034; *State v. Hunt* (Civ. App.) 207 S. W. 636.

Under art. 7687b, it is sufficient for tax collector to send notice to one who appeared to be owner in delinquent records, and it is no defense, in action to recover delinquent taxes from one who subsequently became owner, that his title appeared upon county records. *State v. Hunt* (Civ. App.) 207 S. W. 636.

Under arts. 7687a and 7688a, a suit for delinquent taxes for years between 1896 and 1910 cannot be maintained where the tax collector of the county did not mail to defendant or the record owner of the land a written notice showing the amount of taxes appearing delinquent prior to May 1, 1916. *Barber v. State* (Civ. App.) 212 S. W. 292.

In suit to foreclose lien for delinquent taxes for year 1915, where notice required by this article was mailed June 2, 1916, and suit was filed after 90 days from mailing, state was entitled to judgment and foreclosure, all other requirements of the law having been complied with; the time of giving notice being immaterial, provided taxpayer has 90 days' time from such notice before suit is filed. *State v. Guana* (Civ. App.) 216 S. W. 687.

Under this article, notice must be given to the owner of the title at the time of the notice as disclosed by the public records of the county required to be kept, notwithstanding section 2 (art. 7687b). *Hunt v. State*, 110 Tex. 204, 217 S. W. 1034.

**Limitations.**—This act does not place any limitation on the right of the state to collect delinquent taxes, but is intended merely to fix the duties of the tax collector and county attorneys, for otherwise the state might lose taxes by delay of the tax collector in sending notice, though the bond of such officials does not cover such loss. *State v. Heath* (Civ. App.) 220 S. W. 567.

#### Art. 7687b. Notices, how made up; supplemental tax lists, etc.

See *Hunt v. State*, 110 Tex. 204, 217 S. W. 1034.

Cited, *State v. Guana* (Civ. App.) 216 S. W. 687.

**Notice to property owner.**—See *State v. Hunt* (Civ. App.) 207 S. W. 636; notes to art. 7687a.

**Compensation of collector.**—See *Sherman County v. Ross* (Civ. App.) 197 S. W. 1055; *Curtin v. Harris County* (Civ. App.) 203 S. W. 453; notes to art. 7688a.

**Art. 7687c. Publication of lists postponed.**—That the publication of delinquent lists for State, county, special school, district school and levy improvement taxes, and water improvement districts by the County Commissioners Court of each county or board of directors of any water improvement district in this State shall be postponed until October 15, 1921. [Acts 1921, 37th Leg., ch. 4, § 1.]

**Explanatory.**—The title of the act seems to cover the subject of the act fully, except that, in enumerating the taxes involved, it omits those levied by water improvement districts.

**Art. 7687d. Suspension of suits.**—That no suits shall be brought for the collection of any delinquent taxes for the year 1920 until after the fifteenth day of October, 1921. [*Id.*, § 2.]

See note under art. 7687c.

**Art. 7688. Suits to foreclose tax liens on delinquent lands.**

Cited, *Bomar v. Runge* (Civ. App.) 225 S. W. 287.

**Pleading and proof in general.**—In suits for taxes and foreclosure of liens therefor, it is essential to allege and prove nonpayment and consequent delinquency. *Garza v. City of San Antonio* (Com. App.) 231 S. W. 697.

**Art. 7688a. Duty of county or district attorney to institute suit; fees; compensation of tax collector.**—As soon as practicable after the expiration of ninety days from the date of notice mailed to the delinquent owner by the Tax Collector under the provisions of this Act, the County Attorney or District Attorney, if there be no County Attorney, shall file or institute suit, as otherwise provided by law, for the collection of all delinquent taxes due at the time of filing such suit against any lands or lots situated in the county, together with interest, penalties and costs then due, as otherwise provided by law; provided, that for the work of filing such suits, the County or District Attorney shall receive a fee of Four (\$4.00) Dollars for the first tract of land included in each suit and One (\$1.00) Dollar for each additional tract included therein; and, provided, where improved town lots are sued upon or included in a suit with other lands or unimproved town lots in the same town only one such additional fee shall be added for each twenty lots or any number less than twenty, and it shall be the duty of said County or District Attorney in bringing such suits to include in the same suit all lands and unimproved town lots owned by any one owner; and, provided, further, that in counties containing over fifty thousand inhabitants such fee shall be Two (\$2.00) Dollars for the first tract and Fifty (.50) cents for each additional tract, and that the same provisions with regard to the joining of different tracts owned by the same owner in one suit shall apply to such counties.

The Tax Collector shall, in addition to the compensation and costs now allowed by law, be entitled for the making up the delinquent record or supplements thereto, where necessary under this Act, the sum of Five (.05c) cents for each and every line of yearly delinquencies entered on said delinquent record or supplement, the same not to exceed Twenty-five (25c) in any one case, such compensation to be paid out of the General fund of the county upon a completion or approval of said record or supplement. The Tax Collector shall also receive a commission of five per cent on the amount of delinquent taxes collected in addition to the commissions now allowed by law, but all such fees or commissions of the said Tax Collector, District Attorney or County Attorney under this Act shall be accounted for as fees of office under provisions of the Maximum Fee Bill as provided in Chapter 4, Title 58, of the Revised Civil Statutes of Texas, 1911, as amended by Chapters 121 and 142, Acts of the Regular Session of the Thirty-third Legislature. [Acts 1915, 34th Leg., ch. 147, § 3; Acts 1919, 36th Leg. 2d C. S., ch. 64, § 2.]

Took effect 90 days after July 22, 1919, date of adjournment.

Cited, *State v. Guana* (Civ. App.) 216 S. W. 687.

**Notice to property owner.**—See *Barber v. State* (Civ. App.) 212 S. W. 292; notes to art. 7687a.

**When suit maintainable.**—Under the express provisions of arts. 7687a and 7688a, a suit for delinquent taxes for a period between 1896 and 1910 could not be maintained by the county attorney subsequent to January 1, 1913. *Barber v. State* (Civ. App.) 212 S. W. 292.

**Compensation of collector.**—Under sections 2 and 3 of this act, although tax collector prepared delinquent tax record in duplicate, he was not entitled to five cents per line for both, but only for one. *Sherman County v. Ross* (Civ. App.) 197 S. W. 1055; *Curtin v. Harris County* (Civ. App.) 203 S. W. 453.

The word "record," as used in this act is not synonymous with "book," "volume," or "copy," and the collector is not entitled to double the fee where he copied the compiled matter into a duplicate book. *King v. Marion County* (Civ. App.) 202 S. W. 1052.

Under arts. 3881, 3883, 3889, 3893-3897, a county tax collector is not entitled to receive and retain, in addition to amount allowed by the foregoing sections, compensa-

tion provided by §§ 2, 3, of this act, for making up delinquent tax rolls and collecting delinquent taxes. *Curtin v. Harris County* (Civ. App.) 203 S. W. 453.

**Art. 7688b. Suits against unknown owners.**—In respect to lands and lots appearing on lists furnished by the tax collector to the County or District Attorney in accordance with the provisions of this Act, as lands and lots located in the county which appear on the delinquent tax record in the name of "unknown" or "unknown owner," or in the name of persons whose correct address or place of residence in or out of the county said collector has been unable, by due diligence to discover or ascertain, it shall be the duty of the county attorney or in counties having no County Attorney, of the District Attorney, immediately after the lists of such lands have been furnished him by the collector, to proceed to collect all taxes, penalty, interest and costs then due against the same in the manner prescribed in Chapter 15 of Title 126 of the Revised Statutes of 1911. [Acts 1919, 36th Leg. 2d C. S., ch. 64, § 3.]

**Explanatory.**—Added to Acts 1915, 34th Leg., ch. 147, as § 3a.

**Art. 7689. Proceedings in suits to foreclose tax lien.**

**In general.**—The taxes for ten years on five acres of land assessed as belonging to defendant's husband cannot be collected by foreclosing a tax lien for all of the taxes on two of the five acres assessed as the property of defendant for only six years. *Garza v. City of San Antonio* (Com. App.) 231 S. W. 697.

**Parties.**—Suit may be maintained against either or all of the co-owners of a parcel of land to recover ordinary taxes against the land. *Elmendorf v. City of San Antonio* (Civ. App.) 223 S. W. 631.

**Evidence.**—Presumption of payment after lapse of 20 years applies in a suit to recover alleged delinquent taxes where there was no proof of delinquency other than assessment itself on which penalty and interest had been computed at a time obviously long after levy. *Leake v. City of Dallas* (Civ. App.) 197 S. W. 472.

In a suit to collect delinquent taxes, a mere copy of the assessment roll does not prove nonpayment. *Garza v. City of San Antonio* (Com. App.) 231 S. W. 697.

**Judgment—Requisites and conclusiveness of.**—The refusal of the trial court to foreclose any liens for taxes due prior to judgment for taxes under which the property was sold was correct, since a valid sale under a junior assessment cuts off all prior tax liens. *Ivey v. Teichman* (Civ. App.) 201 S. W. 695.

Costs in excess of lawful amount taxed by reason of clerk's error in making out an original order of sale upon tax foreclosure renders the judgment therein a nullity as against a minor owner, regardless of the smallness of the amount. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

In a suit to foreclose a lien for delinquent taxes, where the petition, in connection with the assessment roll, described the property as containing five acres, a judgment describing the land as consisting of two acres was not sufficient; the portion ordered sold being left to inference and conjecture. *Garza v. City of San Antonio* (Com. App.) 231 S. W. 697.

Where a state or municipality seeks to recover a judgment against a citizen for taxes, by virtue of which his property may be seized and sold, all legal requirements must be strictly complied with, and the rule applies with the same force to the description of the property in a judgment as to proof of nonpayment. *Id.*

— **Grounds for attack on judgment.**—Where a tax judgment has been rendered without citing defendant, the owner of the property, defendant may, within the period of statutory limitations, attack the judgment in a direct proceeding wherein equitable relief may be had as circumstances require. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

— **Collateral attack.**—Tax judgments containing recitals showing jurisdiction may not be contradicted in collateral proceedings. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

A suit to set aside a tax judgment and sale thereunder brought by the owner on the ground that citation had not been served upon her, wherein the petition recited that the suit was in the nature of a bill of review to annul the judgment and proceedings, followed by a statement of facts upon which plaintiff relies, does not constitute a collateral attack on the tax proceedings. *Id.*

If a tax sale judgment was without binding force, the objection that the attack upon it was a collateral one would make no difference. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

**Validity of sale.**—On sale for taxes in an action foreclosing a tax lien under arts. 7688, 7689, an owner is afforded full opportunity to defend and to prevent the sacrifice of his property, so that the validity of the sale is to be determined by the rules governing judicial sales, and not by the rules governing summary tax sales. *Brown v. Bonough* (Sup.) 232 S. W. 490.

**Purchaser in good faith.**—Merely because the purchaser at a tax sale did not know that it was wrongfully or irregularly made does not prevent the sale from being set-

aside in a direct proceeding for that purpose. *Harrison v. Sharpe* (Civ. App.) 210 S. W. 731.

That property has been acquired at a tax sale by an innocent purchaser does not prevent the sale from being set aside because the owner of the property was not cited in the tax proceedings, where the purchaser will receive an unconscionable profit in the owner's loss if he be allowed to retain the property and where he can be placed in status quo. *Id.*

Where property has been sold under a tax judgment without citing the owner and has been purchased by an innocent party at the tax sale, the sale merely will be set aside, and the judgment left undisturbed. *Id.*

#### Art. 7690. Sheriff to execute deeds.

**Title of purchaser at tax sale.**—In the absence of contrary provision in statute or judgment under which sale is made, the purchaser at a valid tax sale acquires title free from any lien for taxes assessed and delinquent for any years previous to that for which sale is made, and the state cannot recover state and county taxes antedating foreclosure sales. *State v. Liles* (Civ. App.) 212 S. W. 517.

One purchasing land sold for taxes under a judgment in a tax suit rendered without service of citation was not a purchaser in good faith entitled to protection as such where the price paid by him was grossly inadequate. *Rowland v. Klepper* (Com. App.) 227 S. W. 1096.

#### Art. 7691. Attorneys to represent state; fees, etc.

**Costs in general.**—Compensation allowed county clerks in delinquent tax suits by this article, must be reported, accounted for, and considered in reaching maximum compensation of such clerks as provided by maximum fee bill (art. 3883), notwithstanding art. 3924. *Jones v. Harris County* (Civ. App.) 209 S. W. 207.

Under the Houston City Charter 1905, except as otherwise specified therein, the fees of officers in suits for sale of property to pay taxes are the same as those in similar suits for state and county taxes under this article. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

The 5 per cent. allowance for attorney's fees in city tax suits under Houston City Charter, art. 3, § 8, supersedes the provision of this article, which is otherwise applicable, in view of arts. 7693, 7699, so that such fee is allowable. *Id.*

On foreclosure of a tax lien, the clerk and sheriff were not entitled to collect fees in excess of those prescribed by this article. *Brown v. Bonougli* (Sup.) 232 S. W. 490.

The title of a purchaser at a sheriff's sale foreclosing a tax lien under valid judgment and order of sale is not affected by the sheriff's unauthorized retention of more than lawful commissions. *Id.*

Where judgment of sale was entered, an order of sale, bearing indorsement of costs in excess of those permitted by this article, though erroneous and irregular, was not void, and the title of the purchaser was good against collateral attack by suit for recovery of the land. *Id.*

#### Art. 7692. Assessor to list unpaid taxes annually, etc.

Cited, *Powell v. Archer County* (Civ. App.) 198 S. W. 1037; *Baker v. Fogle*, 110 Tex. 301, 217 S. W. 141.

**Application.**—Under a city charter, arts. 7621, 7685, 7692, and 7699, relating to delinquent taxes, held applicable, and mere proof of assessment of taxes is not alone sufficient to show nonpayment after 20 years, but it must be shown by delinquent tax record or other evidence outside assessment. *Leake v. City of Dallas* (Civ. App.) 197 S. W. 472.

**Cost, interest, and penalties.**—Where taxes are separable, citizen, to escape penalties for nonpayment of valid taxes, need not tender tax which is invalid, but it is sufficient to tender taxes legally due. *State v. Hoffman*, 109 Tex. 133, 201 S. W. 653.

Where taxpayer tendered portion of taxes validly assessed, he is not liable for penalties on amount of taxes tendered, though he fails to support his claim that part of taxes not tendered was invalid. *Id.*

**When tax due.**—Under Const. art. 6, § 2, art. 7, § 3, art. 8, § 1, and this article, poll tax becomes due on January 1st, and persons entering the state after such date need not pay such tax in order to be qualified voters. *Earnest v. Woodlee* (Civ. App.) 208 S. W. 963.

#### Art. 7693. Law available to incorporated cities and towns.

See *Teat v. Perry* (Civ. App.) 216 S. W. 650; notes to art. 7691.

#### Art. 7696. May redeem in two years by paying double.

See *Turner v. Maury* (Civ. App.) 224 S. W. 255.

**Art. 7697. May redeem, when and how.**—That the owner or any one having an interest in land or lots heretofore sold to the State, or any city or town, under the decrees of court, in any suit or suits brought for the collection of the taxes thereon, or by the collector of taxes, or otherwise, shall have the right at any time within two years after the

taking effect of this Act to redeem the same upon the payment of the amount of taxes for which sale was made, together with all costs, penalties and interest now required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of said redemption. And where lands or lots shall hereafter be sold to the State or to any city or town for taxes under decree of court in any suit or suits brought for collection of taxes thereon or by a collector of taxes, otherwise, the owner having an interest in such lands or lots shall have the right at any time within two years from date of sale to redeem the same after such sale upon payment of the amount of taxes for which sale was made, together with all costs and penalties required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of redemption. [Acts 1909, 2 S. S., p. 400; Acts 1918, 35th Leg. 4th C. S., ch. 69, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 59, § 1.]

**Explanatory.**—Took effect 90 days after June 18, 1920, date of adjournment. Sec. 2 of the act repeals all laws in conflict. The act, though not expressly amending art. 7697, Rev. St. 1911, supersedes that article.

**Art. 7698. Proceedings against delinquents, unknown or non-resident.**

**Parties.**—Defendant in trespass to try title held not the unknown owner within this article, such owner having been the only party cited, it having been open to the county attorney to learn from the records of the tax assessor that defendant paid taxes on the land in three previous years, and that no one had paid since. *Bomar v. Runge* (Civ. App.) 225 S. W. 287.

The state's suit for taxes on land should be brought against a nonresident, under this article, by name. *Catlett v. Combs* (Civ. App.) 227 S. W. 697.

An owner whose land had been previously sold for taxes was not an unknown owner for purposes of suit by the state for taxes; the purchaser of the land from the state comptroller being the owner if the sales were valid. *Id.*

**Requisites of petition, notice or citation.**—In a tax suit against a nonresident owner, the requisites of the necessary citation, in October, 1906, were exclusively prescribed by this article. *Rousset v. Settegast* (Civ. App.) 210 S. W. 219.

That suit for delinquent taxes was against the nonresident owner and his unknown heirs, the petition specially reciting the suit was brought pursuant to Acts 24th Leg. c. 42, relating to the collection of delinquent taxes, did not bring it within arts. 1874, 1875, as to service of citation, instead of art. 7698. *Id.*

Writ against nonresident owner in delinquent tax suit running, "To the sheriff or any constable of Harris County, Greeting," and further reciting, "You are hereby notified that suit has been brought by the state for the collection of said taxes," and "You are commanded to appear and defend said suit," instead of the owner of property himself, was fatally defective as not in compliance with this article. *Id.*

Under art. 5107—46, requiring the process in suits for delinquent taxes by water improvement districts to be served as provided for suits of like character, the citation is not governed by art. 1874, relative to suits in general, but by article 7698, relative to suits for delinquent taxes. *Wheat v. Ward County Water Improvement Dist. No. 2* (Civ. App.) 217 S. W. 713.

**Validity and conclusiveness of judgment.**—Judgment in tax suit against the unknown owner, the only party cited, being regular and valid as against defendant therein, was binding on defendant in the present suit of trespass to try title, if he was the defendant in such suit, otherwise not. *Bomar v. Runge* (Civ. App.) 225 S. W. 287.

**Art. 7699. Similar proceedings by city or town.**

See *Leake v. City of Dallas* (Civ. App.) 197 S. W. 472, notes to art. 7692; *Teat v. Perry* (Civ. App.) 216 S. W. 650, notes to art. 7691.

**Art. 7700b. Release of soldiers, etc., from penalties and costs for non-payment of taxes or assessments.**—By the authority of Section 10, Article 8, and Section 3, Article 1, of the Constitution of the State of Texas, and in conformity with an act passed by the Congress of the United States March 8, 1918, the Legislature of this State by a vote of both Houses, duly entered and recorded on the respective journals thereof, does hereby release to each said soldier, sailor or marine, all penalties and costs of every nature incurred by him and taxed against him by reason of non-payment of any taxes or assessments, whether general or special, falling due during his period of military service in respect

to any of his real property, personal property, or mixed property, of any kind whatever that may have accrued or been charged against them for non-payment of his principal tax during any period of time so engaged in the military service of the United States as a soldier, sailor or marine. [Acts 1919, 36th Leg. 2d C. S., ch. 69, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 7700c. Same; credits to collectors; affidavits.**—The Comptroller of the State of Texas in making annual settlements with county tax collectors of this State shall credit the account of said collectors with all such penalties and costs in respect to any real property, personal property or mixed property so owned by said soldiers, sailors and marines during his period of military service upon presentation to him by the collector of the affidavit of said soldier, sailor or marine so owning such property:

(1) The date and place of such person in the military service of the United States;

(2) A general description of the real, personal or mixed property owned by such soldier on which said penalties or costs may have accrued;

(3) The amount of taxes or assessments against said property which fell due during the period of his service, and the amount of penalties and costs accrued by reason of non-payment of such taxes or assessments; and

(4) The date and place of his discharge from the military service of the United States, and the unit in which he was serving at the time of his discharge. [Id., § 2.]

**Art. 7700d. Same.**—Upon the presentation to the comptroller of public accounts of this State by any county tax collector of this State of the affidavit of any such soldier, sailor or marine, as provided for in Section 2 of this Act [Art. 7700c], the comptroller of public accounts shall be hereby authorized, and it is made the duty of said comptroller of public accounts, to credit the account of the tax collector of any county of this State with all penalties and costs that may have accrued against said soldier, sailor or marine, by reason of his services as such; the said comptroller of public accounts shall also credit the account of the tax collector with the poll tax assessed against such soldier, sailor or marine for the years 1917, 1918 and 1919, as provided for by Senate Bill No. 1, Acts of the Thirty-sixth Legislature, First Called Session, approved May 9, 1919. [Id., § 3.]

**Art. 7700e. Same.**—Upon the presentation by the county tax collector of any affidavit by any such soldier, sailor or marine, as provided in Section 2 of this Act [Art. 7700c], it shall be the duty of the commissioners court or courts of this State to credit the account of such tax collector with all penalties and costs that may have accrued against any such soldier, sailor or marine, as provided for in Section 2 of this Act. [Id., § 4.]

**Art. 7700f. Same; custody of affidavits.**—All such affidavits presented to the comptroller of public accounts, as a part of the tax collector's report and presented to the commissioners courts of this State as a part of the credit claimed by reason of such affidavits on the accounts of such tax collector in the performance of his official duty, shall be kept on file in the office of the comptroller, or the office of the county clerk if made to the commissioners court, for a period of four years. [Id., § 5.]

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Setting aside tax sale—Procedure.**—In a suit to set aside a default judgment rendered in a tax suit and the sheriff's deed thereunder and to recover title to the property, the submission of special issues as to whether plaintiff was served with a copy of the citation and as to when he first learned of the rendition of the judgment was not error. *Rowland v. Klepper* (Com. App.) 227 S. W. 1096.

— **Extent of relief.**—In a suit to set aside a default judgment in a tax suit and the sheriff's deed thereunder and recover title to the property, where it appeared that plaintiff was not served with citation, but the state was not made a party, and no meritorious defense as against the state was shown, the sale will be set aside, leaving the judgment undisturbed. *Rowland v. Klepper* (Com. App.) 227 S. W. 1096.

— **Rights and liabilities of parties.**—In action to set aside judgment for delinquent taxes, legal on its face, and to cancel sheriff's deed, purchaser should have been given judgment for aggregate amount paid out by him as actual taxes on lot since the tax sale, with legal interest and a lien to insure payment. *Rousset v. Settegest* (Civ. App.) 210 S. W. 219.

**Parol evidence.**—See notes under art. 3687, rule 20.

## CHAPTER SEVENTEEN

## ASSESSMENT AND COLLECTION OF TAXES IN CERTAIN CASES

**Article 7702. Property omitted from tax rolls, etc., list of.**

**Right to assess omitted property.**—Before an assessor can place omitted property on the assessment roll, there must be a law authorizing such assessment. *Millers' Mut. Fire Ins. Co. v. City of Austin* (Civ. App.) 210 S. W. 825.

## CHAPTER EIGHTEEN

## OF MUNICIPAL TAXES TO PAY SUBSIDIES IN AID OF RAILROADS AND OTHER INTERNAL IMPROVEMENTS

**Article 7716. [5233] Such taxes, how applied.**

**Property received from collector in lieu of taxes.**—Property conveyed to a city in compromise of a suit against its tax collector and the sureties, on his failure to pay over taxes assessed and collected to meet the obligation of the city on bonds issued in aid of the construction of certain railroads, stands in the same position as would the money collected if paid over; and under the provisions of Rev. St. 1879, art. 4778, cannot be appropriated to the claim of a judgment creditor, and an injunction will issue restraining an execution sale by him. *City of Sherman v. Williams*, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

## CHAPTER EIGHTEEN A

## IMPROVEMENT DISTRICT TAXES TO PAY CERTAIN CERTIFICATES OF INDEBTEDNESS

Art.

7721¼. Tax to pay certificates of indebtedness issued for repair of levies.

7721¼a. Same; election; order for.

7721¼b. Same; levy, assessment and collection of tax.

Art.

7721¼c. Same; priority of outstanding bonds.

7721¼d. Same; when election may not be called.

**Article 7721¼. Tax to pay certificates of indebtedness issued for repair of levies.**—Any improvement district created prior to the year 1915 for drainage or levee purposes, which has heretofore issued, through its commissioners, in the performance of the duty enjoined upon them by law to keep the levees in their districts repaired, its certificates of



indebtedness in payment for necessary repairs of any levee of such districts damaged or destroyed in part by overflow or flood occurring during the year 1915, may pay such certificates by taxation, when the levy and collection of a tax for such purpose shall have been authorized by an election which may be held in such district, as hereinafter provided for. [Acts 1919, 36th Leg., ch. 153, § 1.]

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

**Art. 7721 $\frac{1}{4}$ a. Same; election; order for.**—The County Commissioners' Court of any county in which any such district is situated, when petitioned to do so by a majority of the property tax paying voters of any such district, shall order an election to be held in such district for the purpose of determining whether or not a tax shall be levied, assessed and collected for the purpose of paying such certificates, and the existing law applicable to such improvement district, as to the calling of an election, notice thereof, the appointment of election officers, the qualification of voters therein, the time, place and manner of holding elections, and the making and acting upon returns thereof, for determining whether or not the bonds of the district shall be issued, shall control and be complied with, with only such difference as shall be necessary to make such law applicable to the subject. [Id., § 2.]

**Art. 7721 $\frac{1}{4}$ b. Same; levy, assessment and collection of tax.**—If the result of such an election shall be in favor of the levy, assessment and collection of a tax with which to pay such certificates, then the tax shall be annually levied, assessed and collected by the same agencies, and in the same way as in the case of any tax authorized with which to pay a bond issue, and then the same shall be applied in payment of such certificates as the proceeds of a bond issue of such district would be applied under existing laws upon any valid debt of such districts. [Id., § 3.]

**Art. 7721 $\frac{1}{4}$ c. Same; priority of outstanding bonds.**—All proceedings hereunder shall be subject to the priority and preference in all respects of the outstanding bonds of the district. [Id., § 4.]

**Art. 7721 $\frac{1}{4}$ d. Same; when election may not be called.**—If at the time of the presentation of any petition for an election authorized hereunder, it should appear to the County Commissioners' Court, from an examination of the records pertaining thereto, that the amount of the certificates sought to be paid by taxation, added to the amount of the unpaid bonds outstanding against such district, exceed in amount the aggregate amount of bonds which such district could then legally issue, then no election shall be called. [Id., § 5.]

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## TITLE 127

### TIMBER

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Nature of property in timber.**—Though standing timber is generally regarded as part of the realty, the owner by contract can constructively cause a severance, and for purposes of mortgage or sale convert it into personalty. *Downey v. Dowell* (Civ. App.) 207 S. W. 585.

**Title to timber.**—One having a lien under a deed of trust has no title to wood cut and removed prior to foreclosure. *Chavez v. Schairer* (Civ. App.) 199 S. W. 892.

**Sale of timber in general.**—Contracts of sale and deeds of standing timber, like other contracts, should be interpreted in such manner as will best carry out intention

of parties. *Houston Oil Co. of Texas v. Boykin*, 109 Tex. 276, 206 S. W. 815; *Broocks v. Moss* (Com. App.) 212 S. W. 153.

In action to recover for breach of contract to convey timber, evidence held to support jury findings that there was meeting of minds on essential elements of contract. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

If a deed conveyed timber in fee as an interest in the land, the assignee of the grantee could enjoin the owners of the land from cutting the timber, but, if it granted the timber as personalty, the purchaser had no right after the time fixed for cutting and removal. *Dunsmore v. Blount-Decker Lumber Co.* (Civ. App.) 198 S. W. 603.

Case as made by owner of standing timber for rescission on ground of misrepresentation of contract of sale held not to rest on legal fraud. *Jones v. Eastham* (Civ. App.) 224 S. W. 223.

**Damages for breach of contract.**—Where capacity of buyer's mill would have handled all timber contracted for in addition to timber secured from other sources, timber manufactured could not be considered to minimize damages for breach of contract to deliver. *West Lumber Co. v. C. R. Cummings Export Co.* (Civ. App.) 196 S. W. 546.

Although seller had no notice of inception of contract to deliver timber of special damage from breach, he would be liable therefor if after timely notice he failed to perform. *Id.*

Where seller had notice that buyer was to manufacture timber and would suffer special damages, court did not err in allowing as damages for breach by seller difference between contract price and value of lumber. *Id.*

Where seller of timber knew at the time that the contract was entered into that buyer intended to manufacture such timber into lumber, and that other timber was not available therefor, the buyer, on seller's failure to deliver and on inability to get other timber, could recover the loss of profits that it would have made if the lumber had been manufactured, even though the seller did not know until after contract had been entered into that the buyer would likely suffer damages in loss of profits. *West Lumber Co. v. R. C. Cummings Export Co.* (Com. App.) 228 S. W. 911.

**Limitation as to time.**—Where deed conveying timber provides a definite time within which timber is to be cut and removed, all timber not so cut within time limited reverts to grantor and those holding under him, notwithstanding deed does not in terms provide for reversion. *Adams v. Fidelity Lumber Co.* (Civ. App.) 201 S. W. 1034.

Timber deed providing for extension of period for removal held to authorize annual renewals for limited period, and forfeiture of timber rights could not be declared because grantee's successor, when renewal was asked, tendered only the annual payment. *Id.*

Where timber deed specified acreage as 2,350 acres, more or less, annual payment of extension of time of removal should be computed on that acreage, though it subsequently developed that land was greater in area. *Id.*

Instruments which merely convey timber with a license to remove, without stipulating time for removal, imply that timber must be removed within a reasonable time. *Houston Oil Co. of Texas v. Boykin*, 109 Tex. 276, 206 S. W. 815.

Under contract of sale of standing timber, giving purchaser liberty to go upon land and remove timber as would be convenient to him, title passed to only so much timber as might be removed within a reasonable time, since removal clauses should not be construed as covenants. *Id.*

A contract transferring standing timber, with right to all the time purchaser or his assigns should demand for its removal, and providing they should be forever entitled to have and hold such timber and right of way for its removal, held an absolute sale of timber, with unlimited time for removal. *Houston Oil Co. of Texas v. Hamilton*, 109 Tex. 270, 206 S. W. 817.

Where a deed to timber did not convey a fee-simple title and specified no time for removal, the grantee must remove the timber within a reasonable time, or he will lose his rights thereunder. *Houston Oil Co. of Texas v. Bunn* (Civ. App.) 209 S. W. 830.

A deed of standing timber which gave the grantee the right to cut and remove the timber within a specified time, and an additional term or so much thereof as might be required, on payment of a specified sum, gave the grantee title only to such timber as was cut and removed within the period fixed. *Broocks v. Moss* (Com. App.) 212 S. W. 153.

Timber deeds and contracts containing a time limitation for the removal of timber pass no title save to so much of the timber as the vendee may remove within the time limited. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

A deed conveying all pine timber upon a described tract of land, and empowering grantees to enter to cut the timber, including the usual covenant of warranty, conveyed a fee-simple title to the timber, so that plaintiff was not required to remove it within a reasonable time, but could do so at his pleasure, and title to the timber did not revert to grantor after a reasonable time. *Chapman v. Dearman* (Sup.) 229 S. W. 1112.

**Deed of timber construed.**—A deed conveying all merchantable timber on a certain tract, providing that the grantees should have 10 years to cut and remove it, and permitting the grantees to enter the land for the purpose of cutting and removing the timber, conveys the timber as personalty. *Dunsmore v. Blount-Decker Lumber Co.* (Civ. App.) 198 S. W. 603.

The term "merchantable pine timber," as used in a timber deed, meant such pine timber as was suitable for trade and sale, and which had a value on the market at the date of the deed, only such size timber as was ordinarily used for sawmill purposes in the vicinity. *Southwestern Settlement & Development Co. v. May* (Civ. App.) 220 S. W. 133.

A deed conveying all pine timber on a described tract of land, and empowering grantees to enter to cut and remove it, including the usual covenants of warranty conveyed a fee-simple title to the timber. *Chapman v. Dearman* (Sup.) 229 S. W. 1112.

**Actions for taking timber.**—If defendant had superior title to land when wood was cut therefrom, he had superior title and possessory right to the wood which would constitute a perfect defense to action for conversion. *Chavez v. Schairer* (Civ. App.) 199 S. W. 892.

Where one seizes timber removed from land and is sued in conversion, and he defends on the ground of superior title to land, it is sufficient to show a common source and superior right. *Id.*

That one was in possession of timber which he purchased from one claiming land, and which he has cut and removed, was sufficient evidence of title to maintain action of conversion. *Id.*

— **Measure of damages.**—Where one buys standing timber from one claiming title to land when in fact another has a superior title and seizes the wood, he is a trespasser, and in suit for conversion is not entitled to expenses of cutting and removing. *Chavez v. Schairer* (Civ. App.) 199 S. W. 892.

**Logging contracts.**—Contract for the conduct of a sawmill enterprise as a joint enterprise held to imply in the absence of explanatory evidence, that defendant's share of the expenses was to begin when the mill reached his land, and, where the parol testimony was to the effect that such was the intention, the Court of Civil Appeals erroneously held as a matter of law that defendant was not bound for any part of the expenses until the mill was in actual operation. *Porter v. McKinnon* (Com. App.) 221 S. W. 574, affirming judgment (Civ. App.) *McKinnon v. Porter*, 192 S. W. 1112.

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## TITLE 127 A

### TORTS—SITUS OF SUITS FOR

#### Article 7730½. Suits for death or personal injury by wrongful act committed outside the state.

**Right of action in general.**—The cause of action for wrongful death given by Comp. Laws N. M. 1884, §§ 2309, 2310, as amended by Laws 1891, c. 49, is transitory, and may be maintained in a state other than that of New Mexico. *Atchison, T. & S. F. Ry. Co. v. Berkshire* (Civ. App.) 201 S. W. 1093.

In a servant's action for injuries, based on the defendant railroad's violation of the federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.), the master's liability was enforceable in courts of Texas, without reference to the laws of California, where the tort occurred. *Southern Pac. Co. v. Henderson* (Civ. App.) 208 S. W. 561.

That only one action can be brought in Texas for a tort, and that subsequent actions can be brought in Mexico for damages accruing after trial, does not prevent a Texas court from assuming jurisdiction of action for tort committed in Mexico, and giving judgment for damages accruing before trial. *El Paso Electric Ry. Co. v. Carruth* (Civ. App.) 208 S. W. 984.

Under pleadings and evidence in action for damages for tort committed in Mexico, held that it was not necessary to invoke provisions of Acts 35th Leg. c. 156, bestowing jurisdiction upon courts of Texas in cases involving torts committed in foreign countries, to justify court in taking jurisdiction. *Id.*

A resident of Texas, suffering personal injuries in another state while employed in interstate commerce by a common carrier domiciled in Texas, can bring suit in Texas to enforce the carrier's liability under the federal Safety Appliance Acts (U. S. Comp. St. §§ 8605-8623). *St. Louis Southwestern Ry. Co. of Texas v. Smitha* (Sup.) 232 S. W. 494.

— **Action on penal statute.**—Notwithstanding this act, a widow cannot sue a railroad in Texas for the death of her husband in a crossing collision in New Mexico, under Code N. M. 1915, § 1820, since the recoverable sum is allowed as a penalty. *Clay v. Atchison, T. & S. F. Ry. Co.* (Com. App.) 228 S. W. 907; *Clay v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 201 S. W. 1072.

— **Necessity of ancillary administrator.**—Where domiciliary administrator of New Mexico resident in Texas sued railroad company alleged to be liable for death of his intestate, held that, as Comp. Laws N. M. 1884, §§ 2309, 2310, as amended by Laws 1891, c. 49, allow suit only by personal representative, an ancillary administrator in Texas should be appointed. *Atchison, T. & S. F. Ry. Co. v. Berkshire* (Civ. App.) 201 S. W. 1093.

**Right of non-residents to sue.**—The comity existing between states and nations sanctioned the rule that an inhabitant of another state or another nation has free access to courts for the redress of wrongs or the prosecution of rights. *Coss v. Coss* (Civ. App.) 207 S. W. 127.

## TITLE 128

## TRESPASS TO TRY TITLE

Chap.

1. Pleadings and practice.

Chap.

2. Claim for improvements.

## CHAPTER ONE

## THE PLEADINGS AND PRACTICE

Art.	Art.
7731. Method of trying titles to land, etc.	7742. What is sufficient title, etc.
7733. The petition shall state what.	7743. Either party may demand abstract of title.
7734. Indorsement on petition.	7745. Abstracts shall state what.
7735. Warrantor, etc., may be made a party.	7746. Amended abstract.
7736. Landlord may become defendant.	7747. Surveyor appointed, etc.
7737. The possessor shall be defendant.	7748. Survey unnecessary when.
7738. May join as defendants, whom.	7749. Common source of title, proof of.
7739. May file plea of "not guilty" only.	7752. When defendant claims part only.
7740. What proof may be made under such plea.	7753. Where plaintiff proves part.
7741. Answer taken as admitting possession.	7755. The judgment, etc.
	7756. Damages, etc., when recovered.
	7758. Final judgment conclusive.

**Article 7731. [5248] Method of trying titles to land, etc.**

Nature and scope of remedy in general.—Trespass to try title is a rescission in itself. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Suits for land in ejectment are possessory in their nature, whether based on prior possession or title. *Butler v. Borroum* (Civ. App.) 218 S. W. 1115.

Equities and rights of vendor and purchaser.—Surviving wife and children, suing in trespass to try title after decedent's notes secured by a vendor's lien had been barred by limitations, might satisfy the debt or offer to pay it as a condition to cancellation of surviving wife's deed to defendant and so enable court to adjust their equities. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

Foreclosure.—Foreclosure of a mortgage could not be awarded in an action to rescind a trade for deceit or in an action for trespass to try title. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

Partition.—A partition suit in ordinary form may be converted into trespass to try title by defendant's alleging right of possession in himself to all the land. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

**Art. 7733. [5250] The petition shall state what.**

See *O'Connor v. Luna*, 75 Tex. 592, 12 S. W. 1125; *Windsor v. Freeman* (Civ. App.) 204 S. W. 780; notes to arts. 7741, 7742.

Petition.—Where plaintiff pleads her title specially, she abandons her plea in trespass to try title, but does not thereby subject the petition to general demurrer. *Hensley v. Pena* (Civ. App.) 200 S. W. 427.

In widow's suit in form of trespass to try title, to remove cloud from title, and, in alternative, to enforce equitable vendor's lien, petition held sufficiently to allege fraud which induced her to deed away her interest, thus establishing her cause of action. *Janes v. Stratton* (Civ. App.) 203 S. W. 386.

A complaint in trespass to try title alleging that plaintiff was in possession of the land, describing it, that defendant unlawfully entered and ejected the plaintiff therefrom, and unlawfully withholds possession thereof to plaintiff's damage, etc., held sufficient as against a general demurrer. *Shumaker v. Byrd* (Civ. App.) 203 S. W. 461.

Petition in trespass to try title to deceased's homestead held to state cause of action. *Clark v. Scott* (Civ. App.) 212 S. W. 728.

Where petition set up adverse possession under instrument not describing any locatable land and did not allege that plaintiff entered on any certain described land and held same adversely, petition is insufficient. *School Trustees of Eastland County v. Hilliard* (Civ. App.) 214 S. W. 579.

A petition, alleging plaintiff's ownership in fee simple of land, that defendant was in possession thereof and forcibly detaining it from plaintiff, with facts showing plaintiff's right to possession, though not literally complying with the fiction prescribed by Rev. St. art. 7733, and not containing the indorsement required by article 7734, substantially complies with those statutes and shows the suit to be for recovery of land. *Evans v. Hudson* (Civ. App.) 216 S. W. 491.

A petition in trespass to try title, alleging the recovery by defendant of a default judgment against plaintiffs in a suit to try title to land having the same lot and block numbers but in a different town, was not insufficient, where it was expressly alleged

that the property involved was not the same as that involved in the prior suit. *Hare v. Marshall* (Civ. App.) 226 S. W. 482.

In trespass to try title, under a claim that a foreclosure sale was invalid, because part of the lands were improperly described as being in a named county, it was necessary for plaintiffs to plead a willingness to make reimbursement. *De Guerra v. De Gonzalez* (Civ. App.) 232 S. W. 896.

— **Description of premises.**—In suit for certain land described by metes and bounds and inclosed by defendant's fence, the burden was on defendant to show what portion he was entitled to, and, where he showed title only to part, the court erred in refusing judgment for plaintiff for the remainder because it was not described in the pleadings or evidence so that a description thereof could be made in the judgment. *Esser v. Kneupper* (Civ. App.) 205 S. W. 508.

In suit in form of trespass to try title and to remove cloud, description of deed set forth in petition as basis of plaintiff's title, held so deficient and contradictory in its calls that no land was conveyed. *School Trustees of Eastland County v. Hilliard* (Civ. App.) 214 S. W. 579.

In trespass to try title to land in Lacey league, defendants, claiming part of the land through adverse possession, did not limit their claim to the Moses Hill survey by generally describing the land as being in the latter survey in their pleadings, where they also described the land by metes and bounds. *Tucker v. Angelina County Lumber Co.* (Com. App.) 216 S. W. 149.

— **Interest or ownership.**—In trespass to try title, it is not necessary for plaintiff, who relies on equitable title, to plead specifically facts on which his title is based; customary allegations being sufficient to authorize proof of any fact tending to establish title. *Blumenthal v. Nussbaum* (Civ. App.) 195 S. W. 275.

Fact that vendor pleaded unauthorized deed in rescission of contract would not prevent recovery upon good title pleaded by him and admitted by defendant. *Rockhill Country Club Co. v. Nix* (Civ. App.) 198 S. W. 155.

Trespass to try title being rescission, notice of intention to rescind is unimportant so far as pleading title is concerned. *Id.*

— **Adverse possession or claim.**—Allegations that defendants unlawfully withheld possession from plaintiff, that the property was occupied and used by defendants, and that plaintiff feared defendants would injure the property, held sufficiently to charge an eviction subsequent to the date of his possession of the premises, notwithstanding that the date upon which plaintiff had possession was erroneously stated. *Shumaker v. Byrd*, 110 Tex. 146, 216 S. W. 862.

Petition, which sounded in trespass to try title, was not changed by allegations that defendant's title was void, and that record thereof cast a cloud on the title of plaintiffs. *Canon v. Scott* (Civ. App.) 217 S. W. 429.

— **Prayer for relief.**—In trespass to try title, the court can reform an instrument relied upon to support title under a general prayer for equitable relief, where the proper facts are pleaded, although there is no prayer for reformation. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

In trespass to try title, it was error to grant to plaintiffs rent for which their petition does not pray, in view of subdivision 7 of this article. *Spikes-Nash Co. v. Manning* (Civ. App.) 204 S. W. 374.

— **Amendment.**—A petition substantially complying with this article, though not literally complying therewith, is sufficient to support an amended petition containing all the allegations of fact required by that article. *Evans v. Hudson* (Civ. App.) 216 S. W. 491.

— **Issues, proof and variance.**—Under petition alleging that plaintiffs were heirs of E. and owners of property, held that allegation that they were heirs was descriptive, and evidence was admissible that property was community property of E. and the widow, one of the plaintiffs. *San Antonio & A. P. Ry. Co. v. Evans* (Civ. App.) 198 S. W. 674.

Where paragraph of second amended petition alleged trespass to try title, to which defendants answered by plea of not guilty, formal alternative pleas permitted issue of equitable right in plaintiffs to correct partition between parties because original decree was founded on mutual mistake of matter. *O'Connor v. Sanchez* (Civ. App.) 202 S. W. 1005.

To rebut plaintiff's claim that decree in prior partition suit was based on belief parties owned all land, and that belief was mistake, it was permissible for defendants to plead and prove in rebuttal there was no mistake, and on such issue, made by equitable cause of action pleaded, parol testimony restricting statutory warranty arising from decree of partition was properly admitted. *Id.*

In trespass to try title to land in the "Isom Lee" survey, sheriff's deed to land in "J. Lee" survey was properly excluded, in the absence of evidence tending to show that the variance in the description was a clerical error. *Hopkins v. King* (Civ. App.) 204 S. W. 360.

Much latitude is allowed in suits to recover the title and possession of realty when plaintiff's petition is in the ordinary form of trespass to try title and is only met by a plea of not guilty. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

In trespass to try title met only by a plea of not guilty, either party may offer evidence by way of confession and avoidance, and, under certain conditions, may prove that a deed relied upon by his adversary is void because procured by fraud, or as the result of mistake. *Id.*

Plaintiff fails to establish title to the land sued for, there not only being a difference between the description in his deed and that in the petition, but the evidence showing the tracts to be distinct. *Carr v. Bordner* (Civ. App.) 219 S. W. 282.

Under the provision requiring plaintiff suing for an undivided interest to state the

amount thereof, he must establish title to a definite interest, though it may be less than that stated. *Steddam v. Kirby Lumber Co.*, 110 Tex. 513, 221 S. W. 920, reversing judgment (Civ. App.) 154 S. W. 273.

In trespass to try title, petition pleading the five-year statute of limitations held sufficient to apprise defendants that plaintiffs claimed a privity of estate between themselves and their grantors, so that testimony of such grantors as to the possession of each under their deeds was admissible. *Ammerman v. Bourland* (Civ. App.) 230 S. W. 804.

The presumption of the execution of a deed may be asserted under the general allegations of a trespass to try title petition. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

A showing of title by limitations is not permissible under the general allegations of a petition of trespass to try title, but must be specially pleaded. *Id.*

**Assignability of right of re-entry.**—The question of assignability of the right of re-entry after condition subsequent broken should be governed by the same rule applied to the assignability of an interest in land in the adverse possession of another, and such right is assignable in view of subdivision 4 of this article, notwithstanding the act of 1840, which makes the common law of England the rule of decision in the state. *Perry v. Smith* (Com. App.) 231 S. W. 340.

#### Art. 7734. [5251] Indorsement on petition.

**Effect of failure to indorse.**—Under Rev. St. 1879, art. 4787, where the petition alleged that plaintiff was the widow of the owner of the land, and that it was the homestead, and had been set apart to her by the probate court, and also stated the facts constituting the invasion of her rights, a judgment for plaintiff will not be reversed for want of the required indorsement. *Bradley v. Deroche*, 70 Tex. 465, 7 S. W. 779.

A petition, though not literally complying with the fiction prescribed by art. 7733, and not containing the indorsement required by this article, held to substantially comply with those statutes and show the suit to be for recovery of land. *Evans v. Hudson* (Civ. App.) 216 S. W. 491.

#### Art. 7735. [5252] Warrantor, etc., may be made a party.

Cited, *Monks v. McGrady*, 71 Tex. 134, 8 S. W. 617; *Sulphur Springs & Mt. P. Ry. Co. v. St. Louis, A. & T. Ry. Co. in Texas*, 2 Civ. App. 650, 22 S. W. 107.

**Right of defendant to ask judgment against warrantor.**—Under Rev. St. 1879, arts. 1209, 4788, defendants' vendor being in court, and having made separate answer, defendants were properly allowed to plead his covenants of warranty to them, and to ask judgment against him thereon, in the event of a judgment against them for the land. *Kirby v. Estill*, 75 Tex. 484, 12 S. W. 807.

#### Art. 7736. [5253] Landlord may become defendant.

**Conclusiveness of judgment.**—See *Stout v. Taul*, 71 Tex. 438, 9 S. W. 329; notes to art. 7758.

#### Art. 7737. [5254] The possessor shall be defendant.

Cited, *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

**Possession of defendant in general.**—Under Rev. St. 1879, art. 4790, an action of trespass to try title may be maintained against a defendant who never has occupied the premises, if he claims title thereto; and it is not necessary to aver and prove that the owner ever was in actual possession, or that the defendant was in possession as a trespasser, unless some relief is sought based on these facts. *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865.

**Conclusiveness of judgment.**—See *Stout v. Taul*, 71 Tex. 438, 9 S. W. 329; notes to art. 7758.

#### Art. 7738. [5255] May join as defendants, whom.

**Necessary parties.**—In trespass to try title wherein defendant's title depends on a mortgage with an incorrect description carried through to the sheriff's deed, the mortgagor, or his legal representative, is a necessary party to a reformation of such mortgage. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

In trespass to try title by divorced first wife of decedent, claiming through her son, against second wife, where by judgment court did not attempt to reform deed to second wife, it was not necessary that grantors should have been made parties. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

Where defendant and another agreed to purchase land, title being taken in defendant's name and it being understood that the third person should have no interest until he had paid for his share, held, that the heirs of such third person who died pending a suit were not necessary parties; it appearing no payments were made. *Watkins v. Hines* (Civ. App.) 214 S. W. 663.

In trespass to try title against lessee, subsequent lessees of portions of the land were not necessary parties, and final judgment could be rendered without them as parties; no request having been made that they be made such, though they were possibly proper parties, and no judgment rendered would bind them. *Patton v. Texas Pac. Coal & Oil Co.* (Civ. App.) 225 S. W. 857.

**Art. 7739. [5256] May file plea of "not guilty" only.**

**Affirmative relief and cross actions.**—In trespass to try title, defendant attorney held entitled to have reimbursement for moneys paid for land made condition precedent to enforcement of judgment by client, although not requested in answer, tender having been made by plaintiff's pleading. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849.

Where there was no pleading on the part of defendants of the payment of taxes and no prayer for set-off, the court did not err in refusing to set off against the damages awarded plaintiffs taxes paid by defendants, in view of art. 1907. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

Where a defendant brings a cross-action against plaintiff and another defendant, he must affirmatively show title to land in the possession of second defendant. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

Cross-action by defendant seeking to recover amount paid down on contract for sale of land held, under the pleadings, not defeated by failure to offer to pay rent for land held by her, where it was alleged in supplemental answer that she actually did pay rent. *Speer v. Hansen* (Civ. App.) 213 S. W. 324.

Defendants had the right by cross-action to ask that they be quieted in their title, and, if the evidence established more than the right to such judgment, there was no error in rendering it, even if it did have the effect of settling future possible claims. *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

**Art. 7740. [5257] What proof may be made under such plea.**

**Defenses in general.**—Defendant in trespass to try title, who follows a formal plea of not guilty by specially pleading his title, will not be permitted to show any title other than that specially pleaded. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359.

One purchasing land pending suit in trespass to try title was not an "innocent purchaser." *Roberts v. Dreyer* (Civ. App.) 200 S. W. 1097.

Under allegation that defendant had perfected title by adverse possession, defendant could not show as against prima facie case that the property had been conveyed to him by parol by one who had been in adverse possession, where if the statute of limitations had operated at all in the grantor's favor it had operated long enough to perfect title in him, which could not be divested by parol, in view of art. 1103. *Campbell v. Castle* (Civ. App.) 204 S. W. 484.

In trespass to try title, the defense that conveyance was invalid as to the grantor's wife, who did not join therein, because of homestead rights, must be pleaded. *Guarantee Mercantile Co. v. Nelson* (Civ. App.) 223 S. W. 543.

Except as to title by limitation where plaintiff in trespass to try title elects to plead his title specially, he is confined to the proof of the title so pleaded. *Brownfield v. Brabson* (Civ. App.) 231 S. W. 491.

**Title or right of possession of third person.**—It is not a defense that the land has been sold under execution against one of the cotenants thereof, where defendant does not connect himself with the outstanding title thereby created. *Holmes v. Tennant* (Civ. App.) 211 S. W. 798.

While it is not necessary for a defendant in trespass to try title to connect himself with an outstanding title, it is necessary that he establish the validity of such outstanding title. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

Generally a defendant, relying on an outstanding title in some third person to defeat plaintiff's recovery, must show such outstanding title is a valid one, and the mere fact that some kind of an outstanding title appears is not a good defense. *Houston Oil Co. of Texas v. Choate* (Civ. App.) 215 S. W. 118.

Execution of deed by plaintiff after institution of suit and prior to filing of cross-action by defendant did not create outstanding title upon which defendant could rely as a defense. *Elder v. Craddock* (Civ. App.) 223 S. W. 314.

**Stale demand and laches.**—See *Duren v. Houston & T. C. Ry. Co.*, 86 Tex. 287, 24 S. W. 258; notes to art. 7742.

In trespass to try title founded upon legal and not equitable title, laches was no defense. *Perez v. Maverick* (Civ. App.) 202 S. W. 199.

Legal title to land cannot be defeated by a plea of stale demand. *Cagle v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 202 S. W. 942.

One seeking to repudiate a contract for fraud or mistake must act promptly on discovery thereof and where plaintiff admitted that in 1913, less than a year after her deed to defendant, she learned that he was claiming the land, a suit in trespass to try title not filed until latter part of February, 1916, justified a finding that the right of possession had been lost. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

**Proof under plea of not guilty or general issue.**—The statute of frauds is available as a defense in trespass to try title though not pleaded, under Rev. St. 1879, art. 4793. *Johnson v. Flint*, 75 Tex. 379, 12 S. W. 1120.

Defendant, under plea of not guilty, could not collaterally attack execution sale to plaintiff, although plaintiff stilled competitive bidding at prior sale under same judgment. *Ives v. Culton* (Civ. App.) 197 S. W. 619.

In trespass to try title by divorced first wife of decedent, claiming through her son against second wife, testimony that deed to second wife was intended for her separate use and benefit held admissible under general denial and plea of not guilty. *Johnson v. Johnson* (Civ. App.) 207 S. W. 202.

In city's action to compel removal of fence inclosing alley, which city claimed had been rededicated after 10 years' title against city had been perfected by limitation, defendant, under this article could show that there was no new dedication of the alley, under plea of not guilty. *City of Pearsall v. Crawford* (Civ. App.) 213 S. W. 327.

In trespass to try title, defendant filing a plea of not guilty as well as one of limitations, may show that he was a tenant in common with his codefendants, and had an interest in the fee of less than a whole by virtue of a timber deed. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 216 S. W. 281.

Defendant could, in view of this article, under plea of not guilty, invoke defense that plaintiffs claiming through subtenant were estopped to deny defendant's title. *Rio Bravo Oil Co. v. Sanford* (Civ. App.) 217 S. W. 219.

In trespass to try title by a decedent's daughter against his widow, wherein the latter pleaded a general denial, evidence showing that the deed to decedent offered in evidence by daughter was other than what it purported to be, or was made to the husband in trust for the widow's benefit, would not be admissible. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

The defense that after-acquired title of an oil and gas lessor passed to the lessee by estoppel is available by virtue of this article, under plea of not guilty. *Texas Pacific Coal & Oil Co. v. Fox* (Civ. App.) 228 S. W. 1021.

A legal or equitable estoppel may be proved under the general denial without being specially pleaded; consequently, where plaintiff relied upon title by limitation, it was competent for defendants to show that he in fact entered as their tenant and that his possession therefore was not adverse. *Beason v. Williams* (Civ. App.) 229 S. W. 963.

Though the plea of not guilty authorizes any defense which defeats recovery, since the suit is possessory, it does not authorize an unenclosed equity in defendant to defeat the recovery of the land by the true owner having the paramount legal title under the common source, but such equity must be set up by adequate pleading. *Pope v. Witherspoon* (Civ. App.) 231 S. W. 837.

### Art. 7741. [5258] Answer taken as admitting possession.

See *Von Rosenberg v. Cuellar*, 80 Tex. 249, 16 S. W. 53.

Cited, *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

**In general.**—Pleas of not guilty and of the statutes of limitations will be deemed equivalent to an ouster of plaintiff, under Rev. St. 1879, art. 4794. *St. Louis, A. & T. Ry. Co. v. Prather*, 75 Tex. 53, 12 S. W. 969.

Under Rev. St. 1879, art. 4794 et seq., a plea of not guilty is not sufficient to charge defendant with use and occupation from the institution of suit, without proof of his occupancy. *O'Connor v. Luna*, 75 Tex. 592, 12 S. W. 1125.

In trespass to try title to recover land conveyed by a married woman alone, though part of community of herself and husband, held that under answer alleging that married woman's deed was duly executed, evidence that she had been abandoned by her husband and it was necessary to sell land was admissible. *Hadnot v. Hicks* (Civ. App.) 198 S. W. 359.

### Art. 7742. [5259] What is sufficient title, etc.

**Title to support action.**—In trespass to try title, plaintiff must recover, if at all, upon the strength of his own title, and not upon the infirmity of defendant's title. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675; *Engelking v. Mertens* (Civ. App.) 202 S. W. 777; *Harrison v. Abercrombie* (Civ. App.) 213 S. W. 708; *Canon v. Scott* (Civ. App.) 217 S. W. 429; *Dittman v. Cornelius* (Civ. App.) 218 S. W. 109; *Moss v. Ingram* (Civ. App.) 224 S. W. 258.

Plaintiff, to recover, must establish his title. *Hall v. Edwards* (Com. App.) 222 S. W. 167, reversing judgment (Civ. App.) 194 S. W. 674; *McCaslin v. Veasy* (Civ. App.) 199 S. W. 1173.

A plea of stale demand is no defense to an action of trespass to try title against one claiming title under a land certificate duly located and surveyed under Rev. St. 1879, art. 4795. *Duren v. Houston & T. C. Ry. Co.*, 86 Tex. 287, 24 S. W. 258.

Refusal of defendant, who had purchased property for immoral purposes, to yield possession to plaintiff, who had purchased at trustee's sale under deed in trust executed as a part of the immoral transaction, did not render the illegal deed of trust an unexecuted contract so as to preclude court from giving plaintiff relief in trespass to try title, the contract having been executed by the trustee's sale giving plaintiff a complete title, with the right of possession as an incident thereto, without reference to the original illegal contract. *Hall v. Edwards* (Com. App.) 222 S. W. 167, reversing judgment (Civ. App.) 194 S. W. 674.

One without title cannot maintain an action to establish title, and to recover possession for the use or benefit of another having title. *Duncanson v. Howell* (Com. App.) 222 S. W. 232, reversing judgment (Civ. App.) *Howell v. Duncanson*, 195 S. W. 349.

Where petition was insufficient, in failing to show that plaintiff had either legal or equitable title, if it would sustain a suit for specific performance of contract to convey land, cause should not be dismissed, but should be retained as suit for specific performance. *Ballard v. Ellerd* (Civ. App.) 199 S. W. 305.

Where plaintiff had before the trial sold the land to a third party and given him a deed thereto, and such grantee gave the plaintiff an express written authority to continue and prosecute the suit in her name for him, an assignment claiming that there was an outstanding title in the grantee was without merit. *Paire v. Goff* (Civ. App.) 202 S. W. 813.

Where the evidence justified conclusion that defendant, if in actual possession, was a naked trespasser, he was in no position to take advantage of any irregularities in the execution sale upon which plaintiff's title rested. *Hopkins v. King* (Civ. App.) 204 S. W. 360.



Under art. 7733, par. 4, plaintiff could not maintain trespass to try title, where he had conveyed by warranty deed, although his deed reserved vendor's lien, and provided for reconveyance by purchaser if plaintiff could not secure possession for the purchaser. *Windsor v. Freeman* (Civ. App.) 204 S. W. 780.

The holder of a naked legal title may maintain trespass to try title. *Masterson v. Pullen* (Civ. App.) 207 S. W. 537.

The ten-year statute would begin to run in favor of plaintiff when he took possession of lands within a valid survey claiming title by virtue of a deed, although no patent had been issued to lands within the survey, since those claiming adversely to plaintiff by virtue of the survey could, in view of this article, have maintained trespass to try title. *Spearman v. Mims* (Civ. App.) 207 S. W. 573.

In trespass to try title, bond for title, not reciting any consideration, was not evidence of title, where the payment of valuable consideration was not waived. *Robinson v. Randell* (Civ. App.) 211 S. W. 625.

While the plaintiffs must have title at the commencement of the suit, and one without title cannot sue for the use of another, a conveyance pendente lite by plaintiff does not affect the progress or determination of the suit, and grantee is bound by the judgment rendered, and a judgment for plaintiff inures to grantee's benefit, and such conveyance does not constitute an outstanding title. *Heard v. Vineyard* (Com. App.) 212 S. W. 489.

Even if a temporary administrator should not have been appointed under art. 3301, yet where the will had been duly probated, and there was an administration pending, and debts in a large sum had been filed and approved, the heirs and devisees could not bring trespass to try title to land belonging to the estate against others claiming it. *Simmons v. Campbell* (Civ. App.) 213 S. W. 338.

Plaintiff in a boundary suit must recover on the strength of his own title. *Brooks v. Slaughter* (Civ. App.) 213 S. W. 632.

In trespass to try title, plaintiff must show title in himself from the sovereignty, title by limitation, or such prior possession as entitles him to recover. *Schoonmaker v. Clardy* (Civ. App.) 218 S. W. 1112.

In trespass to try title to land in possession of another, the plaintiff must connect himself with the sovereignty of the soil, or show a common source or agreement as to a common source. *Barry v. Jones* (Civ. App.) 219 S. W. 1113.

A vendor's lien retained to secure notes given for the purchase price of land was a mere incident to the debt itself, and could be developed into title sufficient to sustain an action in trespass to try title only by foreclosure, sale, and purchase. *Burns v. Dyer* (Civ. App.) 230 S. W. 457.

It was necessary for plaintiff to show she had either legal or equitable title to the land described in her petition; and, where her mother's deed to a defendant recited a cash consideration, neither the legal nor the superior title which arises from express reservation of lien to secure payment of the purchase money remained in the mother, or in plaintiff through her. *Smith v. Price* (Civ. App.) 230 S. W. 836.

— **Paper title.**—Plaintiff, whose title depended upon deed from defendant city, could not maintain trespass to try title, deed upon its face showing superior title in defendant. *Bunn v. City of Laredo* (Civ. App.) 208 S. W. 675.

— **Equitable title.**—The assertion of an equitable title arising out of a contract to convey and payment of the purchase money is sufficient to support trespass to try title. *McBride v. Loomis* (Com. App.) 212 S. W. 450.

In trespass to try title, one can recover if he holds the superior title, whether legal or equitable. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

— **Right of plaintiff to possession.**—Prior possession of G., plaintiff's grantor, warrants judgment for plaintiff, defendant showing no superior title; W., under whom defendant claims, having entered as G.'s lessee, and there being no affirmative proof that G. did not have title. *Crafts v. McAllen* (Civ. App.) 196 S. W. 729.

Where the grantor of plaintiff in trespass to try title had possession by a tenant prior to the entry of defendant, plaintiff's possession was sufficient to support a judgment as against defendant who was a mere trespasser. *Mortimer v. Jackson* (Com. App.) 206 S. W. 510.

Though plaintiff failed to deraign title from the state, yet where defendants' plea of title by limitations was not sustained, and plaintiff showed prior possession of the land in his grantors, judgment for plaintiff was proper. *Perez v. Cook* (Civ. App.) 208 S. W. 668.

When land is inclosed by a substantial fence at a time defendant forcibly enters thereon, plaintiffs are entitled, in the absence of title in defendant, to recover on the strength of their prior possession, notwithstanding they have failed to show title because the land has not been inclosed for the statutory period. *McLellan v. Brown* (Civ. App.) 209 S. W. 177.

Plaintiff is entitled to recover by proof of possession by predecessor in title, in absence of any proof on part of defendant. *Robinson v. Randell* (Civ. App.) 211 S. W. 625.

Proof of prior possession is sufficient to sustain the action, when defendant is a mere naked trespasser. *Allen v. Vineyard* (Civ. App.) 212 S. W. 266.

Suits for land, in ejectment or trespass to try title, are possessory in their nature, whether based on prior possession or title; and one having prior possession of land is not required to exhibit his full title to recover against a mere trespasser. *Butler v. Borroum* (Civ. App.) 213 S. W. 1115.

The rule which permits plaintiff to recover against a mere trespasser, on proof of prior possession without further evidence of title, is a rule of evidence only, and not a rule of estoppel, and when defendant shows affirmatively that the plaintiff has no title,

and thus rebuts the presumption arising from his prior possession, defendant, though a mere trespasser, will not be disturbed. *Id.*

Defendants lawfully in possession could defend against mortgagee out of possession suing in trespass to try title who had no right of possession though defendants were not able to show title in themselves. *Langham v. Gray* (Civ. App.) 227 S. W. 741.

To support a recovery against a mere trespasser, the possession need not have been continuous up to and concurrent with the unlawful entry. *Beason v. Williams* (Civ. App.) 229 S. W. 963.

— **Title of cotenant or joint tenant.**—Proof of title to an undivided interest in a survey will support a recovery of the entire survey against a stranger to the title in trespass to try title. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307; *Hennegan v. Nona Mills Co.* (Civ. App.) 195 S. W. 664.

Plaintiff, in addition to establishing title to an undivided interest, must prove that defendant has no title to any interest; it being only a trespasser that a tenant in common can evict and thus appropriate the exclusive possession. *Steddum v. Kirby Lumber Co.*, 110 Tex. 513, 221 S. W. 920, reversing judgment (Civ. App.) 154 S. W. 273.

**Weight and sufficiency of evidence.**—In trespass to try title by heirs of remote owner, recitals in deed by legal representatives of such owner together with surrounding circumstances held sufficient to support court finding that owner before his death executed and delivered a contract to convey land. *Hennegan v. Nona Mills Co.* (Civ. App.) 195 S. W. 664.

In wife's suit to quiet title against mother superior of convent, who claimed husband had willed property to convent, facts recited in bill of exception held insufficient to sustain plea in abatement alleging that by husband's will property was devised to convent or its academy. *Mother Mary Angela v. Battle* (Civ. App.) 198 S. W. 1030.

That plaintiff in suit against the occupants of a homestead who had given a deed absolute as security declined to state from whom he purchased, was a circumstance in determining the weight of his testimony that he did not know, prior to his purchase, of the claims of the occupants. *Mason v. Olds* (Civ. App.) 198 S. W. 1040.

Proof by plaintiff of actual possession, under claim of ownership, irrespective of continuity, was prima facie evidence of title, sufficient against defendant entering the land a few months before and taking possession thereof from a tenant without plaintiff's consent. *Menefee v. Colley* (Civ. App.) 200 S. W. 182.

Where both parties claimed through common source, evidence held sufficient to show that vendee in defendant's chain of title was not innocent purchaser as to prior vendee in plaintiff's chain. *Houston Oil Co. of Texas v. Lane* (Civ. App.) 200 S. W. 216.

Evidence held to sustain findings for plaintiff. *Luttrell v. Click* (Civ. App.) 200 S. W. 255.

Evidence held to sustain judgment for defendant. *McCardell v. Lea* (Civ. App.) 200 S. W. 562.

Evidence held sufficient to establish title in defendant and his successors in interest by deed, duly executed and delivered, which was lost before recording. *Boedefeld v. Johnson* (Civ. App.) 201 S. W. 1027.

Evidence which showed who were mortgagee's heirs and that mortgagee died leaving estate, but which failed to show that there was no administration pending or that administration was unnecessary, was insufficient to prove that conveyance by heirs to plaintiff passed any right. *Engelking v. Mertens* (Civ. App.) 202 S. W. 777.

Under evidence, held, that plaintiff at most had only such right as might accrue to him by reason of having without request liquidated amount of mortgage debt against home of defendant which right was unavailing. *Id.*

In trespass to try title to and to recover possession of a league of land granted by the Mexican government to one John Moore, evidence held insufficient to warrant finding that the John Moore under whom plaintiffs claimed was the original grantee. *Toole v. Moore* (Civ. App.) 203 S. W. 429.

Where plaintiff claimed under a deed conveying lot 17 in block 5, according to the map on file, without otherwise designating boundaries, plaintiff was entitled to recover, where the only official map in evidence showed land to be a part of lot 17; defendant having produced no testimony showing better title in herself or any one else. *Johnson v. Clark* (Civ. App.) 209 S. W. 164.

Evidence held sufficient to show parol gift of part of property involved. *Morrow v. Preston* (Civ. App.) 209 S. W. 270.

In trespass to try title by one of five heirs of patentee of land in L. county, to recover an undivided one-fifth interest in two tracts therein, evidence held to conclusively show the partition of ancestor's estate, and that plaintiff had received land in R. county equaling or exceeding his interest as an heir, so that trial court properly directed a verdict for defendants. *Wright v. Robertson* (Com. App.) 213 S. W. 255.

In suit in form of trespass to try title and to remove cloud, in which defendant set up cross-action for judgment over for title and receivership conceding that description of land in plea was sufficient to describe definite quantity of land though petition did not, held, that plea must fail for want of proof. *School Trustees of Eastland County v. Hilliard* (Civ. App.) 214 S. W. 579.

In an action involving title to land, evidence held sufficient to warrant a finding that person through whom plaintiff was claiming had a grant from the states of Coahuila and Texas, so that it was immaterial that a testimonio in evidence was inadmissible to sustain such finding. *Ross v. Sutter* (Civ. App.) 223 S. W. 273.

A statement of facts reciting the introduction of abstracts to establish plaintiff's title is insufficient to show plaintiff's title, where it did not state that three of the instruments referred to purported to convey the land involved nor that the title was recorded

in the county where the land was situated, even if an abstract could be used as proof of title. *Shumaker v. Byrd* (Civ. App.) 226 S. W. 817.

In a suit for trespass to try title and for specific performance of a contract for the sale of land, evidence held insufficient to show that a decree for specific performance would be inequitable. *Simpson v. Green* (Com. App.) 231 S. W. 375.

**Effect of stipulations.**—See notes to art. 2166.

### Art. 7743. [5260] Either party may demand abstract of title.

**Abstract as evidence of common source.**—Abstracts furnished under this article, are admissible in trespass to try title to show common source. *Mortimer v. Jackson* (Com. App.) 206 S. W. 510.

**Evidence under abstract.**—Under arts. 7743-7745, when demand is seasonably made on plaintiffs to furnish abstract of title they rely upon, there must be strict compliance therewith, and written instrument, subsequently offered in evidence, not having been included in abstract, cannot be admitted. *Davis v. Cisneros* (Civ. App.) 220 S. W. 298.

### Art. 7745. [5262] Abstract shall state what.

**Admissibility of evidence.**—See *Davis v. Cisneros* (Civ. App.) 220 S. W. 298; notes to art. 7743.

### Art. 7746. [5263] Amended abstract.

**Evidence admissible under abstract.**—Under Rev. St. 1879, art. 4799, defendants cannot give in evidence a power of attorney not contained in the abstract, which they had filed under notice from plaintiff. *Smith v. Powell*, 5 Civ. App. 373, 23 S. W. 1109.

### Art. 7747. [5264] Surveyor appointed, etc.

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

**In general.**—Under Rev. St. 1879, arts. 4800 and 4801, where, on refusal of survey, plaintiff dismisses his action, but defendant proceeds for the affirmative relief asked for plaintiff may avail himself of the error in refusing the order of survey; the leading issue being the position of a boundary line, and there having been no sufficient testimony as to the facts which would have been shown by a survey. *Giraud v. Ellis* (Civ. App.) 24 S. W. 967.

**Continuance for survey.**—Under Rev. St. 1879, art. 4800, a judgment will not be reversed because of the refusal to continue the case in order to have a survey made, when there is nothing to show that the defeated party was injured, and it does not appear that the application for continuance was the first application made for that cause. *Coleman v. Beardslee* (Sup.) 16 S. W. 1011.

### Art. 7748. [5265] Survey unnecessary, when:

See *Giraud v. Ellis* (Civ. App.) 24 S. W. 967; notes to art. 7747.

### Art. 7749. [5266] Common source of title, proof of.

**Title from common source in general.**—One claiming land under foreclosure of a trust deed, by showing execution of trust deed by one P., does not show common source of title with one claiming title by judgment against P. and another, constituting defense to conversion of wood. *Chavez v. Schairer* (Civ. App.) 199 S. W. 892.

Where defendant's grantor, engaged to marry a woman who had two children by former marriage, bought land, the title to which was taken in her name, in trust for him, and after marriage he conveyed to plaintiff, and on his wife's death her mother assumed to convey to defendant, defendant had no title from the common source since the two children survived; but plaintiff had equitable title, at least, from the common source, entitling her to recover. *Mortimer v. Jackson* (Com. App.) 206 S. W. 510.

Where one held land for years under a void administrator's deed, a quitclaim deed from the heirs of one who had owned the property at a time prior to the death of the administrator's deceased did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

Where defendant, relying on a deed, introduced the same in evidence, the recitals in the deed were available to the plaintiff in the establishment of his title, although defendant was also relying on a quitclaim deed from heirs of a former owner. *Id.*

Plaintiff, having shown a complete chain of title from the common source to herself, is entitled to recover the land unless defendant as he claims was an innocent purchaser for value. *Johns v. Wear* (Civ. App.) 230 S. W. 1008.

Under this article, the burden is on plaintiff to deraign his title from the sovereignty of the soil unless there is a common source of title shown. *Pope v. Witherspoon* (Civ. App.) 231 S. W. 837.

**Agreement as to common source.**—Where the parties agreed as to a common source, it was incumbent upon plaintiff to show superior title from such source. *Laidacker v. Palmer* (Civ. App.) 210 S. W. 739.

**Effect of common source or claim thereunder in general.**—Evidence that defendant claims under a common grantor is prima facie proof that such grantor had the title at the time he undertook to convey the right which the defendant claims, and this neces-

sarily involves the assumption that he had acquired the title of all previous owners. *McBride v. Loomis* (Com. App.) 212 S. W. 480.

Though defendants' grantor, who was the common source of title, may have had an equity to reform a conveyance to plaintiff's predecessor, so as to make the description in the deed coincide with a survey made at the time of the conveyance, yet defendants, not having shown themselves connected with the equity, cannot, by reason of such outstanding equity, defeat plaintiff's action to recover land included within the description. *Swann v. Mills* (Civ. App.) 219 S. W. 850.

**Proof of common source.**—A void tax deed to one under whom defendants claim, reciting that the land was sold as the property of one under whom plaintiffs claim, is admissible, in connection with subsequent deeds reciting the tax sale and showing a chain of title to defendants, to show that the parties claim under a common source; *Rev. St. 1879, art. 4802. Garner v. Lasker*, 71 Tex. 431, 9 S. W. 332.

*Rev. St. 1879, art. 4802*, does not change the effect of original deeds when offered as evidence of common title. *Bosse v. Cadwallader* (Civ. App.) 23 S. W. 260.

Facts held not to warrant submission of issue whether deed from common source to a son whose heirs are plaintiffs was a bona fide sale and purchase or a conveyance in trust to subserve the convenience of the parties. *Watts v. McCloud* (Civ. App.) 205 S. W. 381.

Under this article, plaintiffs, having shown an undivided interest in the land, however small, were entitled to recover all of the land as against the defendant relying on evidence of deeds merely showing common source. *Le Blanc v. Jackson* (Com. App.) 210 S. W. 687.

Evidence held not to show that plaintiff had discharged the burden of showing title from the agreed common source superior to that of defendants. *Laidacker v. Palmer* (Civ. App.) 210 S. W. 739.

In suit to quiet title, where plaintiffs established title by adverse possession, a quit-claim deed given by one of the defendants to another conveying her interest as heir of the common source of title is irrelevant. *Krause v. Hardin* (Civ. App.) 222 S. W. 310.

Under this article, in trespass to try title by heirs of a deceased wife against the purchaser from the surviving husband, who sold to pay community debts, certified copy of deed from the surviving husband to defendant purchaser held properly admitted in evidence, though there was no affidavit made to show loss of or inability to produce the original. *Stone v. Light* (Civ. App.) 228 S. W. 1108.

Any error in admitting such original certified copy held harmless to plaintiff heirs; the surviving husband having testified prior to the offer in evidence that he had so deeded the land to the purchaser. *Id.*

Deeds introduced by plaintiff to show the title of defendant which contained descriptions varying from those in plaintiff's chain of title held to show that the land referred to was the same land, and to establish a common source of title. *Pope v. Witherpoon* (Civ. App.) 231 S. W. 837.

### Art. 7752. [5269] When defendant claims part only.

Cited, *Keyser v. Meusback*, 77 Tex. 64, 13 S. W. 967.

**Disclaimer in general.**—Under this article, a plea of not guilty and a disclaimer of all of the land sued for are so inconsistent that the plea of not guilty will be disregarded. *Kenedy Pasture Co. v. State* (Civ. App.) 196 S. W. 287.

Where defendant pleaded not guilty, a cross-action by him would not bring him within this article; allegations of the cross-petition not being a part of his answer proper. *Hankins v. Dilley* (Civ. App.) 206 S. W. 549.

That suit by two plaintiffs for different tracts was a friendly one is no reason why effect should not be given by way of estoppel to disclaimer therein by one plaintiff of the tract claimed by the other. *Smith v. Wood* (Civ. App.) 229 S. W. 583.

Defendant's plea setting up the ten-year statute of limitations, showing that while defendant disclaimed title to any of the lands sued for of which he was not in possession he asserted he was in possession of all of it, held not insufficient as containing a disclaimer as to part of the land sued for and not sufficiently describing the part to which the disclaimer did not apply. *Id.*

**Judgment for part disclaimed.**—In the absence of a reason why in equity it should not have such effect, an unqualified disclaimer by defendant of a part of the land entitles plaintiff to judgment for such part, and judgment operates as an estoppel against defendant to assert any right he may have had to such part, a rule which has application where one of two plaintiffs suing for a separate and described part of a tract disclaims any right to the part the other sues for, and judgment is rendered for each for the part for which he sues. *Smith v. Wood* (Civ. App.) 229 S. W. 583.

### Art. 7753. [5270] When plaintiff proves part.

Cited, *Keyser v. Meusback*, 77 Tex. 64, 13 S. W. 967.

**Recovery by plaintiff.**—Where in trespass to try title to recover a 160-acre tract claimed by adverse possession of a 5½-acre tract included therein, plaintiff showed adverse possession to the smaller tract alone, but the pleadings or evidence did not show its location or give a description thereof there is no basis for a judgment for the smaller tract. *Houston Oil Co. of Texas v. Holland* (Com. App.) 222 S. W. 546, reversing judgment (Civ. App.) 196 S. W. 668.

### Art. 7755. [5272] The judgment, etc.

See *O'Connor v. Luna*, 75 Tex. 592, 12 S. W. 1125.

**Judgment in general.**—In trespass to try title, defendant attorney held entitled to have reimbursement for moneys paid for land made condition precedent to enforcement of judgment by client, as he who seeks equity must do equity. *Home Inv. Co. v. Strange*, 109 Tex. 342, 195 S. W. 849.

Where petition was insufficient, in failing to show that plaintiff had either legal or equitable title, if it would sustain a suit for specific performance of contract to convey land, cause should not be dismissed, but should be retained as suit for specific performance. *Eallard v. Ellerd* (Civ. App.) 199 S. W. 305.

In trespass to try title, the court can reform an instrument relied upon to support title under a general prayer for equitable relief, where the proper facts are pleaded, although there is no prayer for reformation. *Alfalfa Lumber Co. v. Mudgett* (Civ. App.) 199 S. W. 337.

Where defendant's title is dependent upon the correction of a mistake, an instrument, upon proper pleading, can be reformed, if the proper parties are before the court. *Id.*

Where defendant counterclaimed, and plaintiff entered general denial, and defendant testified to an administrator's sale to him of the land involved, which was sufficiently shown, although he thereby obtained an excess over the amount actually sold, plaintiff could not have the equitable relief of having the sale set aside. *McCardell v. Lea* (Civ. App.) 200 S. W. 562.

Where administrator's sale report showed sale of various acreages "east of Trinity river, in Liberty county," and of 684 $\frac{1}{2}$  acres "in Liberty county," to defendant, there was no merit in contention that judgment should have allowed defendant only land east of the river, or land shown on the administrator's map of the date of the sale as unsold, though an excess unsold, including the land claimed, was afterwards found. *Id.*

Judgment in boundary suit, held insufficient to settle rights of parties. *Main v. Cartwright* (Civ. App.) 200 S. W. 847.

Claimant by adverse possession may claim a specific acreage of a larger tract and in the alternative an undivided interest in an undescribed acreage of like amount, which interest may be segregated by duly appointed commissioners. *Lockin v. Johnson* (Civ. App.) 202 S. W. 168.

In trespass to try title, met only by a plea of not guilty, affirmative relief to plaintiff, because the deed relied upon by his adversary was void for fraud or mistake, will be granted in response to appropriate pleadings bringing himself within the conditions that entitle him to a rescission. *Grundy v. Greene* (Civ. App.) 207 S. W. 964.

Purchaser who acquired from heirs of third person an outstanding title, and sued seller in trespass to try title but lost suit, held not entitled to specific performance of contract of sale; bringing of action having been repudiation of contract. *Whittenburg v. Groves* (Com. App.) 208 S. W. 901.

Judgment that plaintiff "have and recover" certain land, and that she "have her writ of possession," construed a judgment for both title and possession and not merely for possession. *Pearson v. Lloyd* (Civ. App.) 214 S. W. 759.

Where record title was in defendant and plaintiff failed to sustain her claim to title by limitations, it was proper for the trial court to decree title to be in defendant who filed a cross-action. *Conn v. Houston Oil Co. of Texas* (Civ. App.) 218 S. W. 137.

Though plaintiff's claim of ownership of the fee was decided against him, a judgment, providing merely that he take nothing by the suit, was improper, where he had a life estate in the property; and the judgment should recognize such life estate. *Hunting v. Jones* (Com. App.) 221 S. W. 265, modifying judgment 215 S. W. 959 which reversed (Civ. App.) 183 S. W. 858.

Where plaintiffs showed no title, legal or equitable, as to the interest of defendant in the land involved, a common tract set apart by shareholders in a colony, including plaintiffs and defendant the full extent of plaintiffs' right was to have their interests adjudicated, and to be admitted into joint possession with defendant. *Duncanson v. Howell* (Com. App.) 222 S. W. 232, reversing judgment (Civ. App.) *Howell v. Duncanson*, 195 S. W. 349.

Where heir in possession by consent of coheirs conveyed the whole of the land, the coheirs, in trespass to try title against the heirs' remote grantee were not entitled to a judgment for all of the land, the grantee being entitled to the interest therein of the heir who conveyed the land. *Guarantee Mercantile Co. v. Nelson* (Civ. App.) 223 S. W. 543.

In trespass to try title by owner of land against defendant who had purchased it from third person who had not been authorized by the owner to sell the land, the defendant was not entitled to recover from the owner the purchase price paid to such third person. *Mason v. Hood* (Civ. App.) 230 S. W. 468.

**Partition.**—Partition of land may be prayed for in a suit of trespass to try title where it is alleged plaintiff owns an undivided interest in the land, and that defendant has ejected him and denied his right of possession, but is merely incidental to the main action, which is to try title. *Green v. Churchwell* (Civ. App.) 222 S. W. 341.

**Fixing disputed line.**—Where the question was one of disputed boundary, and the location of a fence was established by the evidence, judgment fixing the boundary at a certain number of varas south of the fence is not open to attack on the ground that it did not define the boundary line by objects on the ground. *Watkins v. Hines* (Civ. App.) 214 S. W. 663.

### Art. 7756. [5273] Damages, etc., when recovered.

See *Campbell v. Jones* (Civ. App.) 230 S. W. 710.

**Damages.**—The general law of limitations does not apply to claim for damages in trespass to try title, but such claim is governed by Rev. St. 1879, arts. 4809, 4814, 4815, relating to such claims. *Gulf, C. & S. F. Ry. Co. v. Poindexter*, 70 Tex. 98, 7 S. W. 316.

**Use and occupation.**—Where defendant purchased with notice that a deed to his grantor was a mortgage, the true owner, in suit to try title, could recover the rental value of the land during the period in which defendant occupied it, less payments made by defendant to the mortgagee. *Hays v. Morris* (Civ. App.) 204 S. W. 672.

One who has never been in possession of property, the subject of suit for trespass to try title, and has never collected or received any of the rents, is not personally liable to plaintiff for rent. *Stiles v. Hawkins* (Com. App.) 207 S. W. 89.

That plaintiff's land was inclosed with that of defendants' merely secured the right to each party to pasture cattle upon the land in proportion to the number of acres in the inclosure owned by him, but defendants could not lease plaintiff's land to others for grazing and appropriate the rent money. *Strait Bros. v. Chaney* (Civ. App.) 209 S. W. 219.

Defendants' leasing of all such land for pasture without plaintiff's knowledge was an exclusive and special use of the land, and plaintiff can recover the rent money collected for use of his land. *Id.*

A petition, alleging that defendants, without plaintiff's knowledge or consent, entered upon such land, used and occupied it, and shared profits arising therefrom, and prevented plaintiff from renting the same, held not demurrable for failing to state that defendants were in exclusive possession thereof. *Id.*

Where a party acquires deeds to land and takes possession thereof, necessitating a suit to recover the land, the successful plaintiff is entitled to rentals though defendant has not collected any rent. *Sherwood v. Sherwood* (Civ. App.) 225 S. W. 555.

### Art. 7758. [5275] Final judgment conclusive.

See *Cassidy v. Kluge*, 73 Tex. 154, 12 S. W. 13.

**Res judicata.**—Under Rev. St. 1879, art. 4811, a judgment against a tenant in possession is not conclusive on the landlord, notwithstanding arts. 4789–4791. *Stout v. Taul*, 71 Tex. 438, 9 S. W. 329.

Judgment against vendor in suit in which recovery was sought under his superior title, held not to bar action to recover on the notes and foreclose his lien. *Tullos v. Mayfield* (Civ. App.) 198 S. W. 1073.

Where there was no evidence that issues and parties in former suit and present suit were the same, decree in former was not admissible to prove res judicata, nor outstanding title. *Zarate v. Unknown Heirs of Zarate* (Civ. App.) 204 S. W. 697.

Decree in former action, introduced by defendants, without any pleading or testimony to show what land was involved, or what issues were disposed of, held not to identify defendants therein with defendants mentioned in amended petition in present suit. *Id.*

A judgment in favor of plaintiff for the land, but not allowing rentals as prayed, does not bar an action for rentals accruing subsequent to the former judgment and secured by a supersedeas bond given under art. 2102, on appeal in the former cause. *Roberson v. Tom* (Civ. App.) 206 S. W. 723.

Where a husband was in adverse possession of land, but became insane and the wife continued to live upon the land, the possession of the wife could not be distinct from that of the husband, and a judgment against the husband was binding on the wife, notwithstanding art. 3593. *Fidelity Lumber Co. v. Howell* (Civ. App.) 206 S. W. 947.

A judgment in a former case between other parties held a mere recital, and not an adjudication of title to the land in question. *Laidacker v. Palmer* (Civ. App.) 210 S. W. 739.

Legal effect of judgment, that plaintiffs take nothing, is to divest the plaintiffs of whatever title they have at the time. *Woodley v. Becknell* (Civ. App.) 214 S. W. 932.

Such judgment is, under this article, binding on all who thereafter derain title through plaintiffs. *Id.*

Where the district court rendered judgment divesting an infant of title to land which had been part of the community estate of her mother and deceased father, and which had been conveyed by the mother after remarriage, held that though the mother had no authority to convey the community property, and though as a general rule a minor's interest in land can be sold only under order of court of probate, the presumption in favor of the validity of the judgment was not overthrown. *Van Ness v. Crow* (Civ. App.) 215 S. W. 572.

Where plaintiffs had recovered a judgment as against the unknown heirs of A, if the person of that name under whom they claimed and the person having the same name under whom defendants claimed was not the same person, they did not, by their judgment, acquire the title of the heirs of the person under whom defendants claimed. *McCarthy v. Houston Oil Co. of Texas* (Civ. App.) 221 S. W. 307.

Such equities as defendant in trespass to try title may have should be asserted in such action and not by suit to restrain execution of a writ of possession issued on the judgment. *Lewright v. Reese* (Civ. App.) 223 S. W. 270.

Under this article, the judgment against plaintiffs is a bar to any suit in the future by them against defendant for the same land, and, as between the parties, has all the force and effect of a judgment specifically vesting title in defendant. *Bomar v. Runge* (Civ. App.) 225 S. W. 287.

Under this article, a judgment against a lessee canceling a mineral lease is not conclusive against an assignee of the lease who procured his assignment before the suit was begun, so that the lis pendens notice filed therein did not affect him. *Burt v. Deorsam* (Civ. App.) 227 S. W. 354.

Purchasers of land pendente lite are not necessary parties, a final judgment being made conclusive upon them by this article. *Lovenskiold v. Casas* (Civ. App.) 229 S. W. 888.

Defendants not parties in a former action in trespass to try title to recover a small strip of land, and to establish a boundary line, cannot urge a judgment in favor of the defendant in the former case as an estoppel against plaintiff, under this article. *Whiteman v. Whiteman* (Civ. App.) 232 S. W. 888.

CHAPTER TWO  
CLAIM FOR IMPROVEMENTS

<p>Art. 7760. Suggestion of improvements in good faith.</p> <p>7761. Issue as to.</p> <p>7762. Rents and profits to be offset against.</p>	<p>Art. 7763. Judgment for excess, etc.</p> <p>7764. Writ of possession not to issue, unless, etc.</p> <p>7765. On failure of plaintiff, defendant may pay, etc., and keep premises.</p>
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**Article 7760. [5277] Suggestion of improvements in good faith.**

See *Buchanan v. Williams* (Civ. App.) 225 S. W. 59.

**Rights of parties as to improvements in general.**—If improvements did not increase value of property, there can be no recovery for improvements. *Allen v. Draper* (Civ. App.) 204 S. W. 792.

The measure of compensation for improvements is the enhancement of the value of the land and not the cost of the improvements, since there must be a benefit to the owner in enhanced value to estop him from denying the right to compensation. *Sheffield v. Meyer* (Civ. App.) 229 S. W. 614.

In trespass to try title, the defendant may plead not guilty, and in addition may appeal to the equitable powers of the court for reimbursement for improvements made, taxes paid, and purchase money, in the event that judgment should be rendered against him as to the title to the property. *Mason v. Hood* (Civ. App.) 230 S. W. 468.

**Possession and good faith as grounds for compensation.**—Under Rev. St. 1879, art. 4813, one who has fenced and cultivated school lands for more than one year, but has not actually resided thereon, is not entitled to compensation for improvements from a purchaser of such lands. *Baker v. Millman*, 77 Tex. 46, 13 S. W. 618.

**Proceedings for recovery of compensation.**—Defendant will not be allowed to recover value of improvements, where he did not plead any valuable and permanent improvements. *Morrow v. Preston* (Civ. App.) 209 S. W. 270.

**Art. 7761. [5278] Issue as to.**

See *Buchanan v. Williams* (Civ. App.) 225 S. W. 59.

**Application of statute.**—This article does not apply to a suit for cancellation of a deed, but in the latter the plaintiff will be required to do equity by paying for improvements made and taxes paid by the grantee in good faith. *Dean v. Dean* (Civ. App.) 214 S. W. 505.

**Limitations.**—See *Gulf, C. & S. F. Ry. Co. v. Poindexter*, 70 Tex. 93, 7 S. W. 316; notes to art. 7756.

**Art. 7762. [5279] Rents and profits to be offset against.**

See *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049.

**Set-off against value of use and occupation and damages.**—There should be no allowance for value of improvements where they are completely offset by rents. *Allen v. Draper* (Civ. App.) 204 S. W. 792.

**Limitations.**—See *Gulf, C. & S. F. Ry. Co. v. Poindexter*, 70 Tex. 93, 7 S. W. 316; notes to art. 7756.

**Art. 7763. [5280] Judgment for excess, etc.**

**Necessity of finding of value.**—Finding of value of improvements placed by defendant on strip in controversy was essential for rendition of final judgment for value of improvements under arts. 7763-7768. *Decker v. Rucker* (Civ. App.) 202 S. W. 1001.

**Art. 7764. [5281] Writ of possession not to issue, unless, etc.**

See *Dignowity v. Fly*, 110 Tex. 613, 210 S. W. 505.

**Time for payment.**—Although appeal was taken by giving cost bond only, it continued case until final decision by Supreme Court, so that defendant had 18 months provided by judgment of lower court, and by arts. 7764, 7765, to pay for land after decision by Supreme Court. *Fain v. McCain* (Civ. App.) 199 S. W. 389.

**Art. 7765. [5282] On failure of plaintiff, defendant may pay, etc., and keep premises.**

See *Dignowity v. Fly*, 110 Tex. 613, 210 S. W. 505.

**Time for payment.**—See *Fain v. McCain* (Civ. App.) 199 S. W. 389; notes to art. 7764.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Conditions precedent to action or recovery in general.**—Although the equitable title to land was in plaintiffs, they could not assert title nor defend under it without first reforming a judgment which, through mistake in description of land, placed title in others, reflect the actual terms of the agreement which was embodied in a judgment to which plaintiffs were parties. *Gulf Production Co. v. Palmer* (Civ. App.) 230 S. W. 1017.

**Reimbursement of taxes paid.**—In trespass to try title, defended on the ground of tax title, evidence in the absence of objection thereto held sufficient to show that taxes paid by defendants for certain years constituted a valid lien against the land, for which defendants should recover. *Teat v. Perry* (Civ. App.) 216 S. W. 650.

In trespass to try title to land claimed under tax sale, held that equity and conscience required that defendants be given back what they were properly shown to have paid out for such taxes as constituted a lien upon the property. *Id.*

In trespass to try title against defendant who had purchased from third person who had had no authority to sell, the defendant could not recover taxes paid for certain year, where the owner had also paid the taxes for such year. *Mason v. Hood* (Civ. App.) 230 S. W. 468.

## TITLE 129

## TRIAL OF RIGHT OF PROPERTY

Art.  
7769. Claimant must make affidavit.  
7770. Bond.  
7771. Bond, condition of.  
7772. Property to be delivered to claimant.  
7774. Form of bond.  
7776. Return of oath, bond and copy of writ when levy made in county other than that where writ issued.  
7778. Jurisdiction.  
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Art.  
7782. Judgment by default against defendant, when.  
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7785. Burden of proof on plaintiff, when.  
7786. Burden of proof on defendant, when.  
7787. Damages.  
7788. Where value of property exceeds judgment.  
7790. Judgment upon failure to establish title.  
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7793. Return of property by claimant within ten days.

**Article 7769. [5286] Claimant must make affidavit.**

See *Brown v. Collins*, 77 Tex. 159, 14 S. W. 173; *Automobile Underwriters of America v. Brooks* (Civ. App.) 228 S. W. 367; notes to art. 7778.

Cited, *Livingston v. Wright*, 63 Tex. 706, 5 S. W. 407; *Turner v. Brown* (Civ. App.) 200 S. W. 1161.

**Persons entitled to remedy.**—Assignee of a fund may intervene in garnishment proceedings to protect its interest in garnished fund. *Zimmerman Land & Irrigation Co. v. Rooney Mercantile Co.* (Civ. App.) 195 S. W. 201.

If, in a garnishment by judgment creditor, the intervening bank owned a beneficial interest in the money before the garnishment, it could recover. *Fannin County Nat. Bank v. Gross* (Civ. App.) 200 S. W. 187.

A third person, as a partnership composed of the judgment debtor and others, may intervene in garnishment proceedings, without being impleaded by garnishee, and set up and have adjudicated a claim to the fund. *Brown v. Cassidy-Southwestern Commission Co.* (Civ. App.) 225 S. W. 833.

**Affidavit or pleading by claimant.**—In suit for debt and to foreclose chattel mortgage wherein plaintiff levied writ of sequestration on the property, claimant thereof could not intervene without filing sworn plea, under this article, setting up his ownership of the property, and also filing claimant's bond. *Wilkie v. Wilkie* (Civ. App.) 220 S. W. 418.

In such suit, intervening claimant's plea based on conversion by plaintiffs, which did not show right to intervene by setting up interest in debt sought to be collected, should have been stricken out, and judgment for the intervener thereon was improper. *Id.*

**Art. 7770. [5287] Bond.**

See *Howard v. Parks*, 1 Tex. Civ. App. 603, 21 S. W. 269; *Wilkie v. Wilkie* (Civ. App.) 220 S. W. 418.

**In general.**—Manner of levy on personal property under execution is waived by a claimant, who executes a claimant's bond and takes possession. *Watson v. Schultz* (Civ. App.) 208 S. W. 958.

A claimant of property levied on under execution, who executes a bond and takes possession, cannot complain that levy should have been made by giving notice, and not by actual seizure. *Id.*



**Assessment of value as determining jurisdiction.**—See *Cleveland v. Tufts*, 69 Tex. 580, 7 S. W. 72; notes to art. 7778.

**Art. 7771. [5288] Condition of bond.**

See *Wilkie v. Wilkie* (Civ. App.) 220 S. W. 418.

**Art. 7772. [5289] Property to be delivered to claimant.**

See *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155.

**Art. 7774. [5291] Form of bond.**

The sureties on the claimant's bond are liable for costs, the form of bond prescribed by Rev. St. 1879, art. 4827, binding the sureties to pay all damages and costs awarded against the claimant. *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, 14 S. W. 843.

**Art. 7776. [5293] Return of oath, bond and copy of writ when levy made in county other than that where writ issued**

See *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

**Transfer of jurisdiction by claim of ownership.**—The justice or court to which a bond given by the claimant of property levied on under execution is made returnable, under Rev. St. 1879, art. 4829, has jurisdiction of an action thereon, though claimant is a resident of another county. *Denson v. Ham* (App.) 16 S. W. 182.

**Art. 7778. [5295] Jurisdiction.**

See *Mudge v. Hughes* (Civ. App.) 212 S. W. 819.

**Determination of value.**—Under Rev. St. 1879, art. 4823, the value of the property in controversy is, in the absence of fraud, to be determined by the assessment made by the officer serving the writ, and not by the subsequently proved value of the property. *Cleveland v. Tufts*, 69 Tex. 580, 7 S. W. 72.

**County court.**—Where plaintiff, in action to recover automobile, sued out a writ of sequestration, and defendant replevied the automobile, which the sheriff assessed at the value of \$600, the county court was not without jurisdiction under Const. art. 5, § 8, for that section applies only to suits for a trial of the right of personal property, under arts. 7769, 7778, and the proceeding is to be transferred to the district court only when the claim is by a third person. *Automobile Underwriters of America v. Brooks* (Civ. App.) 228 S. W. 367.

**Art. 7780. [5297] Issue to be made up, etc.**

See *State v. Bender*, 68 Tex. 676, 5 S. W. 674; *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72.

**Art. 7781. [5298] Requisites of issue.**

**Sufficiency of tender of issue.**—Plaintiff warehouse company, tendering issue in proceedings for trial of right of property to sequestered cotton, that it was stored with it, need not name the owners who stored it, it stating it could not, and this appearing on trial. *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748

**Art. 7782. [5299] Judgment by default against defendant, when.**

**In general.**—As Rev. St. 1879, art. 4835, authorizes judgment by default against a claimant if he does not appear and join issue "within the time prescribed for pleading," which is fixed not later than the fifth day of the term by art. 1263, it is error to render judgment by default against the claimant on the second day of the term, though that is designated as the appearance day by Laws 1891, p. 94, c. 76. *Martin v. Hartnett* (Civ. App.) 24 S. W. 963.

Where claimant files his bond and oath, enters his appearance and requests order directing issues, no judgment can be rendered by default against him or his surety until he refuses to join issues under direction of court. *Warren v. Atlas Const. Co.* (Civ. App.) 197 S. W. 320.

**Art. 7784. [5301] Proceedings, how conducted.**

See *Boaz v. Schneider*, 69 Tex. 128, 6 S. W. 402.

**Art. 7785. [5302] Burden of proof on plaintiff, when.**

See *Howard v. Parks*, 1 Civ. App. 603, 21 S. W. 269.

**Property taken under execution.**—Mere fact that cotton levied on under execution was at M.'s gin did not necessarily raise inference that it was in M.'s possession, and burden was on judgment creditor to remove uncertainty as to who was in possession thereof in order to cast burden upon claimant to prove his ownership, under arts. 7785, 7786. *Burlington Buggy Co. v. Usrey* (Civ. App.) 209 S. W. 684.

**Art. 7786. [5303] Burden of proof on defendant, when.**

See *Le Page v. Slade*, 79 Tex. 473, 15 S. W. 496; *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155; *Burlington Buggy Co. v. Usrey* (Civ. App.) 209 S. W. 684; notes to art. 7785.

**In general.**—Under this article, the fact that the judgment creditor was permitted to open and close did not shift the burden of proof, or entitle the court to place the burden on such creditor. *Horn v. Price* (Civ. App.) 200 S. W. 590.

Under this article the burden of proof was on the claimant of property levied on under writ of sequestration. *Roberts Seed Co. v. Mt. Pleasant Oil Mill* (Civ. App.) 214 S. W. 939.

Under this article, a claimant had the burden of showing that he was in possession of property attached, or, failing in that, of showing that he was justly entitled to possession. *Briggs v. Briggs* (Civ. App.) 227 S. W. 511.

**Art. 7787. [5304] Damages.**

See *Dupree v. Woodruff* (Sup.) 19 S. W. 469; notes to art. 7788; *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155.

**Amount.**—Where judgment is rendered in favor of an attaching creditor, as against a claimant of the attached property, it should not be for the value of the property, but for the amount of the creditor's claim, with 10 per cent. damages thereon, as allowed by Rev. St. 1879, arts. 4840, 4841. *Wetzel v. Simon* (Civ. App.) 25 S. W. 792.

**Art. 7788. [5305] Where value of property exceeds judgment.**

See *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309; notes to art. 7791; *Wetzel v. Simon* (Civ. App.) 25 S. W. 792; notes to art. 7787

Cited, *Wilber v. Kray*, 73 S. W. 533, 11 S. W. 540.

**Basis for assessing damages.**—Under arts. 7787, 7788, that where attaching creditors recovered in the trial of right of property with a third party, and the value of the property was greater than the amount of plaintiffs' claim against defendants, plaintiffs were entitled to recover 10 per cent. damages on the amount of their claim, as evidenced by the judgment rendered. *Harris v. Schuttler* (Civ. App.) 24 S. W. 989.

**Excessive damages.**—Under Rev. St. 1879, arts. 4840, 4841, where the value of the property attached was \$50, and the amount claimed by the writ was \$24.55; damages against claimant for \$5 was excessive. *Dupree v. Woodruff* (Sup.) 19 S. W. 469.

**Art. 7790. [5307] Judgment upon failure to establish title, etc.**

See *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309; notes to art. 7791.

Cited, *Wilber v. Kray*, 73 Tex. 533, 11 S. W. 540.

**Right to judgment.**—Where the claimant of cotton seed levied on under writ of sequestration showed merely that the relation of debtor and creditor existed between it and defendants in the suit, having failed to establish ownership of the seed, claimant was not entitled, under this article, to the judgment. *Roberts Seed Co. v. Mt. Pleasant Oil Mill* (Civ. App.) 214 S. W. 939.

**Form of judgment.**—Under Act April 2, 1887, amending Rev. St. 1879, art. 4843, where there is only one plaintiff, the judgment should fix the amount of his claim, as well as the value of the property. *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115, affirming (Civ. App.) 24 S. W. 963.

**Amount of judgment.**—On failure of claimant of attached property to sustain his claim, judgment may be rendered for plaintiff in attachment for amount of his debt, instead of for value of property, where debt is less than such value. *Warren v. Atlas Const. Co.* (Civ. App.) 197 S. W. 320.

**Burden of proof.**—See *Roberts Seed Co. v. Mt. Pleasant Oil Mill* (Civ. App.) 214 S. W. 939; notes to art. 7786.

**Art. 7791. [5308] Execution shall issue.**

**Relief against execution.**—Under Rev. St. 1879, arts. 4841, 4843, as amended by Laws of 1887, where the plaintiff in the writ issues execution for the full amount of his judgment against the claimant, instead of the amount of his claim with interest and damages, the latter was entitled to relief, and that, the illegal proceedings being subsequent to judgment, injunction was the proper remedy. *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309.

**Art. 7793. [5310] Return of property by claimant within ten days.**

**In general.**—Evidence of the value of the use of the property from the time it was received by claimant under his bond is properly admitted, as the judgment should show such value to enable claimant to choose between the provisions of Rev. St. 1879, art. 4845, allowing him to return the property, and pay for the use thereof, or to pay for the property, with interest on its value. *Keating v. Julian* (Civ. App.) 23 S. W. 607.

**DECISIONS RELATING TO SUBJECT IN GENERAL**

**Weight and sufficiency of evidence.**—In proceedings to determine right to attached property, evidence held to sustain verdict that bill of sale to claimant, who held a mortgage on the property was not intended to convey the property, and that claimant was not the owner. *Clopton v. Jolley & Terry* (Civ. App.) 203 S. W. 799.

Evidence held to show that at time of and prior to levy of attachment, claimant, who replevined the property, was in actual possession and control by the attachment defendant as his agent. *Id.*

## TITLE 130

## TRUSTS—CONSPIRACIES AGAINST TRADE

Chap.	Chap.
1. Definitions, forfeitures and other provisions.	2. Evidence in trust cases.

## CHAPTER ONE

## DEFINITIONS, FORFEITURES AND OTHER PROVISIONS

Art.	Art.
7796. "Trusts" defined.	7805. Where foreign corporation is convicted of violating this law, no other corporation to which the defaulting corporation has transferred its business or property shall be permitted to incorporate or do business in this state.
7797. "Monopoly" defined.	
7798. Conspiracies against trade, what constitutes.	
7799. Acts and things mentioned declared illegal.	
7801. Attorney general to institute quo warranto proceedings.	7807. All agreements in violation of, void.

## Article 7796. "Trusts" defined.

See *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099; *W. T. Rawleigh Co. v. Smith* (Civ. App.) 231 S. W. 799.

**Combinations prohibited.**—Where one man who was either owner or mortgagee in possession of a power plant procured shutting down of competing plant to eliminate its competition, the anti-trust laws were not violated, since neither capital, skill, nor acts were combined to accomplish purpose. *Bomar v. Smith* (Civ. App.) 195 S. W. 964.

Subdivisions 5, 6, relating to combinations to stifle competition, held not to apply to an agreement between fire insurance companies to refrain from writing insurance for an individual. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

If five insurance companies combine in refusing to grant insurance, and also in persuading other companies to refuse insurance by unlawful means, the combination is unlawful. *Id.*

Where a labor union combines to boycott and picket an employer to coerce him into unionizing his business, such combination is a trust within this article, and is illegal under article 7799. *Webb v. Cooks', Waiters' and Waitresses' Union*, No. 748 (Civ. App.) 205 S. W. 465.

The "combination of capital, skill or acts by two or more persons," etc., contemplated by arts. 7796-7798, must be in relation to articles or commodities of merchandise, produce, or commerce, or where they are in any manner affected or controlled. *Dannel v. Sherman Transfer Co.* (Civ. App.) 211 S. W. 297.

The governing body of a hospital may refuse to permit physicians professing a certain system of medicine to practice in the hospital, and adopt such regulations as are proper or deemed by it necessary or expedient to improve the hospital, and require of those using its equipment that they possess specific medical learning and equipment in order to receive membership on the medical staff, and to accomplish this may employ a committee of physicians to standardize the hospital, if done in good faith with no evil intent to injure or oppress. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

Members of a medical association, an organization which no physician professing an exclusive system of medicine could join, could legally agree among themselves not to assist an osteopath in surgery, if they did so in good faith and with no intent to injure the osteopath. *Id.*

For persons interested in competing banks to advise and induce officers, directors, and stockholders in one of them to sell their stock to men who were seeking to organize a new bank held not an unlawful combination. *Edwards v. Roberts* (Civ. App.) 222 S. W. 278.

A railroad company's granting the exclusive privilege to one company to solicit transfer of passengers and baggage on its own grounds and exclusion of others held not in contravention of the rule against monopolies or in violation of anti-trust statutes. *Clisbee v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 230 S. W. 235.

The acts of a labor union, and its members, in calling a strike in the restaurant of proprietors who refused to renew their contract with the union, and in picketing and attempting to dissuade customers from entering the place, were violative of arts. 7796-7799. *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (Civ. App.) 230 S. W. 1086.

The general language of this article, was intended only as an expression of the purpose of the law, and is limited by the specific definitions of the prohibited acts in the subsequent portions of the section, so that a contract which is not within the specific language is not void, though the general language was broad enough to include it. *Schow Bros. v. Adva-Talks Co.* (Civ. App.) 232 S. W. 883.

**Contract not to engage in business.**—Contract whereby partner retiring in favor of another, agreed not to engage in business in town in competition with his old and the new partner, held not void at common law as against public policy, nor as establishing trust, monopoly, or conspiracy in restraint of trade as defined and denounced by arts. 7796-7798, nor evidencing combination of capital, skill, or acts to accomplish things forbidden. *Schlag v. Johnson* (Civ. App.) 208 S. W. 369.

Arts. 7796-7798, do not prohibit sale of business and agreement to abstain from engaging in that business for certain period of time, and obligating the seller to use his influence in aiding the purchaser. *Dannel v. Sherman Transfer Co.* (Civ. App.) 211 S. W. 297.

A contract whereby one of two persons engaged in the funeral business sells to the other an auto hearse, and agrees not to buy another hearse, and to use only the hearse sold for a period of five years at a reasonable rental, did not violate arts. 7796-7798, amounting to no more than sale of business with agreement not to engage in such business. *Id.*

**Interstate commerce.**—An interstate contract for the sale of motorcars to a local dealer in Texas held rendered invalid by a provision imposing restrictions on resale of the cars by the purchaser in violation of the Anti-Trust Law of Texas, and to invalidate notes given for the purchase price of such cars. *Kissel Motor Car Co. v. Walker* (C. C. A.) 270 Fed. 492.

When property is sold and delivered to a resident of the state free from any claim of title by the seller, and is held for resale by retail in the state, it becomes subject to the anti-trust laws of the state, and is not a subject of interstate commerce, though the buyer is termed the agent of the seller. *State v. Willys-Overland* (Civ. App.) 211 S. W. 609.

Where goods were sold in interstate commerce, the moment they passed into the possession of the purchaser such goods and the handling of them and all contracts and agreements concerning their sale or disposition from that time passed out of the influence of the federal law and into the control of the state law, and the anti-trust statutes would apply to resale agreements. *Caddell v. J. R. Watkins Medical Co.* (Civ. App.) 227 S. W. 226.

**Contracts for sale of goods.**—See *State v. Willys-Overland* (Civ. App.) 211 S. W. 609; notes at end of title.

Company's contract for sale of merchandise to its agent, wherein agent agreed "to have no other business or employment," not only required him to devote his entire time, but restricted him to making purchases of merchandise from company only, and so was violative of anti-trust act. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

The owner of a patent right, copyright, or trade-mark, may impose upon his assignee such restrictions as he may see proper, and to which his assignee will agree, including the price at which the article may be sold, the territory in which it may be manufactured and sold, the material that may be used in its manufacture or in connection therewith. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

The owner of an article protected by patent, copyright, or trade-mark, when he has manufactured and sold the same, cannot impose restrictions upon his vendee as to the future sale of the same. *Id.*

Contract between manufacturer and dealer giving dealer exclusive right of sale in certain territory and obligating him not to sell similar goods of any other manufacturer in such territory held in violation of the anti-trust statutes. *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099.

A contract between wholesale and retail dealers, providing that retailer shall sell tractor at price fixed by manufacturer, and requiring wholesaler to reimburse retailer for any decrease in the retail price, held an agreement to fix and maintain price for the sale of a commodity, in violation of subs. 2, 4, 5. *Hubb-Diggs Co. v. Mitchell* (Civ. App.) 231 S. W. 425.

**Exclusive franchise.**—Petition alleging that city granted exclusive franchise for 25 years to use streets and alleys for water system, and that plaintiff became owner of the system, was, in so far as it sought recovery for a breach of contract, subject to special exceptions; the grant of exclusive privilege being void. *Templeton v. City of Wellington* (Civ. App.) 207 S. W. 186.

**Trade unions.**—See notes under arts. 5244, 5245.

### Art. 7797. "Monopoly" defined.

See *Kissel Motor Car Co. v. Walker* (C. C. A.) 270 Fed. 492; notes to art. 7796; *Schlag v. Johnson* (Civ. App.) 208 S. W. 369; *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (Civ. App.) 230 S. W. 1086.

**What are monopolies.**—An ordinance forbidding jitneys within a certain zone does not create a monopoly, in violation of Const. art. 1, §§ 1, 26, in favor of street railways. *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

**Validity in general.**—Private monopolies are contrary to the genius of a commercial people, and contracts in restraint of trade are not looked upon with favor, but the federal Constitution, however, provides for the creation of monopolies in the matter of patent rights, trade-marks and copyrights (article 1, § 8). *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

**Rights acquired under contract.**—If transaction, whereby one life insurance company acquired assets and liabilities, including premium notes, of another, illegal as in violation of arts. 7797, 7807, was executed, title to premium note passed, so that acquiring company could enforce it against maker. *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

Petition, in suit on such note held not demurrable as showing that transaction was not authorized by art. 4737, providing that any life insurance company may reinsure, therefore repugnant to articles 7797, 7807. *Id.*

**Submission of issues.**—In view of the anti-trust statute, and particularly this article, in an action involving purchase of assets of bank by individual, where issue whether contract was entered into to destroy competition was presented by pleadings, refusal of request for its submission as issue of fact held reversible error. *Langford v. Power* (Civ. App.) 196 S. W. 662.

### Art. 7798. Conspiracies against trade, what constitutes.

See *Kissel Motor Car Co. v. Walker* (C. C. A.) 270 Fed. 492; notes to art. 7796; *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (Civ. App.) 230 S. W. 1086; *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099; notes to art. 7807.

**Conspiracy defined.**—A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

**Unlawful conspiracy in general.**—A medical association, qualifications for membership being that applicant must not support or profess an exclusive system of medicine or advertise as such, is legitimate and lawful, and is not rendered an unlawful conspiracy merely because it directly affects the material interest of an osteopath, under arts. 5733, 5736, 5741, 5742, 5745, and the Constitution. *Harris v. Thomas* (Civ. App.) 217 S. W. 1068.

**Liability of conspirators.**—A conspiracy makes the individual parties to it liable not only for their own individual acts, but for the acts of others done in the accomplishment of its purpose. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

**Commodities within statute.**—Under subd. 1, an agreement between fire insurance companies to refuse insurance to an applicant is not prohibited; insurance not being a "commodity." *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

Coca-Cola syrup is not an article to be used by the public, but is useful only as an ingredient in the manufacture of bottled Coca-Cola, and as no one but the licensee of the Coca-Cola Company has the right to manufacture bottled Coca-Cola, it was no restriction on trade to provide in a contract of assignment of rights that bottlers should not sell the syrup, which was sold to them by the company. *Coca-Cola Co. v. State* (Civ. App.) 225 S. W. 791.

Within this article, cuts to be used for advertising purposes in connection with advertising service, and which were not intended to be bought for resale, since their value would be destroyed by general use in the community, are not commodities, so that a contract, forbidding the sale of such cuts by the buyer, is not a violation of the Anti-Trust Act. *Schow Bros. v. Adva-Talks Co.* (Civ. App.) 232 S. W. 833.

**Restraint of trade.**—An agreement between two persons that one will buy from the other exclusively, or that one will sell to the other exclusively, a given commodity, constitutes "conspiracy in restraint of trade," within this article. *Pennsylvania Rubber Co. v. McClain* (Civ. App.) 200 S. W. 586.

No restraint of trade under a contract of sale of a business with good will covenant may rest upon inference; a stipulation being necessary. *Houston Transfer & Carriage Co. v. Williams* (Com. App.) 221 S. W. 1081, reversing judgment (Civ. App.) 201 S. W. 712.

Contract whereby partner retiring in favor of another, agreed not to engage in business in competition with his old and the new partner, held not void at common law as against public policy, nor as establishing conspiracy in restraint of trade as defined and denounced by this article. *Schlag v. Johnson* (Civ. App.) 208 S. W. 369.

Contracts in restraint of trade are to be construed with the intent of arriving at the fair meaning of the parties, and where their provisions are susceptible of two constructions, the court will examine the entire instrument, consider the subject-matter, the motives that led to it, the surrounding circumstances and object intended to be affected, and where one construction would render the contract illegal, and the other would make it lawful, that construction which would conform the contract to the law must be adopted. *Dannel v. Sherman Transfer Co.* (Civ. App.) 211 S. W. 297.

A contract whereby a brewing company, in consideration of plaintiff's payment of a debt owing to it, agreed to give plaintiff the exclusive right to sell its beer in a county, plaintiff to pay a fixed price and to order the beer as he required it, being a contract of sale, and not of agency, falls within this article. *American Brewing Ass'n v. Woods* (Com. App.) 215 S. W. 448.

A brewing company could stipulate as a condition of its lease to a saloon keeper that the saloon keeper should not sell a competitor's beer; such agreement not violating the anti-trust laws. *Celli & Del Papa v. Galveston Brewing Co.* (Com. App.) 227 S. W. 941.

Landlord's threat not to renew lease if lessee purchased goods from lessor's competitor held not unlawful, since such threat was but the exercise of a legal right on the part of the lessor which cannot form the basis of liability in suit against the landlord by the competitor. *Id.*

Mortgagee's threat to foreclose mortgage if mortgagor continued to sell goods of mortgagee's competitor did not entitle the competitor to recover damages in absence of showing that he lost any business by reason thereof. *Id.*

It is not unlawful to induce another not to deal with a third person, provided that contractual rights of third person are not interfered with. *Id.*

Contract giving dealer exclusive territory and obligating him to sell none but the manufacturer's product therein held void as in restraint of trade in violation of the

anti-trust statutes, even though dealer disregarded the contract and sold similar goods of other manufacturers, without manufacturer's knowledge. *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099.

**Art. 7799. Acts and things mentioned declared illegal.**

See *Kissel Motor Car Co. v. Walker* (C. C. A.) 270 Fed. 492; notes to art. 7796; *Webb v. Cooks', Waiters' and Waitresses' Union*, No. 748 (Civ. App.) 205 S. W. 465; *Cooks', Waiters' and Waitresses' Local Union v. Papageorge* (Civ. App.) 230 S. W. 1086.

**Art. 7801. Attorney general to institute quo warranto proceedings.**

Suit for injunction.—Under Const. art. 4, § 22, and Rev. St. 1879, arts. 2805, 2806, attorney general held entitled to bring an action in the name of the state to restrain the establishment of a fire insurance monopoly. *Queen Ins. Co. v. State* (Civ. App.) 22 S. W. 1048, reversed 24 S. W. 397.

**Art. 7805. Where foreign corporation is convicted of violating this law, no other corporation to which the defaulting corporation has transferred its business or property shall be permitted to incorporate or do business in this state.**—When any foreign corporation has been convicted of a violation of any of the provisions of this Chapter, and its right to do business in this State has been forfeited, as provided in Article 7803, Revised Civil Statutes of Texas of 1911, then before such corporation or any other corporation to which such corporation may have transferred its properties and business or which has assumed its obligations, shall be permitted to incorporate or do business in Texas, it shall be required to go into the court where the original judgment of forfeiture was entered and show that it has fully obeyed the decree of court forfeiting its charter, and has satisfied in full all fines and penalties assessed against it, and it shall further show that it has so organized or reorganized its affairs and business that if permitted to do business in Texas it can and will do so without violating any of the laws of this State, and particularly that it has no connection with any person, firm, or corporation engaged in violating the laws against trusts and monopolies, and is not itself so engaged; provided that no such action shall be instituted within five years from the date of such original conviction and provided further that any corporation which shall be convicted a second time of a violation of any provision of this title shall be forever barred from instituting any such action hereunder. Whereupon and after a hearing had, after the notice to the Attorney General herein provided, the court may modify or reform such judgment so as to permit such corporation to incorporate, or secure a permit, and do business in Texas, and such modified or reformed judgment shall be by the clerk of said court certified to the Secretary of State for action by him in conformity therewith. Nothing in this Act shall in any manner affect any judgment hereafter rendered by any court against any corporation, its agent, or employes or successors.

Provided, that notice of filing of such proceeding and the taking of evidence shall be served upon the Attorney General of the State, whose duty it shall be to represent the State in such proceeding; and provided, further, that the court may require the production of all books and records and may appoint a commission to take testimony, either within or without the State; and provided, further, that the expense of the entire proceeding, including reasonable attorney's fee, the amount of which to be determined by the judge trying the case, and the same to be paid to the attorney representing the State, and same to be delivered by such attorney to the State Treasurer and by him deposited to the account of the General Revenue Fund of the State; and it is further provided that the court, after modifying or reforming the judgment, as provided herein, shall retain jurisdiction of the case and at any time thereafter shall, upon showing that the said corporation is violating the laws against trusts or

monopolies, or has connection with any person, firm, or corporation engaged in violation of the laws against trusts or monopolies, set aside any order or judgment entered, and in which event all proceedings based thereon, including all transfers of any and all properties shall be nullified, and it shall be the duty of the Attorney General, for good cause, to enter proceedings to set aside and nullify the modified judgment of the court and its proceedings, as herein provided; and provided, further, that if the court shall, after the hearing provided for, refuse to modify or reform such judgment, no permit shall be issued by the Secretary of State to such corporation or to any other corporation to which its properties or business have been transferred or which has assumed the payment of its obligations. [Acts 1903, p. 121, § 10; Rev. Civ. St. 1911, art. 7805, amended; Acts 1917, 35th Leg., ch. 37, § 1; Acts 1919, 36th Leg., ch. 30, § 1.]

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

### Art. 7807. All agreements in violation of, void.

**Validity of contracts.**—A contract whose main purpose, considered with circumstances and conditions giving rise to its execution, or whose necessary result, was the establishing of a combination or trust, is unenforceable. *Saye v. Garrard* (Civ. App.) 204 S. W. 684.

Though "void" involves the idea of utter ineffectiveness, in this article, term was used to describe usual legal effect of an unlawful contract, which is that when executed resulting titles will not be disturbed. (Per Boyce, J.) *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

If a contract under which absolute sales of goods are made limits resale of the product to prescribed territory, or to fixed price, or the retailer is required to devote all his time to the sale of such particular goods and may not engage in any other business, it is invalid, and not enforceable in the courts. *Caddell v. J. R. Watkins Medical Co.* (Civ. App.) 227 S. W. 226.

Such a contract held invalid and not enforceable. *Id.*

Contract giving dealer the exclusive privilege of sale in described territory and prohibiting dealer from selling any but manufacturer's product in such territory held not susceptible of severance as against contention that illegal provisions violating the anti-trust statute could be eliminated without affecting validity of other portions. *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099.

**Right of action for breach of contract.**—In an action and cross-action, where both parties relied upon a contract illegal as a "conspiracy in restraint of trade," neither can recover. *Pennsylvania Rubber Co. v. McClain* (Civ. App.) 200 S. W. 586.

A contract whereby a brewing company, in consideration of plaintiff's payment of a debt agreed to give plaintiff the exclusive right to sell its beer in a county, plaintiff to pay a fixed price and to order the beer as he required it, being a contract of sale, and not of agency, falls within art. 7798, and hence an action for breach of such agreement cannot be maintained. *American Brewing Ass'n v. Woods* (Com. App.) 215 S. W. 448.

**Actions not brought on illegal contract.**—Where company sold merchandise to agent under contract violative of anti-trust act, and later sold under new contract, which was legal, amount due under such subsequent contract being susceptible of separation, company could recover amount due from agent under it. *Dodd v. W. T. Rawleigh Co.* (Civ. App.) 203 S. W. 131.

If transaction, whereby one life insurance company acquired assets and liabilities, including premium notes, of another, illegal as in violation of the anti-trust statutes was executed, title to premium note passed, so that acquiring company could enforce it against maker. *California State Life Ins. Co. v. Kring* (Civ. App.) 208 S. W. 372.

Petition, in suit on such note held not demurrable as showing that transaction whereby note was acquired was not authorized by art. 4737, therefore repugnant to anti-trust statutes, arts. 7797, 7807. *Id.*

Though purchaser of medicines from a foreign corporation construed a new contract, prepared to take the place of an earlier illegal contract as containing the same provisions as the first, recovery by the foreign corporation will not be denied, where the new contract was not obnoxious to the monopoly statutes, and the corporation was in no wise to blame for the purchaser's construction. *W. T. Rawleigh Co. v. Marshall* (Civ. App.) 220 S. W. 1111.

Where to induce persons to refrain from organizing a new bank, they were persuaded to purchase a controlling interest in one, of which plaintiff was cashier, and to facilitate such purpose defendant and another agreed to pay plaintiff an amount equal to his salary under an unexpired contract, the contract with plaintiff was valid and enforceable even though the acts of the banks amounted to an illegal combination. *Edwards v. Roberts* (Civ. App.) 222 S. W. 278.

Where a dealer indebted to manufacturer for goods delivered under a contract which was void because in restraint of trade in violation of arts. 7796-7818, gave manufacturer his check in settlement of indebtedness in order to procure possession of insurance policy

deposited as security and thereafter stopped payment on check, the manufacturer could recover amount of check notwithstanding illegality of the contract. *Fred Miller Brewing Co. v. Coonrod* (Civ. App.) 230 S. W. 1099.

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## CHAPTER TWO

### EVIDENCE IN TRUST CASES

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Evidence of the violation of the law.**—In action on contract for purchase of assets of a bank by an individual, evidence held to justify a jury finding that individual purchased in behalf of another bank, which ratified transaction, though without prior knowledge thereof, so that anti-trust statute applied. *Langford v. Power* (Civ. App.) 196 S. W. 662.

In an action against fire insurance companies for conspiring to prevent plaintiff from obtaining insurance, evidence held not to show total absence of damage. *Palatine Ins. Co. v. Griffin* (Civ. App.) 202 S. W. 1014.

Evidence held to support finding that contract of sale of business and good will with agreement not to re-engage in the same business in same town while purchaser was in that business therein was not illegal as a combination or trust. *Saye v. Garrard* (Civ. App.) 204 S. W. 684.

In suit for injunction by state against automobile company, existence between company and its selling agents, of a combination of acts actually creating and carrying out restrictions in the free pursuit of a business permitted by law, also preventing or lessening competition in the sale of automobiles, in violation of art. 7796, held established. *State v. Willys-Overland* (Civ. App.) 211 S. W. 609.



**TITLE 131**

**WAREHOUSES AND WAREHOUSEMEN, AND MARKETING**

- Art.  
 7819. Who and what are public warehouses and warehousemen.  
 7823. Must deliver property immediately on production of receipt.  
 7825. Force and effect of warehouse receipts; negotiable, etc.  
 7826. Liability for damages.  
 7827. [Repealed.]

**WAREHOUSES AND MARKETING**

- 7827a. Purpose of act.  
 7827cc. Sample from cotton bales ginned; certificate.  
 7827d. Wrapping of cotton ginned, marking.  
 7827nn-7827p. [Note.]  
 7827q, 7827qq. [Note.]

**UNIFORM WAREHOUSE RECEIPTS ACT**

**PART I. THE ISSUE OF WAREHOUSE RECEIPTS**

- 7827½. Who may issue receipts.  
 7827½a. Form and contents.  
 7827½aa. Insertion of other terms and conditions.  
 7827½b. Non-negotiable receipt  
 7827½bb. Negotiable receipt.  
 7827½c. Duplicate receipts; marking.  
 7827½cc. Non-negotiable receipts; marking.

**PART II. OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS**

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**Article 7819. Who and what are public warehousemen and warehouses.**—All persons, firms, companies or corporations who shall receive cotton, wheat, rye, oats, rice, or any kind of produce, wares, merchandise, or any description of personal property in store for hire, shall be deemed and taken to be public warehousemen.

A warehouse within the meaning of this Act, shall be a house, building, or room in which the above mentioned commodities are stored and are protected from damage thereto by the action of the elements. [Acts

1901, p. 251, § 1; Acts 1913, S. S. p. 93, § 2, amending art. 7819, Rev. St. 1911; Acts 1919, 36th Leg. 2d C. S., ch. 54, § 1.]

**Explanatory.**—Took effect 90 days after July 22, 1919, date of adjournment. Sec. 2 of the act repeals art. 7827 and sec. 3 repeals all laws in conflict.

**Warehouse defined.**—In common parlance a "warehouse" is a house used for storing goods, wares, and merchandise, whether for the owner or for some one else, and whether the same be a public or private warehouse. *New England Equitable Ins. Co. v. Mechanics'-American Nat. Bank of St. Louis* (Civ. App.) 213 S. W. 685.

**Art. 7823. Must deliver property immediately upon production of receipt.**

**Care of property stored.**—One maintaining a meat cold storage impliedly agrees to use ordinary care to maintain it in such condition that meat can be safely kept there for usual length of time. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918.

Although plaintiff did not agree to pay storage to defendant compress company, where cotton was received with expectation that defendant would be compensated by carrier before shipment, held defendant was a bailee for hire, whose duty it was to exercise ordinary diligence. *Jackson v. Greenville Compress Co.* (Civ. App.) 202 S. W. 324.

Where defendant accepted cotton in connection with its compress business on storage for mutual benefit of both parties, it was not necessary to prove an express contract, law implying a contract and imposing on defendant duty to use ordinary care. *Id.*

A cotton compress and warehouse company, which charged for compressing cotton, and stored it as a mere incident to the compression, was a "bailee for hire" of the cotton while in storage, and responsible for failure to exercise ordinary care. *Exporters' & Traders' Compress & Warehouse Co. v. Wills* (Civ. App.) 204 S. W. 1056.

Where plaintiff left two bales of cotton with defendant for storage until plaintiff should call for them, alleged to have been received only for plaintiff's convenience, and receipt stating it was not a public warehouse, a bailment resulted, requiring defendant to exercise ordinary care to hold and return the cotton. *Griffin v. Smith* (Civ. App.) 218 S. W. 33.

**Limiting liability.**—Contract of warehouse company, covering storage of cotton, and stipulating that company would not be responsible for loss by fire or otherwise, not stipulating against responsibility for loss through fire caused by its own negligence, did not exempt company from liability for loss by fire so caused. *Exporters' & Traders' Compress & Warehouse Co. v. Wills* (Civ. App.) 204 S. W. 1056.

**Art. 7825. Force and effect of warehouse receipts; negotiable, etc.**

**Receipt as contract.**—A receipt issued by warehouseman, stating the amount or quantity of goods received, and also the conditions under which the same are to be stored, is more than a mere receipt, and is in fact a contract fixing the rights of the parties. *Kahn v. Cole* (Civ. App.) 227 S. W. 556.

**Negotiability.**—Cotton tickets, issued for cotton stored in warehouse, were not negotiable at common law. *Carter, v. Farmers' Nat. Bank of Seymour* (Civ. App.) 224 S. W. 265.

**Transfer of receipts.**—Where a cotton yard issued a ticket for bale of cotton, the legal title, ownership, and constructive possession of the bale was evidenced by the ticket, so that the delivery of the ticket was a symbolic delivery of the cotton and raised a presumption of the transfer of ownership, although the rule would be otherwise if the possession by the cotton yard indicated a claim of ownership by it. *McLendon Hardware Co. v. J. A. Hill & Son* (Civ. App.) 226 S. W. 825.

**Sale of cotton without receipt.**—One purchasing cotton from the manager of a warehouse company engaged in storing cotton and issuing receipts therefor, providing for delivery of the cotton only on their return, gets no title, the manager not having the receipts, and having no authority to sell, and the warehouse company being guilty of no acts operating as an estoppel. *King-Collie Co. v. Wichita Falls Warehouse Co.* (Civ. App.) 205 S. W. 748.

**Art. 7826. Liability for damages.**

**Evidence in actions against warehouseman.**—Where it is alleged that meat kept in defendant's cold storage was moldy through dampness, evidence need not show negligence producing dampness. *Sherman Ice Co. v. Klein* (Civ. App.) 195 S. W. 918.

Evidence held to show conclusively a breach of defendant's duty as bailee of cotton to hold the bales for plaintiff as agreed, and to return them on demand. *Griffin v. Smith* (Civ. App.) 218 S. W. 33.

**Art. 7827. [Repealed by Acts 1919, 36th Leg. 2d C. S., ch. 54, § 2.]**

WAREHOUSES AND MARKETING

**Art. 7827a. Purpose of act.**

**Validity.**—Conditions in the cotton trade, as to negligent weighing, loss in transit, deterioration, and "city crop" held to warrant enactment of this act, and it is within the legitimate exercise of the police power. *Ex parte White*, 82 Cr. R. 85, 198 S. W. 583.

It is not obnoxious to constitutional objections. *Id.*

The mere fact that conditions requiring remedy in the cotton trade were not caused by cotton ginner did not make its enactment unwarranted. Id.

It is not invalid as embracing two unrelated subjects; its purpose being to promote the cotton industry, in doing which both ginning and storage must be regulated. Id.

It is not invalid, merely because the title purports regulation of "all gins" and the body of the act refers only to public gins, since, as a matter of fact, all gins within the state are public. Id.

It is not obnoxious to Const. U. S. Amend. 14, or any other provision thereof, and is valid. Id.

It does not deprive producers of due process of law. Id.

**Art. 7827cc. Sample from cotton bales ginned; certificate.**

**Validity.**—This act is not invalid for failing to provide a penalty for its violation by the producer by substituting a different sample, since he is liable under the swindling statute if he does so. Ex parte White, 82 Cr. R. 85, 198 S. W. 583.

The provision requiring cotton ginner to abstract and preserve three samples from each bale, thus imposing an expense of not to exceed 15 cents per bale in the ginning of cotton, does not deprive ginner of due process of law. Id.

**Art. 7827d. Wrapping of cotton ginned; marking.**—Each bale of cotton ginned by a licensed and bonded ginner in this State shall be so wrapped that the bale will be completely covered when compressed; provided that the ends of the bale shall be closed and well sewed; and, provided further, that the quality of the bagging shall at all times be such that marking thereon will, under ordinary conditions, remain intact and visible. Each and every licensed and bonded ginner shall mark each bale of cotton ginned by him with a metal tag or marker or some indestructible material on which shall be stamped in distinct letters the following "B——— and "B. G. ——," together with the name of the gin or ginner and his post office address. The manner of marking for identification may at any time be regulated by the Commissioner. The first blank above indicated shall be filled in by the ginner by placing the same number, numerically, as that of the bale, as shown on the books of the gin ginning the same; and the letter "B" shall stand for "bale." The second blank shall be filled in by the ginner, by inserting the number of the gin license assigned to it by the Commissioner; and the letters "B. G." when so used, shall stand for "Bonded Gin." All laws and parts of laws heretofore enacted, providing for the marking of branded cotton in the bale, are hereby repealed. [Acts 1914, 33d Leg. 2d C. S., ch. 5, § 6; Acts 1917, 35th Leg. 1st C. S., ch. 41, § 7; Acts 1919, 36th Leg., ch. 116, § 1.]

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

**Art. 7827nn.**

See art. 7827½a, post. While this article is largely superseded, some of its provisions would seem to be still operative.

**Art. 7827o.**

**Explanatory.**—Superseded in part only by the Uniform Warehouse Receipts Act. See arts. 7827½b-7827½cc, post.

**Art. 7827oo.**

See arts. 7827½d-7827½f, which probably supersede this article.

**Art. 7827p.**

See arts. 7827½rr-7827½x.

**Arts. 7827q, 7827qq.**

See, also, 1918 Supp., arts. 6016½-6016½c, as to newspaper publication instead of posting.

See arts. 7827½mm-7827½r, probably superseding these articles.

UNIFORM WAREHOUSE RECEIPTS ACT

PART I. THE ISSUE OF WAREHOUSE RECEIPTS

**Art. 7827 1/2.** **Who may issue receipts.**—Warehouse receipts may be issued by any warehouseman. [Acts 1919, 36th Leg., ch. 126, § 1.]  
Took effect 90 days after March 19, 1919, date of adjournment.

**Art. 7827 1/2a.** **Form and contents.**—Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

- (a) The location of the warehouse where the goods are stored.
- (b) The date of issue of the receipt.
- (c) The consecutive number of the receipt.
- (d) A statement whether the goods received will be delivered to a specified person, or to a specified person or his order.
- (e) The rate of storage charges.
- (f) A description of the goods or of the packages containing them.
- (g) The signature of the warehouseman, which may be made by his authorized agent.
- (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and
- (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required.

(j) When a negotiable receipt is issued under the terms of this Act for cotton or other agricultural products stored in any warehouse operating under the terms of this Act, it shall, in addition to the other conditions mentioned herein, state the weight, grade, and condition of the same and shall state plainly whether such agricultural products are insured or not. [Id., § 2.]

**Art. 7827 1/2aa.** **Insertion of other terms and conditions.**—A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

- (a) Be contrary to the provisions of this Act.
- (b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him, which a reasonably careful man would exercise in regard to similar goods of his own. [Id., § 3.]

**Art. 7827 1/2b.** **Non-negotiable receipt.**—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt. [Id., § 4.]

**Art. 7827 1/2bb.** **Negotiable receipt.**—A receipt in which it is stated that the goods received will be delivered to the order of any person named in such receipt is a negotiable receipt.

No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted shall be void. [Id., § 5.]

**Art. 7827½c. Duplicate receipts; marking.**—When more than one negotiable receipt is issued for the same goods, the word “duplicate” shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damages caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. [Id., § 6.]

**Art. 7827½cc. Non-negotiable receipts; marking.**—A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it, “non-negotiable,” or “not negotiable.” In case of the warehouseman’s failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This action shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. [Id., § 7.]

## PART II. OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN UPON THEIR RECEIPTS

**Art. 7827½d. Delivery of goods to holder of receipt or depositor thereof.**—A warehouseman, in the absence of some lawful excuse provided by this Act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

- (a) An offer to satisfy the warehouseman’s lien.
- (b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and
- (c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is required by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. [Acts 1919, 36th Leg., ch. 126, § 8.]

**Art. 7827½dd. Justification of warehouseman in delivering.**—A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

(a) The person lawfully entitled to the possession of the goods, or his agent.

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either endorsed upon the receipt or written upon another paper, or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been endorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. [Id., § 9.]

**Art. 7827½e. Liability for misdelivery.**—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of

the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either—

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. [Id., § 10.]

**Art. 7827 $\frac{1}{2}$ ee. Cancellation of receipt upon delivery of goods.**—Except as provided in Section 36 [Art. 7827 $\frac{1}{2}$ r], where a warehouseman delivers goods for which he has issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods. and fails to take up and cancel the receipt, he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. [Id., § 11.]

**Art. 7827 $\frac{1}{2}$ f. Cancellation of receipt upon delivery of part of goods.**—Except as provided in Section 36 [art. 7827 $\frac{1}{2}$ r], where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. [Id., § 12.]

**Art. 7827 $\frac{1}{2}$ ff. Altered receipts.**—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was

- (a) Immaterial
- (b) Authorized, or
- (c) Made without fraudulent intent

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. [Id., § 13.]

**Art. 7827 $\frac{1}{2}$ g. Lost or destroyed receipts.**—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient securities to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The Court

may also in its discretion order the payment of the warehouseman's reasonable costs.

The delivery of the goods under an order of the Court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [Id., § 14.]

**Art. 7827½gg. Effect of duplicate receipts.**—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. [Id., § 15.]

**Art. 7827½h. No title to goods in warehouseman.**—No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. [Id., § 16.]

**Art. 7827½hh. Interpleader of claimants of goods.**—If more than one person claims the title or possession of the goods, the warehouseman, may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead. [Id., § 17.]

**Art. 7827½i. Determination of claims to goods.**—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [Id., § 18.]

**Art. 7827½ii. Adverse title, when not a defense.**—Except as provided in the two preceding sections and in sections 9 [art. 7827½dd] and 36 [art. 7827½r], no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. [Id., § 19.]

**Art. 7827½j. Liability for non-existence or misdescription of goods.**—A Warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. [Id., § 20.]

**Art. 7827 $\frac{1}{2}$ jj** WAREHOUSES AND WAREHOUSEMEN—MARKETING (Title 131

**Art. 7827 $\frac{1}{2}$ jj.** **Liability for loss of or injury to goods.**—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. [Id., § 21.]

**Art. 7827 $\frac{1}{2}$ k.** **Goods to be kept separate.**—Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. [Id., § 22.]

**Art. 7827 $\frac{1}{2}$ kk.** **Mingling fungible goods.**—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. [Id., § 23.]

**Art. 7827 $\frac{1}{2}$ l.** **Same; delivery to owners.**—The warehouseman shall be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. [Id., § 24.]

**Art. 7827 $\frac{1}{2}$ ll.** **Attachment, etc., of goods.**—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they can not thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. [Id., § 25.]

**Art. 7827 $\frac{1}{2}$ m.** **Remedies of creditors of depositors.**—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. [Id., § 26.]

**Art. 7827 $\frac{1}{2}$ mm.** **Lien of warehouseman.**—Subject to the provisions of Section 30 [Art. 7827 $\frac{1}{2}$ o] a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of goods where default has been made in satisfying the warehouseman's lien. [Id., § 27.]

**Art. 7827 $\frac{1}{2}$ n.** **Enforcement of lien.**—Subject to the provisions of Section 30 a warehouseman's lien may be enforced—

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and



(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. [Id., § 28.]

**Art. 7827 $\frac{1}{2}$ nn. Loss of lien.**—A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act. [Id., § 29.]

**Art. 7827 $\frac{1}{2}$ o. Statement of claim of lien in receipt.**—If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of Section 27 [art. 7827 $\frac{1}{2}$ mm], although the amount of the charges so enumerated is not stated in the receipt. [Id., § 30.]

**Art. 7827 $\frac{1}{2}$ oo. Retention of goods until satisfaction of lien.**—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. [Id., § 31.]

**Art. 7827 $\frac{1}{2}$ p. Other remedies of warehouseman.**—Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies, allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. [Id., § 32.]

**Art. 7827 $\frac{1}{2}$ pp. Sale to satisfy lien.**—A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due.

(b) A brief description of the goods against which the lien exists.

(c) A demand that the amount of the claim as stated in the notice, and of such further claims as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable

for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. From the proceeds of such sale, the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of such proceeds shall be deposited with the County Clerk of the County in which the warehouse is located and shall be delivered, on demand, to the person to whom the warehouseman would have been bound to deliver, or justified in delivering the goods, for which the receipt was issued.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this Act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. [Id., § 33.]

**Art. 7827 $\frac{1}{2}$ q.** Same; perishable and hazardous goods.—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made upon the terms of this auction shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. [Id., § 34.]

**Art. 7827 $\frac{1}{2}$ qq.** Other methods of enforcing lien.—The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. [Id., § 35.]

**Art. 7827 $\frac{1}{2}$ r.** Effect of sale.—After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the de-

positor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. [Id., § 36.]

PART III. NEGOTIATION AND TRANSFER OF RECEIPTS

**Art. 7827½rr. Negotiation by delivery.**—A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or when a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. [Acts 1919, 36th Leg., ch. 126, § 37.]

**Art. 7827½s. Negotiation by indorsement.**—A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner. [Id., § 38.]

**Art. 7827½ss. Transfer of receipt.**—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt can not be negotiated, and the indorsement of such receipt gives the transferee no additional right. [Id., § 39.]

**Art. 7827½t. Who may negotiate receipt.**—A negotiable receipt may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery. [Id., § 40.]

**Art. 7827½tt. Title acquired by negotiation of receipt.**—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman[d] to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. [Id., § 41.]

**Art. 7827½u. Title acquired by transfer of receipt.**—A person to whom a receipt has been transferred but not negotiated, acquires

thereby, as against the transferrer, the title of the goods, subject to the terms of any agreement with the transferrer.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferrer or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferrer of a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer. [Id., § 42.]

**Art. 7827 $\frac{1}{2}$ uu. Transfer of negotiable receipt without indorsement.**—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. [Id., § 43.]

**Art. 7827 $\frac{1}{2}$ v. Warranties on negotiation, etc., of receipt.**—A person who for value negotiable or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

- (a) That the receipt is genuine.
- (b) That he has a legal right to negotiate or transfer it.
- (c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby. [Id., § 44.]

**Art. 7827 $\frac{1}{2}$ vv. Indorser as guarantor.**—The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. [Id., § 45.]

**Art. 7827 $\frac{1}{2}$ w. Implied warranty.**—A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described. [Id., § 46.]

**Art. 7827 $\frac{1}{2}$ ww. Fraud, mistake, or duress.**—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake or duress. [Id., § 47.]

**Art. 7827½www. Subsequent negotiation.**—Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. [Id., § 48.]

**Art. 7827½x. Seller's lien and stoppage in transitu.**—Where a negotiable receipt has been issued for goods, no seller's lien or right or stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transit. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. [Id., § 49.]

#### PART IV. CRIMINAL OFFENSES

Sec. 50-55 of this act. See Penal Code, arts. 977o to 977t.

#### PART V. WHO MAY BECOME PUBLIC WAREHOUSEMEN

**Art. 7827½xx. Who may be public warehousemen; bonds.**—Any person, firm, corporation, partnership, or association of persons, may become a Public Warehouseman under the terms and provisions of this Act by filing with the County Clerk of the County in which he is located, and proposes to do business, a good and sufficient bond in the sum of five thousand dollars on the condition that he will conduct his business in accordance with the terms and provisions of this Act.

Upon the filing and approval of such bond with the County Clerk, it shall be the duty of the County Clerk to immediately certify such fact to the Commissioner of Markets & Warehouses, of the State of Texas. Any one injured by the violation of the terms of the bond, and the provisions of this Act may recover damages to the extent of said bond; should said bond become impaired by recovery, or otherwise, the Commissioner of Markets and Warehouses, may require such Public Warehouseman to file an additional bond, but in no event shall such additional bond be for a greater amount than Five Thousand Dollars. The bond required thereunder shall be good for the term of one year from the date of filing and the right to continue as a Public Warehouseman shall be conditioned upon the renewal of said bond from year to year, according to the terms of this Act. The form of the bond required hereunder shall be prescribed by the Commissioner of Markets and Warehouses, and the bond provided for herein may be made by any surety company authorized to do business under the laws of the State of Texas; or by two solvent sureties to be approved by the County Clerk of the County in which such Public Warehouseman may desire to do business. [Acts 1919, 36th Leg., ch. 126, § 56.]

**Art. 7827½xxx. Supervision over private warehousemen.**—The Commissioner of Markets and Warehouses may exercise a general supervision over all Private Warehouses operating under the provisions of this Act, and may, in his discretion, prescribe rules and regulations for the conduct of same not inconsistent with the terms and provisions of this Act. [Id., § 57.]

**Art. 7827 $\frac{1}{2}$ y. Repeal.**—All laws and parts of laws in conflict with any of the provisions of this Act are hereby repealed except that it is expressly provided for herein that this Act shall not in any wise repeal or impair any part of the Act of the First Called Session of the Thirty-fifth Legislature, approved May 26, 1917, and known as the Permanent Warehouse Act. [Id., § 58.]

#### PART VI. INTERPRETATION

**Art. 7827 $\frac{1}{2}$ yy. Rules of law, equity, etc., applicable, when.**—In any case not provided for in this Act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. [Acts 1919, 36th Leg., ch. 126, § 59.]

**Art. 7827 $\frac{1}{2}$ yyy. Interpretation of act.**—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it. [Id., § 60.]

**Art. 7827 $\frac{1}{2}$ z. Definitions.**—(1) In this Act, unless the context or subject-matter otherwise requires—

“Action” includes counter claim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “Purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

(2) A thing is done “in good faith” within the meaning of this Act, when it is in fact done honestly, whether it is done negligently or not. [Id., § 61.]

**Art. 7827 $\frac{1}{2}$ zz. Retroactive effect of act.**—The provisions of this Act do not apply to receipts made and delivered prior to the taking effect of this Act. [Id., § 62.]

**Art. 7827 $\frac{1}{2}$ zzz. Citation of act.**—This act may be cited as the Uniform Warehouse Receipts Act. [Id., § 63.]

#### DECISIONS RELATING TO TOPIC IN GENERAL

**Construction of storage contract.**—A contract covering the storage of cotton, presumably written by the warehouse company, must be construed most strongly against it. *Exporters' & Traders' Compress & Warehouse Co. v. Willis* (Civ. App.) 204 S. W. 1056.

## TITLE 132

## WEIGHERS—PUBLIC

Art.	Art.
7828, 7829. [Superseded.]	7833f. Qualifications of weighers; oath of office.
7830. Duties.	7833g. Bonds of weighers; filing.
7831. [Superseded.]	7833h. Weight certificates; form and contents.
7833. Factor or commission merchant not to employ.	7833i. Seal of weighers; rules and regulations.
7833a. Public weighers; who are.	7833j. Records of weighings.
7833b. For justice precincts; appointment; bonds.	7833k. Certificates of authority issued to weighers; fee for.
7833c. Same; deputies; bonds.	7833l. Re-weighing.
7833d. Existing public weighers continued in office.	7833m. Suspension or dismissal of weighers.
7833e. For cities; appointment; bonds.	7833n. Duties of weighers.
7833ee. Governor shall appoint public weighers; bond; deputies.	7833o. Reports.

Articles 7828, 7829. [4308] [4309] [Superseded by Acts 1919, 36th Leg., ch. 76, post, arts. 7833a–7833o.]

See *Carter v. Farmers' Nat. Bank of Seymour* (Civ. App.) 224 S. W. 265.

**Validity of statutes.**—The act of 1883 and an earlier act of 1879 on the same subject were not in conflict with Const. art. 3, § 56, relative to local or special laws "regulating the affairs of counties, cities, towns, wards, or school districts." *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321.

Act April 19, 1879, which creates the office of public weigher, and is entire, and a substitute for the act of 1875, and contains 10 sections, each section complete in itself, is not in contravention of Const. art. 3, § 36, providing that "no law shall be revived or amended by reference to its title. Id.

Act April 12, 1883, § 1, was not unconstitutional as a delegation of legislative power, as the commissioners' court had no power to revise or amend the act, it being complete as a law by legislative enactment, in accordance with constitutional forms, and the subject a matter of local regulation. Id.

**Repeal.**—The law of 1883, applying to public weighers as embodied in *Sayles' Ann. Civ. St.* 1897, art. 4308, was repealed by Acts 1899, c. 155. *Troilo v. Gittinger* (Civ. App.) 230 S. W. 233.

#### Art. 7830. [4310] Duties.

**Negotiation of receipts.**—This article held to make cotton tickets negotiable instruments only in hands of holder to whom it has been negotiated by delivery and indorsement. *Carter v. Farmers' Nat. Bank of Seymour* (Civ. App.) 224 S. W. 265.

The provision making cotton tickets negotiable by delivery and indorsement, must be strictly followed by one relying on its benefit and protection, since it gives to such tickets a character other than that which they would have had under the common law. Id.

**Liability of weigher storing cotton.**—In view of arts. 583, 584, bank having taken valid assignment of cotton receipts issued by public weigher, and having thereby and by agreement acquired title to cotton, under this article, public weigher, in delivering cotton without requiring surrender of receipts, must respond to bank, in suit in its own name, for its loss. *Taliaferro v. Brady Nat. Bank* (Civ. App.) 209 S. W. 174.

Public weigher and his sureties were not entitled to require such bank, to foreclose its mortgage upon security other than cotton or receipts before it could recover against weigher and sureties. Id.

Debtor having left country and other property securing debt having been disposed of or not being discoverable, bank held not required to foreclose upon or exhaust such property before going against public weigher and sureties. Id.

Under stipulation in receipts that cotton would be delivered only on return of receipts, and this article, liability of weigher and sureties to bank, held fixed by delivery of cotton to assignor of receipt without return of certificates. Id.

Under art. 7828, as amended by Acts 35th Leg. (1918) 4th Called Sess. c. 95, and arts. 583, 584, and 7829, public weigher, who delivered cotton to owner without taking up cotton tickets, was not liable to bank to which former owner had transferred tickets as collateral without indorsements subsequent to the sale of the cotton, since the tickets, not having been indorsed, were not negotiable instruments in hands of bank under this article. *Carter v. Farmers' Nat. Bank of Seymour* (Civ. App.) 224 S. W. 265.

Art. 7831. [4311] [Superseded by Acts 1919, 36th Leg., ch. 76, post, arts. 7833a–7833o.]

#### Art. 7833. [4314] Factor or commission merchant not to employ.

See *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321.

**Art. 7833a. Public weighers; who are.**—All persons, firms, corporation, co-partnerships, or individuals, engaged in the business of public weighing for hire, or any person, firm, or corporation who shall weigh or measure any commodity, produce or article, and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce, or article is based, shall be known as a public weigher, and shall comply with the terms and provisions of this Act, provided the provisions of this section shall not apply to the owners, managers, agents or employees of any compress or any public or private warehouse in their operations as a warehouseman and provided further that this Act shall not apply in any manner to any Texas port. [Acts 1919, 36th Leg., ch. 76, § 1; Acts 1921, 37th Leg., ch. 86, § 1.]

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

**Art. 7833b. For justice precincts; appointment; bonds.**—Within sixty days after the taking effect of this Act, it shall be the duty of the Commissioners' Court of the various counties of Texas to appoint one public weigher for each justice precinct within each county in this State, when in their judgment it is necessary, and when no public weigher has previously been elected, who shall give a bond, payable to the State of Texas, in the penal sum of Twenty-five Hundred Dollars (\$2,500), conditioned that he shall weigh or measure accurately thereafter, any commodity, article or quantity of produce tendered to him for weighing, as a public weigher in this State; that he will comply with the terms of law governing public weighers; that he will not permit anyone to molest, mutilate, or destroy, any article, produce, or commodity, while in his possession. Such bond shall be good for the term of two years from the date given, and shall be subject to the approval of the Commissioners' Court of the County in which such public weigher resides. After such bond is filed, approved and recorded, as provided by law, the County Clerk shall immediately certify such appointment, or election, to the Commissioner of Markets and Warehouses of Texas. Such bond shall not be void upon first recovery, but may be sued upon successively by any and all parties who are injured by reason of any false weight, or measure, or any willful destruction or mutilation of such article, produce or commodity while in his possession, or false certificate given by such public weigher. [Acts 1919, 36th Leg., ch. 76, § 2.]

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

**Art. 7833c. Same; deputies; bonds.**—Such public weigher, so appointed by the Commissioners' Court, or elected, shall have the right, and it shall be his duty to appoint a sufficient number of deputies in each precinct, to weigh all produce tendered for the purpose of weighing at any and all points within such precinct. He shall require each of said deputies to file a bond in the penal sum of One Thousand (\$1000) dollars, under the same terms and conditions as the bond which he filed with the Commissioners' Court of the County in which he resides, before he shall be permitted to engage in the business of deputy public weigher; such bond, so filed, shall be payable to the State of Texas, and shall be subject to the approval of the Commissioners' Court of the County in which he resides, and certified to the Commissioner of Markets and Warehouses, before such deputy public weigher shall be entitled to engage in the business of public weighing. [Id., § 3.]

**Art. 7833d. Existing public weighers continued in office.**—In all cases where a public weigher has been elected or appointed, under the present law governing public weighers, he shall be permitted to continue



in office, but shall be required to file a bond within sixty days after the taking effect of this Act, with the Commissioners' Court of the County in which he resides, which bond shall be of the same terms and conditions as outlined in Section 2 of this Act [Art. 7833b]. It shall be his duty, as soon as such bond is filed and approved, and his certificate of authority issued by the Commissioner of Markets and Warehouses, to appoint a sufficient number of deputies to weigh all produce tendered to him for weighing in the precinct for which he was elected or appointed; each of such deputies shall give a bond, as prescribed in Section 2 of this Act. [Id., § 4.]

**Art. 7833e. For cities; appointment; bonds.**—In all cities and towns in this State, which receive as much as fifty thousand bales of cotton, twenty-five thousand tons of cotton seed; one hundred thousand bushels of grain or rice, or one hundred thousand pounds of wool; five thousand barrels of sugar or any other commodity in large quantities, it shall be lawful for the Governor to appoint a sufficient number of public weighers for such city, town or shipping point to carefully and accurately weigh all produce tendered for the purpose of weighing for shipment; such appointments shall be made by the Governor, on the recommendation of the Senator from whose senatorial district such appointment is made, together with a majority of the representatives in the legislature from such senatorial district. No man shall be appointed unless he shall receive the endorsement of a majority of the representatives, and the senator, from such district. Every public weigher so appointed shall file a bond payable to the State of Texas, in the sum of Five Thousand (\$5,000) Dollars, conditioned that he will accurately weigh, or measure, all produce tendered to him for weighing or measuring, and that all certificates of weights issued by him shall represent a true and accurate weight of such produce so weighed, and otherwise complying with the terms and conditions of the bond, as outlined in Section 2 of this Act [Art. 7833b]; such bond, so given, shall not be void upon first recovery, but may be sued on successively by any and all persons who are injured by such public weigher. Such public weigher shall have the right to appoint a sufficient number of deputies to aid him in weighing, or measuring, any commodity that is tendered to him for weighing. All bonds given by such public weighers or their deputies shall be subject to approval of the Commissioner of Markets and Warehouses. [Id., § 5.]

**Art. 7833ee. Governor shall appoint public weighers; bond; deputies.**—In all counties of this State in which there are two or more cities, towns or shipping points that receive as much as fifty thousand bales of cotton; or twenty-five thousand tons of cotton seed; or one hundred thousand bushels of grain; or one hundred thousand bushels of rice; or one hundred thousand pounds of wool; or five thousand barrels of sugar, or any other commodity in large quantities, it shall be lawful for the Governor to appoint a sufficient number of public weighers for such county to carefully and accurately weigh all commodities tendered for the purpose of weighing for shipment, sale or purchase, provided this Act shall not apply to Galveston and Nueces counties. All such public appointment shall be made by the Governor, on the recommendation of the Senator from whose Senatorial District such appointment is made, together with a majority of the representatives in the Legislature from such Senatorial District. No man shall be appointed unless he shall receive the endorsement of a majority of the Representatives, and the Senator, from such district. Every public

weigher so appointed shall file a bond payable to the State of Texas, in the sum of Five Thousand (\$5,000.00) Dollars, conditioned that he will accurately weigh, or measure, all commodities tendered to him in said county for weighing or measuring, and that all certificates of weight issued by him shall represent a true and accurate weight of such produce so weighed, and otherwise complying with the terms and conditions of the bond, as outlined in Section 2 of the original Act [Art. 7833b]; such bond, so given, shall not be void upon first recovery, but may be sued on successively by any and all persons who are injured by such public weigher. Such public weigher shall have the right to appoint a sufficient number of deputies to aid him in weighing, or measuring, any commodity that is tendered to him for weighing. All bonds given by such public weighers or their deputies shall be subject to approval of the Commissioner of Markets and Warehouses, and all bonds and oaths of such public weighers or their deputies shall be filed with the Commissioner of Markets and Warehouses. [Acts 1921, 37th Leg. 1st C. S., ch. 22, § 1 (§ 5a).]

**Explanatory.**—Took effect Nov. 15, 1921. The act adds section 5a to Acts 1919, 36th Leg., ch. 76.

**Art. 7833f. Qualifications of weighers; oath of office.**—No person shall be appointed or elected a public weigher in this State, unless he shall be at least twenty-one years of age, and is of good moral character and unquestioned integrity. He shall have a fair education and be able to keep an accurate set of books as required by this Act. He shall, before entering upon the duties of his office, take the constitutional oath of office prescribed for all officers in this State, which oath of office shall be filed with the Commissioners' Court of the County in which he resides. [Acts 1919, 36th Leg., ch. 76, § 6.]

**Art. 7833g. Bonds of weighers; filing.**—All public weighers, or deputy public weighers, appointed or elected, under the terms and provisions of this Act, shall file their bonds, as required herein, with the Commissioners' Court of the County in which they reside, and shall obtain from the Commissioner of Markets and Warehouses a certificate of authority to carry on the business of public weigher or deputy public weigher, within the city, village, place, or shipping point, for which he was elected or appointed, and no one shall be allowed to pursue the business of weighing for the public, or grant a certificate or weight sheet upon which a purchase or sale is made, unless he shall comply with the terms and conditions of this Act. [Id., § 7.]

**Art. 7833h. Weight certificates; form and contents.**—The Commissioner of Markets and Warehouses shall prescribe the form of weight certificate to be used by all public weighers in this State, which certificate shall be known as a State Certificate of Weights and Measures; such certificate shall state thereon the kind of produce; the number of the same, the date of the receipt of the produce, the owner, agent or consignee, the total weight of the produce, the vessel, railroad, or other means by which the produce was received, and any trade or other mark thereon; and such other information as may be necessary to distinguish or identify the produce from a like kind. No certificate other than the one herein prescribed shall be used by any public weigher in this State, and such certificate, when so made and properly signed, shall be prima facie evidence of such weight. [Id., § 8.]

**Art. 7833i. Seal of weighers; rules and regulations.**—It shall be the duty of every public weigher in this State, to provide himself with a seal,

consisting of a star of five points, and shall have inscribed on the outer margin thereof, the words, "Public Weigher, Precinct No. —, ——— County, Texas"; which seal shall be impressed upon each weight certificate issued by such public weigher, or deputy public weigher, or any and all weight sheets made out by them. The Commissioner of Markets and Warehouses of Texas, shall prescribe rules and regulations for government of public weighers throughout the State, which rules and regulations shall be uniform and shall be of the same force and effect when promulgated as if they were enacted into law. Such rules and regulations shall be observed by all public weighers or deputy public weighers. [Id., § 9.]

**Art. 7833j. Records of weighings.**—All public weighers, within this State, shall keep and preserve a correct and accurate record of all weights made by them, as provided in this Act, which record shall be open for the inspection of the Commissioner of Markets and Warehouses, his deputies or inspectors, at any and all times, and the public. Such record shall be uniform throughout the State, and the form of such record shall be prescribed by the Commissioner of Markets and Warehouses. [Id., § 10.]

For sections 11-14 of this act, see Penal Code. arts. 995a, 992a, 995b, 992b.

**Art. 7833k. Certificates of authority issued to weighers; fee for.**—It shall be the duty of the Commissioner of Markets and Warehouses to issue a certificate of authority to all persons engaged in the business of weighing for the public; to carefully and accurately test all scales, weights, beams and measures, used by such public weighers at least once every twelve months, and to charge such public weigher a fee of Five (\$5.00) Dollars for such inspection, which fee shall be paid, by the Commissioner of Markets and Warehouses into the State Treasury; such inspection fee to be collected at the time the Certificate of Authority is issued to any public weigher or deputy public weigher in this State, and such fee shall be collected annually thereafter from all persons engaged in the business of public weigher or deputy public weigher. [Id., § 15.]

**Art. 7833l. Re-weighing.**—When any doubt or difference arises as to the correctness of the net or gross weight of any amount, commodity, or a part of a commodity, produce or article, for which a certificate of weight or measure has been issued, as provided in this State, by the public weigher, the owner, agent, or consignee, may, upon complaint to the Commissioner of Markets and Warehouses, have said amount, or part of any commodity, produce or article, re-weighed by the Commissioner of Markets and Warehouses, or his deputy, or by a public weigher designated by the Commissioner of Markets and Warehouses, by depositing with the Commissioner of Markets and Warehouses a sufficient sum of money to defray the cost of re-weighing such article or commodity. If, on re-weighing, it is discovered that fraud or carelessness, or faulty weighing apparatus was the cause of a discrepancy in weights, the cost of re-weighing shall, in all instances, be borne by the public weigher who issued the weight sheet or weight certificate. [Id., § 16.]

**Art. 7833m. Suspension or dismissal of weighers.**—Whenever any public weigher, or deputy public weigher appointed or elected under the terms and provisions of this Act, shall be guilty of malfeasance or misfeasance in office, or who is grossly incompetent in the performance of his duties, he shall be subject to suspension or dismissal from office

by the Commissioners' Court of the County in which he resides, or by the Governor of Texas, should he be appointed by the Governor. In all cases it shall be the duty of the Commissioner of Markets and Warehouses, to file with the Commissioners' Court or the Governor, as the case may be, the specific charges alleging malfeasance, misfeasance, dishonesty or incompetency or other cause. Such case may be set down for hearing not less than ten days, nor more than thirty days from the filing of such charges. The person so accused shall be furnished a copy of such charges and be notified of the date set down for hearing of his case. He shall also have the right to be represented by an Attorney, to introduce evidence in his own behalf, and to have issued a compulsory process compelling the attendance of witnesses and production of record. Should he be found guilty, it shall be the duty of the Commissioners' Court, or Governor, to immediately discharge him as public weigher, or deputy public weigher, provided, however, he may have the right of appeal to the district court of his county or to the district court of Travis county, Texas. [Id., § 17.]

**Art. 7833n. Duties of weighers.**—All amounts, lots, or shipments, or consignments of produce, after having been weighed, shall be piled or stored separately as nearly as can be, in order that amounts, lots, shipments, or consignments, may be distinguished from the other lots, shipments, or consignments of like kind, and it shall be the duty of all public weighers in weighing any commodity, produce, or article, to immediately tag or mark such commodity, produce or article that has been weighed by him, so as to distinguish same from that which has not been weighed. [Id., § 18.]

**Art. 7833o. Repeal.**—All laws and parts of laws in conflict with this Act are hereby repealed. [Id., § 19.]

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## TITLE 133

### WEIGHTS, MEASURES, GRADES AND PACKS

Art.	Art.
7836-7843. [Superseded.]	vision over all weights and measures.
7846bbb. Grades of onions, cabbage, string beans, pears, and potatoes.	7846¼n. Testing weights and measures used by state institutions.
7846e. Appointment of inspectors; expense; certificate of inspection.	7846¼o. Removal of sealers or deputy sealers of weights and measures.
7846¼. Legal standards.	7846¼p. Reports of local sealers of weights and measures.
7846¼a. Unit of standard of length and surface	7846¼q. Investigation of weights and measures; report.
7846¼b. Standards of weight.	7846¼r. Rules and regulations for sealers, etc., of weights and measures.
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7846¼d. Contracts to be governed by legal standards.	7846¼t. Jurisdiction of sealers and inspectors of weights and measures.
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7846¼f. Weights not provided for in preceding article.	7846¼v. Sealing and marking of weights and measures.
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7846¼h. Same; term of office, etc.	7846¼x. Weights, etc., which may be sold.
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7846¼l. Same; copies for municipalities.	
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Art.

7846¼yy. Prosecutions for violations of law.  
7846¼z. Seizure and condemnation of weights and measures.

Art.

7846¼zz. Powers as peace officers.  
7846¼zzz. "Person" defined.  
7846½. Weight of bread loaves.

**Articles 7836-7843.** [5322-5329] [Superseded by Acts 1919, 36th Leg., ch. 130, and Acts 1919, 36th Leg., ch. 131, post, arts. 7846¼-7846¼zzz.]

**Art. 7846bbb. Grades of onions, cabbage, string beans, pears, and potatoes.**

*Texas Bermuda onion grades.*

#### Grade No. 1.

This grade shall consist of onions which are sound, mature, bright, well-shaped, of one variety, free from doubles, splits, bottle necks, and seed stems, and practically free from damage caused by dirt or other foreign matter, moisture, sunburn, cuts, disease, insects, or mechanical means. The minimum diameter shall be two (2) inches. In order to allow for variation incident to commercial grading and handling, six (6) per centum, by weight, of any lot need not meet the foregoing requirements of this grade. In the case of yellow onions, not more than five (5) per centum, by weight, of any lot may be noticeably pink.

If any lot which meet the requirements of this grade contains more than ten (10) per centum, by weight, of onions with a minimum diameter of three and one-half (3½) inches, the grade shall be "Grade No. 1, Large."

#### Boiler Grade.

This grade shall consist of onions which are sound, mature, bright, well-shaped, of one variety, free from doubles, splits, bottle necks, and seed stems, and practically free from damages caused by dirt or other foreign matter, moisture, sunburn, cuts, disease, insects, or mechanical means. The minimum diameter shall be one (1) inch and the maximum diameter shall be two (2) inches. In order to allow for variations incident to commercial grading and handling, six (6) per centum, by weight, of any lot need not meet the foregoing requirements of this grade. In the case of yellow onions, not more than five (5) per centum, by weight, of any lot may be noticeably pink.

#### Grade No. 2.

This grade shall consist of onions not meeting the requirements of Grade No. 1, which are sound, of one variety, free from doubles, splits, bottle necks and seed stems, and practically free from damage caused by moisture, sunburn, cuts, disease, insects, or mechanical means. The minimum diameter shall be two (2) inches. In order to allow for variations incident to commercial grading and handling, ten (10) per centum by weight, of any lot need not meet the requirements of this grade. If any lot which meets the requirements of this grade contains more than ten (10) per centum, by weight, of onions, with a minimum diameter of three and one-half (3½) inches, the grade name shall be "Grade No. 2, Large."

#### Grade No. 3.

This grade shall consist of onions not meeting the requirements of any of the foregoing grades, which are sound, free from doubles, splits, bottle necks, and seed stems, and practically free from damage caused

by moisture, sunburn, cuts, disease, insects, or mechanical means. The minimum diameter shall be one (1) inch. In order to allow for variations incident to commercial grading and handling ten (10) per centum, by weight, of any lot need not meet the foregoing requirements of this grade.

#### Culls.

Culls shall consist of doubles, splits, bottle necks, and sed stems, or other onions which do not meet the requirements of any of the foregoing grades.

#### Terms Defined.

“Sound” means free from water-soaked, decayed, sprouted, or otherwise unsound onions.

“Mature” means having reached a stage of development at which the onions are firm—not soft or spongy.

“Bright” means having the normal, attractive, pearly luster of Bermuda onions.

“Well-shaped” means having the general appearance of being round—not three, four, or five-sided, or badly pinched by dry, hard soil, or thick-necked, but need not be of the exact, typical, flat Bermuda shape.

“One variety” means one variety or type, such as the Crystal Wax (white), or White Bermuda (yellow), or Red Bermuda (red), and not a mixture of different varieties or types.

“Practically free from damage” means that the appearance shall not be injured to an extent readily apparent upon casual examination.

“Sunburn” means discoloration due to exposure to the sun, but does not mean the green color running down the “veins” in the Crystal Wax (white) variety, unless such green color covers the surface between the veins.

“Diameter” means the greatest dimension at right angles to a straight line running from the stem to the root.

“Noticeable pink” means the pink color often found in the White Bermuda (yellow) variety which is to be readily apparent upon casual examination.

#### *Texas cabbage grades.*

##### Grade No. 1.

This grade shall consist of sound, green colored, partially trimmed, and reasonably hard heads, weighing not less than one and one-half pounds nor more than eight pounds each; which are free from cracked or over-ripe heads, stem rot and other diseases, and practically free from dirt, worm holes and lice.

In order to allow for variations incident to commercial grading and handling, five per centum by weight, of any lot may be under prescribed size, and in addition, three per centum, by weight of any such lot may be below the remaining requirements of this grade.

##### Grade No. 2.

This grade shall consist of sound cabbage not meeting the requirements of Grade No. 1.

#### Terms Defined.

“Over-ripe” means such cabbage as shows signs of going to seed and turning white from age.

“Partially Trimmed” means that not more than three outside leaves shall be left on the head.

*Texas snap (string) bean grades.*

## Grade No. 1.

This grade shall consist of sound, bright, clean beans of one variety and color, from one-half to full grown; which are free from leaves, stems, spots, insect damage, rust, or other diseases, and over-ripe pods.

In order to allow for variation incident to commercial grading and handling three per centum (3%) by weight, may be of another variety of the same color.

## Grade No. 2.

Any beans not meeting the above requirements shall be classed as No. 2.

All beans are to be packed in hamper weighing, when packed, not less than 17 pounds net weight for one-half bushel hamper, and 34 net weight for one bushel.

## Terms Defined.

"Over-ripe" are such pods as will not snap on being broken, and where there is an absence of abundant juice (water) in the pods; also, when the beans in the pod show evidence of maturing.

*Texas Bartlett pear grades.*

## Extra Fancy.

Shall consist of Bartlett Pears clean, bright, natural color and shape, sound, free from worms, specks, blemishes, bruises or limb scar red fruit.

## Fancy.

Shall be the same as "Extra Fancy," except it may contain ten per cent. slightly scarred fruit and slight blemishes that do not injure texture of the skin or its keeping qualities.

## Choice.

Shall be the same as "Fancy," except it may contain ten per cent. of fruit that is misshapen and with worm strings that have healed over.

## Culls.

Any pears not measuring up to the above specifications, shall be branded as "Culls."

## Packing.

Fruit shall be tightly packed in clean standard boxes, one end stamped with the grade, number of pears, name of and post-office of packer.

## Packs Defined.

"Four Tier" shall be packed in four layers. Minimum pack 120 pears to box.

"Five Tier" shall be packed in six layers. Minimum pack 135, maximum pack 180 pears to box.

"Six Tier" shall be packed in six layers, containing 216 pears to the box, or in five layers containing 195 or 210 to the box, but will be considered "six tier."

*Texas Irish potato grades.*

## Grade No. 1.

This grade shall consist of sound potatoes of similar varietal characteristics, which are practically free from dirt or other foreign matter, frost injury, sunburn, second growth, cuts, scab, blight, dry rot, and damage caused by disease, insects, or mechanical means. The minimum diameter shall be one and three-fourths ( $1\frac{3}{4}$ ) inches. In order to allow for variation incident to commercial grading and handling, five per centum by weight of any lot may be under the prescribed size, and, in addition, three per centum by weight of any such lot may be below the remaining requirements for quality of this grade.

## Grade No. 2.

This grade shall consist of potatoes of similar varietal characteristics, which are practically free from frost injury and decay, and which are free from serious damage caused by dirt or other foreign matter, sunburn, second growth, cuts, scab, blight, dry rot, or other disease, insects, or mechanical means. The minimum diameter shall be one and one-half ( $1\frac{1}{2}$ ) inches. In order to allow for variations incident to commercial grading and handling, five per centum, by weight, of any lot may be under the prescribed size, and, in addition, five per centum by weight of any such lot may be below the remaining requirements for quality of this grade.

## Culls.

Any potatoes that do not measure up to the requirements for size and general quality in the grades number one and two shall be classed as "Culls," and shall not be shipped unless branded or marked "Culls," and shipped in separate consignments.

Three per centum by weight shall be allowed on all Texas grown new potatoes, for natural shrinkage, and in instance where dirt adheres to the potatoes a fair and reasonable estimate, by weight, of such dirt, shall be made and deducted from the gross weight of the potatoes and dirt, which estimate may be made by removing and weighing the dirt from three or more samples of not less than fifty (50) pounds each, that, when taken together, represents the average conditions of the potatoes.

All potato containers must have some mark or brand showing the name and post-office address of the grower or shipper.

## Terms Defined.

"Practically free" means that the appearance shall not be injured to an extent readily apparent upon casual examination, and that any damage from the causes mentioned can be removed by the ordinary process of paring without appreciable increase in waste over that which would occur if the potato were perfect. Loss of the outer skin (epidermis) only shall not be considered as an injury to the appearance.

"Diameter" means the greatest dimensions at right angles to the longitudinal axis.

"Free from serious damage" means that the appearance shall not be injured to the extent of more than twenty per centum of the surface and that any damage from the causes mentioned can be removed by the ordinary processes of paring without increase in waste of more than



ten per centum, by weight, over that which would occur if the potato were perfect. [Acts 1918, 35th Leg. 4th C. S., ch. 63, § 1.]

**Explanatory.**—Added to Acts 1917, 35th Leg., ch. 181, as § 2b, by Acts 1918, 35th Leg. 4th C. S., ch. 63, § 1. The act took effect April 2, 1918. Sec. 8 is set forth, post, as art. 993 $\frac{1}{2}$ a, Penal Code.

**Art. 7846e. Appointment of inspectors; expense; certificate of inspection.**—It shall be the duty of the Commissioner of Agriculture to appoint inspectors to inspect fruits and vegetables at the different shipping or loading stations in this State, when called upon by the growers, shippers or shippers' agents representing the growers, and the expenses of such inspectors shall be paid by said growers, shippers or shippers' agents. Where two or more shipping agents are operating at the same shipping point, and one of them requests a State Inspector and such inspector is appointed by the Commissioner of Agriculture, each shipping agency at said shipping point shall be required to come under the State Inspector, and each shall pay his pro rata share of the expense of inspection.

Provided, that in the grading, packing and inspection of onions, only those shippers who desire State Inspection shall be required to have their onions inspected under State authority, and all railway and express companies may accept and ship onions not inspected by State Inspectors, provided that graded and nongraded onions shall not be shipped in the same car, except in less than carload lots.

The Commissioner of Agriculture shall furnish a blank form or certificate to all State Inspectors, to be filled out by them to accompany each car load of fruits and vegetables, where State Inspection is enforced. Said certificate shall contain the name and number of the car, the kind and grade of fruit or vegetables, and number of packages contained, the date of shipment and name of inspector, together with the words, "Graded and packed under State Inspection." [Acts 1917, 35th Leg., ch. 181, § 5; Acts 1919, 36th Leg., ch. 54, § 1.]

Took effect March 13, 1919.

**Art. 7846 $\frac{1}{4}$ . Legal standards.**—The standard of weights and measures adopted and used by the Government of the United States is hereby declared the legal standard of weights and measures of this State; provided, that as to commodities for which the Congress of the United States provided no standard of weights or measures the standards adopted by this State shall be the standard of weight or measures for such commodities. [Acts 1846, p. 180, § 4; P. D. 5352; Acts 1919, 36th Leg., ch. 130, § 1; Acts 1919, 36th Leg., ch. 131, § 1.]

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

See *Pope v. Joschke* (Civ. App.) 228 S. W. 986; notes to art. 7846 $\frac{1}{4}$ c.

**Art. 7846 $\frac{1}{4}$ a. Unit of standard of length and surface.**—The unit of standard of length and surface, from which all the other measures of extension, whether lineal, superficial or solid, shall be derived and ascertained, is the standard yard designated in this Act, which is divided into three equal parts called feet, and each foot into twelve equal parts called inches. For measures of cloth, and other commodities commonly sold by the yard, it may be divided into halves, quarters, eighths and sixteenths. The rod, pole or perch contains five and one-half yards; the mile one thousand seven hundred and sixty yards. The Spanish vara, thirty-three and one third inches. Where land is measured by the English rule, the chain for measuring land shall be twenty-two yards long and divided into one hundred equal parts called links. The acre for land measure shall be measured horizontally and shall contain forty

eight hundred, forty square yards; six hundred forty acres shall constitute a square mile. [Acts 1919, 36th Leg., ch. 130, § 1.]

**Art. 7846 $\frac{1}{4}$ b. Standards of weight.**—The units or standards of weight from which all the other weights shall be derived and ascertained shall be the standard of avoirdupois and troy weights designated in this Act, and avoirdupois pounds shall bear to the troy pounds the ratio of seven thousand to five thousand seven hundred and sixty grains, and the avoirdupois pound shall be divided into sixteen equal parts called ounces. The hundred weight shall consist of one hundred avoirdupois pounds, and twenty hundred weight shall constitute a ton. The troy ounce shall be one twelfth of a troy pound. [Id., § 2.]

**Art. 7846 $\frac{1}{4}$ c. Standards of measure of capacity for liquids and solids.**—The units or standards of measure of capacity for liquids from which all other measures shall be derived and ascertained, shall be the standard gallon and its parts designated in this Act. The barrel shall constitute thirty-one and one half gallons and two barrels shall make a hogshead. All other measures of capacity for liquids shall be derived from the liquid gallon by continual division by the number two, so as to make half gallons, quarts, pints, half pints, and gills. The unit or standard measure of capacity for substance not liquids, from which all measures of such substance shall be derived and ascertained, is the standard half bushel mentioned in this Act. The peck, half peck, quarter peck, quart and pint measure for measuring commodities which are not liquid shall be derived from the half bushel by successively dividing that measure by two. The standard bushel measure shall constitute two thousand one hundred fifty and forty two one hundredths cubic inches; the standard half bushel measure shall contain ten hundred seventy five and twenty one hundredths cubic inches; the standard gallon shall contain two hundred thirty one cubic inches. All measures for measuring dry commodities shall not be heaped but shall be stricken with a straight stick or roller. [Id., § 3.]

**Meaning of "barrel" in contract.**—In view of this act where plaintiff contracted to bore for defendant a well yielding 30 barrels of water each day, the word "barrel" meant 31 $\frac{1}{2}$  gallons, the standard United States measure except as to barrels of petroleum, and the provisions of the contract giving defendant right to test the capacity of the well for not exceeding 90 days did not give her absolute power to determine unappealably whether there was insufficient water. *Pope v. Joschke* (Civ. App.) 228 S. W. 986.

**Art. 7846 $\frac{1}{4}$ d. Contracts to be governed by legal standards.**—All contracts hereafter to be executed and made within this State for any work to be done, or for anything to be sold, delivered, done or agreed for, by weight or measure shall be taken and construed to be made according to the standard weight and measure ascertained as hereinbefore provided, unless there is an express contract to the contrary. In making any adjustment of weights or measures under the laws of this State, the standard herein given in this Act shall be taken as the rule and guide for making such adjustment. [Id., § 4.]

**Art. 7846 $\frac{1}{4}$ e. Weight of wheat, etc.**—Whenever any of the following articles shall be contracted for, sold or delivered, the weight per bushel or barrel or divisible merchantable quantities of a bushel, or barrel or ton shall be as follows:

- Wheat flour, per barrel, 200 pounds.
- Wheat flour, per half barrel, sack 100 pounds.
- Wheat flour, per quarter barrel sack, 50 pounds.
- Wheat flour, per eighth barrel sack, 25 pounds.
- Corn Meal, per bushel sack, 50 pounds.
- Corn Meal, per half bushel sack, 25 pounds.

- Corn Meal, per quarter bushel sack, 12 $\frac{1}{2}$  pounds.
- Alfalfa Seed, per bushel, 60 pounds.
- Apples, green, per bushel, 50 pounds.
- Apples, dried, per bushel, 28 pounds.
- Barley, per bushel, 48 pounds.
- Beans, green or string, per bushel, 24 pounds.
- Beans, wax, per bushel, 24 pounds.
- Beans, white, per bushel, 60 pounds.
- Beans, castor, per bushel, 46 pounds.
- Beets, per bushel, 60 pounds.
- Blue Grass Seed, per bushel, 14 pounds.
- Bran, per bushel, 20 pounds, by the 100 pounds in 100 pound bags.
- Buckwheat, per bushel, 52 pounds.
- Carrots, per bushel, 50 pounds.
- Charcoal, per bushel, 22 pounds.
- Clover Seed, per bushel, 60 pounds.
- Coal, anthracite, per bushel, 80 pounds.
- Coke, per bushel, 40 pounds.
- Broom Corn Seed, per bushel, 48 pounds.
- Corn meal, unbolted, per bushel, 48 pounds.
- Corn, in the ear, per bushel, 70 pounds, after December 1st.
- Corn, in the ear, per bushel, new crop, before December 1st, 72 pounds.
- Corn, kaffir, per bushel, 50 pounds.
- Corn, shelled, per bushel, 56 pounds.
- Cotton seed, per bushel, 32 pounds; by the ton 2000 pounds.
- Cranberries, per bushel, 33 pounds.
- Cucumbers, per bushel, 48 pounds.
- Flax seed, per bushel, 56 pounds.
- Gooseberries, per bushel, 40 pounds.
- Hair, plastering, unwashed, per bushel, 8 pounds.
- Hair, plastering, washed, per bushel, 4 pounds.
- Hemp seed, per bushel, 44 pounds.
- Hickory nuts, per bushel, 50 pounds.
- Hungarian grass seed, per bushel, 48 pounds.
- In lian corn or maize, per bushel, 56 pounds.
- Lime, unslaked, per barrel, 180 pounds net.
- Lime, hydrated, per sack, 100 pounds net.
- Lime, hydrated, per bag, 40 pounds net.
- Lime, agricultural, per sack, 100 pounds net.
- Lime, agricultural, per bag, 50 pounds net.
- Milo Maize, per bushel, 50 pounds.
- Millet, per bushel, 50 pounds.
- Millet, Japanese barnyard, per bushel, 35 pounds.
- Oats, per bushel, 32 pounds.
- Onions, per bushel, 57 pounds.
- Onion sets, top, per bushel, 30 pounds.
- Onion sets, bottom, per bushel, 32 pounds.
- Orchard grass seed, per bushel 14 pounds.
- Parsnips, per bushel, 50 pounds.
- Peaches, per bushel, 50 pounds.
- Peaches, dried, per bushel, 28 pounds.
- Peanuts, green, per bushel, 22 pounds, Georgia or Virginia.
- Peanuts, Spanish, per bushel, 24 pounds.
- Peanuts, roasted, per bushel, 20 pounds.
- Pears, per bushel, 58 pounds.

Peas, dried, per bushel, 60 pounds.  
 Peas, green, in pod, per bushel, 32 pounds.  
 Popcorn, in ear, per bushel, 70 pounds.  
 Popcorn, shelled, per bushel, 56 pounds.  
 Potatoes, Irish, per bushel, 60 pounds.  
 Potatoes, sweet, per bushel, 50 pounds.  
 Quinces, per bushel, 48 pounds.  
 Rape seed, per bushel, 50 pounds.  
 Red top seed, per bushel, 14 pounds.  
 Rough rice, per bushel, 45 pounds.  
 Rutabagas, per bushel, 50 pounds.  
 Rye meal, per bushel, 50 pounds.  
 Rye, per bushel, 56 pounds.  
 Salt, coarse, per bushel, 55 pounds.  
 Salt, fine, per bushel, 50 pounds.  
 Shorts, per bushel, 20 pounds; by 100 pounds in 100 pound bags.  
 Sorghum seed, per bushel, 50 pounds.  
 Sudan Grass seed, No. 1, per bushel, 32 pounds.  
 Sudan Grass seed, No. 2, per bushel, 30 pounds.  
 Sudan Grass seed, No. 3, per bushel, 28 pounds.  
 Spinach, per bushel, 12 pounds.  
 Sweet clover seed, unhulled, per bushel, 33 pounds.  
 Timothy seed, per bushel, 45 pounds.  
 Tomatoes, per bushel, 56 pounds.  
 Turnips, per bushel, 55 pounds.  
 Walnuts, per bushel, 50 pounds.  
 Wheat, per bushel, 60 pounds.

Whenever any commodity is sold in this State by the cord it shall mean 128 cubic feet, or the contents of a space eight feet long, four feet wide and four feet high. Whenever anything is sold in this State by the ton, it shall mean two thousand pounds avoirdupois.

Whenever any of the following named articles are sold by the cubic yard, and the same are weighed, the following weights shall govern:

Bank sand, 2,500 pounds, 1 cubic yard.  
 Torpedo sand, 3,000 pounds, 1 cubic yard.  
 Gravel, 3,000 pounds, 1 cubic yard.

Provided that the weights prescribed herein for flour shall not become effective until October 1, 1919, and shall not apply to retail merchants as to stock then on hand, and the weights prescribed for corn meal and feedstuff shall become effective immediately on the taking effect of this Act; provided that this Act shall not prevent millers from using such sacks and bags as they have on hand at the time this Act takes effect by having printed or stenciled on such sacks and bags the actual weight of the contents therein. Provided further that all sacks, containers and packages, prescribed by the National Bureau of Standards, under an Act now pending in Congress, known as H. R. No. 10957, should the same become the law, shall be recognized as official weights, packages, sacks or containers for flour, meal or feed under the terms and provisions of this Act; but all packages, sacks or containers shall in all instances contain the net weight of the article contained therein. [Acts 1883, p. 73; Acts 1901, p. 271; Acts 1919, 36th Leg., ch. 130, § 5.]

**Art. 7846 $\frac{1}{4}$ f. Weights not provided for in preceding article.**—Whenever it shall be ascertained that any article not mentioned in Section 5 [Art. 7846 $\frac{1}{4}$ e] is to be sold by the bushel, by the cubic yard or by the ton, the Governor of this State is hereby empowered to issue a proclamation prescribing the number of pounds that shall be contained in

a bushel or other unit that is necessary, in order to constitute a standard, and the Governor's proclamation defining a standard unit shall be as binding and shall have the same force and effect as if enacted into law. [Id., § 6.]

Sections 7 and 8 of Acts 1919, 36th Leg., ch. 130, are penal, see post, Penal Code, arts. 992c, 992d.

**Art. 7846<sup>1</sup>/<sub>4</sub>g. State Superintendent of Weights and Measures.**—The Commissioner of Markets and Warehouses of Texas is hereby constituted and appointed ex officio State Superintendent of Weights and Measures, with full power and authority under the terms of this Act to enforce, or cause to be enforced all the provisions of this Act. Whenever and wherever the term of "State Superintendent of Weights and Measures" or "Superintendent" is used in this Act, it shall mean the Commissioner of Markets and Warehouses for the State of Texas, who is ex officio State Superintendent of Weights and Measures. [Acts 1919, 36th Leg., ch. 131, § 1.]

**Art. 7846<sup>1</sup>/<sub>4</sub>h. Same; term of office, etc.**—The term of office of the State Superintendent of Weights and Measures shall be two years, and shall be the same as that of the Commissioner of Markets and Warehouses. In case of the death, resignation or removal of the Commissioner of Markets and Warehouses from office, the term of office of the State Superintendent of weights and measures shall automatically cease with that of the Commissioner of Markets and Warehouses. The Commissioner of Markets and Warehouses in his capacity as Superintendent of Weights and Measures shall receive no additional salary for services rendered as such. Before entering upon the duties of his office, he shall execute a separate bond to that of Commissioner of Markets and Warehouses, in the sum of Five Thousand Dollars (\$5,000) payable to the Governor of Texas or his successor in office, conditioned upon the faithful performance of all the duties incumbent upon him as ex officio State Superintendent of Weights and Measures. [Id., § 2.]

**Art. 7846<sup>1</sup>/<sub>4</sub>i. Same; chief deputy and other deputies.**—The State Superintendent shall appoint a chief deputy, who shall receive such salary as the Legislature may, from time to time appropriate. In the absence of the Superintendent, or his inability to act from any cause, the chief deputy may perform all the duties required by law of the State Superintendent. The State Superintendent shall also appoint such additional deputies from time to time to serve as sealers of weights and measures, as may be provided for by appropriation. He may designate such inspectors, lecturers, or employees serving under him as Commissioner of Markets and Warehouses also as sealers of weights and measures. The salaries of such deputies so appointed shall be fixed by the Legislature from time to time in the biennial appropriation bill; such deputies so appointed, together with the chief deputy and commissioner shall be entitled to their actual traveling expenses when traveling on business for the State. The Legislature shall provide from time to time by appropriation, other estimated expenses to fully carry out the provisions of this Act. [Id., § 3.]

**Art. 7846<sup>1</sup>/<sub>4</sub>j. State standards of weights and measures.**—The standard of weights and measures received from the United States under a resolution of Congress, approved June 14, 1836, and such new weights and measures as shall be received from the United States as standard weights and measures in addition thereto, or in renewal thereof, and such as shall be procured by the State in conformity therewith and certified

by the bureau of standards, shall be the State's standards by which all State and municipal standard of weights and measures shall be tried, authenticated, proved and sealed. [Id., § 4.]

**Art. 7846 $\frac{1}{4}$ k. Same; custody; certification; tolerances and specifications.**—The standards referred to in the preceding section shall be kept by the State's Superintendent in a safe and suitable place in his office, from which they shall not be removed except for repairs or certification. He shall maintain such standards in good order and shall submit them, at least once in ten years to the National Bureau of Standards for certification. Upon demand the State Treasurer shall deliver to the State Superintendent all standards now under control and in his possession as ex officio State Sealer, of weights and measures. The State Superintendent, immediately upon receipt of such standards, shall submit them to the National Bureau of Standards for certification, and he shall replace such standards as are incorrect and purchase such additional standards as shall be necessary to complete and make up a complete standard of weights and measures as required by this Act. He shall also purchase such apparatus as shall be found necessary to a proper prosecution of the work of the office. The State Superintendent of Weights and Measures shall establish tolerances and specifications for commercial weighing and measuring apparatus for use in the State of Texas, similar to the tolerances and specifications recommended by the national bureau of standards and he may establish a standard net weight or net count of any commodity, produce, or article, and prescribe such tolerances for same as he may in his best judgment deem necessary for the proper protection of the public. [Id., § 5.]

The last sentence of this section is penal. See post, Penal Code, art. 992dd.

**Art. 7846 $\frac{1}{4}$ l. Same; copies for municipalities.**—The State Superintendent shall, at the request of any City Council, town council, city commission or any other such legislative town or city body, furnish to them copies of the standard weights and measures of the State; such copies shall be furnished at the expense of any such city or town requesting the same. He shall, upon request of any such city council, town council, or city commission, test and accurately approve copies of the state's standards of weights and measures procured for the use of any such city, or town, to be used by the sealer of weights and measures for such city or town. All copies furnished under the provisions of this section or copies tested and approved by the State Superintendent under the provisions of this section shall be true and correct; shall be sealed and certified by the state superintendent and stamped with the letter "C." Such copies need not be of the same material or construction as the standards of the State and such copies may be furnished in any suitable materials or construction that the city or town requiring the same may specify, subject, however, to the approval of the State Superintendent. [Id., § 6.]

**Art. 7846 $\frac{1}{4}$ m. Same; inspection and correction of municipal standards; supervision over all weights and measures.**—The State superintendent shall inspect and correct the standards used by any incorporated city or town in this State at least once every two years and compare the same with others in his possession, and keep a record of the state of inspection and character of weights and measures so compared. The state superintendent shall also have general supervision over all weights and measures and weighing and measuring devices sold or offered for sale in this State. If any false weights or measures are being sold, offered for sale, or about to be sold, he shall have full authority to condemn same and prohibit the sale and distribution of such false weights and measures,

or weighing and measuring devices in this State. All sealers of weights and measures, or deputy sealers of weights and measures appointed under the terms and provisions of this act are prohibited from using for the purpose of comparison or verification in any official capacity any weights or measures, unless same has been certified to by the State Superintendent. All expenses incurred in certifying to the correctness of the weights and measures or copies of the same used by any incorporated city or town in this state, shall be paid by such city or town for whom the comparison or test is made. In addition to the standards heretofore referred to, and required to be kept by the state, the state shall also have a complete set of copies of such original standards of weights and measures adopted by this act, which shall be used for adjusting municipal standards by the superintendent or his deputy in the performance of their duties, and the original standards shall not be used, except for the adjustment of this set of copies and for certification purposes. Additional complete sets of copies for such original standards of weights and measures may be purchased by the superintendent when the same are necessary for use by any State sealer of weights and measures, or deputy state sealer of weights and measures. In all instances where the state shall furnish true and correct copies of weights and measures for the use of any incorporated city or town in this State, such city or town shall reimburse the state for the actual cost thereof, plus such expenses as are necessary to pay the freight, express and cost of certification thereof. [Id., § 7.]

**Art. 7846 $\frac{1}{4}$ n. Testing weights and measures used by state institutions.**—The State Superintendent or his deputy shall at least once annually, or oftener, if requested so to do, by the Board of Control, or board of supervisors, regents or other governing body of any State institution or penitentiary commission or the governing body of any other penal institution of the state; test all scales, weights and measures used in checking the receipt and distribution of supplies of any such institution under the control of the State, and shall report his findings to the Chairman of the Board, or the superintendent of such institution. He shall also test all scales, weights and measures used for any other purpose by such institution. [Id., § 8.]

**Art. 7846 $\frac{1}{4}$ o. Removal of sealers or deputy sealers of weights and measures.**—The State Superintendent, if he finds that any sealer or deputy sealer of weights and measures appointed by any incorporated city or town in this state, by virtue of the authority given them under the law, or under the provisions of their charter, is neglecting to perform the duties of his office, or has refused to accept the recommendations and instructions of the state superintendent and be guided thereby, or is guilty of any malfeasance in office, or who is incompetent, he shall present to the city council or officer who has control or supervision of such city sealer of weights and measures, or deputy sealer of weights and measures, a written charge and accusation based upon and clearly stating the offense of such sealer or deputy sealer and request such officer or city commission to hear and determine such accusation. Upon receipt of such charge and accusation, it shall be the duty of such officer or city commission with whom the same has been filed, to make an order setting the same for a hearing at a time which shall be not less than ten days nor more than twenty days from the date of filing of such charge and accusation and shall in such order fix the time and place for such hearing. A copy of such charge and accusation, together with a copy of such order, shall be served upon the accused at least seven days prior to the time fixed for such hearing.

At such hearing the accused shall have the right to be represented by counsel, if he so desires, and to produce witnesses and documentary evidence in his defense. If, upon such hearing, he shall be found guilty of malfeasance, or misfeasance in office or adjudged to be incompetent to perform the duties of the office, the officer or city commission or city council before whom such hearing is had, must forthwith remove him from office. Such removal from office, however, shall not be a bar to a prosecution for violating any of the Penal statutes of this State. Whenever it shall become known to the state superintendent of weights and measures or his deputy that any local sealer of weights and measures for any city or town in this state, or deputy sealer of weights and measures, is guilty of accepting any bribe, gift or money from any one who is interested in procuring false weights and measures, as soon as such fact shall become known, or be made known to the officer or city commission employing such sealer or deputy sealer, he shall immediately suspend such sealer from office and not permit him to conduct the duties of his office any longer. [Id., § 9.]

**Art. 7846<sup>1</sup>/<sub>4</sub>p. Reports of local sealers of weights and measures.—**Every local sealer of weights and measures, or deputy sealer, appointed by any city council or town council or city commission in this State shall be under the supervision of the state superintendent, and shall be required to report to him regularly and carry out all the instructions of the state superintendent of weights and measures. Failure or refusal to do so shall constitute a misdemeanor and shall be punished as hereinafter set forth, and shall likewise be grounds for dismissal from the service. [Id., § 10.]

**Art. 7846<sup>1</sup>/<sub>4</sub>q. Investigation of weights and measures; report.—**It shall be the duty of the State Superintendent to investigate conditions throughout the State, and especially in all the cities and towns in the State, with respect to weights and measures, and the sale of goods, wares and merchandise, commodities, food stuff and feed stuff sold in packages or containers, and also all kinds of feed, fuel or ice that is sold by weight or measure. The State Superintendent shall annually report to the Governor, and shall, prior to each regular session of the Legislature file a copy of such reports made by him to the Governor, together with his recommendations, with the Legislature of the State. [Id., § 11.]

**Art. 7846<sup>1</sup>/<sub>4</sub>r. Rules and regulations for sealers, etc., of weights and measures.—**The State Superintendent shall issue instructions and make such rules and regulations for the government of all State sealers of weights and measures, deputy sealers, inspectors and local sealers, as he may in his judgment see proper, in order to carry out the purposes and intentions of this Act. All such rules and regulations so issued by him, or under his authority, shall be as binding and have the same force and effect as if they were enacted into law. [Id., § 12.]

**Allegation and proof of order.—**To obtain a prosecution for selling bread of insufficient weight, in violation of an order and regulation by the superintendent of weights and measures, made under this act, the state must disclose by averment the making of the order, and establish by proof the allegation thus made. *Carlson v. State* (Cr. App.) 232 S. W. 807.

**Art. 7846<sup>1</sup>/<sub>4</sub>s. Records kept by State Superintendent.—**The State Superintendent shall keep in his office a complete record of all acts done by him; of all inspections made throughout the State, and a record of all prosecutions for the violation of the provisions of this Act. He shall keep an accurate record of the reports of all the various sealers of weights and measures, deputy sealers and inspectors appointed by him, or under



his direction, as well as a record of the inspections of all local sealers of weights and measures appointed by the various cities of the State; such record shall always be open to the inspection of the public. Copies of such record may be had by application therefor, together with the necessary cost of making such copies. [Id., § 13.]

**Art. 7846 $\frac{1}{4}$ t. Jurisdiction of sealers and inspectors of weights and measures.**—The jurisdiction of all State Sealers, deputy sealers and inspectors appointed by the State Superintendent shall be coextensive with the limits of the State and they shall have a right to inspect weights and measures in any and all districts or localities designated by the State Superintendent. The jurisdiction of all local sealers of weights and measures appointed by the city council or city commission of any city in this State shall be coextensive with the limits of said city. [Id., § 14.]

**Art. 7846 $\frac{1}{4}$ u. Duties of sealers, etc., of weights and measures.**—It shall be the duty of every sealer of weights and measures, deputy sealer, inspector, or local sealer to carefully preserve all copies of the standards of weights and measures used by him in his inspection work, and to keep the same safe and in good order, when not in actual use. He shall keep a record of all work done by him showing the inspections made, for whom made, giving the names and post office addresses of each party for whom any measurement, test weight, inspection, condemnation or prosecution is made; such record shall be preserved by him, from which he shall compile his reports at regular intervals to the State Superintendent when required to make a report. He shall keep a careful record of all violations of the weights and measures law and report in detail to the State Superintendent. [Id., § 15.]

**Art. 7846 $\frac{1}{4}$ v. Sealing and marking of weights and measures.**—Every person, firm or corporation, or association of persons, using or keeping for use, or having or offering for sale, weights, scales, beams or measures of any kind, instruments or mechanical devices for weighing or measuring, and tools, appliances and accessories connected with any or all of such instruments or measurements within this State shall cause all such weights, scales, beams, measures of every kind, instruments or mechanical devices for weighing or measuring and tools, appliances and accessories connected with any or all of such instruments or measures to be sealed and marked by the sealer of weights and measures as to their correctness, and no instrument shall be sold for the purpose of weighing or measuring unless such instrument, scale, weight, beam or measure shall bear the seal of the inspector of weights and measures as to its correctness. [Id., § 16.]

**Art. 7846 $\frac{1}{4}$ w. Fee for testing weights and measures.**—The State Superintendent shall have the right and power to fix and collect a nominal fee for testing all weights, scales, beams and any kind of instruments or mechanical devices for weighing or measuring; all tools, appliances and accessories connected with all such instruments before they are offered for sale; such fee, however, to be reasonable and to be graduated according to the cost of such instrument, and it shall be unlawful for anyone to sell any weights, scales, beams, measuring instruments or mechanical devices for weighing or measuring, or to lease or rent same, unless such instruments have been inspected, tested and approved by the State Superintendent, or one of his duly accredited deputies. All moneys collected by the Superintendent shall be paid into the general fund of the State Treasury. [Id., § 17.]

**Art. 7846 $\frac{1}{4}$ x. Weights, etc., which may be sold.**—When any weight, scale, beam, measure of any kind, instrument or mechanical device for weighing or measuring; also all tools, and appliances necessary or connected with any such instruments of measure have been tested and found correct by any sealer appointed under the provisions of this Act, the same may be used, kept for use, offered for sale, sold or kept for sale anywhere within this State for one year without being further tested. Any weight, scale, beam, measures of every kind, instruments or mechanical devices for weighing or measuring, or appliances and accessories connected with any or all of such instruments or measure, which have been tested and sealed and certified as correct by the National Bureau of Standards may be kept for sale, sold or offered for sale without being tested and sealed by a sealer under the provisions of this Act, but all such weights, scales, beams, measures of any kind, instruments or mechanical devices for weighing and measuring and all tools, appliances and accessories connected with any or all of such instruments or measures shall always be subject to inspection and testing as herein provided, notwithstanding that the same have been tested and sealed, either by a sealer appointed under the provisions of this Act, or by the National Bureau of Standards. [Id., § 18.]

**Art. 7846 $\frac{1}{4}$ xx. Same.**—Any scale, beam or mechanical device for weighing or measuring, which, after being sold, and before being used for weighing or measuring, it is found necessary to assemble and set up. may be sold, kept for sale or offered for sale without first being tested and sealed, as provided in this Act, but such scale, beam or measuring device for weighing or measuring, before being used for weighing or measuring, without the consent of the State Superintendent, must be tested and sealed as provided in this Act. [Id., § 19.]

**Art. 7846 $\frac{1}{4}$ y. Inspection, testing, etc., of weights and measures by sealers and inspectors.**—It shall be the duty of all sealers, deputy sealers, inspectors, and local sealers in this State to inspect, try and test all weights, scales, beams, measures of any kind, instruments or mechanical devices for weighing or measuring and all tools, appliances and accessories connected with any or all such instruments or measures kept for the purpose of sale, sold or used by any proprietor, agent, lessee or employee in proving the size, quantity, extent, area weight or measurement of quantities, things, produce, articles for distribution or consumption, purchased or offered or submitted by such person or persons for sale, hire, or award and ascertain if the same are correct, and he shall have the power to and shall from time to time weigh or measure packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered for sale or sold, or in the process of delivery, in order to determine whether the same contains the quantity or amount represented and whether they are being offered for sale or sold in accordance with law and may seize for use as evidence such amounts of commodities or packages which shall be found to contain a less amount than that represented. He shall at least once each year, or as much oftener as may be found necessary, and directed by the State Superintendent, see that the weights, measures and all weighing and measuring apparatus, used in any locality to which he is assigned for the purpose of inspection, are correct. All local sealers of weights and measures shall test at least once each year all scales, weights and measures of every kind and device within any such city to which they are appointed, and oftener, if required so to do. Any sealer or deputy sealer, or inspector for the purposes above mentioned, and in the general perform-

ance of his duty may, without warrant, enter, go into or upon any stand, place, building or premises, or stop any vendor, peddler, junk dealer, driver of a coal wagon, ice wagon or delivery wagon or the driver of any wagon containing commodities for sale or delivery, and if necessary require him to proceed to some place which the sealer may specify for the purpose of making the proper tests. [Id., § 20.]

**Art. 7846<sup>1</sup>/<sub>4</sub>yy.** Prosecutions for violations of law.—Any sealer, deputy sealer, or inspector having a knowledge of a violation of any of the provisions of this Act, or any law relative to weights and measures, shall cause the violator to be prosecuted, when in his opinion such violation is wilfully committed. [Id., § 21.]

**Art. 7846<sup>1</sup>/<sub>4</sub>z.** Seizure and condemnation of weights and measures.—Whenever a sealer, deputy sealer, or inspector of weights and measures compares weights and measures, or weighing or measuring instruments and finds that they correspond, or cause them to correspond to the standards, or he shall seal or mark under his name such weight or measure or weighing or measuring instrument with an appropriate device showing that the weight or measure, or weighing or measuring instrument is correct, and the date of the inspection, which device shall be placed so as to be easily seen. He shall condemn and seize and may destroy incorrect weights and measures and weighing and measuring instruments, which in his best judgment are not susceptible of repair, but any weights and measures, or weighing or measuring instruments which shall be found to be incorrect, but which, in his best judgment are susceptible of repair, he shall cause to be marked with a tag or other suitable device with the words "Out of Order." The owner or user of any weights or measures, or weighing or measuring instruments, which have been marked "Out of Order," as in this Section provided, may have the same repaired or corrected within thirty days, but until the same have been repaired or corrected and tested as herein provided, the owner or user thereof must neither use nor dispose of the same in any way, but shall hold the same at the disposal of the State Superintendent or any deputy or local sealer. When the same have been repaired or corrected, the owner or user thereof shall notify the State Superintendent or his deputy, or local sealer and they shall again be tested for the purpose of proving the weight, measure or weighing or measuring instrument, which had been found to be incorrect and marked as in this Section, and until such weight, measure or weighing or measuring instrument has been re-inspected by the sealer and found correct, the same shall not be used or in any way disposed of by the owner. Any person who removes or obliterates any tag or device placed upon any weight or measure, or weighing or measuring instrument by any sealer, deputy sealer, or inspector, provided for in this Act, shall be guilty of a misdemeanor. When any weight, measure or weighing or measuring instrument has been repaired and corrected, as in this Act provided, and has been re-inspected and found correct by the sealer of weights and measures, as in this Act provided, the sealer of weights and measures shall remove the tag or device with the words "Out of Order" and shall mark such weight, measure or weighing or measuring instrument in the manner provided for the marking of the same where upon inspection they were found to be correct. [Id., § 22.]

Sec. 23 of this act is penal. See post, Penal Code, art. 992e.

**Art. 7846<sup>1</sup>/<sub>4</sub>zz.** Powers as peace officers.—The State Superintendent, his deputy, sealers or inspectors and all local sealers and their deputies

in the performance of their official duties, shall have the same power as peace officers in this State. [Id., § 24.]

Sections 25, 26, 27, 28 and 29 of this act are penal. See post, Penal Code, arts. 343b, 434a, 434b, 995c, 992f.

**Art. 7846 $\frac{1}{4}$ zzz. "Person" defined.**—The word "person," whenever used in this Act, shall be deemed to include person, firm or corporation and all officers, directors and managers of corporations shall comply with the provisions of this Act on behalf of their respective corporations. The penal provisions of this Act shall apply to the executive head, manager, agent, trustee or receiver of any corporation doing business in this State. [Id., § 30.]

**Art. 7846 $\frac{1}{2}$ . Weight of bread loaves.**—Bread to be sold by the loaf made by bakers engaged in the business of whole-saling and retailing bread, shall be sold based upon any of the following standards of weight and no other, namely, a loaf weighing one pound or 16 ounces, a loaf weighing one and one-half pounds, or 24 ounces, and loaves weighing two pounds, or 32 ounces, and loaves weighing three pounds, or some other multiple of one pound or 16 ounces. These shall be the standards of weight for bread to be sold by the loaf. Provided, however, that variations, or tolerance, shall not exceed one ounce per pound over and one ounce per pound under the standard unit weight, within a period of 24 hours after baking. [Acts 1921, 37th Leg., ch. 63, § 5.]

See arts. 4595 $\frac{1}{4}$ –4595 $\frac{1}{4}$ d, ante, and art. 711a, Penal Code, post. The act took effect 90 days after March 12, 1921, date of adjournment.

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## TITLE 134

### WELLS—OIL, GAS AND WATER

Art.

7854c. Waste in production of natural gas, and crude oil or petroleum; waste defined.

7854d. Same; confining gas in wells.

7854e. Same; powers of railroad commission.

7854f. Same; duties of pipe line expert.

7854g. Same; certificate of compliance with laws before connecting with wells.

7854h. Same; books showing production of oil and gas.

Art.

7854i. Same; penalties.

7854j. Same; repeal.

7854k. Same; partial invalidity of act.

7854kk. Salaries and expenses, how paid.

7854kkk. Act cumulative.

7854l. Owners and operators of wells to keep books; corporations, etc., operating wells, etc., to file name, etc., with railroad commission.

**Article 7854c. Waste in production of natural gas, and crude oil or petroleum; waste defined.**—Natural gas and crude oil or petroleum shall not be produced in the State of Texas in such manner and under such conditions as to constitute waste. The terms "waste" in addition to its ordinary meaning shall include (a) escape of natural gas in commercial quantities into the open air from a stratum recognized as a natural gas stratum; but this is not intended to have application to gas pockets in high points in strata recognized as oil strata; (b) drowning with water of a gas stratum capable of producing gas in commercial quantities; (c) underground waste; (d) the permitting of any natural gas well to wastefully burn (e) the wasteful utilization of such gas; (f) burning flambeau lights except when casing head gas is used in same; provided not more than four may be used in or near the derrick of a drilling well and (g) the burning of gas for illuminating purposes between eight o'clock A. M. and five o'clock P. M. unless the use is regulated by meter. [Acts 1919, 36th Leg., ch. 155, art. (sec.) 1.]

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

**Art. 7854d. Same; confining gas in wells.**—Whenever natural gas in such quantity and quantities, in a gas bearing stratum known to contain natural gas in such quantities, is encountered in any well drilled for oil or gas in this State, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste and all such strata shall be adequately protected from infiltrating waters. All operators, contractors, or drillers, pipe line companies, gas distributing companies drilling for or producing crude oil or natural gas or piping oil or gas for any purpose shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil and gas, or both, in drilling and producing operations, storage or in piping or distributing and shall not wastefully utilize oil or gas, or allow same to leak or escape from natural reservoirs, wells, tanks, containers, or pipes. [Id., art. (sec.) 2.]

**Art. 7854e. Same; powers of railroad commission.**—It shall be the duty of the railroad commission to make and enforce rules and regulations for the conservation of oil and gas, it shall have authority to prevent the waste of oil and gas in drilling and producing operations and in the storage, piping and distribution thereof, and to make rules and regulations for that purpose; it shall be its duty to require dry or abandoned wells to be plugged in such way as to confine oil, gas and water in the stratas in which they are found and to prevent them from escaping into other stratas and to establish rules and regulations for that purpose. It is empowered to establish rules and regulations for the drilling of wells and preserving a record thereof, and it shall be its duty to require such wells to be drilled in such manner as to prevent injury to the adjoining property, and to prevent oil and gas and water from escaping from the stratas in which they are found into other stratas, and to establish rules and regulations therefor; it shall be its duty to establish rules; and regulations for shooting wells and for separating oil from gas; it shall have authority to require records to be kept and reports made by oil and gas drillers, operators and pipe line companies and by its inspectors; it is authorized to do all things necessary for the conservation of oil and gas whether here especially enumerated or not, and to establish such other rules and regulations as will be necessary to carry into effect this Act and to conserve the oil and gas resources of the State. [Id., art. (sec.) 3.]

**Removal of casing.**—The property right in the casing in an oil well as well as the derrick, tools, etc., belongs to the driller of the well the same as trade fixtures and may be removed by him. *Southwestern Oil & Gas Co. v. Kimball Oil & Development Co.* (Civ. App.) 224 S. W. 1111.

Where defendants began drilling a well under a lease which gave plaintiffs the right to complete the well if defendants should not drill to a stated depth, plaintiff, on defendant's refusal to drill to that depth, can have removal of the casing enjoined, though it belongs to defendants, since such removal under this act, and the rule of the commission, requiring wells to be plugged when the casing was withdrawn, would deprive plaintiff of its right to complete the well if defendant removed the casing therefrom. *Id.*

**Art. 7854f. Same; duties of pipe line expert.**—It shall be the duty of the pipe line expert provided for in Section 11, Chapter 30, of the Acts of 1917, to be the supervisor for the Railroad Commission in enforcing its rules and regulations. The Railroad Commission may appoint such deputy supervisor as may be necessary. It shall have the authority to increase the salary of the supervisor to a sum not exceeding \$5,000.00 per annum and to fix the salaries of the deputies at not exceeding \$3,600.00 per annum, all salaries and other expenses of the administration and enforcement of this Act shall be paid out of the funds created in Chapter 30 of the Acts of 1917, and in the manner therein provided. It

shall be the duty of the supervisor and his deputies to supervise the plugging of all abandoned wells and the shooting of wells and to conform to the rules and regulations of the Railroad Commission, dealing with the production and conservation of oil and gas. [Id., art. (sec.) 4.]

**Art. 7854g. Same; certificate of compliance with laws before connecting with wells.**—Owners or operators of gas wells shall, before connecting with any oil or gas pipe lines, secure from the Railroad Commission a certificate showing compliance with the oil and gas conservation laws of the State and conservation orders of the Railroad Commission. Pipe line companies shall not connect with oil or gas wells until the owners or operators thereof shall furnish certificates from the Railroad Commission that the conservation laws of the State have been complied with, provided this Act shall not prevent a temporary connection with any well or wells in order to take care of production and prevent waste until opportunity shall have been given the owner or operator of said well to secure certificate showing compliance with the conservation laws of the State. [Id., art. (sec.) 5.]

**Art. 7854h. Same; books showing production of oil and gas.**—It is hereby made the duty of all owners or operators of oil and gas wells to keep books showing the amount of oil and gas produced and disposed of, with the price for which the same was sold, together with the receipts from the sale or transfer of leases or other property, and the disbursements made in connection with or for the benefit of such business, which books shall be kept open for the inspection of the Railroad Commission, or any accredited representative thereof; and of any stockholder or shareholder in said business and any owner or operator refusing to comply with the provisions of this Article shall be subject to the penalties imposed by this Act. [Id., art. (sec.) 6.]

**Art. 7854i. Same; penalties.**—In addition to any penalty that may be imposed by the Railroad Commission for contempt, any firm, person, corporation or any officer, agent or employé thereof, directly or indirectly violating the provisions of this Act or the orders or regulations of the Railroad Commission made in pursuance thereof, shall be subject to a penalty of not more than Five Thousand (\$5,000.00) Dollars, to be recovered in any Court of competent jurisdiction, such suit to be brought in the name of the State of Texas, and to be instituted and conducted by any County or District Attorney, on the direction of the Railroad Commission. Each day that such violation continues shall be considered a separate offense. [Id., art. (sec.) 7.]

**Art. 7854j. Same; repeal.**—This Act shall be cumulative of all laws of this State which are not in direct conflict herewith, regulating the conservation of oil and gas, but it shall repeal all laws or parts of laws in conflict with its provisions. [Id., art. (sec.) 8.]

**Art. 7854k. Same; partial invalidity of act.**—If any of the provisions of this Act shall be held unconstitutional or for any other reason shall be held void, such holdings shall not have the effect to nullify the remaining parts of this Act, but the parts not so held to be void shall nevertheless remain in full force and effect. [Id., art. (sec.) 9.]

**Art. 7854kk. Salaries and expenses, how paid.**—All salaries and expenses necessary to enforce the provisions of Chapter 155, Acts of the Regular Session of the Thirty-sixth Legislature to conserve the oil and gas resources of the State, shall be paid out of the fund created by Sec-

tion 11, Chapter 30, Acts of the Regular Session of the Thirty-fifth Legislature. [Acts 1919, 36th Leg. 2d C. S., ch. 31, § 2.]

See ante, art. 732½, and arts. 7854c-7854k.

**Art. 7854kkk. Act cumulative.**—This Act shall be cumulative of all other laws for the conservation of oil and gas and the control of pipe lines. [Id., § 3.]

Took effect July 25, 1919.

**Art. 7854l. Owners and operators of wells to keep books; corporations, etc., operating wells, etc., to file name, etc., with railroad commission.**—It is hereby made the duty of all owners and operators of oil and gas produced and disposed of, with the price for which the stock sold and unsold and amount of promotion money paid, amount of oil and gas produced and disposed of, with the price for which the same was sold, together with the receipts from the sale or transfer of leases or other property, and the disbursements made in connection with or for the benefit of such business; which books shall be kept open for the inspection of the Railroad Commission or any accredited representative thereof, and of any stockholder or shareholder or royalty-owner in said business, and shall report such information to the Railroad Commission of Texas for its information, when required by the Commission to do so. Any person, firm, partnership, joint stock association, corporation or other organization, domestic or foreign, operating wholly or partially within this State, acting as principal or agent for another, for the purpose of drilling, owning or operating any oil or gas well, or owning or controlling leases of oil and mineral rights, or the transportation of oil or gas by pipe line, shall immediately file with the Railroad Commission of Texas, at Austin, the name of the company or organization, giving the name and post office address of the organization, the plan under which it was organized, and the names and post office addresses of the trustee or trustees thereof, and the names and post office addresses of the officers and directors. Any person, firm, joint stock association, corporation or other organization, or the agent thereof, refusing to comply with any of the provisions of this section, shall be subject to all the fines and penalties imposed by Article 7, Chapter 155, Acts of the Regular Session of the Thirty-sixth Legislature, approved March 31st, 1919. [Id., § 1.]

## TITLE 135

## WILLS

<b>Art.</b>	<b>Art.</b>
7855. Persons competent to make a will.	7865. Posthumous children.
7856. What may be devised, etc., by will.	7866. Children born after making of will.
7857. Requisites of a will.	7867. The same.
7858. Will wholly written by testator.	7869. Bequests to children, etc., not to lapse.
7859. Revocation of written will.	7874. To be recorded, etc.
7861. Nuncupative will, requisites of.	7875. Foreign wills.
7863. Testimony to be committed to writing, etc.	

**Article 7855. [5333] Persons competent to make a will.**

See *Davis v. Laning*, 85 Tex. 39, 19 S. W. 846, 18 L. R. A. 82, 34 Am. St. Rep. 784.

**Mental capacity.**—Mere eccentricities of one who knows that he is making a will, remembers the objects of his bounty, and acts without improper influence, are not sufficient to justify annulling the will. *Vaughan v. Malone* (Civ. App.) 211 S. W. 292.

Insane delusions, as distinguished from general insanity, will, where it can fairly be inferred that the testamentary instrument was affected thereby, defeat probate. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

Mental incapacity may be inferred from an enfeebled condition of the mind and body. *Bradshaw v. Brown* (Civ. App.) 218 S. W. 1071.

That testatrix is old, in feeble health, or that her memory does not possess the vigor of earlier years, or that she has excluded from her bounty some or all of her legal heirs, will not defeat will if she retains sufficient mind or understood what she was doing, the nature and extent of her property, the disposition she desires to make, the persons she desires to be recipients of her bounty, the mode of distribution, and a mind capable of exercising judgment, reason, and deliberation and capable of seeing the consequences of will to a reasonable degree, and the effect of it upon her estate and family. *Id.*

The mental capacity required in disposing of an estate by will and in disposing of it by contract is the same. *Turner v. Robertson* (Civ. App.) 224 S. W. 252.

**Undue Influence.**—Undue influence, to vitiate will, need not consist of overt acts exercised at time of execution; influence exercised previously to and operating at time of execution, being sufficient. *Rounds v. Coleman* (Civ. App.) 214 S. W. 496; *Pendell v. Apodaca* (Civ. App.) 221 S. W. 682.

Will otherwise valid will not be set aside on ground of undue influence, unless it be shown that such undue influence operated on testator's mind, causing him to make disposition which, except for such influence, he would not have made. *Beadle v. McCrabb* (Civ. App.) 199 S. W. 355.

Where a will is plain, and testator is capable of fully understanding it, and either carefully reads it or has it correctly read to him, that the beneficiaries fail to advise him fully as to claims of others is immaterial. *Leahy v. Timon* (Civ. App.) 204 S. W. 1029.

It does not constitute undue influence for a wife to plead with her husband to make a will in a certain manner, nor even to insist thereon, provided her solicitations and importunities do not overthrow the will and destroy the free agency of the testator. *Ater v. Moore* (Civ. App.) 231 S. W. 457.

**Fraud.**—It was not fraud on the part of beneficiary under a will that a third person gave advice to testator without any inducement or solicitation on the part of the beneficiary, who had no participation whatever therein. *Ater v. Moore* (Civ. App.) 231 S. W. 457.

**Evidence of mental capacity and undue influence.**—See notes to art. 3271.

**Unnatural disposition.**—While this article gives every person of sound mind absolute power of disposition over his property, yet, where unnatural disposition was shown as evidence of want of testamentary capacity, a requested instruction that, if the testator was not incapable, he might dispose of his property as he saw fit, though dictated by unreasonable prejudice toward one heir or overwhelming love for another, was properly refused, as being argumentative. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

In such case a requested instruction that, if the testator was not incapable, he might dispose of his property as he saw fit, in disregard of all natural affection, was properly refused, as being on the weight of the evidence. *Id.*

**Art. 7856. [5334] What may be devised, etc., by will.**

See *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70; *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82.

**Community property.**—Where husband's will directed distribution of his own property only, executor had no right to administer wife's half of the community estate. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.



**Art. 7857. [5335] Requisites of a will.**

**In general.**—See *Adams v. Maris* (Com. App.) 213 S. W. 622; notes at end of title. A will gave the residue to testator's brother, in trust, "to be disposed of by him as I have heretofore or may hereafter direct him to do," but did not name the beneficiaries. Held, that neither a paper, written by the brother, not offered for probate as part of the will, nor testimony by the brother that he wrote the paper at testator's request on the morning before the execution of the will, was admissible under Rev. St. 1879, art. 4859. *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29.

Under this article, every will, except when wholly in the handwriting of testator, must be in writing and signed and attested, as stated herein. *Massey v. Allen* (Civ. App.) 222 S. W. 682.

In proceedings to probate a will, evidence held insufficient, under art. 3267, to prove execution in compliance with this article. *Id.*

**Form of instrument.**—Instrument providing in part that husband should have use of property during his natural life, and that upon his death property should immediately pass "in accordance with terms of this bill of sale," held not testamentary in character. *Smith v. Smith* (Civ. App.) 200 S. W. 540.

If a paper clearly evidences on its face an intention to make a gift inter vivos which is not consummated by delivery, the paper cannot, by the aid of parol testimony, be converted into a will in contravention of this article. *Adams v. Maris* (Com. App.) 213 S. W. 622.

— **Deed or will.**—Instrument purporting to convey title to lands on its delivery is deed and not will, though possession be deferred until grantor's death. *Lovenskoild v. Casas* (Civ. App.) 196 S. W. 629.

When the grantor in a deed reserves control of the deed or right to dispose of the property during his life, or a deed is deposited with a third party, but under control of the grantor, and not to take effect until after his death, such control renders the instrument testamentary in character, with the right of revocation in the grantor. *Eckert v. Stewart* (Civ. App.) 207 S. W. 317.

**Attestation.**—Where testator signed his name in the presence of the two subscribing witnesses, and called upon the two to witness what he had said and done, and the witnesses carried the instrument to a table only 10 feet from testator, signed it, and returned with it to the testator, there was a valid execution of the codicil under this article, though when the witnesses signed their backs were toward testator, and their bodies between testator and the paper. *Earl v. Mundy* (Civ. App.) 227 S. W. 716.

**Art. 7858. [5336] Will wholly written by testator.**

**In general.**—An envelope addressed to payee and indorsed, "Notes," and a letter inclosed asking payee to accept "this," referring to a form note inclosed partly in deceased maker's handwriting, the envelope and letter being wholly in his handwriting, held valid as a holographic will. *Adams v. Maris* (Com. App.) 213 S. W. 622.

An instrument, signed and dated, and in terms: "To Mrs. Eugenia Poss auto and \$5,000," held shown by application for probate to be a valid holographic will. *Poss v. Kuhlmann* (Civ. App.) 222 S. W. 633.

**Art. 7859. [5337] Revocation of written will.**

**In general.**—Evidence that testatrix stated she had "destroyed" will held sufficient to rebut the presumption that the will had not been revoked; such statement not being a conclusion, but a statement of ultimate fact, in view of this article, the term "destroy," as applied to wills, meaning to burn or tear into fragments, and the destruction being the essential fact to be proved, as distinguished from the means used. *Rape v. Cochran* (Civ. App.) 217 S. W. 250.

Mere expression of a desire by testator to change his will cannot have the effect of revoking it or of changing any of its provisions, in view of this article. *Ater v. Moore* (Civ. App.) 231 S. W. 457.

Where testator inherited money after executing his will, which he did not desire to have pass by the will, and went to his partner for advice, and the latter unintentionally deceived him by telling him that such property would not pass under the will, the will was not revoked or changed in any manner. *Id.*

**Subsequent will.**—The disposition of property by different wills will be sustained, unless the inconsistency is such that the wills cannot stand together, and a later will revokes a former only when and to the extent that it is inconsistent with the former. *Adams v. Maris* (Com. App.) 213 S. W. 622.

Where holographic will gave a note to the payees, his later will, giving to another a certain sum and providing that at his death the rest of his property should go to his bodily heirs, did not prevail over the specific bequests to the legatees named. *Id.*

**Joint will.**—Widow, after executing codicil confirming joint will of her and her husband, held not entitled to abrogate the joint will, but to own only a life estate in accordance therewith, the fee being owned by the devisees. *Moore v. Moore* (Civ. App.) 198 S. W. 659.

Joint will executed by two sisters became irrevocable after surviving sister ratified it by having it probated and by accepting and enjoying the benefits derived from its provisions, and she was estopped from making a different disposition by subsequent will. *Sherman v. Goodson's Heirs* (Civ. App.) 219 S. W. 839.

**Evidence of revocation.**—See *Adams v. Maris* (Com. App.) 213 S. W. 622; *Clover v. Clover* (Civ. App.) 224 S. W. 916; notes to art. 3267, et seq.

**Revival of revoked will.**—Under Rev. St. 1879, art. 4861, the cancellation of a will expressly revoking all former wills does not revive a former will. *Hawes v. Nicholas*, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863.

**Art. 7861. [5339] Nuncupative will, requisites of.**

See *Walker v. Fields* (Civ. App.) 221 S. W. 632; notes to art. 7863.

**Art. 7863. [5341] Testimony to be committed to writing, etc.**

**Reduction of testimony to writing.**—Under arts. 3269, 3270, 7861, 7863, it is not sufficient that one or even two of the witnesses set down the testament; it being necessary that each of the witnesses sign, read, assent, or agree to what is written, notwithstanding art. 5502. *Walker v. Fields* (Civ. App.) 221 S. W. 632.

Arts. 3269, 3270, 7861, 7863, not providing who shall commit the testimony to writing or its manner or form, the procedure may be informal so long as it observes the essential requirements of the law, and the testimony as reduced to writing will be sufficient if it contains all the requirements of a nuncupative will, it being also proper to include the fact that testator dies at his habitation, etc., and to show who was present and heard the words. *Id.*

**Art. 7865. [5343] Posthumous children.**

See *Parker v. Swain* (Civ. App.) 223 S. W. 231.

**Art. 7866. [5344] Children born after making a will.**

**In general.**—This article held applicable to the rights of an after-born child under his mother's will, in view of art. 5502, subsds. 3, 4. *Parker v. Swain* (Civ. App.) 223 S. W. 231.

**Art. 7867. [5345] The same.**

See *Parker v. Swain* (Civ. App.) 223 S. W. 231.

**Art. 7869. [5347] Bequests to children, etc., not to lapse.**

See *Moss v. Helsley*, 60 Tex. 426.

**Art. 7874. [5352] To be recorded, etc.**

**Sufficiency of record.**—Judgment for probate of will is not lacking in finality for appeal because will was not copied therein, if the judgment identified the will by definite description, declared it probated, and ordered it to be filed and recorded, and the transcript to the district court showed compliance with this article. *Edens v. Cleaves* (Civ. App.) 202 S. W. 355.

**Art. 7875. [5353] How foreign will may be proved.**

**Admissibility in evidence.**—Under *Sayles' Civil St.* 1888, art. 548a, § 1, a will of lands in Texas, executed and probated in Georgia, was not admissible in trespass to try title, though recorded in the county where the lands were situate, where a copy of the judgment of the court admitting it to probate did not accompany the will. *Green v. Benton*, 3 Civ. App. 92, 22 S. W. 256.

**Who entitled to contest.**—No one is entitled to contest probate of will of a resident of another state under this article except a "person interested" therein, that is, one who either absolutely or contingently is entitled to share in the estate, so that a creditor of testator is not included. *Thompson v. Dodge* (Civ. App.) 210 S. W. 586.

DECISIONS RELATING TO TOPIC IN GENERAL

3. **Contracts to devise or bequeath.**—Mother's promise to make will devising estate to daughter as inducement to execution of daughter's deed to mother is enforceable against mother's estate. *Robinson v. Faville* (Civ. App.) 213 S. W. 316.

If decedent's statements were never communicated to her nephew, there could have resulted therefrom no express contract between her and the nephew to pay for his services in her will. *Ivey v. Lane* (Civ. App.) 225 S. W. 61.

A contract, not rendered unenforceable by any statute by which one party agrees to leave property to the other at the former's death, is enforceable. *Hooks v. Bridgewater* (Sup.) 229 S. W. 1114.

6. **Reasonableness.**—Every citizen of Texas has the absolute right by his testamentary bequests to dispose of his property regardless of the ties of nature and relationship and in defiance of the rules of justice or the dictates of reason. *Stolle v. Kanetzky* (Civ. App.) 220 S. W. 557.

8. **Validity of bequests in general.**—A bequest for a "tabernacle" or "coliseum" to be erected in a public park on plans to be determined by persons named, suitable for pleasures and comforts of persons resorting to park, held not void for uncertainty of object. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

A gift to a college for erection of a chapel is not void on the ground that the college,

being incorporated for educational purposes, cannot own and control a building used for purpose of conducting religious services. *Id.*

Courts are reluctant to declare wills void for uncertainty, and it is only when the instrument is unintelligible or uncertain, after admission of extrinsic evidence as to situation of parties and circumstances, that a true patent ambiguity is established. *Adams v. Maris* (Com. App.) 213 S. W. 622.

A testator may create successive life estates in the same property, provided they are persons in being at the time the will takes effect, each such estate to begin upon the termination of a preceding life estate. *Neely v. Brogdon* (Civ. App.) 214 S. W. 614.

To avoid a will or any of its provisions for uncertainty, it is not enough that the disposition appears too obscure and irrational for the testator to have been likely to intend it, but the gift must be without clear meaning at all; and the improbability of such a gift on general principle, shall not defeat it. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

Other provisions of a will are not invalidated by the fact of one person by fraud or undue influence obtaining provisions therein for himself. *Walker v. Irby* (Civ. App.) 229 S. W. 331.

8½. — **Rule against perpetuities.**—A perpetuity is a limitation of property taking the subject thereof out of commerce for a longer period than a life or lives in being and 21 years thereafter (citing Words and Phrases, Perpetuity). *West Texas Bank & Trust Co. v. Matlock* (Com. App.) 212 S. W. 937.

A will which does not provide for vesting the fee during the life or lives of a person or persons in being or within 21 years and 10 months thereafter is void under the rule against perpetuities. *Neely v. Brogdon* (Civ. App.) 214 S. W. 614.

In determining whether a will is void under the rule against perpetuities the possibilities of vesting of estate within the period fixed by the rule are to be determined as of the time of testator's death. *Id.*

A will devising testatrix's property to her husband for life, and on his death to be divided between two childless nieces, who were to receive the revenues and pay an annuity, and providing that the estate should pass to their issue, if any, or, if none, to her two other childless nieces and to their issue, conferred on the issue of her two other nieces a fee, and not a life estate, and so did not violate the rule against perpetuities. *Id.*

11. **Construction—Law governing.**—The law at the time of the execution of a will may be considered in ascertaining testator's intent. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706.

12. — **Intention of testator.**—The intention of testator, if not inconsistent with some established rule of law or with public policy, must control in the construction of a will; and it is the duty of the courts to ascertain such intention, and to give force and effect to the scheme that the testator had in his mind for the disposition of his estate. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706; *Neely v. Brogdon* (Civ. App.) 214 S. W. 614; *Norton v. Smith* (Civ. App.) 227 S. W. 542; *Gilliam v. Mahon* (Com. App.) 231 S. W. 712.

All parts of a will must be construed together, and the intention of the testator must be arrived at by considering the whole, and not from detached, segregated, and isolated words, sentences, or clauses. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706; *Mahon v. Gilliam* (Civ. App.) 215 S. W. 124; *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

The intent of the testator, as expressed in the whole instrument when read in the light of the circumstances surrounding the testator when the will was written, must govern. *Nations v. Neighbors* (Civ. App.) 201 S. W. 691; *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

It is permissive to consider language of whole will for purpose of ascertaining intention of testator, provided language so considered indicates that words "heirs of body" were used in narrower sense than true one. *McMahan v. McMahan* (Civ. App.) 198 S. W. 354.

The presumption is that a testator intended to dispose of his entire estate, and not to die partially or wholly intestate, though such presumption against partial intestacy arises only where intent to pass whole estate is expressed in some form, and not where testator's language is plain and unambiguous. *Grant v. Stephens* (Civ. App.) 200 S. W. 893.

Where residue is given by will, every presumption is against an intended intestacy, and such intent so to do must appear from appropriate language or clear implication. *Id.*

No presumption of an intent to die intestate as to any part of property is to be made, where language of will can fairly be construed to dispose of whole estate. *Id.*

The primary rule is to give the instrument the effect intended by the testator, and this interpretation must be ascertained from the language used, the nature and extent of the property bequeathed, the status and surroundings of the beneficiaries, etc. *McNeill v. St. Aubin* (Civ. App.) 209 S. W. 781.

While the statute requiring wills in writing precludes ascribing to testator any intention not expressed, yet there is an obligation to give effect to the intention which the will properly expounded contains; and therefore evidence simply explaining the writing is admissible. *Adams v. Maris* (Com. App.) 213 S. W. 622.

The testator's intention is to be ascertained from the language of the entire will, and technical rules or grammatical construction will be disregarded when to follow them would nullify his will. *Neely v. Brogdon* (Civ. App.) 214 S. W. 614.

It will be presumed that testator intended to make a valid will, and if the will admits of both a valid and an invalid construction, the former will be adopted. *Id.*

Courts must not indulge in and give effect to mere conjecture as to the intention of

a testator, since to do so would be assuming the power to make rather than to construe the will. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

13. — **Language.**—Words may be transposed, supplied, or omitted when to do so would make a will more clearly express the intention of the devisor as indicated by the entire contents of the instrument. *Neely v. Brogdon* (Civ. App.) 214 S. W. 614; *Haupt v. Michaelis* (Com. App.) 231 S. W. 706.

In construing a will the application of the rule to accord a technical meaning to technical words is relaxed to a greater extent than in construing other documents. *Johnson v. Goldstein* (Com. App.) 215 S. W. 840.

Technical words are presumed to have been used in their settled legal meaning unless the contrary is manifest. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

In harmonizing conflicts to effectuate the ascertained intention of the testator, words and phrases may be given meanings other than their technical import. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

Where words or phrases are susceptible of two constructions, one consistent with an intention to do that which the testator may lawfully do, and the other consistent with an intention to do that which he may not lawfully do, the first construction will be adopted and the other rejected. *Id.*

14. — **Separate clauses.**—Will, giving property in trust, held not to give to testator's wife the policies on his life, within the rule that a special provision of a will, when clear, will control a general provision, the subsequent clause being but a recognition of the fact that all the policies would, on his death, be her separate property, as would have been the case had he not thereafter made his estate beneficiary in some of them. *Freeman v. Classen* (Civ. App.) 223 S. W. 300.

A will is not to be read so as to contradict itself if its apparent contradictions can be reconciled by bringing the various clauses together and deducing a consistent interpretation from the whole context. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

A subsequent clause in a will must be deemed to affirm, not to contradict, an earlier clause, if such construction can clearly be given. *Id.*

The will should be considered in its entirety, and seeming conflicts between its separate clauses reconciled, if possible, to give effect to the true intention of the testator as manifested by the instrument as a whole. *Norton v. Smith* (Civ. App.) 227 S. W. 542.

Where there are clauses in a will so inconsistent or contradictory that all cannot be given effect, those should be given effect which seem most nearly to comport with the real and true intention of the testator as gathered from the entire instrument, and others should be ignored. *Id.*

15. — **Instruments construed together.**—Where a note in an envelope indorsed, "notes," existed when the inclosed letter asking payees to accept "this" was written, the word "this" would not of itself incorporate note into letter, nor would fact that note was written at same time make it a part of letter. *Adams v. Maris* (Com. App.) 213 S. W. 622.

Evidence that a note in a sealed envelope, indorsed, "Notes," was only thing sealed up with letter asking payees to accept "this," held sufficient to support jury's conclusion that word "this" referred to inclosed note. *Id.*

16½. — **Construction by executors.**—Under will devising estate to executors and trustees, with power to decide all questions of construction in their best judgment, their construction of will to include devise of income as well as corpus, honestly and fairly made and reasonably predicated on will, would not be overruled. *Grant v. Stephens* (Civ. App.) 200 S. W. 893.

19. **Devisees and legatees—Heirs.**—A will providing that "each heir" should take an undivided interest in certain land, and states, "Their is one exception to this rule," and then recites that his afflicted daughter's husband and grown sons should not have any interest, held not to exclude such afflicted child from an interest. *Michaelis v. Haupt* (Civ. App.) 212 S. W. 274.

Where an absolute devise was followed by a paragraph, which directed that the estate should go to devisee's sister if she survived him dying without "heirs of his body \* \* \* but if he dies leaving issue of his own body then his said heirs shall inherit" the second clause would be given effect as giving the property, in case devisee was survived by issue of his body, to those of such issue who were living at his death: "heirs of his body" and "issue of his own body" being construed to mean simply "children." and "inherit" to mean "take," although technically "inherit" is a word of limitation, and "take" is a word of purchase. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

Under a will devising land after the death of testator's wife to "my brothers living and the heirs of my deceased brothers", held, that testator intended to devise the property to the children of his deceased brothers, and not their heirs. *Connor v. Biard* (Civ. App.) 232 S. W. 885.

It appearing from a will that testator regarded the word "child" and the word "heir" as synonymous, it was the duty of the court to read the words "heir" and "heirs" as meaning "child" and "children." *Id.*

20. — **Classes.**—Where testatrix devised in equal parts to F. W. and the living children of D. A., deceased, "or their heirs," testatrix being adopted daughter of sister of D. A., and having inherited from her adoptive mother, F. W. and living children of D. A.'s four children and heirs of D. A.'s deceased children were each entitled to a fifth per stirpes. *Ladd v. Whitledge* (Civ. App.) 205 S. W. 463.

21½. — **Exclusion from provisions of will.**—Testator having six children, including a married daughter, who had a husband and two children, in his lifetime divided his lands into five parts, and made deeds, respectively, to the children other than the daughter, and in his will recited the fact of such division, and provided that L., the daughter's husband, and his two children should receive no part of his lands. The will further recited that the daughter was entirely incompetent, and had to be taken care of all her life. The daughter had lived in the home of testator for five years preceding testator's death. Her husband never visited her during that time, and she suffered from intense and continuous melancholia. Held, that it was the evident intent of testator to exclude the daughter from any interest in the land. *Haupt v. Michaelis* (Com. App.) 231 S. W. 706.

24½. **Substituted devise.**—A will bequeathing real estate to testator's wife, and in later paragraphs expressing a desire that his estate be kept together until majority of his youngest child, and then for partition and division between his children, devised the property to the wife in the event she survived him, and devised it to their children and grandchildren in the event he survive her. *Belcher v. Schmidt* (Civ. App.) 226 S. W. 491.

25. **Description of property.**—A bequest for erection of a chapel by the executor at a cost between specified limits held not void for uncertainty of amount. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

A bequest of a specified number of Mexican pesos is not ambiguous by reason of the subsequent divergence in the exchange of value of Mexican silver and Mexican gold coin. *Volpe v. Benavides* (Civ. App.) 214 S. W. 593.

Such bequest must be construed to mean Mexican pesos, gold or silver, and gives executors the option to pay either in silver pieces or gold pieces or in their equivalent value in United States money at the rate of exchange prevailing when payment is due. *Id.*

27. — **Community property.**—Husband's will, directing division of "my estate," directed disposition of husband's property only, and not wife's community property. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

Will providing that property given wife should, upon wife's death, be divided equally between specified heirs, did not authorize distribution of wife's community estate among such heirs, where husband's will did not attempt to direct disposition of wife's share of community property. *Id.*

28. **Estates created—Limitation over.**—Where a testator, after giving his property, by language importing absolute fee-simple title, to his wife, inserted a clause directing disposition thereof on her death, the intention of the testator as expressed in the latter clause should be given effect, if possible, since it does not violate any rule of law or public policy. *Norton v. Smith* (Civ. App.) 227 S. W. 542.

Under a will giving the property to testator's wife with full power of disposition, which contained a subsequent clause directing her to will the property on her death to the respective families of herself and testator, the latter clause applies only to the property of testator still possessed by the wife at her death. *Id.*

A provision that an estate shall take a certain course in case of the death of a named person operates only in case the person's death occurs before testator's death; but such rule is inapplicable where, after an absolute devise, the contingency named whereby the estate devised should go to devisee's sister was not his death merely, but his death "before his sister \* \* \* without heirs of his body." *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

Where an absolute devise was followed by a provision that "in case" devisee died before his sister without "heirs of his body" his share should go to his sister, the devisee, on surviving the testator, did not take title absolutely but on his death without issue the devise over to his sister, if living, would take effect; "in case" meaning "in the event," and "without heirs of his body" meaning "without issue." *Id.*

A clause in a will devising over to another an estate given to testatrix's daughter in fee by a previous clause, "in case of the death" of the daughter and her named child, impliedly conditioned the devise over upon the death of the daughter and her child before testatrix's death, so that where the daughter and her child survived testatrix the devise over lapsed. *Id.*

29. — **Fee simple.**—An estate devised without words of limitation will be construed an estate in fee, and if the legatee be not in existence when the will takes effect, the fee will vest in him upon his coming into existence unless the will be defeated by the rule against perpetuities. *Neely v. Brogdon* (Civ. App.) 214 S. W. 614.

Under a will creating successive life estates with no words of limitation as to the estate passing to the issue of the last life tenants, the issue takes a fee simple. *Id.*

Where a testator devised his property to his wife and children, a subsequent provision that it was to be kept intact until the youngest child attained his majority did not defeat the title theretofore vested in the devisees, and a creditor of a nonresident devisee could attach his interest in the property and obtain service by publication, even though he could not require partition of the property before the youngest child reached majority. *Sewell v. Taylor* (Civ. App.) 224 S. W. 530.

Will which devised land by granting and habendum clauses sufficient, without qualifying language, to vest a fee under art. 3235, but stated that estate was devised subject to certain conditions, held not to vest absolute fee in devisee at time of testator's death, but to vest the estate upon the conditions named, one of which was that he should live to a specified age before being given specified portion of estate, and that on his death without issue before reaching specified age the estate should vest in executors. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

The rule that an absolute disposition may be limited by a subsequent clause in a will, where the intention is clearly expressed, is not affected by art. 1106, raising a pre-

sumption of fee-simple devise, "if a less estate be not limited by express words." *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

A will providing that "I give and bequeath to my wife all my real and personal property, \* \* \* also my granddaughter to have equal share with all my heirs when the property is divided," gave the property to the wife in fee, as the clear gift in fee could not be cut down by the subsequent ambiguous clause. *Gilliam v. Mahon* (Com. App.) 231 S. W. 712.

30. — **Rule in Shelley's Case.**—Under will devising land to daughter for life with remainder in fee in heirs of her body, held, daughter took life estate; "heirs of body," meaning children of daughter living at her death, making rule in Shelley's Case inapplicable. *McMahan v. McMahan* (Civ. App.) 198 S. W. 354.

Rule in Shelley's Case does not preclude construction of technical words "heirs of body" so as to ascertain testator's intention. *Id.*

A will giving a life estate to a son, remainder to "his heirs by his present wife," and providing that, if he should die "without any surviving heirs," the property "shall go to my other heirs, each sharing alike," construed as using the word "heirs" as equivalent to "children," so that the son took only a life estate, and not a fee under the rule in Shelley's Case. *Hunting v. Jones* (Com. App.) 215 S. W. 959.

Devise to C. in terms for life, with remainder in fee at his death to his "heirs" or his "heirs at law," vests in him the fee, under the rule in Shelley's Case; there being nothing manifesting intention to use the technical words in the sense of child or children. *Crist v. Morgan* (Civ. App.) 219 S. W. 276.

Where an absolute devise was followed by a provision that in case the devisee at her death shall leave children, "which includes B. [her child by a former marriage], her children shall inherit her estate, share and share alike," the devisee was limited to a life estate with remainder over to those of her children who might survive her; the clause "which includes B." being treated as surplusage and ineffective, and the provision that the property should pass "share and share alike" being conclusive of testatrix's intention that it pass by purchase, not by limitation. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

The rule in Shelley's Case is directed against a devise over to the "heirs" of the first taker, and hence is inapplicable to an absolute devise followed by a provision that if the devisee should die before his sister and without heirs of his body the estate shall go to the sister. *Id.*

31. — **Life estate.**—A devise of possessions, use, rents, or revenues of property during a life in being creates a life estate. *Neely v. Brogdon* (Civ. App.) 214 S. W. 614.

Where testator gave all his real and personal property to his wife, and expressed the desire that his granddaughter should have an equal share with all his heirs when the property was divided, the wife took a life estate, and not a fee; the later clause showing an intention that property should ultimately be divided among testator's heirs. *Mahon v. Gilliam* (Civ. App.) 215 S. W. 124.

31½. **Use and occupation.**—Where a will created a spendthrift trust for testatrix's stepson held that an item bequeathing to him testatrix's "homestead place to be used and enjoyed by him as a home to live at for and during his natural life," with remainder over upon his death to his issue, and in default of such issue to revert to testatrix's general estate, would be construed to give him only a right of occupancy as a home for life. *Johnson v. Goldstein* (Com. App.) 215 S. W. 840.

33. **Conditions.**—Will in favor of testatrix's daughter conditional on her paying all that was owed on a granddaughter's property "out of her money," in view of the context, held not to have required the daughter to pay the granddaughter's debts with the daughter's money. *Minor v. Hall* (Civ. App.) 225 S. W. 784.

Will in favor of testatrix's daughter, held to require the daughter to pay the burial expenses of testatrix, a debt due to a third person, and certain lien indebtedness against testatrix's home place, and to invest \$100 for two grandchildren, as a condition precedent or subsequent to the passing of absolute title to the daughter. *Id.*

As words can be changed in a will only when it will effectuate a clearly apparent intent of testator, the word "refuse" in a devise with provision that, if devisee refuse a home to his sisters when sick or out of employment, the land shall be divided equally between them, cannot be changed to "fail." *Adams v. Henry* (Civ. App.) 231 S. W. 152.

A will, which gave land to testatrix's nephew "H. (with express understanding that his sisters are to have a home there whenever they need one)," held not to create a condition precedent, but to vest the fee in the nephew, on a condition subsequent, in view of art. 1106. *Id.*

Such nephew having after death of testatrix accepted under the will, his interest in the land was not affected by any statement before testatrix's death, that his sisters should not have a home there, nor by the fact that after such death one of them, did not seek a home there, believing from what he had previously said that it would be refused. *Id.*

37. — **Restraint on power of alienation.**—A clause in a will directing that the rights that a beneficiary receives under the will shall revert to others, if he gives any of the estate he inherits under the will to any of certain named kin, is void. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

38. **Testamentary trusts—Creation.**—Where income under testamentary trust was payable during beneficiary's lifetime for her use and benefit without limitation, held not to be a spendthrift trust. *Nunn v. Titcher-Goettinger Co.* (Civ. App.) 196 S. W. 890.

Whenever it appears to have been the creator's intention that beneficiary's interest should not be subject to creditor's claims, such interest is a spendthrift trust. *Id.*

A will, although not using word "trust," held to give executor right to hold property in trust for minor beneficiaries. *Beckham v. Beckham* (Civ. App.) 202 S. W. 517.

Where a will gave property absolutely to testator's wife and directed that at her death she will to the respective families of testator and herself whatever she might have, the later clause was more than an expression of desire and imposed a conditional limitation on the fee so as to create a trust on all testator's property which the wife did not dispose of during her lifetime. *Norton v. Smith* (Civ. App.) 227 S. W. 542.

A trust will not be imposed unless it clearly appears from the will that it was intended. *Beckham v. Beckham* (Com. App.) 227 S. W. 940.

Where a will gave an absolute estate to testator's children, and in subsequent provision authorized the executor to take possession of "any and all property belonging to my estate; to sell and convey same; \* \* \*" etc., the executor held independent executor, and not a trustee. *Id.*

A clause following devises of life estates to testatrix's son and daughter, in which testatrix enjoined them to "take care of B. [the son of the daughter by a former marriage] and properly educate him, to be paid for out of the estate which I give to my said two children \* \* \*," was precatory merely; it being left to the will of the son and daughter whether its provisions should be regarded. *Barmore v. Darragh* (Civ. App.) 231 S. W. 472.

38½. — **Charitable trust and gifts.**—Bequest for education of youth of certain county, to be carried out in specified manner, is a charitable trust, the college to which given being trustee, for inability of which to take trust will not fail, but will be administered by equity. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

Testamentary gift to trustees, invested with discretionary powers as to manner of expenditure, to aid a school founded by testator, held to sufficiently describe the beneficiaries, and good as a gift to a public charity. *Kirtley v. Spencer* (Civ. App.) 222 S. W. 328.

Where the purpose of a charitable trust is distinctly declared, and trustees are appointed by the will to carry out the intent of the testator, and the beneficiary may be ascertained, it is not void on the ground of being too indefinite and uncertain to be administered by a court of equity. *Jones' Unknown Heirs v. Dorchester* (Civ. App.) 224 S. W. 596.

Testamentary trust for the erection and maintenance of hospital for the poor was not defeated by the fact that at the time of the execution of the will there were no hospitals in such city and the existence of two such hospitals at time trust was sought to be enforced. *Id.*

Such trust did not fail merely because the estate was not as big as had been supposed by testator and was not sufficient for erection and maintenance of as costly a hospital as contemplated, where it was sufficient for the erection and maintenance of a hospital on a smaller scale for the care of poor. *Id.*

39. — **Violation of rule against perpetuities.**—A bequest for erection of a building in a public park is not void under the provisions of the Constitution against perpetuities, being a charitable gift. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

The main purpose of a corporation being education, it is a charity legacy to which is not within inhibition against perpetuities, though it has stockholders which elect from their number, the directors. *Id.*

Will bequeathing property to named trustees to have full management, control and sale, with directions to turn proceeds over to certain church when in judgment of trustees the church shall be in need of new church building, did not contravene constitutional inhibition against perpetuities. *Meadors v. Sherrill* (Civ. App.) 212 S. W. 546.

40. — **Construction.**—Under will devising all real and personal estate to executors and trustees to be managed by them for 20 years, with power to make sales, etc., the executors and trustees took a fee simple to the whole estate. *Grant v. Stephens* (Civ. App.) 200 S. W. 893.

Devise of real and personal property to executors and trustees to be managed for 20 years, with power of sale and duty to loan on security or invest moneys not needed for specified purposes, included not only the corpus, but the income. *Id.*

Where a testator devised property in trust for his minor grandchildren, though the will did not expressly limit the trust to the minority of the beneficiaries, it must be so construed, and when any of the beneficiaries come of age, or, if a female, marries, the trustee should turn over to such beneficiary his or her share of the property. *McNeill v. St. Aubin* (Civ. App.) 209 S. W. 781.

Where a testator devised to trustees for named minor grandchildren one-fourth of his estate, and authorized such trustees, who were also executors, to sell any part of the estate, held that the trust cannot be considered as passive, and so the guardian of the minor grandchildren cannot recover the property. *Id.*

Under a will creating a trust and requiring payment, on the beneficiary's death of the expenses of her last sickness, her "last sickness" held that illness by which she was last taken to her bed, and not the general or protracted illness of a chronic invalid. *McLean v. Breen* (Com. App.) 219 S. W. 1089, 9 A. L. R. 459.

41. **Powers—Alienation.**—A testamentary power to executors and trustees to sell any property of the estate, at public or private sale, implied the power to sell the whole estate, requiring, as a condition precedent, a fee-simple estate. *Grant v. Stephens* (Civ. App.) 200 S. W. 893.

47. **Compromise of litigation over will.**—Compromise agreement for division of land devised to plaintiff and defendant with provision for survivorship, held susceptible only of the construction that defendant was to convey to plaintiff a fee-simple estate, and not merely a life estate. *Flores v. Flores* (Civ. App.) 200 S. W. 1157.

48. **Rights of devisees and legatees.**—Heirs and legatees may sell and convey their interest in the estate. *Miers & Rose v. Trevino* (Civ. App.) 213 S. W. 715.

**54. Election—Testamentary provisions.**—As a general rule, a party cannot take under the will and at the same time adverse to it. *Slavin v. Greever* (Civ. App.) 209 S. W. 479.

Surviving wife is not required to make election between will and her share of community property, where she receives no benefit under will inconsistent with her community interest. *Id.*

In an action by a widow on notes of deceased husband, widow's right to recover as legatee being inconsistent with her right to recover as heir, and the evidence showing that the will was duly probated, and there being no evidence that the widow declined to accept as such legatee, it will be assumed that she accepted as legatee. *Houston Transfer & Carriage Co. v. Williams* (Com. App.) 221 S. W. 1051, reversing judgment (Civ. App.) 201 S. W. 712.

**55. — Acts constituting.**—Recognizing the named executor, accepting an estate devised by the will, but to which one is entitled by law, is not an election to take under a will. *Campbell v. Campbell* (Civ. App.) 215 S. W. 134.

**56. — Effect.**—A wife's acceptance of her husband's will which disposed only of his interest in their community property does not waive her community rights. *Hutchens v. Dresser* (Civ. App.) 196 S. W. 969.

Under will devising real and personal property to executors and trustees, the provision made for widow, not required by reason of her election to take her share of community estate, held not a partial intestacy, but to revert to trust estate. *Grant v. Stephens* (Civ. App.) 200 S. W. 893.

A will, giving the younger children each a sum of money from testator's estate, and then giving all testator's estate to his wife plainly and unambiguously, undertakes to dispose only of the estate testator owned, not the interest of the wife in the community estate, so that her taking under the will was not an election that her community interest should pass under the will. *Waller v. Dickson* (Civ. App.) 229 S. W. 893.

**59. Lapsed devises and bequests.**—A bequest lapsing by the legatee dying before testatrix, in the absence of statute, falls into the residuary clause of "all of the remainder of my property"; a contrary intention not being clearly expressed. *Lightfoot v. Poindexter* (Civ. App.) 199 S. W. 1152.

Where provision for support of testator's children was not needed, because of court's election that they take under will of their mother, which had been set aside, held, in view of testator's intention, that the bequest did not lapse, but fell into residuary trust. *Grant v. Stephens* (Civ. App.) 200 S. W. 893.

**60. Rights of creditors of legatees and devisees.**—See *Sewell v. Taylor* (Civ. App.) 224 S. W. 530.

The judgment in probate proceedings having required the payment in Texas of the share of a legatee, his creditors claiming to have an interest in his share are not in a position to complain of the judgment in so far as it provides for a transfer to Mexico of the administration in other respects. *State Nat. Bank v. Trevino* (Civ. App.) 215 S. W. 989.

In a suit against an independent executor and residuary legatees to recover under a promise by decedent to make a bequest in plaintiff's favor, a complaint, charging that the legatees had received certain enumerated property of a value more than sufficient to satisfy the claim, was insufficient as failing to allege a personal liability against the legatees; the remedy being to proceed to enforce a creditor's lien against the property. *Patton v. Smith* (Civ. App.) 221 S. W. 1034.

**61. Mutual wills.**—A mutual will of a husband and wife, giving the survivor a life estate, and upon his or her death devising the homestead in fee to an adopted child and a son of a deceased adopted child, when adopted and ratified by the widow, who survived, vested an undivided half interest in the homestead in each of the named remaindermen. *Rossetti v. Benavides* (Civ. App.) 195 S. W. 208.

Joint will of husband and wife held to evidence reciprocal agreement, whereby survivor accepted life estate and the fee vested in the children and grandchildren, the devisees. *Moore v. Moore* (Civ. App.) 198 S. W. 659.

Instrument executed by two sisters held intended to operate as a joint and mutual disposition of all the property owned by each, and for the mutual benefit of each, and not an instrument in which each severally undertook to dispose of her property. *Sherman v. Goodson's Heirs* (Civ. App.) 219 S. W. 839.

Joint will, providing that all property, both real and personal and mixed, belonging to one who shall die first, shall pass to survivor to be used by such survivor as she may choose during her lifetime, etc., did not give survivor power to dispose of property by will. *Id.*

A will of husband and wife, whereby they give their property to trustees for a charity, the trustees to pay half of the income to the survivor for life, held a joint and mutual will, estopping the survivor, after acceptance of benefits under it, from renouncing it. *Kirtley v. Spencer* (Civ. App.) 222 S. W. 328.



## TITLE 136

## WOOL GROWING INTERESTS

**Article 7879. [5357] Inspectors to be appointed in counties.**

**Admissibility of order and bond in evidence.**—Under Act April 4, 1883, an order appointing plaintiff sheep inspector, and approving his bond, is admissible in an action for his fees, as it will be presumed that the commissioners ascertained the facts authorizing the appointment. *Abbott v. Stanley*, 77 Tex. 309, 14 S. W. 62.

## FINAL TITLE

## GENERAL PROVISIONS

Sec.	Sec.
3. To be liberally construed.	16. Shall be construed as continuation of former laws, etc.
5. Repeal does not affect, what.	17. Laws of the thirty-second legislature not affected.
6. Same subject.	

**Section. 3. To be liberally construed.**

**Remedial statutes.**—Remedial statutes will be liberally construed to accomplish legislative purpose, especially as this section expressly so provides. *Taylor v. Iowa Park Gin Co.* (Civ. App.) 199 S. W. 853.

**Penal statutes.**—By this section, penal statutes must be liberally construed with a view to effect their objects and to promote justice. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

**Derogation of common law.**—By this section, statutes in derogation of the common law must be liberally construed with a view to effect their objects and to promote justice. *Sugg v. Smith* (Civ. App.) 205 S. W. 363.

**Mechanics' liens.**—Under Const. art. 16, § 37, and this section, one who has no title to land when he enters into a contract for the erection of a building thereon, but who acquires title pending the performance of such contract, is an "owner," within Sayles' Civil St. art. 3164, which gives a lien to mechanics and material men furnishing labor or material on a building under a contract with the "owner" or his agent. *Schultze v. Alamo Ice & Brewing Co.*, 2 Civ. App. 236, 21 S. W. 160.

**Sec. 5. Repeal does not affect, what.**

**Retroactive laws in general.**—See *Freeman v. W. B. Walker & Sons* (Com. App.) 212 S. W. 637; *State v. Elliott* (Civ. App.) 212 S. W. 695.

When new statute deals with procedure only, prima facie it applies to all actions, those which have accrued, or are pending, and future actions. *Texas Refining Co. v. Alexander* (Civ. App.) 202 S. W. 131.

**Fixed or vested rights.**—This section held to protect privilege in a libel suit as a vested ground of defense. *International & G. N. R. Co. v. Edmundson* (Com. App.) 222 S. W. 181, reversing judgment (Civ. App.) 185 S. W. 402.

**Sec. 6. Same.**

**Effect of repeal or change of law in general.**—In view of this section, held, that arts. 4621, 4622, 4624, cannot be given retroactive effect to create personal liability of wife who joined husband in execution of note before passage of such sections. *Akin v. Thompson* (Civ. App.) 196 S. W. 625.

**Sec. 16. Shall be construed as continuation of former law, etc.**

Cited, *Harris County v. Hammond* (Civ. App.) 203 S. W. 445; *American Type Founders' Co. v. Nichols*, 110 Tex. 4, 214 S. W. 301.

**Continuation of acts.**—Although Acts 27th Leg. c. 26, defining "libel," giving newspapers certain defenses, and preserving existing defenses, was incorporated in Rev. St. 1911, without phrase about existing defenses, such revision did not destroy previously existing defense that civil pleadings are privileged. *Taylor v. Iowa Park Gin Co.* (Civ. App.) 199 S. W. 853.

Intention to alter or change provisions of art. 3831, cannot be inferred from fact that it was in revision of statute placed under a title which contained a statute relating to a different matter. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Rev. St. 1911 constitutes a mere codification and continuation of laws formerly en-

acted, and therefore article 4957, which was intended to be a codification of section 65, Acts 31st Leg. c. 108, is controlled thereby. *North American Accident Ins. Co. v. Hodge* (Civ. App.) 208 S. W. 700.

**Effect as to construction.**—Where Legislature revises statutes of a state without changing particular statute which has been judicially construed, it is presumed that Legislature intended that same construction should continue. *Gearheart v. State*, 81 Cr. R. 540, 197 S. W. 187.

**Effect as to validity.**—The incorporation into the Revised Statutes of an act invalid because its subject-matter is not included in the title does not give validity to the act. *Western Indemnity Co. v. Free and Accepted Masons, of Texas* (Civ. App.) 198 S. W. 1092.

### Sec. 17. Laws of the thirty-second legislature not affected.

**Similar provisions of prior revisions.**—Under Rev. St. 1879, final tit., § 20, which provides that "any law passed by the sixteenth legislature in conflict with any provision of this act shall be the law of the state, this act to the contrary notwithstanding," the act of 1879 relative to public weighers passed by the sixteenth legislature, and amended by the act of 1883, is not invalidated by Rev. St. 1879, p. 587, art. 4081, etc., which was passed with the Revised Statutes, and requires the governor to appoint the officer. *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321.

# APPENDIX

- I. County courts.
- II. Local road laws.
- III. Land laws.
  - Decisions relating to old land laws.
- IV. Laws of the United States Concerning Citizens.
- V. Laws of the United States Concerning Naturalization.
- VI. Laws of the United States Relating to Removal of Causes from State to Federal Courts.

## I. COUNTY COURTS

### AN ALPHABETICAL LIST OF COUNTIES WHOSE COURTS ARE ACTING UNDER SPECIAL LAWS ENACTED SINCE PUBLICATION OF VERNON'S SAYLES' CIVIL STATUTES 1918 SUPPLEMENT

- Carson—*Jurisdiction restored*: Acts 1919, 36th Leg. 2d C. S., ch. 17.
- Edwards—*Jurisdiction increased*: Acts 1921, 37th Leg., ch. 30.
- Haskell—*Jurisdiction increased*: Acts 1919, 36th Leg., ch. 33.
- Kerr—*Jurisdiction diminished*: Acts 1921, 37th Leg. 1st C. S., ch. 7.
- Menard—*Jurisdiction diminished*: Acts 1919, 36th Leg. 2d C. S., ch. 15.
- Mitchell—*Jurisdiction increased*: Acts 1919, 36th Leg., ch. 11.
- Reagan—*Jurisdiction diminished*: Acts 1921, 37th Leg. 1st C. S., ch. 14.
- Scurry—*Jurisdiction increased*: Acts 1919, 36th Leg. 2d C. S., ch. 13.
- Shelby—*Jurisdiction diminished*: Acts 1920, 36th Leg. 4th C. S., ch. 8.

## II. LOCAL ROAD LAWS

- Angellna.—Sp. Acts 1919, 36th Leg., p. 315; Sp. Acts 1920, 36th Leg. 3d C. S., p. 67.
- Austin.—Sp. Acts 1919, 36th Leg., p. 80.
- Bandera.—Sp. Acts 1921, 37th Leg., p. 208.
- Baylor.—Sp. Acts 1919, 36th Leg., p. 170.
- Bee.—Sp. Acts 1921, 37th Leg., p. 242.
- Bell.—Sp. Acts 1918, 35th Leg. 4th C. S., p. 275.
- Blanco.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 204; Sp. Acts 1920, 36th Leg. 3d C. S., p. 263.
- Bowie.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 70.
- Brazos.—Sp. Acts 1919, 36th Leg., 2d C. S., p. 252; Sp. Acts 1921, 37th Leg. p. 109.
- Briscoe.—Sp. Acts 1921, 37th Leg., p. 237.
- Brown.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 215.
- Burnet.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 214.
- Caldwell.—Sp. Acts 1921, 37th Leg., p. 230.
- Camp.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 18.
- Cass.—Sp. Acts 1921, 37th Leg., p. 36.
- Chambers.—Sp. Acts 1918, 35th Leg. 4th C. S., p. 276.
- Cherokee.—Sp. Acts 1919, 36th Leg., p. 1; Sp. Acts 1920, 36th Leg. 3d C. S., p. 103; Sp. Acts 1921, 37th Leg. p. 131.
- Coleman.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 240.
- Collin.—Sp. Acts 1919, 36th Leg., p. 269; Sp. Acts 1921, 37th Leg., p. 185.
- Cooke.—Sp. Acts 1919, 36th Leg., p. 68.
- Coryell.—Sp. Acts 1919, 36th Leg., p. 82; Sp. Acts 1920, 36th Leg. 3d C. S., p. 66; Sp. Acts 1921, 37th Leg., p. 31.
- Dallas.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 172; Sp. Acts 1920, 36th Leg. 4th C. S., p. 16.
- Delta.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 221.
- Denton.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 144; Sp. Acts 1921, 37th Leg., p. 221.
- Eastland.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 107.
- Erath.—Sp. Acts 1919, 36th Leg., p. 250.
- Falls.—Sp. Acts 1919, 36th Leg., p. 185; Sp. Acts 1919, 36th Leg. 2d C. S., p. 113; Sp. Acts 1921, 37th Leg., p. 81.
- Fannin.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 37; Sp. Acts 1920, 36th Leg. 4th C. S., p. 16.
- Fayette.—Sp. Acts 1919, 36th Leg., p. 2; Sp. Acts 1920, 36th Leg. 3d C. S., p. 69.
- Gillespie.—Sp. Acts 1919, 36th Leg., p. 13; Sp. Acts 1920, 36th Leg. 3d C. S., p. 192.
- Gonzales.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 52.
- Grayson.—Sp. Acts 1919, 36th Leg., p. 160.
- Hardeman.—Sp. Acts 1919, 36th Leg., p. 99.
- Hardin.—Sp. Acts 1919, 36th Leg., p. 12; Sp. Acts 1921, 37th Leg. 1st C. S., p. 51.
- Harris.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 107.
- Henderson.—Sp. Acts 1918, 35th Leg. 4th C. S., p. 284.
- Hill.—Sp. Acts 1919, 36th Leg., p. 105; Sp. Acts 1919, 36th Leg. 2d C. S., p. 15.
- Hopkins.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 249.
- Houston.—Sp. Acts 1919, 36th Leg., p. 135; Sp. Acts 1920, 36th Leg. 3d C. S., p. 65.

- Hunt.—Sp. Acts 1919, 36th Leg., p. 27.  
 Jack.—Sp. Acts 1921, 37th Leg., p. 155.  
 Kaufman.—Sp. Acts 1919, 36th Leg. 2d C. S., pp. 64, 248.  
 Kerr.—Sp. Acts 1919, 36th Leg., p. 293; Sp. Acts 1919, 36th Leg. 2d C. S., p. 196;  
 Sp. Acts 1920, 36th Leg. 3d C. S., p. 295.  
 Lamar.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 24; Sp. Acts 1920, 36th Leg. 3d C. S., p. 53.  
 Liberty.—Sp. Acts 1921, 37th Leg. 1st C. S., p. 56.  
 Limestone.—Sp. Acts 1919, 36th Leg., p. 236. See *Garrett v. Commissioners' Court of Limestone County* (Civ. App.) 230 S. W. 1010.  
 Live Oak.—Sp. Acts 1919, 36th Leg., p. 23.  
 Llano.—Sp. Acts 1921, 37th Leg., p. 106.  
 McLennan.—Sp. Acts 1921, 37th Leg., p. 264.  
 Mason.—Sp. Acts 1919, 36th Leg., p. 326.  
 Medina.—Sp. Acts 1921, 37th Leg., p. 258.  
 Milam.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 138.  
 Mills.—Sp. Acts 1919, 36th Leg., p. 247; Sp. Acts 1920, 36th Leg. 3d C. S., p. 149.  
 Navarro.—Sp. Acts 1919, 36th Leg., p. 183; Sp. Acts 1921, 37th Leg., p. 82.  
 See *Montfort v. Commissioners' Court of Navarro County* (Civ. App.) 226 S. W. 424.  
 Newton.—Sp. Acts 1919, 36th Leg., p. 94.  
 Polk.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 274.  
 Red River.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 271; Sp. Acts 1921, 37th Leg., p. 236.  
 Rockwall.—Sp. Acts 1919, 36th Leg., p. 208; Sp. Acts 1919, 36th Leg. 2d C. S., p. 17;  
 Sp. Acts 1920, 36th Leg. 3d C. S., p. 278.  
 Runnels.—Sp. Acts 1919, 36th Leg., p. 102.  
 Rusk.—Sp. Acts 1919, 36th Leg., p. 100; Sp. Acts 1919, 36th Leg. 2d C. S., p. 189.  
 Sabine.—Sp. Acts 1919, 36th Leg., p. 152.  
 San Patricio.—Sp. Acts 1918, 35th Leg. 4th C. S., p. 274; Sp. Acts 1919, 36th Leg. p. 51.  
 Scurry.—Sp. Acts 1918, 35th Leg. 4th C. S., p. 306.  
 Shelby.—Sp. Acts 1919, 36th Leg., p. 21.  
 Smith.—Sp. Acts 1918, 35th Leg. 4th C. S., p. 262; Sp. Acts 1919, 36th Leg. 2d C. S., p. 68.  
 Tarrant.—Sp. Acts 1919, 36th Leg., p. 245; Sp. Acts 1920, 36th Leg. 3d C. S., p. 118;  
 Sp. Acts 1920, 36th Leg. 4th C. S., p. 4.  
 Titus.—Sp. Acts 1919, 36th Leg., p. 85; Sp. Acts 1919, 36th Leg. 2d C. S., p. 22.  
 Trinity.—Sp. Acts 1919, 36th Leg., p. 204.  
 Tyler.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 224; Sp. Acts 1921, 37th Leg., p. 232;  
 Sp. Acts 1921, 37th Leg. 1st C. S., p. 128.  
 Walker.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 93.  
 Wheeler.—Sp. Acts 1920, 36th Leg. 3d C. S., p. 65.  
 Wichita.—Sp. Acts 1919, 36th Leg. 2d C. S., p. 261.  
 Wilbarger.—Sp. Acts 1921, 37th Leg., p. 156.  
 Wood.—Sp. Acts 1919, 36th Leg., p. 147; Sp. Acts 1921, 37th Leg., p. 228.  
 Van Zandt.—Sp. Acts 1921, 37th Leg., p. 262.

### III. LAND LAWS

#### DECISIONS RELATING TO OLD LAND LAWS

##### R. S. 1895, Art. 4041. [3800] Title to mines, etc., released.

**Validity.**—This article when treated as a validating act, is not in violation of Const. art. 7, § 4, as to Legislature not having power to grant relief to purchasers of school lands, or section 5, forbidding appropriation of school funds to a foreign purpose. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

**Extension of earlier act.**—Although this article is a re-enactment of the statute of 1879, in identical terms, it extended the operative force of the latter over the period between 1879 and 1895. *Greene v. Robison*, 109 Tex. 367, 210 S. W. 498.

##### R. S. 1895, Art. 4280. Unorganized county school land.

**In general.**—Acts 17th Leg. c. 61, providing for designating and setting apart 300 leagues of land out of unappropriated public domain for benefit of unorganized counties, and for its survey and location, was not a present grant, but a provision for a future donation. *Yoakum County v. Slaughter*, 109 Tex. 42, 195 S. W. 1129.

If vested right was created in unorganized counties by such act, Legislature retained power over land involved, and had authority to adopt Acts 18th Leg. c. 55, making reservation of land for benefit both of unorganized counties and such organized counties as had failed to obtain title to land previously appropriated in their behalf. *Id.*

If, while Acts 17th Leg. c. 61, continued in force, any of such counties had perfected organization and paid or tendered surveying and patent fees, it would have become entitled to four leagues out of reservation, and would have acquired, vested right. *Id.*

Had a statute invested unorganized counties with title to part of public domain for benefit of free schools, lands would have constituted granted lands, and rights of counties would have been protected from adverse legislation by Const. art. 7, § 6. *Id.*

It was within power of Legislature to make such provisions for benefit of counties in respect to maintenance of free schools as in its wisdom were best suited to their situation. *Id.*

#### IV. LAWS OF THE UNITED STATES CONCERNING CITIZENS

The following changes have occurred in the laws on this subject since the publication of the 1918 Supplement of Vernon's Annotated Statutes:

§ 3958. (Act March 2, 1907, c. 2534, § 1.) Issue of passports to and protection of persons having made declaration of intention to become citizens.—Repealed. Act June 4, 1920, c. 223, § 5, 41 Stat. 751.

#### V. LAWS OF THE UNITED STATES CONCERNING NATURALIZATION

The following changes have occurred in the laws on this subject since the publication of the 1918 Supplement of Vernon's Annotated Statutes:

R. S. Sec. 2166. Aliens honorably discharged from military service.—Repealed. Act May 9, 1918, c. 69, § 2, 40 Stat. 546.

Act July 26, 1894, c. 165. Aliens honorably discharged from service in Navy or Marine Corps.—Repealed. Act May 9, 1918, c. 69, § 2, 40 Stat. 546.

R. S. Sec. 2171. Alien enemies not admitted.—Repealed. Act May 9, 1918, c. 69, § 2, 40 Stat. 546.

The section numbers hereinafter referred to are those of the United States Compiled Statutes 1916 or 1918, with their Supplements.

§ 3959a. (Act Oct. 5, 1917, c. 68.) Repatriation of certain citizens; procedure.—Repealed. Act May 9, 1918, c. 69, § 1, 40 Stat. 546.

§ 4352. (Act June 29, 1906, c. 3592, § 4, as amended Act May 9, 1918, c. 69, §§ 1-3.) Proceedings for naturalization. Filipinos, Porto Ricans or aliens in service of Army, Navy, Marine Corps, Coast Guard, or merchant marine.—Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any State, Territory, or the District of Columbia, or the State militia in Federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representa-

tive of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien, who, at the time of the passage of this Act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service

may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the Act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the Commissioner or Deputy Commissioner of Naturalization: Provided, That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: Provided further, That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the Act of June twenty-ninth, nineteen hundred and six.

**Alien seamen deemed citizens.**—Eighth. Every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States, anything to the contrary in any Act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen: Provided, That nothing contained in this Act shall be taken or construed to repeal or modify any portion of the Act approved March fourth, nineteen hundred and fifteen (Thirty-eighth Statutes at Large, part one, page eleven hundred and sixty-four, chapter one hundred and fifty-three), being an Act to promote the welfare of American seamen.

**Reimbursement for printing and binding.**—Ninth. For the purpose of carrying on the work of the Bureau of Naturalization of sending the

names of the candidates for citizenship to the public schools and otherwise promoting instruction and training in citizenship responsibilities of applicants for naturalization, as provided in this subdivision, authority is hereby given for the reimbursement of the printing and binding appropriation of the Department of Labor upon the records of the Treasury Department from the naturalization fees deposited in the Treasury through the Bureau of Naturalization for the cost of publishing the citizenship text book prepared and to be distributed by the Bureau of Naturalization to those candidates for citizenship only who are in attendance upon the public schools, such reimbursement to be made upon statements by the Commissioner of Naturalization of books actually delivered to such student candidates for citizenship, and a monthly naturalization bulletin, and in this duty to secure the aid of and cooperate with the official State and national organizations, including those concerned with vocational education and including personal services in the District of Columbia, and to aid the local Army exemption boards and cooperate with the War Department in locating declarants subject to the Army draft and expenses incidental thereto.

**Aliens erroneously exercising privileges of citizens.**—Tenth. Any person not an alien enemy, who resided uninterruptedly within the United States during the period of five years next preceding July first, nineteen hundred and fourteen, and was on that date otherwise qualified to become a citizen of the United States, except that he had not made the declaration of intention required by law and who during or prior to that time, because of misinformation regarding his citizenship status erroneously exercised the rights and performed the duties of a citizen of the United States in good faith, may file the petition for naturalization prescribed by law without making the preliminary declaration of intention required of other aliens, and upon satisfactory proof to the court that he has so acted may be admitted as a citizen of the United States upon complying in all respects with the other requirements of the naturalization law.

**Alien enemies.**—Eleventh. No alien who is a native, citizen, subject, or denizen of any country, State, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States unless he made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or unless his petition for naturalization shall then be pending and is otherwise entitled to admission, notwithstanding he shall be an alien enemy at the time and in the manner prescribed by the laws passed upon that subject: Provided, That no alien embraced within this subdivision shall have his petition for naturalization called for a hearing, or heard, except after ninety days' notice given by the clerk of the court to the Commissioner or Deputy Commissioner of Naturalization to be present, and the petition shall be given no final hearing except in open court and after such notice to the representative of the Government from the Bureau of Naturalization, whose objection shall cause the petition to be continued from time to time for so long as the Government may require: Provided, however, That nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien; and section twenty-one hundred and seventy-one of the Revised Statutes of the United States is hereby repealed: Provided further, That the President of the United States may, in his



discretion, upon investigation and report by the Department of Justice fully establishing the loyalty of any alien enemy not included in the foregoing exemption, except such alien enemy from the classification of alien enemy, and thereupon he shall have the privilege of applying for naturalization; and for the purposes of carrying into effect the provisions of this section, including personal services in the District of Columbia, the sum of \$400,000 is hereby appropriated, to be available until June thirtieth, nineteen hundred and nineteen, including travel expenses for members of the Bureau of Naturalization and its field service only, and the provisions of section thirty-six hundred and seventy-nine of the Revised Statutes shall not be applicable in any way to this appropriation.

**Repatriation of expatriated citizens.**—Twelfth. Any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any State authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul to the Department of State and the Bureau of Naturalization, and the Act (Public fifty-five, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen), is here repealed.

**Proof of continuous residence.**—Thirteenth. Any person who is serving in the military or naval forces of the United States at the termination of the existing war, and any person who before the termination of the existing war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the State, Territory, or the District of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the affidavits of two credible witnesses, citizens of the United States, identifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral character required by law, and he shall comply with the other requirements of the naturalization law. (34 Stat. 596. 40 Stat. 542-546, 548.)

The above provision is amendatory of Act June 29, 1906, c. 3592, § 4, as set forth in the 1914 edition of Vernon's Statutes, by adding thereto subdivisions 7 to 13 inclusive, as set forth above.

§ 4352a. (Act May 9, 1918, c. 69, § 3.) **Validation of certificates of naturalization.**—All certificates of naturalization granted by courts of competent jurisdiction prior to December thirty-first, nineteen hundred and eighteen, upon petitions for naturalization filed prior to January thirty-first, nineteen hundred and eighteen, upon declarations of intention filed prior to September twenty-seventh, nineteen hundred and six, are hereby declared to be valid in so far as the declaration of intention is concerned, but shall not be by this Act further validated or legalized. (40 Stat. 548.)

§ 4352aa. (Act May 9, 1918, c. 69, § 2.) **Acts repealed.**—All acts or parts of acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined: Provided, That for the purposes of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to this Act the statutes and laws hereby repealed shall remain in full force and effect: Provided further, That as to all aliens who, prior to January first, nineteen hundred, served in the Armies of the United States and were honorably discharged therefrom, section twenty-one hundred and sixty-six of the Revised Statutes of the United States shall be and remain in full force and effect, anything in this Act to the contrary notwithstanding. (40 Stat. 547.)

§ 4352aaa. (Act July 19, 1919, c. 24, § 1.) **Persons of foreign birth serving in military or naval forces of United States during war with Germany.**—Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, Thirty-fourth Statutes at Large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States. (41 Stat. 222.)

§ 4356a. (Act June 30, 1914, c. 130.) **Aliens honorably discharged from service in Navy or Marine Corps or in Revenue-Cutter Service.**—Repealed. Act May 9, 1918, c. 69, § 2, 40 Stat. 547.

§ 4369. (Act June 29, 1906, c. 3592, § 10, as amended, Act May 9, 1918, c. 69, § 3.) **Evidence of residence.**—In case the petitioner has not resided in the State, Territory, or the District of Columbia for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside. (34 Stat. 599. 40 Stat. 548.)

## VI. LAWS OF THE UNITED STATES RELATING TO REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS

The following changes have occurred in the laws on this subject since the publication of the 1918 Supplement of Vernon's Annotated Statutes:

§ 1021a. (Act April 16, 1920, c. 146.) **Service of process after removal.**—Hereafter, in all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such

process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court: Provided, Nothing in this Act shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal. (41 Stat. 554.)

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# SUPPLEMENT

TO

# THE PENAL CODE

## TITLE 1

### GENERAL PROVISIONS RELATING TO THE WHOLE CODE

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|-------|--|-------|--|
| Chap. | 1. The general objects of the Code, principles on which it is founded, rules for its interpretation. | Chap. | 3. Persons punishable under this Code and the circumstances which excuse, extenuate or aggravate an offense. |
|       | 2. Definitions.  |       |  |

### CHAPTER ONE

#### THE GENERAL OBJECTS OF THE CODE, THE PRINCIPLES ON WHICH IT IS FOUNDED, AND RULES FOR THE INTERPRETATION OF PENAL LAWS

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|------|--|------|---|
| Art. | 1. Design of the Code.                           | Art. | 9. General rule of construction.              |
|      | 2. Object of punishment.                         |      | 10. Words specially defined, how understood.  |
|      | 3. All penalties must be affixed by written law. |      | 11. Innocence presumed.                       |
|      | 4. Common law the rule of construction, when.    |      | 15. Effect of modification by subsequent law. |
|      | 6. Unintelligible law not operative.             |      | 16. Repeal, effect of.                        |

#### Article 1. [1] Design of the Code.

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.  
Cited, *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210; *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Definiteness of penal statutes.**—Art. 820k, (a), providing that vehicles shall be operated in a careful manner, with due regard for the safety and convenience of pedestrians and all other vehicles, is obnoxious to the rule which requires some degree of certainty in informing one accused of crime of the nature of the accusation against him, and such provision is inoperative and unenforceable in so far as it undertakes to define an offense. *Russell v. State* (Cr. App.) 228 S. W. 566; *Snider v. State* (Cr. App.) 230 S. W. 146.

In view of this article the failure to clearly define the punishment of an offense does not reduce defendant's peremptory challenges, though the prosecuting attorney declares that he will not insist on the death penalty. *Kerley v. State* (Cr. App.) 230 S. W. 163.

#### Art. 2. [2] Object of punishment.

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.  
Cited, *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210.

**In general.**—Under Vernon's Ann. Code Cr. Proc. 1916, arts. 865c, 865e, and in view of arts. 865d and 865g, as well as this article, one convicted of a felony, whose sentence is suspended by the jury, cannot, after the period of suspended sentence has expired, be imprisoned on that sentence because of a later charge of another felony; for that would violate the purpose of the suspended sentence statute. *Ex parte Coots*, 85 Cr. R. 334, 212 S. W. 173.

#### Art. 3. [3] All penalties must be affixed by written law.

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811; *Lotto v. State* (Cr. App.) 208 S. W. 563.

Cited, *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210; *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**8. Punishable offenses.**—Art. 820k, (a), providing that vehicles shall be operated in a careful manner, with due regard for the safety and convenience of pedestrians and all other vehicles, is obnoxious to the rule which requires some degree of certainty in informing one accused of crime of the nature of the accusation against him, and such provision is inoperative and unenforceable in so far as it undertakes to define an offense. *Russell v. State* (Cr. App.) 228 S. W. 566; *Snider v. State* (Cr. App.) 230 S. W. 146.

A completed penal law must define with certainty the act or omission denounced as an offense. *Ex parte Leslie*, 87 Cr. R. 476, 223 S. W. 227.

Due process requires that a penal law give reasonable notice as a predicate of the punishment for violation. *Id.*

The power of the Legislature to make a given act penal is not limited to the permission of the Constitution but exists where not specifically forbidden. *Reeves v. State* (Cr. App.) 227 S. W. 668.

#### Art. 4. [4] Common law rule of construction, when.

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

#### Art. 6. [6] Unintelligible law not operative.

See *Ex parte Leslie*, 87 Cr. R. 476, 223 S. W. 227.

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Definiteness.**—Under Const. art. 5, § 17, juvenile delinquent law, construed with this article, and Vernon's Ann. Code Cr. Proc. 1916, art. 770, held, that order committing female delinquent child to sister of order for an indefinite term not beyond the age of 21 was void. *Ex parte McLoud*, 82 Cr. R. 299, 200 S. W. 394.

Acts 36th Leg. (1919) c. 161, § 1a, amending Acts 35th Leg. (1917) c. 207, § 9, post art. 320d, making it unlawful to operate automobile, motorcycle, or bicycle with front lamps projecting forward a light of such glare and brilliancy as to seriously interfere with the sight of or temporarily blind the vision of a driver of a vehicle approaching from an opposite direction, held void for indefiniteness; the glare and brilliancy not being described by any standard. *Griffin v. State*, 86 Cr. R. 498, 218 S. W. 494.

Acts 1st Called Sess. 35th Leg. (1917) c. 41, § 47 (art. 977m), making it a crime to "falsely pack a bale of cotton," held not so indefinite as to be unconstitutional or violative of this article, the quoted words having a clear meaning as required by arts. 9 and 10, in view of Code Cr. Proc. 1911, arts. 58 and 59. *Ex parte Montgomery*, 86 Cr. R. 636, 218 S. W. 1042.

It is not necessary to put into a statute mention of all the specific ways in which the offense therein set forth may be committed. *Id.*

Juvenile delinquent law, defining juvenile delinquents and providing for trial, procedure, penalty, commitment, etc., held not so uncertain and indefinite as to be invalid. *Ex parte Pruitt*, 82 Cr. R. 394, 200 S. W. 392.

#### Art. 9. [9] General rule of construction.

Cited, *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**3. Meaning of language.**—Owner of garage is not guilty of violating Acts 35th Leg. c. 159 (art. 1617½c) providing that any "garage" or "repair shop" not keeping register of repairs to automobiles shall be guilty of a misdemeanor; in view of the requirement that words be given their clear meaning. *Fowler v. State*, 81 Cr. R. 574, 196 S. W. 951.

#### Art. 10. [10.] Words specially defined, how understood.

See *Taylor v. State*, 29 Tex. App. 466, 16 S. W. 302.

**Legislative Intent.**—"Incorrigible," used in Acts 35th Leg. 4th Called Sess. (1918) c. 26 (Code Cr. Proc. art. 1197) prescribing procedure in cases of delinquent children, in its general use means bad beyond correction or reform, but, in view of this article, it was not legislative intent that child to come within law must be bad beyond reform in absolute sense, but rather one whose reformation could not be effected by control to which he was subject. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

**Indictment or Information.**—Owner of garage is not guilty of violating Acts 35th Leg. c. 159 (art. 1617½c), providing that any "garage" or "repair shop" not keeping register of repairs to automobiles shall be guilty of a misdemeanor, in view of the requirement that words be given their clear meaning. *Fowler v. State*, 81 Cr. R. 574, 196 S. W. 951.

A "cashier," defined as a custodian of money of a bank, mercantile house, and the like, is not a "clerk," who is defined as one to keep accounts or records, a higher assistant in an office, so that there is a variance between an indictment charging accused with embezzlement of money, while clerk of a corporation, which charge must be construed under this article, by giving the ordinary meaning to the words, and proof that he was the cashier of the corporation, especially where the manager of the corporation expressly testified that he was not a clerk. *Miller v. State* (Cr. App.) 226 S. W. 379.

#### Art. 11. [11] Innocence presumed.

Cited, *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963.

**Art. 15. [15] Effect of modification by subsequent law.**

**Modification by construction.**—Where a statute giving grounds for disbarment of an attorney was construed by the court of final jurisdiction and was thereafter re-enacted without material change, to give the statute a new construction disbarring an attorney on a new ground, would be in effect disbarring the attorney by a law not previously prescribing the offense. *Lotto v. State* (Civ. App.) 208 S. W. 563.

**Art. 16. [16] Repeal, effect of.**

See *State v. Mitchell*, 110 Tex. 498, 221 S. W. 925.

**Effect on pending proceedings.**—One being prosecuted under a city ordinance for speeding at the time Acts 35th Leg. c. 207 (art. 820s) relating to speed of automobiles, went into effect, should be discharged, because such act contains no saving clause as to pending actions. *Ex parte Wright*, 32 Cr. R. 247, 199 S. W. 486.

Prosecution of employer for discharge of employé for giving testimony before the industrial welfare commission, in violation of Acts 36th Leg. (1919) c. 160, § 9, will be dismissed where, pending the employer's motion for rehearing before the Court of Criminal Appeals, such statute was repealed by Acts Reg. Sess. 37th Leg. Senate Bill 41. *Poye v. State* (Cr. App.) 230 S. W. 161.

**Mode of repeal.**—A void act of the Legislature cannot repeal existing valid statutes, and a void penal statute, not being operative, can furnish no ground for an accused to elect under which act he would be prosecuted, or to elect as to which punishment should be inflicted in case of a conviction. *Venn v. State*, 85 Cr. R. 151, 210 S. W. 534.

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## CHAPTER TWO

### DEFINITIONS

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| <p><b>Art.</b><br/>23. Singular includes plural, and masculine feminine.</p> <p>24. "Person" includes state or any corporation.</p> | <p><b>Art.</b><br/>25. "Accused" and "defendant" synonymous.</p> <p>27. "Convict" defined.</p> |
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**Article 23. [23] Singular includes plural, and masculine feminine.**

**Singular and plural.**—Under Acts 33d Leg. c. 101, §§ 1, 3, 6, (arts. 640a, 640c and 640f) and this article, information charging neglect to support four minor children named, and alleging that the "injured party" was under age of 16 held to sufficiently plead that each of the children was under such age. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855

**Art. 24. [24] "Person" includes state or any corporation.**

See *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

**Prosecution against corporation.**—There is no provision of law in Texas under which a firm or corporation can be indicted or tried under the criminal laws. *Judge Lynch International Book & Publishing Co. v. State*, 84 Cr. R. 459, 208 S. W. 526.

**Art. 25. [25] "Accused" and "defendant" synonymous.**

Cited, *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 23 Am. St. Rep. 899.

**Art. 27. [27] "Convict" defined.**

Cited, *Brittian v. State*, 85 Cr. R. 491, 214 S. W. 351.

**Witness.**—Defendant's accomplice in burglarizing and stealing from a millinery store, who was convicted of burglary and accepted the verdict with recommendation of suspended sentence and entered into recognizance for such sentence as required, held not a "convict," until final judgment or sentence was pronounced. *Brown v. State*, 86 Cr. R. 8, 215 S. W. 323.

In a prosecution for receiving stolen property, defendant's accomplice, though the jury had rendered against him a verdict of guilty of a felony, was not disqualified as a witness, where he had not been sentenced when he testified. *Grant v. State*, 87 Cr. R. 19, 218 S. W. 1062.

CHAPTER THREE

OF THE PERSONS PUNISHABLE UNDER THIS CODE, AND THE CIRCUMSTANCES WHICH EXCUSE, EXTENUATE, OR AGGRAVATE AN OFFENSE

Art.	Art.
32. The persons punishable under this Code.	41. Intoxication as a defense.
34. Children not punishable.	44. Duress a defense, when.
35. Persons under seventeen years not punishable capitally.	45. Accidents excused, when.
39. Insanity a defense.	46. No mistake of law excuses.
40. Proof of insanity according to common law.	47. Mistake of fact excuses, when.
	51. Intention presumed.
	52. Burden of proof on defendant, when.

**Article 32. [32] The persons punishable under this Code.**

**Corporations.**—There is no provision of law in Texas under which a firm or corporation can be indicted or tried under the criminal laws. *Judge Lynch International Book & Publishing Co. v. State*, 84 Cr. R. 459, 208 S. W. 526.

**Art. 34. [34] Children not punishable.**

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811; *Williams v. State* (Cr. App.) 225 S. W. 173.

**12. Juvenile delinquents.**—A judgment in a proceeding under the juvenile delinquent law, finding a boy of 10 or 11 years of age to be a delinquent and committing him, conflicted with this article, unless it is shown that he had discretion sufficient to understand the nature and legality of the act constituting the offense, so that where there was no such showing the judgment would be reversed. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

**Art. 35. [35] Persons under seventeen years not punishable capitally.**

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.

**Evidence of non-age.**—Jury's finding that defendant was not under 17 at time of commission of crime, as to which defendant has the burden of proof, held supported by the evidence. *Flores v. State* (Cr. App.) 231 S. W. 786.

**Art. 39. [39] Insanity a defense.**

Cited, *Ex parte Trader*, 24 Tex. App. 393, 6 S. W. 533.

**1. Criminal responsibility in general.**—Sanity is a condition precedent to guilt. *Kiernan v. State*, 84 Cr. R. 500, 208 S. W. 518.

**8. Temporary insanity.**—In prosecution for rape, where defendant set up temporary insanity on account of drunkenness in mitigation of penalty, the court in instructions properly limited defense to a state of mind rendering accused incapable of distinguishing between right and wrong. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

**9. Trial of issue of insanity.**—Where defendant has no attorney, insanity at the time of the alleged crime and trial is a good ground for a new trial, on motion there by relatives who became aware of the prosecution after conviction. *Gardner v. State*, 82 Cr. R. 38, 198 S. W. 312, L. R. A. 1918B, 1144.

**12. Evidence.**—The killing by defendant of his own son without provocation worthy of the name should call for the closest scrutiny of his mental condition. *Kiernan v. State*, 84 Cr. R. 500, 208 S. W. 518.

The fact that defendant, who had once previously been adjudged insane, was found to be insane, but two years before the commission of the offense charged, will not establish his insanity at the time of the offense; it appearing that after a short stay in the insane asylum he was paroled on condition that he should within 30 days report in person or by letter, and it further appearing that during the interim defendant had been at liberty, etc., free from all restraint. *Barton v. State* (Cr. App.) 230 S. W. 989.

**14. Separate trial of insanity after conviction.**—Defendant, who sends to the Court of Criminal Appeals with his motion for rehearing copy of a judgment of the county court entered since the appeal adjudging defendant insane, cannot thereby procure that the court shall withhold its mandate should the motion for rehearing be overruled; the appellate court apprehending that on sufficient showing judgment will be held up and the case disposed of as provided in Code Cr. Proc., arts. 1017-1030. *Escue v. State* (Cr. App.) 227 S. W. 483.

**Art. 40. [40] Proof of insanity according to common law.**

**2. Burden of proof.**—The burden is upon accused to make out his defense of insanity. *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.

The fact that defendant in murder case was subject to epileptic attacks did not change the rule requiring one accused of crime to satisfy the minds of the jury that at

the very time of the commission thereof his mind was in such condition that he did not know the nature and quality of the act, that it was an act he ought not to do, and, if he knew it was wrong, that he had not sufficient will power to refrain from doing the same. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In homicide prosecution defended on the ground of insanity, the defendant was required to prove by a preponderance of the testimony that the act charged was done by him while insane. *Perea v. State* (Cr. App.) 227 S. W. 305.

The law presumes that accused was sane at the time he committed the offense, and does not require the state to prove his sanity. *Taylor v. State* (Cr. App.) 227 S. W. 679.

In a prosecution for assault with intent to murder, when it was not claimed that defendant was permanently or continuously insane, the existence of defendant's mental derangement at the time he shot his wife was not a presumption following the proof that, upon other occasions, he had become temporarily deranged; and it being conceded that his mental derangement was an exception, it was defendant's burden to prove that it prevailed at the time the offense was committed. *Roberts v. State* (Cr. App.) 231 S. W. 759.

**4. Mental condition in general.**—Where the question of insanity is raised upon the trial of a person accused of crime, insanity in the family of the accused is a proper subject of investigation. *Bouldin v. State*, 87 Cr. R. 419, 222 S. W. 555.

Where defense was insanity, the mere fact that the half-brother of defendant's father was of a weak mind was provable, and it was germane to that question that he was not of sufficient weak mind to require his being restrained or charged with insanity. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

In homicide prosecution defended on the ground of insanity, where defendant's father, his employers, his friends, and a number of physicians testified without expressing the opinion that defendant had at any time been insane, and where an expert physician, upon a full statement of the facts, including the fact that for some time prior to the homicide defendant had been afflicted with syphilis, declined to state that in his opinion the defendant was insane, exclusion of testimony that syphilis frequently caused insanity held proper. *Perea v. State* (Cr. App.) 227 S. W. 305.

The fact that defendant, who had once previously been adjudged insane, was found to be insane but two years before the commission of the offense charged, will not establish his insanity at the time of the offense; it appearing that after a short stay in the insane asylum he was paroled on condition that he should within 30 days report in person or by letter, and it further appearing that during the interim defendant had been at liberty, etc., free from all restraint. *Barton v. State* (Cr. App.) 230 S. W. 989.

In a prosecution for assault to murder, where the defense was insanity, it was not error to permit the sheriff to testify as to the demeanor of defendant when he was arrested. *Roberts v. State* (Cr. App.) 231 S. W. 759.

**7. Opinion evidence—Nonexperts.**—A witness, who visited defendant in jail the morning after the shooting charged, was present when he was released on bond, and took him home with him for several days, should have been permitted to testify that he appeared physically collapsed, nervous, weak, and pale, and to give his opinion that his mind was unsound, especially where the state's witnesses were permitted to express opinions on no stronger predicate. *Plummer v. State*, 86 Cr. R. 487, 218 S. W. 499.

A witness who was not an expert could not state her conclusion as to defendant's insanity without first giving the facts on which the opinion was based. *Taylor v. State* (Cr. App.) 227 S. W. 679.

Where defendant relied on insanity, testimony by a nonexpert witness that he talked to defendant and did not notice anything peculiar about his mental condition, the witness further testifying that he had had occasion to observe insane persons, was properly admitted, the witness not purporting to give his opinion, but merely stating the facts of his observation. *Barton v. State* (Cr. App.) 230 S. W. 989.

Where a nonexpert witness testified that in conversation with defendant he observed nothing unusual as to his mental condition, the fact that the witness may have had slight opportunity for observation goes only to the weight of his testimony. *Id.*

In a prosecution for assault to murder, where the defense was insanity, it was not error to permit the sheriff to give his opinion that accused was sane, based on his observations of accused while in custody. *Roberts v. State* (Cr. App.) 231 S. W. 759.

**8. — Experts.**—Where accused claimed he killed deceased while temporarily insane from use of narcotics and intoxicants, evidence regarding the amount of morphine and whisky accused had taken prior to the killing held to sustain the hypothetical case put to a physician who testified that the amount specified would not cause temporary insanity. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

**10. Sufficiency of evidence.**—Evidence of accused's insanity held to require reversal of conviction of assault with intent to rape a female under 15 years of age. *Gardner v. State*, 85 Cr. R. 103, 210 S. W. 694.

Although accused, in a prosecution for homicide, need not prove insanity beyond a reasonable doubt, it must be clearly proved. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In a homicide case, evidence held to sustain a conviction of murder as against a claim of insanity. *Id.*

In prosecution for murder, where defense was that defendant by reason of blows on the head, and by reason of being crazed by excessive use of intoxicants, did not know the criminal nature of the acts committed by him, evidence held to sustain conviction. *Haynes v. State* (Cr. App.) 224 S. W. 1100.



**Art. 41. [41] Intoxication as a defense.**

**2. Intoxication as defense.**—Question of intent, being raised by the evidence in larceny, should be submitted, notwithstanding defendant's drunkenness. *Riddick v. State*, 83 Cr. R. 291, 202 S. W. 947.

An intoxicated person is held to the same degree of caution in the handling of a pistol or other deadly instrument as is required of a sober person. *Haynes v. State* (Cr. App.) 224 S. W. 1100.

Defendant, claiming temporary insanity brought about by the recent use of intoxicants, is not entitled to more than the benefit of that phase of this article, which rendered the temporary insanity, if it existed from the cause stated, available to mitigate the punishment. *Hooter v. State* (Cr. App.) 225 S. W. 1093.

**4. Evidence of intoxication in general.**—Whether physical condition of defendant, due to use of intoxicants, was such that he could not commit assault with intent to rape, held, under the evidence, for the jury. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

Where a defendant convicted of malicious mischief was shown to have been under the influence of intoxicants, it was error to exclude testimony of the quantity of liquor he had been drinking, and his conduct. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

**5. Admissibility in mitigation of punishment.**—The opinion of witnesses was admissible as to the extent of defendant's intoxication, which would not excuse the offense, but might mitigate the punishment. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

**9. Toxicomania.**—In prosecution for rape, where defendant set up temporary insanity on account of drunkenness in mitigation of penalty, the court in instructions properly limited defense to a state of mind rendering accused incapable of distinguishing between right and wrong. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

This article precludes one excusing himself from an unlawful act on the ground of mental derangement rendering him incapable of understanding the nature of the act where such derangement is brought about only by the recent and voluntary use of intoxicating liquors. *Hooter v. State* (Cr. App.) 225 S. W. 1093.

**10. Combination of causes of insanity.**—In prosecution for negligent homicide, mental condition produced by intoxicants could not justify an illegal act in and of itself; but it might do so, combined with two blows on the head, both of which knocked defendant down. *Haynes v. State*, 83 Cr. R. 6, 204 S. W. 430.

**13. Charge of court.**—On a trial for murder a charge defining insanity, as understood in criminal law, as when a person was, at the time of committing the act, laboring under such defect of reason as not to know the nature of the act; or, if he did know, that he did not know he was doing wrong; or, if he knew it was wrong, that he did not have the mental power to refrain from doing it; and instructing that intoxication produced by the voluntary recent use of intoxicants does not excuse crime or mitigate either the degree or the penalty; but that if defendant, at the time of the homicide, was so intoxicated, and such intoxication produced in his mind a state of insanity, as the term has been defined, he can be convicted of murder in the second degree, but not in the first,—is proper. *Rather v. State*, 25 Tex. App. 623, 9 S. W. 69.

In a prosecution for assault with intent to rape, evidence held to require an instruction as to temporary insanity from the use of intoxicating liquor, in mitigation of penalty. *Morris v. State*, 82 Cr. R. 13, 198 S. W. 141.

In prosecution for murder, charge on effect of drunkenness on defendant's part, in connection with charge on insanity, held to cover every phase of issue as to effect of defendant's drunkenness. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

In prosecution for murder, defendant's intoxication, together with fact that he received two blows on the head, which knocked him down, should have been submitted to jury on question of mental status and temporary insanity. *Haynes v. State*, 83 Cr. R. 6, 204 S. W. 430.

In a criminal prosecution, where there was evidence that defendant was under the influence of intoxicating liquors, it was error to refuse to instruct following the statute that, while intoxication or temporary insanity therefrom would not excuse the offense, it should be considered in mitigation of penalty. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

**Art. 44. [44] Duress, a defense, when.**

**Power of control over accused.**—The behest of an employer furnishes no excuse for the commission of an offense. *Cassl v. State*, 86 Cr. R. 369, 216 S. W. 1099.

**Art. 45. [45] Accidents excused, when.**

**Intent.**—In a prosecution under art. §20aa, as amended, against the president and general manager of a corporation, based on the operation by the corporation of a motor car on which the seal assigned by the highway department was not displayed, it is a defense that defendant procured a seal for such car, as he did for all the others, and gave orders for its attachment, which orders were not carried out, through a change in the personnel of the corporation's servants, and that defendant was ignorant that the car was operated without a seal. *Axtell v. State*, 86 Cr. R. 264, 216 S. W. 394.

Where defendant fired a shot at one person, with malice, intending to kill him, the fact that it wounded another, whom he did not intend to kill, would not excuse him from liability for assault with intent to murder. *Jones v. State* (Cr. App.) 231 S. W. 122.

**Art. 46. [46] No mistake of law excuses.**

See *Pettit v. State*, 28 Tex. App. 240, 14 S. W. 127.  
Cited, *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206; *Busby v. State* (Cr. App.) 230 S. W. 419.

**Art. 47. [47] Mistake of fact, excuse, when.**

**Mistake of fact.**—Defendant is not guilty of a violation of a pure food law (arts. 698-716) simply because sulphite is found in sausage meat sold by him; it being necessary that the sulphite be added willfully and knowingly, in view of arts. 46, 47, 704, 710, 711, and 715. *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

In prosecution for aggravated assault, sole ground of aggravation charged being that injured party was a female, accused should be afforded the benefit of the law as applied in criminal cases of an honest mistake of fact if the prosecuting witness was wearing the apparel of a man and presented the appearance of one, and accused was misled into the belief that she was a man, without fault or want of care upon his part, since such mistake would have mitigated the offense. *Vyoral v. State* (Cr. App.) 224 S. W. 889.

In a prosecution for bigamy where appellant claimed and testified that at the time of the second marriage he believed that a decree of divorce had been entered dissolving the former marriage, court erred in excluding under the hearsay rule testimony of defendant's sister that she had related to defendant that she had had a conversation with a lawyer whom defendant had employed to bring suit for divorce, and that such lawyer had told her that the divorce had been granted, being original testimony going to show the information upon which defendant acted in entering into the second marriage. *Busby v. State* (Cr. App.) 230 S. W. 419.

**Art. 51. [51] Intention presumed.**

See *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.  
Cited, *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963.

**Instructions.**—In a prosecution for manslaughter, instruction that if defendant struck and killed deceased, but without intention to kill, and defendant had not provoked the difficulty, or by his own wrongful acts had not produced the necessity of taking decedent's life, etc., then he was not guilty of a higher offense than that of an aggravated assault, held erroneous as shifting the burden of proof and requiring the jury to find beyond a reasonable doubt that defendant struck and killed deceased, and also that in making the assault he was not justified. *Mason v. State* (Cr. App.) 228 S. W. 952.

**Art. 52. [52] Burden of proof on defendant, when.**

**2. Burden of proof on defendant and charge of court thereon.**—In a murder prosecution, where the state, over defendant's objection, introduced evidence that the cause of the killing was insulting conduct towards defendant's wife, thus assuming the burden of reducing the offense to manslaughter, a judgment of conviction should be reversed. (Per Davidson, P. J.) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

To bring unlawful homicide within the grade of manslaughter as against that of murder, the burden is not on accused to prove the mitigating circumstances, but he is entitled to have the offense mitigated to the grade of manslaughter, if there is evidence producing in the minds of the jury a reasonable doubt as to which of the grades of the offense he should be convicted of. *Moore v. State* (Cr. App.) 228 S. W. 218.

In a prosecution for statutory rape upon a female between the ages of 15 and 18 under art. 1063, where the defense was previous unchaste character, accused had the burden of showing her unchaste character, not by reputation, but by specific acts. *Norman v. State* (Cr. App.) 230 S. W. 991.

**10. — Bigamy.**—In a prosecution for bigamy, where defendant asserted that on the morning of the day when the marriage took place he was rendered unconscious by partaking of some kind of liquid, and knew nothing of the marriage, the burden of establishing such defense was on him. *Burgess v. State* (Cr. App.) 225 S. W. 182.

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## TITLE 2

### OF OFFENSES AND PUNISHMENTS

#### CHAPTER ONE

#### DEFINITION AND DIVISION OF OFFENSES

Art.

53. "Offense" defined.

55. Felonies and misdemeanors defined.

Art.

56. Felonies subdivided.

**Article 53. [53] "Offense" defined.**

**What constitutes "offense."**—Custom for superintendent of schools of city to chastise pupils existed in violation of principles of civil law and of provision of Criminal Code denouncing use of unlawful violence upon another's person, and custom was not defense to superintendent when sued for assault by pupil whom he chastised. *Prendergast v. Masterson* (Civ. App.) 196 S. W. 246.

Charging a number of distinct felonies in one count of an indictment violates the right of accused under Bill of Rights, § 10, to demand the nature and cause of the accusation against him, since an offense is but one act or omission forbidden by positive law under this article, so that the defect is not a matter of form, but of substance, and warrants a reversal, notwithstanding Code Cr. Proc. 1916, art. 476. *Todd v. State* (Cr. App.) 229 S. W. 515.

**Art. 55. [55] Felonies and misdemeanors defined.**

Cited, *Thompson v. State*, 24 Tex. App. 383, 6 S. W. 296; *Cooper Grocery Co. v. Neblett* (Civ. App.) 203 S. W. 365.

**Theft.**—See *Clark v. State*, 26 Tex. App. 486, 9 S. W. 767.

**Art. 56. [56] Felonies subdivided.**

See *Kerley v. State* (Cr. App.) 230 S. W. 163.

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**TITLE 3**

**OF PRINCIPALS, ACCOMPLICES AND ACCESSORIES**

Chap.

1. Principals.
2. Accomplices.

Chap.

3. Accessories.
4. Trial of accomplices and accessories.

**CHAPTER ONE**

**PRINCIPALS**

Art.

74. Who are principals.
75. Same.
76. Same.

Art.

77. Same.
78. Same.

**Article 74. [74] Who are principals.**

**1. Acting with others and presence at commission of crime in general.**—Mere presence of an accused when an offense is committed will not make him guilty, since there must be some character of guilty connivance or participation. *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749; *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

Principal not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him, in connection with the plan and furtherance of the common purpose, whether he is present where the main fact is to be accomplished or not. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

The mere fact that a conspiracy is shown does not make all parties to the conspiracy principals, whether they were present or not when the offense was committed. *Id.*

When the offense is committed by the perpetration of different parts, which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense to render them liable as principals. *Id.*

Parties engaged in conspiracy to commit crime performing different acts in furtherance thereof are "principals" under the statute, whether present bodily at the place of the offense or not. *Id.*

One may be a principal who is not bodily present when the offense is committed. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

During continuance of conspiracy the acts of each conspirator in furtherance of the common design are the acts of all, and each would be a principal in any crime committed in the execution of such design. *Id.*

Where person who did not actually commit crime was prosecuted as a principal, the evidence must show that at the time of the commission of the offense the parties must have been acting together, each doing some part in the execution of the common purpose. *Id.*

All persons are principals who are guilty of acting together in the commission of an offense where act was done in pursuance of a common intent, whether all were actually bodily present on the ground when the offense was actually committed or not. *Id.*

Where two families engaged in a gun fight, and the son of accused fired the shot

which killed deceased, accused was not chargeable with the killing, unless he and his son were acting together as principals. *Rasberry v. State* (Cr. App.) 224 S. W. 1093.

To bigamy, as to all other offenses, applies the law of principal and accessory, and one knowingly aiding and abetting, even as a party, is a principal; so a woman who knowingly married a married man is a principal. *Burgess v. State* (Cr. App.) 225 S. W. 182.

Where act of killing deputy sheriff was one of the reasonable consequences of an attempted jail delivery, one taking part therein was guilty of murder, though there was no evidence of an express agreement to take the life of the deputy. *Israel v. State* (Cr. App.) 230 S. W. 984.

**2. Act and Intent.**—Defendant, owner of hog which died otherwise than by slaughter, and person who sold meat for him, being coconspirators in so doing, act of one within scope and duration of conspiracy was binding on other, so whether defendant's agent was innocent or guilty through lack of or possession of knowledge of way hog died, his act in selling meat was one in which defendant was guilty. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

**3. Distinguished from accomplice.**—If calf was stolen when accused was not bodily present, but pursuant to conspiracy in which he performed a part in furtherance of common design, accused would be liable as principal under this article, and not as accomplice under article 79. *Simpson v. State*, 81 Cr. R. 389, 196 S. W. 835.

**4. Knowledge and concealment of crime.**—That defendant's alleged coconspirator may have placed poison in the food of deceased, husband of defendant, and that she knew in advance that coconspirator was going to do it, did not make her a principal, where she did not prepare the poison, or place it in the food of deceased, and was not present at the time of the homicide. *Roebuck v. State*, 85 Cr. R. 524, 213 S. W. 656.

There are six ways in which a party may be a principal, in only two of which it is necessary that he be actually present, and where A. actually commits the offense, but B. keeps watch so as to prevent the interruption of A., or where A. actually commits the offense but B. at the time of such commission is endeavoring to secure the safety or concealment of A., or A. and B., B.'s presence at the scene of commission of crime is unnecessary. *Smith v. State* (Cr. App.) 230 S. W. 410.

**6. Misdemeanors in general.**—Defendant, having induced another to make assault, is guilty of assault; distinction between principal and accomplice not being recognized in misdemeanors. *Latham v. State*, 81 Cr. R. 566, 196 S. W. 839.

As a general rule, all guilty participants in misdemeanor are principals. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

**7. Specific crimes—Abortion.**—One who has been unduly intimate with a female, and arranges with a physician for an abortion, and takes the female to the physician, is guilty as a principal, although not actually present on occasion of premature birth; what was done being result of conspiracy. *Hammett v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

**8. — Assault.**—Defendant, having induced another to make assault, is guilty of assault; distinction between principal and accomplice not being recognized in misdemeanors. *Latham v. State*, 81 Cr. R. 566, 196 S. W. 839.

In the case of a misdemeanor, as a single assault, all parties are regarded as principals. *Lewis v. State*, 86 Cr. R. 6, 215 S. W. 303.

**9. — Assault with intent to murder.**—If, after accused cut prosecutor, accused's brother shot prosecutor to defend accused from apparent attack by prosecutor, brother not knowing of original difficulty and finding accused and prosecutor in controversy, accused would be responsible as principal only for cutting, and not for shooting. *Soria v. State*, 83 Cr. R. 343, 203 S. W. 57.

**13. — Burglary.**—Act of receiving stolen property some hours after it was taken from house with knowledge that it was stolen would not make recipient principal in burglary, although he could be prosecuted for receiving fruits of crime. *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853.

If defendant, in connection with another, committed a burglary, he was guilty equally with other. *Bega v. State*, 81 Cr. R. 635, 197 S. W. 1109.

One present, aiding and encouraging others to go into house to commit burglary, is principal, although he does not go into house. *Coleman v. State*, 83 Cr. R. 86, 200 S. W. 1087.

The mere presence of defendant at the scene of a burglary would not make him guilty as a principal. *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

**17. — Homicide.**—Defendant held not responsible for death of decedent, stabbed by defendant's father or by his brother, acting independently of defendant. *Wallace v. State*, 82 Cr. R. 588, 200 S. W. 407.

If an accused did not enter into a conspiracy to kill, and did not take part in the homicide, or did not, knowing the unlawful purpose of his companions, aid or encourage them in the commission of the act, he would not have been guilty of the crime, though he was present, but if he was a party to such conspiracy, or, knowing the unlawful purpose of his companions, aided or encouraged them in their unlawful act, he might be guilty, though he was not at the scene of the killing. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

Where defendant, who was present when his son killed deceased, was charged with murder an instruction that if defendant and his son had entered into an agreement to kill deceased and agreed to act together in so doing and had previously formed a design in which the minds of the two united and concurred in the common intent to take the life of deceased, and in pursuance of said common intent of both defendant, acting in

conjunction with his son, took the life of deceased, then he was guilty of murder, is not erroneous. *Henderson v. State* (Cr. App.) 229 S. W. 535.

One who knowingly engages in common with another in an unlawful enterprise having for its purpose the death or serious bodily injury of another is guilty of such crime whether it is intended that his own hand or that of another shall strike the fatal blow, and hence an instruction that defendant could not be convicted unless he intended to take the life of deceased or inflict upon him serious bodily injury was properly refused. *Monday v. State* (Cr. App.) 232 S. W. 531.

18½. — **Rape.**—Where accused held the victim while another raped her, accused was guilty of rape, under the law of principals, unless insane. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

20. — **Theft.**—Defendant was not guilty of hog theft as principal even if he knew it was another's hog which he was asked to haul from place of killing to his house. *Williams v. State*, 82 Cr. R. 215, 199 S. W. 296.

Defendant, who agreed to purchase from cattle thieves cattle to be stolen by them, and who encouraged the theft and furnished arms and a wagon to aid in its perpetration, but who was not present at the commission of the crime and committed no act in furtherance thereof, was not a principal, but merely an accomplice. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

To hold defendant guilty as principal in prosecution for theft of mules, it must appear that he was one of the individuals who took the mules or at the time of taking was doing something in aid of those who did the taking. *Benavides v. State*, 85 Cr. R. 375, 212 S. W. 658.

21. — **Violations of local option and prohibition laws.**—A conviction for the unlawful selling of intoxicating liquors cannot be had under the Dean Law, in view of section 31 thereof (art. 588¼o), making purchase unlawful, and section 40 (art. 588¼ss), which seeks to compel offenders to testify, and of arts. 74–83, defining principals, accomplices, and accessories, where the witness purchasing the liquor was not corroborated as required by Code Cr. Proc. 1911, art. 301. *Franklin v. State* (Cr. App.) 227 S. W. 486.

Where the prosecuting witness and another, discovering that defendant was not at home, found him in another place, and defendant, in response to an inquiry as to where the prosecuting witness could procure whisky, stated that he had a cotton picker who could furnish liquor, etc., but defendant was not present at the sale, he is not guilty as a principal, for he was not present, he did not keep watch, he did not assist in the unlawful act, he did not endeavor to secure the safety or concealment of the sellers, he did not employ an innocent agent, and he did not advise or agree to the commission of the offense. *Chandler v. State* (Cr. App.) 231 S. W. 105.

23. **Indictment, proof and variance.**—To convict one of rape under law of principals, the indictment need not allege the acts making accused a principal, but may directly charge the crime of rape. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

A principal offender, by reason of the part performed by him in the commission of an offense, may be convicted under an indictment charging him directly with its commission. *Jones v. State* (Cr. App.) 231 S. W. 122.

Defendant charged as a principal with automobile theft could not be convicted as an accomplice. *Seebold v. State* (Cr. App.) 232 S. W. 328.

24. **Evidence.**—Deceased having been engaged in difficulty with defendant's father and brother, evidence held not to authorize submission of law of principals. *Wallace v. State*, 82 Cr. R. 588, 200 S. W. 407.

Evidence held sufficient to show that defendant and his accomplice actually stole car, and that defendant was a principal with his accomplice, even if latter himself personally did the stealing. *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771.

In prosecution for hog theft, evidence held to connect accused with offense as principal so that it was not error to fail to instruct as to distinction between accomplices and principals. *Wilson v. State*, 83 Cr. R. 593, 204 S. W. 321.

Evidence held sufficient to support conviction of murder under the law of principals. *Davis v. State*, 85 Cr. R. 163, 211 S. W. 589.

In prosecution for murder, facts held to show a conspiracy between defendant and person who did killing. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

26. **Instructions.**—Evidence warranting instructions, see notes under Code Cr. Proc. art. 735.

An instruction on principals that: "If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed or not"—was properly given. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

There was no error in telling jury that accused, who was indicted alone for negligent homicide but who was accompanied by another person who seemed to be acting with him, would be guilty, if he or his companion, acting together, committed the offense. *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

In a prosecution for murder, instruction applying the doctrine of principals held too broad as covering the entire domain of principals, not merely those parts directly applicable to the facts of the case. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241.

Where person who did not actually commit crime was prosecuted as a principal, the evidence must show, and the charge of the trial court submit, that at the time of the commission of the offense the parties must have been acting together, each doing some part in the execution of the common purpose. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

The court should follow the statutory law in instructing on principals. *White v. State* (Cr. App.) 225 S. W. 511.

#### Art. 75. [75] Same.

See *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014; *Franklin v. State* (Cr. App.) 227 S. W. 486.

Cited, *Watson v. State*, 21 Tex. App. 598, 17 S. W. 550.

**Giving encouragement.**—One present, aiding and encouraging others to go into house to commit burglary, is principal, although he does not go into house. *Coleman v. State*, 83 Cr. R. 86, 200 S. W. 1087.

A person acting with another in the taking of an automobile for the purpose of converting it into money was guilty of theft, although the automobile was actually taken by such other person. *Smith v. State* (Cr. App.) 227 S. W. 1105.

In a prosecution for receiving stolen goods and for larceny, on theory of conspiracy, held, that defendant who encouraged another to steal automobiles, agreeing to buy the stolen cars at a certain price, the thief having no further interest in either car or proceeds, was not a principal to the theft. *Kolb v. State* (Cr. App.) 228 S. W. 210.

**Instructions.**—An instruction that, if F. or B. unlawfully, etc., shot and killed deceased, and if defendant was present and participated in the homicide, or, knowing the unlawful intention of F. and B. and of each or either to shoot and kill deceased, encouraged them by words or acts in the commission of the offense, and was a principal with them in its commission, he was guilty, was not erroneous as not clearly or sufficiently stating the grounds upon which he might be convicted as a principal. *Monday v. State* (Cr. App.) 232 S. W. 831.

An instruction that one who is present at the time and place an offense is actually committed, and, knowing the unlawful intent and purpose of the person committing the offense, either participates in the commission or encourages the person engaged in it knowing his unlawful purpose and intent, by words, signs, deeds, or acts, is a principal, and alike guilty with the one committing the offense, though not in the exact language of this article, sufficiently states the principle embraced therein, and is not erroneous. *Id.*

#### Art. 76. [76] Same.

See *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046; *Franklin v. State* (Cr. App.) 227 S. W. 486.

**Theft.**—A person who was four miles distant at the time when certain other persons stole a number of hogs, and who did not assist in the theft, and was not endeavoring to secure the safety or concealment of the offenders, is not a principal, though he made preparations to slaughter and pack the hogs, and assisted in so doing when they were brought to his house. *Per Hurt, J., dissenting. Watson v. State*, 21 Tex. App. 598, 17 S. W. 550.

#### Art. 77. [77] Same.

See *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046; *Franklin v. State* (Cr. App.) 227 S. W. 486.

**Employing person not punishable.**—In a prosecution for forgery consisting of writing in a check a larger amount than authorized by its maker, the fact that the defendant used an innocent agent to fill out the fraudulent check which defendant indorsed did not release defendant. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

#### Art. 78. [78] Same.

See *Walker v. Kellar* (Civ. App.) 226 S. W. 796; *Franklin v. State* (Cr. App.) 227 S. W. 486.

Cited, *Watson v. State*, 21 Tex. App. 598, 17 S. W. 550.

**Procuring or assisting.**—One who purposely removes a possible or probable witness for the purpose of preventing the witnessing by such person of the proposed crime, and who is keeping such person away, is a principal within this article. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

One who procured another to commit murder and was present at the time of the killing was a principal. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

**Instructions.**—An instruction that, if F. or B. unlawfully, etc., shot and killed deceased, and if defendant was present and participated in the homicide, or, knowing the unlawful intention of F. and B. and of each or either to shoot and kill deceased, encouraged them by words or acts in the commission of the offense, and was a principal with them in its commission, he was guilty, was not erroneous as not clearly or sufficiently stating the grounds upon which he might be convicted as a principal. *Monday v. State* (Cr. App.) 232 S. W. 831.

## CHAPTER TWO

## ACCOMPLICES

## Article 79. [79] Accomplice, who is.

See *Parker v. State*, 24 Tex. App. 61, 5 S. W. 653; *West v. State*, 28 Tex. App. 1, 11 S. W. 635.

1. **Accomplice in general.**—An “accomplice,” is one who has completed his offense before the crime is actually committed, and whose liability attaches after its commission, by virtue of his previous acts in bringing it about through the agency of or in connection with third parties. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

A positive agreement to commit a felony constitutes a conspiracy, whether the felony is afterwards executed or not; but, where the party is charged as an accomplice, there must be a crime in pursuance to the agreement, and the accomplice must advise, commend, or agree to furnish means or aid in order to connect him with it. *Cone v. State*, 86 Cr. R. 291, 216 S. W. 190.

2. **Actual complicity between accomplice and principal necessary.**—To prove conspiracy to commit crime, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and pursued by common means, proof that they pursued the same objects performing different parts thereof so as to complete it with a view to the attainment of the same object being sufficient. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

7. **Accessory before the fact.**—If calf was stolen when accused was not bodily present, but pursuant to conspiracy in which he performed a part in furtherance of common design, accused would be liable as principal under art. 74, and not as accomplice under this article. *Simpson v. State*, 81 Cr. R. 389, 196 S. W. 835.

One having knowledge that principals intended to obtain money by conspiracy and false representation, who aided and encouraged it, adopted the acts of the principals which preceded his entry into the scheme. *Gerber v. State* (Cr. App.) 232 S. W. 334.

27. **Particular crimes—Theft.**—Defendant, who agreed to purchase from cattle thieves cattle to be stolen by them, and who encouraged the theft and furnished arms and a wagon to aid in its perpetration, but who was not present at the commission of the crime and committed no act in furtherance thereof, was not a principal, but merely an accomplice. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

That defendant previous to taking advised theft and gave information touching preparation for the offense would tend to show that he was not a principal, but an “accomplice,” defined, as one not present at the commission of the offense. *Benavides v. State*, 85 Cr. R. 375, 212 S. W. 653.

To convict defendant as an accomplice to theft of automobile charged to have been stolen by P., it is necessary to prove that P. was a principal, and that defendant advised and encouraged him to commit the theft, and that defendant was to receive the stolen automobile and pay therefor. *Cone v. State*, 86 Cr. R. 291, 216 S. W. 190.

28. **Violations of liquor laws.**—In a prosecution for possession of intoxicating liquor not for medicinal, mechanical, scientific, or sacramental purposes, a purchaser of liquor will, under the Dean Law, be deemed an “accomplice,” and a conviction cannot be had on his uncorroborated testimony, for the term “accomplice,” as used in *Vernon’s Ann. Code Cr. Proc. 1916*, art. 801, is used in a different sense from the term as used in *Pen. Code 1911*, art. 79, and includes any person connected with the crime by unlawful act or omission transpiring either before, at, or after the commission of the offense, and under such definition purchaser is an accomplice. *Chandler v. State* (Cr. App.) 231 S. W. 107.

33. **Evidence.**—Evidence in proof of a conspiracy to commit crime will generally, from the nature of the case, be circumstantial. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

35. **Instructions.**—In prosecution of defendant as an accomplice to theft of automobile, held, that jury should have been instructed that the state must prove first that P. was a principal and committed the theft. *Cone v. State*, 86 Cr. R. 291, 216 S. W. 190.

## CHAPTER THREE

## ACCESSORIES

## Article 86. [86] Who is an accessory.

**Particular crimes—Burglary or theft.**—One who merely hauls away for a thief the articles stolen is not an accessory. *Garcia v. State*, 81 Cr. R. 316, 195 S. W. 196.

CHAPTER FOUR

TRIAL OF ACCOMPLICES AND ACCESSORIES

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|---|---|
| <p>Art.<br/>89. Accomplice may be tried before principal.</p> | <p>Art.<br/>91. Can not be witnesses for each other, but may sever.</p> |
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**Article 89. [89] Accomplice may be tried before principal.**

**Evidence.**—Where defendant was indicted as an accomplice it is necessary to prove the guilt of the principal as a part of case against defendant. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

**Art. 91. [91] Can not be witnesses for each other, but may sever.**

**Witnesses.**—One indicted as principal with defendant for same crime was not available to him as witness, under Code Cr. Proc. art. 791, or this article. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

Defendant, charged by information with unlawful assembly, codefendants being charged therewith by separate informations, having complied with Code Cr. Proc. art. 727, in making his application for severance, trial court was without discretion to overrule it without sufficient reasons, shown in record. *Ligon v. State*, 82 Cr. R. 147, 198 S. W. 787.

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TITLE 4

OF OFFENSES AGAINST THE STATE, ITS TERRITORY,  
PROPERTY AND REVENUE

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|---|---|
| <p>Chap.<br/>3. Misapplication of public money.<br/>4. Illegal contracts affecting the state.<br/>5. Collection of taxes and other public money.<br/>6. Occupation tax on soliciting orders in local option districts, cold storage and C. O. D. shipments.</p> | <p>Chap.<br/>7. Occupation tax on dealers in nonintoxicating malt liquors.<br/>9. Dealing in public land by officers.</p> |
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CHAPTER THREE

MISAPPLICATION OF PUBLIC MONEY

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|---|---|
| <p>Art.<br/>96. Officer fraudulently taking or misapplying public money.<br/>97. Using public funds.<br/>105. Misapplication of county or city funds.<br/>105b. Payment to teacher or superintendent who does not hold certificate.</p> | <p>Art.<br/>107. Officer failing to pay over public money.<br/>108. Venue.<br/>115. Amounts allowed officers may be retained, etc.<br/>118. Penalty for violating three preceding articles.</p> |
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**Article 96. [96] Officer fraudulently taking or misapplying public money.**

**Repeal.**—Arts. 96, 97, were not repealed by Civ. St. arts. 2431, 2434, and in view of arts. 3837, 3838, 3840, the failure of the secretary of state to pay public moneys coming into his hands officially into state treasury within a certain time is an offense. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

LOCAL SEAWALL ACTS

Acts 1920, 36th Leg. 3d C. S., chs. 22, 23, 24, and 25, granting to the cities of Aransas Pass, Rockport, Port Lavaca, and Freeport, respectively, state aid, by way of relinquishment of state taxes, to aid in the construction of seawalls, etc. Each one of these acts imposes a criminal penalty for misapplication of the fund donated to the cities, and provides for punishment as provided by article 96 of the Penal Code.

**Art. 97. [97] Using public funds.**

**Repeal.**—Arts. 96, 97, were not repealed by Civ. St. arts. 2431, 2434, and in view of arts. 3837, 3838, 3840, the failure of the secretary of state to pay public moneys coming



into his hands officially into state treasury within a certain time is an offense. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

**Art. 105. [103] Misapplication of county or city funds.**

Cited, *Lewis v. State*, 28 Tex. App. 140, 12 S. W. 736.

**County officers.**—A justice of the peace is a county officer within the purview of this article. *Crump v. State*, 23 Tex. App. 615, 5 S. W. 182.

**Indictment.**—Indictment conforming substantially to No. 25 of Willson's Criminal Forms is sufficient to charge against a county officer the offense of misapplying the public money. *Crump v. State*, 23 Tex. App. 615, 5 S. W. 182.

**Art. 105b. Payment to teacher or superintendent who does not hold valid certificate.**— \* \* \* And any person responsible for paying from public school funds, any such teacher or superintendent [art. 2798, Civil Statutes, ante], shall be deemed guilty of a misdemeanor and shall upon conviction be fined, for each offense, in any sum of not less than one hundred dollars and not more than five hundred dollars. [Acts 1920, 36th Leg. 3d C. S., ch. 61, § 1 (§ 123).]

**Art. 107. Officer failing to pay over public money.**

Cited, *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

**Art. 108. Venue.**

Cited, *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

**Art. 115. Amounts allowed officers may be retained, etc.**

Cited, *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

**Art. 118. Penalty for violating three preceding articles.**

Cited, *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

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## CHAPTER FOUR

### OF ILLEGAL CONTRACTS AFFECTING THE STATE

**Article 122b. Supervisor, etc., of conservation districts interested in contracts; punishment.**—No supervisor, engineer or any employee of any district created under this Act shall be interested directly or indirectly, either for themselves or as agents for anyone else, in any contract for the purchase of any material required, or for the construction of any work by said district, and if any such person shall directly or indirectly become interested in any such purchase or contract, he shall be guilty of a misdemeanor and on conviction thereof, shall be punished by a fine in any sum not to exceed one thousand (\$1000.00) Dollars or by confinement in the county jail for not less than six months nor more than one year, or by both such fine and imprisonment, and shall be removed from office, and disqualified for further service. [Acts 1919, 36th Leg. 2d C. S., ch. 48, § 85.]

Took effect July 28, 1919.

For the remainder of this act, see ante, Civ. St. arts. 5107—180 to 5107—266.

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## CHAPTER FIVE

### COLLECTION OF TAXES AND OTHER PUBLIC MONEY

Art.

133. Payment of tax bars prosecution.  
140. Failure to collect occupation taxes.

Art.

148a. Persons or corporations liable to gross receipts tax engaging in business without obtaining permit.

**Article 133. [114] Payment of tax bars prosecution.**

See *Curry v. State*, 28 Tex. App. 477, 13 S. W. 773.

**Art. 140. [117] Failure to collect occupation taxes.**

Cited, *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Art. 148a. Persons or corporations liable to gross receipts tax engaging in business without obtaining permit.**—Any person, company, firm, partnership, corporation, unincorporated company or association, transacting business in this State upon which a gross receipts tax is required by law to be paid, without having first obtained a permit to do so, or transacting such business after its permit so to do has been suspended, as provided in this Act, shall be liable to a penalty of not less than \$50.00 nor more than \$500.00 daily for each day's business which is transacted in violation of this Act. And in addition, every person, whether as an individual or the member of a company, firm, partnership, or unincorporated company or association, or as an officer, agent, director or employé of a corporation, who wilfully and knowingly violates or aids another, whether such other person be a corporation or a natural person, in the violation of any of the terms of this Act shall be guilty of a misdemeanor, and upon conviction shall be punished by fine of not less than \$50.00 nor more than \$250.00 for each day or part of a day that such person is engaged in violating this Act; and each day shall be a separate offense. It shall be the duty of the Attorney General to bring suits for all penalties authorized by this Act, and he may bring such suits in any court having venue and jurisdiction of the subject matter and of the person of the offender; and the courts of Travis County shall have concurrent jurisdiction over all violations of this Act. and for such purpose jurisdiction and venue is conferred upon all the courts of Travis County having jurisdiction under the Constitution over the subject matter of this Act. [Acts 1918, 35th Leg. 4th C. S., ch. 84. § 4.]

For remainder of this act see ante, Civ. St., arts. 7392a-7392d.

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## CHAPTER SIX

### OCCUPATION TAX ON SOLICITING ORDERS IN LOCAL OPTION DISTRICTS, COLD STORAGE, AND C. O. D. SHIPMENT OFFICES

#### Articles 150-156. [Superseded.]

**Explanatory.**—These articles, imposing an occupation tax on the solicitation of orders in local option districts, and on cold storage and C. O. D. shipment offices, have been rendered inoperative by the amendment of art. 16, § 20, of the State Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, post. arts. 588¼-588½tt.

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## CHAPTER SEVEN

### OCCUPATION TAX ON DEALERS IN NON-INTOXICATING MALT LIQUORS

<p>Art. 157. Persons selling non-intoxicating malt liquors as a beverage.</p>	<p>Art. 158. To file application for license and pay collector the tax. 160. Providing penalty for violation.</p>
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**Article 157. Persons selling non-intoxicating malt liquors as a beverage.**

**Validity.**—This article though intended to aid enforcement of laws against sale of intoxicating liquors, is not void under Const. art. 16, § 20, nor under Const. art. 8, § 2, because Acts 31st Leg. (1st Called Sess.) c. 17, imposes different tax on business of selling intoxicating malt liquors. *Claunch v. State*, 82 Cr. R. 355, 199 S. W. 483.

The Legislature has power to prohibit, as a police regulation, sale of nonintoxicating malt liquors in territory where prohibition is in force. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Repeal.**—Art. 496, defining as a disorderly house a place in prohibition territory where nonintoxicating malt liquors are sold, is in direct conflict with and repeals arts. 157, 158, 160, levying an annual occupation tax on such business in prohibition territory, and no conviction can be had for failure to acquire the license. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Construction in general.**—Nonintoxicating malt liquor is a fermented malt liquor, containing alcohol in quantities insufficient to produce intoxication when used as a beverage. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Evidence.**—In prosecution for engaging in business of selling nonintoxicating malt liquors without payment of tax, evidence held insufficient to sustain conviction. *Cheves v. State*, 81 Cr. R. 613, 197 S. W. 716.

**Art. 158. To file application for license and pay collector the tax.**

See *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Art. 160. Providing penalty for violation.**

See *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

## CHAPTER NINE

### DEALING IN PUBLIC LANDS BY OFFICERS

**Article 164. [123] Officers not to deal in public lands.**

**What constitutes "public lands."**—The term "public lands," as used in this article, is not restricted to unappropriated public domain, but includes school lands. *Cotulla v. Laxson*, 60 Tex. 443.

**County surveyors.**—A contract by a county surveyor, whereby he was to receive a greater compensation for his work than the law allowed, is void. *Keith v. Fountain*, 3 Civ. App. 391, 22 S. W. 191.

"Public land," is not limited to the unappropriated public domain, but includes school lands, and, as the issuance of a certificate of occupancy does not completely divest the state of its title, the county surveyor is incompetent to acquire the right or interest of an occupant who has not received a certificate but a patent. *De Shazo v. Eubank* (Com. App.) 222 S. W. 976, reversing judgment (Civ. App.) 191 S. W. 369.

## TITLE 4 A

### OF OFFENSES AGAINST THE UNITED STATES

Art.	Art.
173½. Disloyal or abusive language.	173½j. Transportation of women for unlawful sexual intercourse with members of military or naval forces of United States, etc.
173½a. Same.	173½k. Transportation of women accompanied by members of military or naval forces of United States for purpose of unlawful sexual intercourse.
173½b. Mutilation, defacing, etc., flag of United States.	173½l. Owner, etc., of house permitting unlawful sexual intercourse with members of military or naval forces of United States.
173½c. Display of enemy flag, etc.	173½m. Transportation of members of military or naval forces of United States, etc., to houses of prostitution, etc.
173½d. Arrests.	173½n. Punishment.
173½e. Venue of offenses.	173½o. Definitions.
173½f. Reports of violations of act.	
173½g. Soliciting sexual intercourse with members of military or naval forces of United States, etc.	
173½h. Sexual intercourse by women with venereal diseases with members of military or naval forces of United States.	
173½i. Transportation of members of military or naval forces of United States, etc., for purposes of unlawful sexual intercourse.	

**Article 173½.** **Disloyal or abusive language.**—If any person shall, at any time or place within this State, during the time the United States of America is at war with any other nation, use any language in the presence and hearing of another person, of and concerning the United States of America, the entry, or the continuance, of the United States of America in the war or of and concerning the army, navy, or marine corps of the United States of America, or of and concerning any flag, standard, color, or ensign of the United States of America, or any imitation thereof, or the uniform of any officer of the army of the United States of America, which language is disloyal to the United States of America, or abusive in character, and calculated to bring into disrepute the United States of America, the entry, or continuance, of the United States of America in the war, the army, navy, marine corps of the United States of America, or any flag, standard, color, or ensign of the United States of America, or any imitation thereof, or the flag, color, standard, or ensign, or the uniform of any officer of the army of the United States of America, or is of such nature as to be reasonably calculated to provoke a breach of the peace, if said in the presence and hearing of a citizen of the United States of America, shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years. [Acts 1918, 35th Leg. 4th C. S., ch. 8, § 1.]

Took effect March 11, 1918.

**Validity.**—The prohibition of the use of disloyal language per se as a war measure is a subject of federal legislation, and not within the purview of the regulatory power of the state, and the Disloyalty Act infringes upon the exclusive domain of federal legislation, in that the gravamen of the offense is the use of disloyal language, and not breach of the peace. Ex parte Meckel, 87 Cr. R. 120, 220 S. W. 81.

The Disloyalty Act, prohibiting the use of disloyal talk of such nature as to be reasonably calculated to provoke a breach of the peace while the government is at war, is violative of Bill of Rights, § 8, relating to free speech, freedom of the press, etc. Id.

A state has the power to pass laws making it a felony to utter disloyal statements in the presence of an American citizen while the country is at war which may cause a breach of the peace. Id.

The disloyalty Act is invalid. Schellenger v. State, 87 Cr. R. 411, 222 S. W. 246.

**What constitutes offense.**—To constitute an offense under this act, the language complained of must be both disloyal and calculated to provoke breach of the peace, and must have been said in the hearing of a citizen of the United States. Ex parte Acker, 85 Cr. R. 364, 212 S. W. 500.

**Indictment.**—The word "or" in this article, was intended to be and should be read "and," and each element of the offense must be charged conjunctively. Fromme v. State, 85 Cr. R. 336, 212 S. W. 501.

**Review.**—Where appeal from a conviction under this act, came up without any bills of exceptions or statement of facts in the record, and motion for new trial only questioned the sufficiency of the evidence to support verdict, and court, on examination, finds that indictment appears to follow language of statute, and that language imputed to defendant, if uttered, violated the law, the conviction would be affirmed. Meyer v. State, 85 Cr. R. 168, 212 S. W. 504.

**Discharge on habeas corpus.**—In habeas corpus proceedings for discharge of prisoner charged with violation of Disloyalty Act, court will not discharge prisoner, though complaint does not set out the language used, or show wherein it was calculated to provoke a breach of the peace, and does not allege that it was used in the presence and hearing of a United States citizen, since under Vernon's Code Cr. Proc. art. 206, the prisoner will not be discharged where there is probable cause to believe an offense has been committed. Ex parte Acker, 85 Cr. R. 364, 212 S. W. 500.

**Art. 173½a. Same.**—Any person who shall at any time and place within this State, during the time the United States is at war with any other nation, or nations, commit to writing or printing, or both writing and printing, by letters, words, signs, figures, or any other manner, and in any language, anything of and concerning the United States, the entry or continuance of the United States in the war, or of and concerning the army, navy, or marine corps of the United States, any flag, standard, color, or ensign of the United States, or any imitation thereof, or uniform of any of its officers, which is abusive in character, or disloyal to the United States, and reasonably calculated to bring into

disrepute the United States, the entry, or continuance of the United States in the war, the army, navy, or marine corps of the United States, any flag, standard, color, or ensign of the United States, or that of any of its officers, and reasonably calculated to provoke a breach of peace if written to or in the presence of a citizen of the United States, or if said in the presence and hearing of any citizen of the United States shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years. [Id., § 2.]

**Art. 173½b. Mutilation, defacing, etc., flag of United States.**—Any person who shall, within this State, publicly or privately, mutilate, deface, defile, defy, tramp upon, or cast contempt upon, either by words or acts, any flag, standard, color, or ensign of the United States, or that of any of its officers, or on any imitation of either of them, shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years. [Id., § 3.]

**Art. 173½c. Display of enemy flag, etc.**—Any person who, during the existence of the war between the United States and any other nation, or nations, shall knowingly, within this State, display, or have in his possession for any purpose whatsoever, any flag, standard, color, or ensign, or coat of arms of any nation with which the United States is at war, or any imitation thereof, or that of any State, subdivision, city, or municipality of any such nation, shall be deemed guilty of a felony, and shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than twenty-five years. [Id., § 4.]

**Art. 173½d. Arrests.**—Any officer may, without warrant, arrest anyone violating any section of this Act, when the offense is committed in his presence, or within his view, or within the view of a magistrate. Any officer about to make such arrest shall be authorized to require any person violating any provisions of this Act to at once desist from such violation. [Id., § 5.]

**Art. 173½e. Venue of offenses.**—Indictments and prosecutions for violations of the provisions of this Act may be had in any county where the offense is committed, or in Travis County, the State of Texas; and for such purpose venues and jurisdiction is conferred upon the district courts of the counties of the State where such offenses are committed, and on the District Court of Travis County; provided, that the Suspended Sentence Laws of this State shall not apply in convictions had under this Act. [Id., § 6.]

**Art. 173½f. Reports of violations of act.**—It shall be the duty of any person who shall hear, see, or know of any person violating any of the provisions of this Act, to immediately report the same to some officer authorized to make arrests in such cases; and it shall be the duty of said officer to forthwith cause the arrest of such person, or persons, against whom such charge has been filed, and to immediately carry him before some officer whose duty it shall be to thoroughly investigate the charges, and to make such orders, and to enter such judgments, as to such person, as the law may direct. [Id., § 7.]

**Art. 173½g. Soliciting sexual intercourse with members of military or naval forces of United States, etc.**—It shall be unlawful for any person to make an appointment for, or solicit any person engaged in the

service of the United States military or naval forces, or any of the military or naval forces of the Allies of the United States in the present war with Germany, to meet or come in contact with any woman, for the purpose of having unlawful sexual intercourse. [Acts 1918, 35th Leg. 4th C. S., ch. 16, § 1.]

Took effect March 20, 1918.

**Constitutionality of act.**—This act, entitled an act to prohibit soliciting soldiers and sailors to have intercourse with any "immoral woman," but prohibiting such solicitation for intercourse with "any woman," does not violate Const. art. 3, § 35, requiring a statute's subject to be expressed in its title. *Ex parte Wilson*, 85 Cr. R. 554, 213 S. W. 984.

The provision of this act that it shall not be subject to existing suspended sentence law (Vernon's Ann. Code Cr. Proc. 1916, art. 865b), does not violate Const. art. 3, § 36, prohibiting amendment of a statute by reference to its title, and requiring re-enactment at length. *Id.*

**Art. 173<sup>1</sup>/<sub>2</sub>h. Sexual intercourse by women with venereal diseases with members of military or naval forces of United States.**—It shall be unlawful for any woman knowing herself to be afflicted with a communicable venereal disease to have unlawful sexual intercourse with any person engaged in the service of the military or naval forces of the United States or any of the military or naval forces of the Allies of the United States in the present war with Germany. [*Id.*, § 1a.]

**Art. 173<sup>1</sup>/<sub>2</sub>i. Transportation of members of military or naval forces of United States, etc., for purposes of unlawful sexual intercourse.**—It shall further be unlawful for any person operating any vehicle for hire to knowingly transport any person engaged in the service of the military or naval forces of the United States or any of the military or naval forces of the Allies of the United States in the present war with Germany to any place for the purpose of unlawful sexual intercourse. [*Id.*, § 2.]

**Art. 173<sup>1</sup>/<sub>2</sub>j. Transportation of women for unlawful sexual intercourse with members of military or naval forces of United States, etc.**—It shall be unlawful for any person operating any vehicle for hire to knowingly transport any woman to meet any person in the service of the United States military or naval forces or any of the military or naval forces of the Allies of the United States in the present war with Germany for the purpose of unlawful sexual intercourse. [*Id.*, § 3.]

**Art. 173<sup>1</sup>/<sub>2</sub>k. Transportation of women accompanied by members of military or naval forces of United States for purpose of unlawful sexual intercourse.**—It shall be unlawful for any person operating any vehicle for hire to knowingly transport any woman accompanied by any person in the military or naval forces of the United States or any of the military or naval forces of the Allies of the United States in the present war with Germany to any place for the purpose of unlawful sexual intercourse. [*Id.*, § 4.]

**Art. 173<sup>1</sup>/<sub>2</sub>l. Owner, etc., of house permitting unlawful sexual intercourse with members of military or naval forces of United States.**—It shall be unlawful for the owner or keeper of any house to knowingly permit any person engaged in the service of the military or naval service of the United States, or any of the military or naval forces of the Allies of the United States in the present war with Germany, to meet or be with, in such house, any woman for the purpose of unlawful sexual intercourse. [*Id.*, § 4a.]

**Art. 173<sup>1</sup>/<sub>2</sub>m. Transportation of members of military or naval forces of United States, etc., to houses of prostitution, etc.**—It shall be unlaw-

ful for any person operating any vehicle for hire or accommodation to knowingly transport any person engaged in the service of the military or naval forces of the United States, or any of the military or naval forces of the Allies of the United States in the present war with Germany, to any place where lewd women live, reside or assemble for the purpose of carrying on their avocation. [Id., § 4b.]

**Art. 173½n. Punishment.**—Any person violating any of the provisions of this Act shall be deemed guilty of a felony and be punished therefor by confinement in the State penitentiary for a term of years not more than five. In prosecution for violations of this Act the accused shall not be permitted to make application for the suspended sentence and no one shall upon conviction for violation of this Act be entitled to any of the benefits of the suspended sentence Act. [Id., § 5.]

**Art. 173½o. Definitions.**—By the term “any person engaged in the service of the United States military or naval forces, or any of the military or naval forces of the Allies of the United States in the present war with Germany” is meant any person who is actually enlisted in either branch of said service, and which fact is known to the person who is charged with the violation of this Act, or any person who wears a uniform or insignia, which is required of him by the Government. [Id., § 6.]

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## TITLE 5

### OFFENSES AFFECTING THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL DEPARTMENTS OF THE GOVERNMENT

#### CHAPTER THREE

#### DRUNKENNESS IN OFFICE AND IN PUBLIC [OR PRIVATE] PLACE

**Article 204. [150] Drunkenness in public or private place; how punished.**

See *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443.

**Indictment, information and complaint.**—Written complaint, charging the offense of drunkenness in a public place, as substantially prescribed by this article, held sufficient. *Harper v. State*, 82 Cr. R. 149, 198 S. W. 786.

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## TITLE 6

### OF OFFENSES AFFECTING THE RIGHT OF SUFFRAGE

Chap.

1. Bribery and undue influence.
2. Offenses of persons, judges and other officers of elections.

Chap.

3. Riots and unlawful assemblies at elections, and violence used or menaced toward electors.
5. Primary elections.

#### CHAPTER ONE

#### BRIBERY AND UNDUE INFLUENCE

Art.

206. Bribery of any person to influence voter.
208. Election officer accepting a bribe.

Art.

211. Furnishing money for election purposes.

**Article 206. [152] Bribery of any person to influence voter.**See *Roby v. Carter*, 6 Civ. App. 295, 25 S. W. 725.**Art. 208. [154] Election officer accepting a bribe.**Cited *Ex Parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.**Art. 211. [156] Furnishing money for election purposes.**See *Roby v. Carter*, 6 Civ. App. 295, 25 S. W. 725.

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**CHAPTER TWO****OFFENSES BY PERSONS. JUDGES AND OTHER OFFICERS OF ELECTIONS**

Art.

221a. [Superseded.]

224. Poll tax receipts.

Art.

258. Judge of election assisting voter to prepare ballot.

**Art. 221a. [Superseded.]**

See art. 289a, post.

**Article 224. Poll tax receipts.**

**Duty to issue receipt.**—In view of *Vernon's Sayles' Civ. St. arts. 2942, 2944, 2949*, held that, where a poll is tendered in time, the collector has no discretion but to receive it and issue a receipt, though he is in doubt as to the right of the payer to vote, and, when the tax is paid in time, it is the duty of the collector to issue a receipt as of the date of payment, notwithstanding this article. *Parker v. Busby* (Civ. App.) 170 S. W. 1042.

**Art. 258. Judge of election assisting voter to prepare ballot.**—Any judge or other officer at an election who assists any voter to prepare his or her ballot, except when a voter is unable to prepare the same on account of blindness or some bodily infirmity such as renders him unable to write, or is over sixty years of age, or who shall aid such voter by using any other than the English language, or shall violate any of the provisions of Article 3003 [Civ. St.] as amended by this Act, shall be deemed guilty of a misdemeanor; and any judge or other officer of an election who, in assisting a voter so incapacitated, or over sixty years of age, in the preparation of his or her ballot, shall prepare the same otherwise than such voter shall direct in the English language, shall be deemed guilty of a misdemeanor. Any person convicted under this Article shall be punished by a fine of not less than \$200 and not more than \$500, or by confinement in the County jail for not less than two months and not more than twelve months, or both by such fine and imprisonment. [Acts 1905, p. 564; Acts 1918, 35th Leg. 4th C. S., ch. 30, § 2; Acts 1919, 36th Leg., ch. 55, § 2.]

Took effect March 13, 1919.

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**CHAPTER THREE****RIOTS AND UNLAWFUL ASSEMBLIES AT ELECTIONS, AND VIOLENCE USED OR MENACED TOWARD ELECTORS**

Art.

267. Tumults, mobs and disturbances at elections.

Art.

269. Carrying arms about elections.

**Article 267. [167] Tumults, mobs and disturbances at elections.**See *Cooper v. State*, 25 Tex. App. 530, 8 S. W. 654.**Art. 269. [169] Carrying arms about elections.**

**Construction in general.**—This article, and art. 477, do not define the same offense, so that defendant, convicted upon indictment of the offense defined herein, may not object that the two provisions fix different punishments for the same offense, and are therefore not enforceable. *Cooper v. State*, 25 Tex. App. 530, 8 S. W. 654.



## CHAPTER FIVE

### PRIMARY ELECTIONS

Art.	Art.
289a. Violation of absentee voting law.	295—3. Hiring, etc., persons to aid in campaigns unlawfully; punishment.
295—1. Purposes for which expenditures may be made; persons authorized to make expenditures; amounts of expenditures; punishment for violations of article.	295—4. Expenditures by candidate, campaign manager, etc., on behalf of another candidate; punishment.
295—2. Campaign contributions; persons who may make; limitation on amounts; personal expenditures; violations of article; punishment.	295—5. Violations of act; punishment.
	295—6. Records of receipts and expenditures; contents; affidavits to; false oaths, etc., punishment.

**Article 289a. Violation of absentee voting law.**—If any person wishing to vote as an absentee voter shall violate any of the provisions of this law [Art. 2939, Civil Statutes, ante], or shall vote or offer to vote illegally or in any case or at any place where he is not entitled to vote, or who shall make any false representation in any effort to be allowed to vote, or who shall attempt to vote on any poll tax receipt issued to any person other than himself, shall be deemed guilty of a violation of the law and upon conviction shall be punished by fine not more than One Thousand Dollars or by imprisonment in the county jail not more than two years or by both such fine and imprisonment: provided that the provisions of this Act providing for absentee voting or casting ballots with the county clerk shall apply to any and all primary elections only. [Acts 1917, 1st C. S. ch. 40, § 1; Acts 1920, 36th Leg. 4th C. S., ch. 6, § 4a; Acts 1921, 37th Leg., ch. 113, § 1, amending art. 2939, Rev. Civ. St. 1911, as amended.]

**Art. 295—1. Purposes for which expenditures may be made; persons authorized to make expenditures; amounts of expenditures; punishment for violations of article.**—No candidate for any nomination to be determined by primary election and no campaign manager for such candidate shall himself or by or through any other person or persons, or on behalf of any other person or persons, directly or indirectly, give, pay or expend any money or pay or give anything of value or promise to give, pay or expend any money or to pay or to give anything of value, or authorize any expenditure or assume any pecuniary liability in furthering or opposing the candidacy of any persons for any nomination to be determined by a primary election in this State, except for the following purposes only, to-wit:

1. For the traveling expenses of the candidate, or of his campaign manager or assistant campaign manager as defined by this Act or of a secretary for such candidate.
2. The payment of fees or charges for placing the name of the candidate upon the primary ballot, and for holding and making returns of the election.
3. The hire of clerks and stenographers and the cost of clerical and stenographic work and of addressing, preparing and mailing campaign literature.
4. Telegraph and telephone tolls, postage, freight and express charges.
5. Printing and stationery.
6. Procuring and formulating lists of voters.
7. Headquarters of office rent.
8. Newspaper and other advertising and publicity.
9. Renting of halls or providing places for public meetings and all

expenses of advertising and other expenses usually incident to holding such meetings.

No expenditure authorized by this Section may lawfully be made or authorized or liability therefor incurred by any person other than a candidate himself, or his lawfully designated campaign manager or assistant campaign manager, or by some clerk or other agent lawfully authorized, in writing, by a campaign manager or assistant campaign manager, provided that no campaign manager or assistant campaign manager shall have more than one person so authorized to act for him at the same time.

The expenditure of any money or the giving, paying or promising to give or pay any money or anything of value, directly or indirectly by any candidate for nomination or by any campaign manager or assistant campaign manager or any authorized clerk or other employé of such campaign manager or assistant campaign manager, in furthering or opposing the candidacy of any person for nomination in a primary election, except in the manner and for the purposes authorized by the provisions of this section is expressly prohibited, and the total amount expended and authorized for these purposes and for any and all purposes connected with furthering or opposing the candidacy of any person for a nomination to be determined by a primary election by any candidate or campaign manager, shall not exceed the following amounts for each candidate for each of the following offices to-wit:

For United States Senator.....	\$10,000.00
For Governor.....	10,000.00
For all other officers to be chosen by voters of the entire State, including Judges of Courts of Last Resort and Members of Congress at large.....	2,500.00
For District Members of Congress.....	2,500.00
For member of the Court of Civil Appeals.....	1,500.00
For District Attorney or District Judge.....	600.00
For member of the State Senate.....	1,000.00
For member of the House of Representatives.....	300.00
For County officers in counties having a population of 50,000 or more.....	750.00
For County Officers in Counties having a population of 30,000 and more, and less than 50,000.....	500.00
For County Officers in Counties having a population of less than 30,000.....	300.00
(The last Federal census to determine the population of a County.)	
For any other position which the law may provide shall be chosen in primary election.....	100.00

Four-fifths of the sums stipulated in this Section as the limits of expenses to be incurred by candidates and their campaign managers may be expended in the campaign preceding the first primary, and the remaining one-fifth in the campaign preceding the second primary.

The limits fixed by this section for all State and district nominations shall include and cover all amounts, expended, or authorized to be expended by such candidate or his campaign manager and also all amounts paid or distributed to assistant campaign managers for use of expenditure in their respective Counties. Any such assistant campaign manager may himself and through his lawfully authorized agent, expend in his county out of contributions made to the campaign fund by citizens of his County and collected by him or out of monies furnished him by the candidate or his campaign manager or from all such sources to-

gether, for lawful purposes permitted by this Act, a sum which shall not exceed ten (\$10.00) dollars for each One hundred qualified voters on the current poll tax list of such county provided that such sum shall in no event exceed in the aggregate the sum of Five hundred (\$500.00) dollars for any County; and provided further, that the aggregate sums stipulated in this section as the maximum amounts that may be expended by candidates and their campaign managers shall be construed to embrace all expenditures herein authorized to be made in counties by assistant campaign managers. The expenditure of any money or the giving or promising to give or pay any money or anything of value by any candidate or by any campaign manager or his clerk or agent, or assistant campaign manager, or his clerk or agent in furthering of or opposition to the candidacy of any person for any nomination in a primary election in excess of the amount fixed and prescribed by this Section, is hereby prohibited and declared to be unlawful. Any person who shall violate any of the provisions of this section shall be deemed guilty of an offense, and upon conviction thereof, should be punished by a fine not to exceed \$1,000.00, or by confinement in the County jail for not more than one year, or by both such fine and imprisonment, or by confinement in the penitentiary for not less than one year, nor more than five years. [Acts 1919, 36th Leg., ch. 88, § 3.]

Took effect 90 days after March 19, 1919, date of adjournment.  
See arts. 3174¼-3174½b, Civil Statutes.

**Art. 295—2. Campaign contributions; persons who may make; limitation on amounts; personal expenditures; violations of article; punishment.**—It shall be lawful for any person other than a corporation to make campaign contributions to be paid directly to the candidate or his lawfully designated and appointed campaign manager or by citizens of any County to the lawfully designated and appointed assistant campaign manager for such County, such contributions to be used for lawful purposes. It shall be lawful for any one or more citizens residing in any locality to raise by voluntary contributions a fund not exceeding fifty (\$50.00) dollars in amount for the purpose of defraying the expenses of any political meeting to be held in such locality, such expense to include the cost of advertising such meeting, or hiring halls or providing other places for holding the same, or providing music therefor, or the bona fide traveling expenses and hotel bills of speakers, provided that a statement of all receipts and disbursements for such purposes signed and sworn to by the person or persons receiving and disbursing the same shall be filed with the County Clerk of the County in which such meeting is held, within twenty-four hours after it is held.

It shall be lawful for any person to expend for postage, or telegraph or telephone tolls, or for cost of any correspondence or any other lawful purpose out of his own funds where the sum is not to be repaid to him in behalf of any one candidate a sum which shall exceed in the aggregate Ten (\$100.00) Dollars, and it shall also be lawful for any person to contribute bona fide his own personal services and personal traveling expenses, including hotel bills while traveling to the support of any candidacy. Except as expressly permitted by the foregoing provisions of this Section, it shall be unlawful for any person other than candidates for nomination to be determined by primary elections or the campaign managers or assistant campaign managers of such candidates lawfully designated as provided in this Act, or the agents or such campaign managers or assistant campaign managers lawfully authorized as provided in this Act, either himself or by or through any other person or persons or on behalf of any other person or persons directly or indirectly to

give pay or expend any money or give or pay anything of value or promise to give, pay or expend any money or to pay or to give anything of value or authorize any expenditure or assume any pecuniary liability for the purpose of aiding, assisting or promoting or defeating or helping to defeat the nomination at any such primary election of any candidate for any nomination to be determined thereby and any person who shall violate the provisions of this Section shall be deemed guilty of an offense, and upon conviction thereof, should be punished by a fine not to exceed \$1000.00 or by confinement in the county jail for not more than one year, or by both such fine and imprisonment, or by confinement in the penitentiary for not less than one year, nor more than five years. [Id., § 4.]

**Art. 295—3. Hiring, etc, persons to aid in campaigns unlawfully; punishment.**—And [any] candidate or other person who otherwise than in compliance with the provisions of this Act, shall hire or employ or offer to hire or employ or shall reward or give to any person anything of value for his services or for loss of time or for reimbursement for his expenses in consideration of such person directly or indirectly working, electioneering or making public addresses for or against any candidate for a nomination in a primary election who rewards or offers to reward any person for his vote or influence or the promise of his vote or influence for or against any candidate for nomination in a primary election, shall be deemed guilty of an offense, and upon conviction thereof, should be punished by a fine not to exceed \$1,000.00, or by confinement in the county jail for not more than one year, or by both such fine and imprisonment, or by confinement in the penitentiary not less than one year, nor more than five years. [Id., § 5.]

**Art. 295—4. Expenditures by candidate, campaign manager, etc., on behalf of another candidate; punishment.**—No candidate for a nomination in a primary election or his campaign manager or his assistant campaign manager, shall directly or indirectly himself or by or through another person, give, pay, expend or contribute any money or thing of value for the furtherance of the candidacy of any other candidate. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine not to exceed \$1000.00, or by confinement in the county jail not to exceed one year, or by both such fine and imprisonment. [Id., § 6.]

**Art. 295—5. Violations of act; punishment.**—Any candidate or other person who furnishes, gives, or delivers to another person any money or other thing of value to be used in violation of or for any purpose prohibited by the provisions of this Act, and any person who receives or accepts any money or thing of value to be used in violation of or for any purpose prohibited by the provisions of this Act, shall be deemed guilty of an offense, and upon conviction thereof, should be punished by a fine not to exceed \$1000.00, or by confinement in the County jail for not more than one year, or by both such fine and imprisonment, or by confinement in the penitentiary for not less than one year, nor more than five years. [Id., § 7.]

**Art. 295—6. Records of receipts and expenditures; contents; affidavits to; false oaths, etc., punishment.**—Each and every candidate for nomination in a primary election and every campaign manager or assistant campaign manager for any such candidate, is hereby required to keep an accurate record of all funds received and disbursed for campaign purposes, which record shall be preserved for a period of twelve

months, and shall be open to inspection of all opposing candidates and qualified voters, and every candidate and campaign manager is hereby required to file a sworn statement of all monies previously received or disbursed by him, including money borrowed and liabilities incurred but not paid, not more than thirty nor less than twenty-five days prior to the date of the primary election, and not more than twelve nor less than eight days prior to the date of the primary election, and not more than ten days after the date of the primary election. Each such statement shall include all items contained in all statements previously made in accordance with the requirements of this Section, if any, and shall include the names of all contributors to any campaign fund handled by the party making the same, and the names of all persons from whom any money has been received or from whom any money has been borrowed for such fund, and the names of all persons to whom disbursements exceeding ten (\$10.00) dollars in amount have been made and the purpose of such disbursements. Such statement shall also set forth that it is as full and explicit as the party making it is able to make, and the party making it shall before some officer qualified to administer oaths, take and subscribe the following oath, which shall be filed with said statement:

"I do solemnly swear that the foregoing statement, filed herewith correctly shows all moneys received by me and disbursed by me or in my behalf or with my knowledge or consent through or by any other person in connection with the candidacy of \_\_\_\_\_ for the nomination for \_\_\_\_\_ before the \_\_\_\_\_ primary election, and that I have neither directly nor indirectly arranged or assented to, encouraged or connived at the spending of any money other than as shown in said statement, and that I have not violated any of the provisions of the laws of Texas governing primary elections of the expenditure of funds in connection with a candidacy for a nomination in such primary election in letter or in spirit."

Such statements and oaths shall be filed within the times required by this section by candidates for State and District nominations and their campaign managers with the Secretary of State, and by candidates for County nominations and their campaign managers and by the assistant campaign managers of candidates for State and District nominations with the County Clerk of the County in which they reside.

Whoever shall willfully and corruptly make any false oath, affidavit or sworn statements in complying with the requirements of this Section shall be deemed guilty of an offense, and upon conviction thereof should be punished by a fine not to exceed \$1000.00, or by confinement in the County jail for not more than one year, or by both such fine and imprisonment, or by confinement in the penitentiary for not less than one year, nor more than five years. [Id., § 8.]

## TITLE 7

OF OFFENSES WHICH AFFECT THE FREE EXERCISE OF  
RELIGIOUS OPINION

Chap.

1. Disturbance of religious worship.

Chap.

2. Sunday laws.

## CHAPTER ONE

## DISTURBANCE OF RELIGIOUS WORSHIP

**Article 296. [193] Disturbance of congregation in any manner.**

**Designation of offense.**—Where a conviction is had under this article, the recognizance on appeal is fatally defective which recites that the offense is "willfully disturbing a congregation assembled for the purpose of public worship." *Mullinix v. State*, 32 Cr. R. 116, 22 S. W. 407.

A recognizance merely reciting that defendant stands charged with the offense of disturbance of religious worship is fatally defective, for failure to recite that the congregation was assembled for religious purposes, was conducting itself lawfully, and that the disturbance was willfully created. *Morgan v. State*, 32 Cr. R. 413, 23 S. W. 1107.

## CHAPTER TWO

## SUNDAY LAWS

Art.

299. Working on Sunday.

300. Not applicable, when.

301. Horse racing, gaming, etc., on Sunday.

Art.

302. Selling goods on Sunday.

303. Exceptions from operation of preceding article.

**Article 299. [196] Working on Sunday.**

Cited, *Vogt v. State*, 21 Tex. App. 331, 17 S. W. 624.

**Labor.**—Sale of engine oil on Sunday by dealer in automobile supplies held not permissible as work of necessity, where oil might have been obtained from one of the places excepted by art. 303. *Grimes v. State*, 82 Cr. R. 512, 200 S. W. 378.

**Art. 300. [197] Not applicable, when.**

Cited, *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207.

**Work of necessity.**—Sale of engine oil on Sunday by dealer in automobile supplies held not permissible as work of necessity, where oil might have been obtained from one of the places excepted by art. 303. *Grimes v. State*, 82 Cr. R. 512, 200 S. W. 378.

**Art. 301. [198] Horse racing, gaming, etc., on Sunday.**

Cited, *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207.

**Art. 302. [199] Selling goods on Sunday.**

Cited, *Cottar v. State*, 81 Cr. R. 659, 197 S. W. 987; *Dillon v. State*, 81 Cr. R. 660, 197 S. W. 987; *Phillips v. State*, 81 Cr. R. 658, 197 S. W. 988; *Riggle v. State*, 81 Cr. R. 658, 197 S. W. 988.

**3. Municipal powers.**—Ordinance allowing a moving picture show to remain open on Sunday cannot suspend this article, prohibiting them to run on Sunday with certain films. *Zucarro v. State*, 82 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

**5. Construction.**—This article is not affected by article 1480, making theaters public houses of amusements to be regulated by law and ordinance. *Zucarro v. State*, 82 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

That moving picture shows were invented subsequent to the enactment of this article, prohibiting certain amusements on Sunday, would not preclude statute prohibiting it if it came within classification defined therein. *Id.*

**7. Elements of offense.**—A recognizance, on appeal from a conviction for selling goods on Sunday, merely reciting that defendant stands charged with the offense of selling goods on Sunday, is insufficient, as failing to recite an offense, since the sale, to constitute an offense, must be made by a person belonging to one of the classes enumerated. *Henderson v. State* (Cr. App.) 23 S. W. 692.

10. **Persons liable.**—Dealer in wares, merchandise, and automobile supplies who sold engine oil on Sunday held not excepted from prohibition, conceding that garages are covered by exception in favor of livery stables. *Grimes v. State*, 82 Cr. R. 512, 200 S. W. 378.

It is no ground for quashing a complaint, for keeping open on Sunday a place of amusement, that it charges defendant as being the agent or employé of the proprietor. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

15. **Public amusements.**—The words, "such other amusements," includes moving picture shows where they reproduce dramatic or theatrical performances or acrobatic or other displays such as pertain to the circus, or dancing, gymnastics, or amusements similar to those shown in variety theaters. *Zucarro v. State*, 82 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

Drama is story put in action, and theatrical performance is dramatic performance, and essential elements of circus and variety theater are performances or acts of those taking part, and motion picture produces drama without spoken word. *Id.*

There is no merit in motion to quash a complaint, on the ground that the Sunday law does not apply to moving picture shows; the charge being of keeping open on Sunday a place of amusement, to wit, a theater, an act expressly forbidden by such statute. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

A person can be held for a violation of this article, prohibiting operating of theaters, circuses, and other amusements on Sunday, under a charge for operating a theater on Sunday, whether the performance was a tragedy, melodrama, or comedy, and one violated such article when he operated a moving picture show, although the screen depicted war pictures entitled "Under Four Flags," forming a part of the publicity work of a committee selected by the President during the war. *Hegman v. State* (Cr. App.) 227 S. W. 954.

16. **Indictment, information and complaint.**—A complaint and information for violating the Sunday law stating that defendant was a dealer "of" wares and merchandise instead of "in" wares and merchandise, as used in the statute, was not invalid. *Helms v. State*, 84 Cr. R. 621, 209 S. W. 657.

That the criminal complaint was filed on Sunday is not ground for quashing it. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

19. **Instructions and questions for jury.**—Whether a moving picture theater and pictures constitute a theater or circus which cannot remain open on Sunday, is a question of law for the court and not a question of fact for the jury. *Hegman v. State* (Cr. App.) 227 S. W. 954.

23. **Injunction.**—An injunction will not issue to restrain the operation of a moving picture show on Sunday, where such operation constitutes a misdemeanor, and no property rights of complainant are involved. *Barry v. State* (Civ. App.) 212 S. W. 304; *State v. Barry* (Civ. App.) 217 S. W. 957.

### Art. 303. [200] Exceptions from operation of preceding article.

See *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207.

**Druggists.**—Where defendant was accused of selling Florida water on Sundays, and the testimony of several physicians called as witnesses of the state was conflicting as to whether Florida water was a medicine, and defendant testified that he kept a drug, book and general store, and kept the article among his medicines, and sold it as such, that the evidence did not warrant a conviction. *Todd v. State*, 30 Tex. App. 667, 18 S. W. 642.

**Livery stable keepers.**—Garage is a place for the care and storage of motor vehicles, and in which they are kept for hire, and a livery stable is a place where horses are groomed, fed, and hired, and vehicles are kept for hire. *Grimes v. State*, 82 Cr. R. 512, 200 S. W. 378.

**Garage keepers.**—This article does not except dealer in automobile supplies under rule of ejusdem generis. *Grimes v. State*, 82 Cr. R. 512, 200 S. W. 378.

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## TITLE 8

### OF OFFENSES AGAINST PUBLIC JUSTICE

#### Chap.

1. Of perjury.
2. Of false swearing.
3. Of subornation of perjury and false swearing.
4. Offenses relating to the arrest and custody of prisoners [and to the administration of the laws].
5. False certificate, authentication or entry by an officer.

#### Chap.

6. Miscellaneous offenses.
  - (1. Extortion.)
  - (3. Peculation.)
  - (4. Nepotism.)
  - (5. Failure of duty.)
  - (6. Barratry.)
  - (7. Compounding crime.)
  - (8. Malicious prosecution.)
  - (9. False Personation.)
  - (11. General provisions.)

## CHAPTER ONE OF PERJURY

Art.

304. "Perjury" defined.  
305. Not perjury, when.

Art.

307. And about something past or present.  
310. Punishment.

### Article 304. [201] "Perjury" defined.

1. **Elements of offense.**—If witness in civil case had testified falsely, or signed false affidavit, in support of motion for new trial, that former testimony was false, he would have been guilty of perjury, but not of false swearing. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

Defendant was guilty of perjury, where, before the grand jury investigating his relations with an unmarried woman not his wife, he willfully and deliberately, not laboring under mistake or excitement, made certain material false statements, even though such statements were not freely and voluntarily made, since one must tell the truth in every judicial proceeding even though he speaks under compulsion. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

4. — **Affidavits.**—Where a public school teacher, on making affidavit, as required by law, to the check drawn by the trustees on the county treasurer for his pay, makes a false statement, he may be prosecuted for perjury. *O'Bryan v. State*, 27 Tex. App. 339, 11 S. W. 443.

That false affidavit, filed in judicial proceeding, such as motion for new trial, was or was not attached to the motion did not affect question of perjury. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

Where defendant attempted to bribe witness to make false affidavit, in support of motion for new trial, that his own testimony had been false, if witness made such affidavit, it was perjury. *Id.*

False affidavit obtained and filed with motion for new trial, to be used on the motion, was in a judicial proceeding, so that any falsity in it constituted perjury rather than false swearing. *Id.*

9. **Evidence.**—In prosecution for perjury in testifying at trial of one for arson, where indictment for arson, set out in indictment for perjury, named owner of the house burned, admission of testimony of an owner that house was in possession of and rented to party on trial for arson, as alleged, was not error. *Herndon v. State*, 82 Cr. R. 232, 198 S. W. 788.

In trial for perjury, court did not err in permitting court reporter to state, both from his recollection and from his stenographic notes taken at the time, what defendant swore to on the trial of another for arson. *Id.*

Evidence held to support a conviction of perjury. *Allen v. State*, 82 Cr. R. 416, 199 S. W. 633.

In prosecution for perjury, where defendant was not present at first difficulty, but claimed only to have been present when killing occurred, and testified to what he saw, details of first difficulty were inadmissible. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

In prosecution for perjury committed while testifying as a witness, evidence of testimony given by accused at the trial at which the alleged perjury was committed may be testified to by the court stenographer at such trial. *Roberts v. State*, 83 Cr. R. 511, 204 S. W. 866.

In a prosecution for perjury, in which defendant was accused of falsely swearing that he had sexual intercourse with a woman prior to her alleged seduction by another, the woman's testimony of facts and conversations of her alleged seducer in consummating the offense, and of the birth of her child were inadmissible, where not connected with defendant. *Ice v. State*, 84 Cr. R. 418, 208 S. W. 345.

In a prosecution for perjury, alleged to have been committed before the grand jury, where the grand jury did not have a full written record of the testimony, it was proper to permit a grand juror to testify to defendant's oral testimony in full, particularly where there was no claimed conflict between the testimony so given and the part written. *Id.*

In prosecution for perjury by having made false statements before the grand jury investigating defendant's relations with a woman other than his wife in Hood county, testimony that defendant had taken the woman to a rescue home in another county, etc., was admissible. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

In prosecution for perjury where indictment alleged perjury of testimony given in previous trial in solido, the state must prove all such testimony to be false. *Welch v. State* (Cr. App.) 227 S. W. 301.

10. **Instructions.**—Court improperly instructed that under allegation of defendant's attempt to induce third person to commit perjury, jury would be justified in convicting of attempt to induce false swearing. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

In prosecution for perjury, where state introduces proceedings in trial on which perjury was committed, if result of such trial was adverse to testimony of defendant charged with perjury, court must limit effect of evidence, otherwise such charge is unnecessary. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

In prosecution for perjury, court on request should have given charge defining words "willfully" and "deliberately" in connection with perjury. *Id.*

In a prosecution for perjury, where the court charged that if defendant's statement



before the grand jury investigating a criminal matter implicating defendant was made under mistake, agitation, or excitement, or unless the district attorney had warned defendant he did not have to make any statement, and that any statement might be used against him, etc., special charge that the jury would not consider for any purpose the statement made by defendant unless it was freely and voluntarily made was properly refused. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

**Art. 305. [202] Not perjury, when.**

See *Steber v. State*, 23 Tex. App. 176, 4 S. W. 880.

**Art. 307. [204] And about something past or present.**

Cited, *Addison v. State*, 85 Cr. R. 181, 211 S. W. 225.

**Art. 310. [207] Punishment.**

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

## CHAPTER TWO

### OF FALSE SWEARING

Art.

312. False swearing, definition of.

316. Witness before grand jury divulging proceedings, etc.

317c. False statement in affidavit of bidder for state supplies.

Art.

317d. False statement by live stock commission merchant as to average daily sales.

**Article 312. [209] "False swearing," definition of.**

4. **Perjury distinguished.**—If witness in civil case had testified falsely, or signed false affidavit, in support of motion for new trial, that former testimony was false, he would have been guilty of perjury, but not of false swearing. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

**Art. 316. [213] Witness before grand jury divulging proceedings, etc.**

**Issues, proof and variance.**—In prosecution of witness before grand jury for having divulged its proceedings, testimony of person to whom defendant was alleged to have divulged the proceedings as to what defendant told him held a variance from the allegations of the indictment. *Addison v. State*, 85 Cr. R. 181, 211 S. W. 225.

**Evidence.**—In prosecution for divulging proceedings of grand jury, foreman of jury was properly permitted to testify that defendant was a witness before the jury and as to what he testified to when there, despite defendant's claim that truth, or falsity of his evidence before jury was not under investigation, and that foreman's testimony was in violation of his oath. *Addison v. State*, 85 Cr. R. 181, 211 S. W. 225.

**Persons compelled to testify.**—This article includes members of the grand jury as well as witnesses testifying before them in its prohibitive language, and in an inquiry before any judicial tribunal, where the members of the grand jury or those who have been witnesses before it are required to testify to any of the matters set forth herein, they are authorized so to testify by the last clause of the article. *Addison v. State*, 85 Cr. R. 181, 211 S. W. 225.

**Art. 317c. False statement in affidavit of bidder for state supplies.**—Any person making a false statement in any such affidavit shall be deemed guilty of a felony and shall be punished as now prescribed for that offense; provided, however, that in addition to any other county having venue of such offense Travis county shall also have venue of the same, and such person, regardless of where the offense was committed, may be indicted by the grand jury of Travis county and be tried in Travis county. [Acts 1919, 36th Leg., ch. 167, § 5.]

**Explanatory.**—This article is a part of sec. 5 of Acts 1919, 36th Leg., ch. 167. For the remainder of this act, see ante, Civ. St. arts. 7150¼-7150½p.

**Art. 317d. False statement by live stock commission merchant as to average daily sales.**—Any materially false statement made by the person, firm or corporation to the County Judge relative to the average daily sales of live stock sold on commission for the twelve months period preceding the application for the approval of the bond [Arts. 3832c-3832i,

Civil Statutes, ante] shall constitute false swearing as defined by the Penal Code of this State and shall be punished accordingly. [Acts 1921, 37th Leg., ch. 91, § 11.]

### CHAPTER THREE

#### OF SUBORNATION OF PERJURY AND FALSE SWEARING

##### Article 318. [214] Subornation of perjury, or false swearing.

**Evidence.**—In prosecution for attempt to induce another to commit perjury by making false affidavit, in support of motion for new trial, that testimony in civil case had been false, defendant had right to disprove any act relied on by state as to truth of evidence of witness, and to show fallacy of all such evidence, though state introduced only testimony stated in indictment. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

In prosecution for attempt to induce another to commit perjury by filing, in support of motion for new trial, false affidavit falsifying testimony, defendant had right to show truthfulness of affidavit by direct or circumstantial evidence, by impeachment of witness, or by attack on circumstances corroborating him. *Id.*

**Instructions.**—In prosecution for attempt to induce another to commit perjury by making false affidavit, state having alleged general false statement in *solido*, court was required to charge that to convict entire affidavit must be proven false. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

In prosecution for attempt to induce another to commit perjury, where indictment alleged particular amount of money offered such other, court improperly charged jury should find guilty if they believed defendant sought "by any means" to induce other to commit perjury. *Id.*

### CHAPTER FOUR

#### OFFENSES RELATING TO THE ARREST AND CUSTODY OF PRISONERS [AND TO THE ADMINISTRATION OF THE LAWS]

Art.  
329. Conveying arms, disguises, etc., into jail to aid felon.  
334b. Persuading inmates of State Home for Dependent and Neglected White Children.  
338. County convict escaping from employer.

Art.  
340. In cases of misdemeanors.  
343b. Obstructing State Superintendent of Weights and Measures.  
343c. Interfering with eradication of predatory animals.  
343d. Hindering or obstructing Food and Drug Commissioner.

##### Article 329. [225] Conveying arms, disguises, etc., into jail to aid felon.

Cited, *Welch v. State*, 25 Tex. App. 580, 8 S. W. 657.

**Art. 334b. Persuading inmates of State Home for Dependent and Neglected White Children.**—Any person who shall persuade, coerce, employ, induce in any manner any child who has been committed to said Home from any institution or from any home selected by the persons herein empowered to make such selections without the knowledge and consent of such persons shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than \$100.00, and not more than \$500.00 or be imprisoned in the county jail for not less than sixty days nor more than six months or by both such fine and imprisonment. [Acts 1919, 36th Leg., ch 159, § 11.]

**Explanatory.**—For other parts of Acts 1919, 36th Leg., ch. 159, see ante, Civ. St. arts. 5234 $\frac{3}{4}$ -5234 $\frac{4}{4}$ j. The act took effect 90 days after March 19, 1919, date of adjournment.

##### Art. 338. [234] County convict escaping from employer.

**Elements of offense.**—Defendant, convicted of gambling, and fined and hired under convict bond, who left employer's place because he had nothing to eat, and did not know his employer had made arrangements with third persons to feed him, was not guilty of willful escape. *Coleman v. State*, 83 Cr. R. 472, 204 S. W. 332.

**Indictment and Information.**—Information against a county convict for escape from her hirer, need not set out, by date or otherwise, the term of the hire. (*Carter v. State*, 29 Tex. App. 5, 14 S. W. 350 followed.) *Peoples v. State* (App.) 14 S. W. 352.

**Art. 340. [236] In cases of misdemeanors.**

**Charge.**—In a prosecution for resisting an officer in arresting a person for a misdemeanor, without a warrant, the court charged the jury that the penalty in case of conviction would be "any sum not less than \$500," was error. *Holmes v. State* (App.) 17 S. W. 1089.

**Art. 343b. Obstructing State Superintendent of Weights and Measures.**—Any person who shall hinder or obstruct in any way the State Superintendent, or his deputy, inspectors, sealer or local sealer in the performance of their duties shall be guilty of a misdemeanor. [Acts 1919, 36th Leg., ch. 131, § 25.]

**Explanatory.**—For the remainder of Acts 1919, 36th Leg., ch. 131, see ante, Civ. St. arts. 7846¼, 7846¼g-7846¼zzz.

**Art. 343c. Interfering with eradication of predatory animals.**—Any person who shall in any way interfere with such work or who shall attempt to keep any persons named in Section 5 of this Act [Civ. St. Art. 7169e] from entering on any public or private lands for the purpose of exterminating injurious predatory animals shall be deemed guilty of a misdemeanor and shall be fined in the sum of not less than \$10.00 or more than \$500.00, and in addition thereto may be confined in the county jail for not less than one month or for not more than twelve months, provided that such persons so appointed under the provisions of this Act shall upon request exhibit his certificate of appointment which shall, among other things, contain a provision that such person is drawing a salary by virtue of such appointment. [Acts 1919, 36th Leg., ch. 107, § 6.]

**Explanatory.**—For the remainder of Acts 1919, 36th Leg., ch. 107, see, ante, Civ. St. arts. 7169a-7169e. The act took effect 90 days after March 19, 1919, date of adjournment.

**Art. 343d. Hindering or obstructing Food and Drug Commissioner.**—It shall be unlawful for any person to hinder or obstruct, or refuse to permit the Food and Drug Commissioner, or his inspectors or other person by him duly authorized to perform his or their duties in the exercise of the power conferred upon him by this Act. [Acts 1919, 36th Leg., ch. 125, § 11.]

**Explanatory.**—The other sections of the act are set forth, post, as arts. 999¾-999¾j. The act took effect 90 days after March 19, 1919, date of adjournment.

The office of Food and Drug Commissioner was abolished and the duties transferred to the State Health Officer by Acts 1921, 37th Leg. ch. 10, § 1, Civ. St. art. 4575a.

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## CHAPTER FIVE

### FALSE CERTIFICATE, AUTHENTICATION OR ENTRY BY AN OFFICER

**Article 359. [253] Officer giving blank certificate.**

See *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. 501.

## CHAPTER SIX

## MISCELLANEOUS OFFENSES UNDER THIS TITLE

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|---|--|---|--|
| <p>Art. 363. Extortion by officers.</p> <p>373. County or city officers trading in claims.</p> <p>382. Officers included.</p> <p>389. Failure to arrest offender.</p> <p>420g. Officer or employé of public free schools failing to perform duties.</p> <p>420h. Same.</p> <p>420i. Same.</p> <p>420j. Failure to perform duties relating to certain communicable diseases.</p> <p>420k. Officer, employé or relative maintaining store near eleemosynary institution.</p> <p>421. Defining same.</p> | <p>1. EXTORTION</p> <p>3. PECULATION</p> <p>4. NEPOTISM</p> <p>5. FAILURE OF DUTY</p> <p>6. BARRATRY</p> | <p>Art. 422. Agreeing with offender not to prosecute.</p> <p>423. Defined and punished.</p> <p>424. Falsely pretending to be an officer.</p> <p>426. Wilful neglect of official duty.</p> <p>427. Selection of jurors in certain counties.</p> <p>428. Putting in or taking names from wheel illegally.</p> <p>434a. Neglecting or refusing to exhibit weight or measure.</p> <p>434b. Neglecting or refusing to exhibit articles sold at given weight or quantity.</p> | <p>7. COMPOUNDING CRIME</p> <p>8. MALICIOUS PROSECUTION</p> <p>9. FALSE PERSONATION.</p> <p>11. GENERAL PROVISIONS</p> |
|---|--|---|--|

## 1. EXTORTION

**Article 363. [256] Extortion by officers.**

**Elements of offense.**—A contract by a county surveyor, whereby he was to receive a greater compensation for his work than the law allowed, is void. *Keith v. Fountain*, 3 Civ. App. 391, 22 S. W. 191.

## 3. PECULATION

**Art. 373. [264] County or city officers trading in claims.**

**What acts illegal.**—Under this article a contract between a sheriff, at the time ex officio tax collector of his county, and another, by which each party was to furnish equal amounts of money, to be invested in county scrip, and to divide the profits equally, is illegal. *Read v. Smith*, 60 Tex. 379.

## 4. NEPOTISM

**Art. 382. Officers included.**

Cited, *Zucarro v. State*, 32 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

## 5. FAILURE OF DUTY

**Art. 389. [269] Failure to arrest offender.**

See *Pratt v. Brown*, 80 Tex. 603, 16 S. W. 443.

**Art. 420g. Officer or employé of public free schools failing to perform duties.**—Any official or employee of the public free schools failing to perform his or her legal duty in connection with the administration of this law shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not more than five hundred dollars or removal from office or both fine and removal from office. [Acts 1918, 35th Leg. 4th C. S., ch. 17, § 4.]

**Explanatory.**—For the remainder of this act, see ante, Civ. St. arts. 2904aa-2904aaaa. The act took effect March 20, 1918.

**Art. 420h. Same.**—Any official or employee of the public free schools failing to perform his or her legal duty in connection with the administration of this law shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not more than five hundred dollars or removal of

office or both fine and removal from office. [Acts 1918, 35th Leg. 4th C. S., ch. 38, § 4.]

For remainder of this act, see ante, Civ. St. arts. 2904aa-2904aaaa.

**Art. 420i. Same.**—Any teacher, principal, superintendent, trustee, or other school official having responsibility in the conduct of the work of the school, and failing to comply with this provision of the law shall be deemed guilty of a misdemeanor and upon conviction thereof in proper court shall be subject to fine of not less than Twenty-five Dollars (\$25.00) and not more than One Hundred Dollars (\$100.00), cancellation of certificate, or removal from office as the case may be, or both fine and cancellation of certificate or fine and removal from office. Each day shall be regarded as a separate offense, and it shall be the duty of the trustee, city or county superintendent, or ex-officio superintendent to inspect the schools regularly with regard to the enforcement of this Act and file charges promptly in the court in all cases of violation. [Acts 1918, 35th Leg. 4th C. S., ch. 80, § 2.]

**Explanatory.**—Acts 1918, 35th Leg. 4th C. S., ch. 80, sec. 1, requires the school work in the public free schools to be conducted exclusively in the English language, etc. The act took effect 90 days after March 27, 1918, date of adjournment.

**Art. 420j. Failure to perform duties relating to certain communicable diseases.**—Any local health officer, employee, inspector, physician, nurse, superintendent of clinic or hospital, druggist or other person who fails to perform the duties required of him in this Act, or violates any of the provisions of this Act, shall be deemed guilty of a misdemeanor and upon conviction therefor shall be fined in any sum not less than five nor more than fifty dollars, and each violation shall be a separate offense. Any health officer or other physician who shall willfully fail to perform the duties required of him in this Act shall, in addition to the penalties imposed by this Section forfeit his right and license to practice medicine within this State; and the district courts of the State shall have jurisdiction of suits for the forfeiture of such license in such cases, and the suit may be filed by any citizen of the State in the court having jurisdiction, under the ordinary rules of venue, and it shall be the duty of the county and district attorneys to represent the petitioners in such suit. [Acts 1918, 35th Leg. 4th C. S., ch. 85, § 12.]

**Explanatory.**—For remainder of this act, see ante, Civ. St. arts. 4605¼-4605¼k. The act took effect 90 days after March 27, 1918, date of adjournment.

**Art. 420k. Officer, employé or relative maintaining store near eleemosynary institution.**—It shall be unlawful for any person or persons appointed as manager, superintendent, clerk or otherwise employed in or by any eleemosynary institution of this State that is under the control, supervision, or management of the State of Texas, or the wife of such appointee or employee or any other person related within the third degree by affinity or consanguinity to the person so appointed or employed in such institution, to own, operate, manage or in any way be pecuniarily interested in any store or other place of business where any article of merchandise is sold or offered for sale to inmates of such institution.

Any such appointee or employee, or the wife of such appointee or employee, or other person related to such appointee or employee within the third degree by affinity or consanguinity who shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of competent jurisdiction, shall be punished by dismissal from his office or employment, and be fined

not less than Twenty-five Dollars (\$25.00) nor more than Two Hundred Dollars (\$200.00). [Acts 1921, 37th Leg. 1st C. S., ch. 58, § 1.]

Took effect Nov. 15, 1921.

## 6. BARRATRY

### Art. 421. [290] "Barratry" defined and punished.

**Constitutionality.**—Though, under the law of Texas, causes of action in tort as well as in contract are assignable, this article, as amended by Laws 1917, c. 133, § 1, forbidding the personal solicitation of employment to prosecute, defend, present, or collect any claim, is a reasonable regulation of the business of obtaining adjustment of claims and does not violate rights of liberty and property, or deny the equal protection of the laws, in violation of the Fourteenth Amendment. *McCloskey v. Tobin*, 252 T. S. 107, 40 Sup. Ct. 306, 64 L. Ed. 481; *Ex parte McCloskey*, 82 Cr. R. 531, 199 S. W. 1101.

Acts 35th Leg. c. 133, amending Pen. Code 1911, art. 421, so as to further define barratry and extend provision to all persons who might seek employment to present or collect claim, held not in violation of Const. art. 1, §§ 3 and 19, as depriving citizens of Texas of property, privileges, or immunities without due process of law, but valid in view of restrictions of every person's right to use his property to detriment of state, etc. *Ex parte McCloskey*, 82 Cr. R. 531, 199 S. W. 1101.

Barratry was offense at common law, and though Rev. St. 1911, art. 5686, allows assignment of unliquidated claim for damages for personal injury or other choses in action, state has right to denounce, as offense of barratry, solicitation of employment to collect such claims. *Ex parte McCloskey*, 82 Cr. R. 531, 199 S. W. 1101.

**Elements of offense.**—Petition in action to recover a money judgment, in the alternative to recover a leasehold interest in described realty, held not to show on its face, to render it demurrable, that plaintiff, in his alleged contract with defendants to file suit for cancellation of a former lease on which agreed rentals had not been paid, and therefore had terminated, but which remained a cloud on the title, was willfully guilty of any act or combination of acts denounced as barratry. *Tunstill v. Grisham* (Civ. App.) 228 S. W. 272.

**Evidence.**—Evidence held insufficient to show that temporary guardian was appointed or had himself appointed for mere purpose of giving certain attorneys employment. *McAllen v. Wood* (Civ. App.) 201 S. W. 433.

**Effect on right of action.**—A suitor is not barred from recovery because his attorney had violated the law in obtaining the employment. *Kurz v. Soliz* (Civ. App.) 231 S. W. 424.

## 7. COMPOUNDING CRIME

### Art. 422. [291] Agreeing with offenders not to prosecute.

**In general.**—Defendant, who charged plaintiff with stealing, and, under duress of threats of murder and prosecution, forced him to assign vendor's lien notes, and secured conveyance from buyer from plaintiff, could not keep fruits of duress as against plaintiff on ground both were in *pari delicto* in contracting to stifle prosecution. *Mallard v. Day* (Civ. App.) 204 S. W. 245.

## 8. MALICIOUS PROSECUTION

### Art. 423. [292] "Malicious prosecution" defined and punished.

**In general.**—The making of a motion for contempt cannot be the basis for a suit for malicious prosecution, in absence of a showing of arrest: an arrest being an essential element of such cause of action. *Baten v. Houston Oil Co. of Texas* (Civ. App.) 217 S. W. 394.

## 9. FALSE PERSONATION

### Art. 424. [293] Falsely pretending to be an officer.

**Elements of offense.**—If one falsely pretends to be a designated officer and in such character does an act claiming it to be official, he is guilty of false personation, whether the act be one which the officer might legally do, or he called upon to do, or not. *Walker v. State* (Cr. App.) 229 S. W. 853.

**Indictment and information.**—An information for false personation of an officer must set out the pretense charged with sufficient particularity to enable accused to know what office he is charged with assuming. *Walker v. State* (Cr. App.) 229 S. W. 853.

**Issues, proof and variance.**—An information, charging defendant with falsely pretending to be an executive officer of the state, county, and city, to wit, a deputy sheriff, a constable, deputy constable and a policeman, was not supported by proof that he said he was an "officer"; there being many other officers besides state officers. *Walker v. State* (Cr. App.) 229 S. W. 853.

**Evidence.**—That defendant's motives in going to a house which had been burglarized and asking permission to see if anything had been stolen may have been sinister, and that he may have been a confederate of the burglar will not justify conviction for false personation of an officer. *Walker v. State* (Cr. App.) 229 S. W. 853.

## 11. GENERAL PROVISIONS

**Art. 426. [294] Wilful neglect of official duty.**

See *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

**Art. 427. Selection of jurors in certain counties.**

See *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

**Art. 428. Putting in or taking names from wheel illegally.**

See *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

**Art. 434a. Neglecting or refusing to exhibit weight or measure.—**

Any person neglecting or refusing to exhibit any weight, measure, or weighing or measuring instrument of any kind, or appliances and accessories connected with any or all of such instruments or measures which are in his possession or under his control, to the State Superintendent, his deputy, inspector or to any local inspector or local sealer, for the purpose of allowing the same to be inspected and examined, as provided for in this Act, shall be guilty of a misdemeanor. [Acts 1919, 36th Leg., ch. 131, § 26.]

For remainder of Acts 1919, 36th Leg., ch. 131, see ante, Civ. St. arts. 7846¼, 7846¼g-7846¼zzz.

**Art. 434b. Neglecting or refusing to exhibit articles sold at given weight or quantity.—**Any person, who, by himself, or his employee, agent, or as the proprietor or manager, shall refuse to exhibit any article, commodity, produce or anything being sold or offered for sale at a given weight or quantity, or ordinarily so sold, to the State Superintendent, or to his deputy or to a sealer or his deputy, or to an inspector or local sealer for the purpose of allowing same to be tested and proved as to quantity contained therein, as provided for in this Act, shall be guilty of a misdemeanor. [Id., § 27.]

See note to art. 434a, ante.

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## TITLE 9

### OF OFFENSES AGAINST THE PUBLIC PEACE

Chap.

1. Unlawful assemblies.
2. Riots.

Chap.

3. Affrays and disturbances of the peace.
4. Unlawfully carrying arms.

### CHAPTER ONE

#### UNLAWFUL ASSEMBLIES

Art.

435. "Unlawful assembly" defined.
445. To prevent any person from pursuing his labor.

Art.

450. Lawful meetings included if unlawful purpose is afterwards agreed on.

**Article 435. [299] "Unlawful assembly" defined.**

**Elements of offense.**—One charged with unlawful assembly may be convicted thereof, although others with whom he assembled were acquitted of the charge, so that less than the requisite number to constitute an unlawful assembly remained. *Reynolds v. State*, 82 Cr. R. 505, 199 S. W. 1092.

**Indictment or information.**—A complaint charging defendant with having taken part in an unlawful assembly with reference to two separate persons is not defective as charging separate and distinct offenses; unlawful assembly being one offense, though committed against two persons. *Reynolds v. State*, 82 Cr. R. 505, 199 S. W. 1092.

**Art. 445. [309] To prevent any person from pursuing his labor.**

**Indictment, information or complaint.**—Under Pen. Code 1911, arts. 435, 445, an indictment charging unlawful assembly as against a motorman and conductor of a street car, held not defective for failing to allege that the car was operated or run, or that it was intended to be operated or run, or as charging actual violence instead of unlawful assembly. *Reynolds v. State*, 82 Cr. R. 505, 199 S. W. 1092.

**Art. 450. [314] Lawful meetings included if unlawful purpose is afterwards agreed on.**

Cited, *McGehee v. State*, 23 Tex. App. 330, 5 S. W. 222.

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**CHAPTER TWO**
**RIOTS**

Art.	Art.
451. "Riot" defined.	465. Where assembly was at first lawful.
460. Preventing any person from labor.	467. Indictment, requisites of.
464. All participants guilty.	

**Article 451. [315] "Riot" defined.**

Cited, *Ligon v. State*, 82 Cr. R. 147, 198 S. W. 787.

**Art. 460. [324] Preventing any person from labor.**

Cited, *McGehee v. State*, 23 Tex. App. 330, 5 S. W. 222.

**Art. 464. [328] All participants guilty.**

Cited, *Blackwell v. State*, 30 Tex. App. 672, 18 S. W. 676.

**Art. 465. [329] Where assembly was at first lawful.**

Cited, *Blackwell v. State*, 30 Tex. App. 672, 18 S. W. 676.

**Art. 467. [331] Indictment, requisites of.**

Cited, *Blackwell v. State*, 30 Tex. App. 672, 18 S. W. 676.

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**CHAPTER THREE**
**AFFRAYS AND DISTURBANCES OF THE PEACE**

Art.	Art.
470. Disturbance of the peace.	471. Vulgar or profane language over telephone.

**Article 470. [334] Disturbance of the peace.**

**Sufficiency of evidence.**—Evidence held sufficient to show accused guilty of disturbing the peace. *Samino v. State*, 83 Cr. R. 481, 204 S. W. 233.

**Art. 471. Vulgar or profane language over telephone.**

**Indictment, information or complaint.**—Where complaint charged offense of using indecent language over telephone as committed in Wichita county, information founded thereon charging such offense in county of ——— will not support conviction, in view of Code Cr. Proc. art. 478, subd. 5. *Mays v. State*, 83 Cr. R. 218, 202 S. W. 733.

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**CHAPTER FOUR**
**UNLAWFULLY CARRYING ARMS**

Art.	Art.
475. Unlawfully carrying arms.	479. Arrest without warrant; officer failing to arrest, punishable.
476. Not applicable, when and to whom.	
477. Carrying arms in church or other assembly.	



**Article 475. [338] Unlawfully carrying arms.**—If any person in this State shall carry on or about his person, saddle, or in his saddle bags any pistol, dirk, dagger, slung-shot, sword, cane, spear or knuckles made of any metal or any hard substance, bowie knife, or any other knife manufactured or sold for the purposes of offense or defense, he shall be punished by fine not less than \$100.00 nor more than \$500.00, or by confinement in the county jail for not less than one month nor more than one year. [Acts 1905, p. 56; Acts Jan. 30, 1889; Acts 1918, 35th Leg. 4th C. S., ch. 91, § 1.]

Cited, *Jacobs v. State*, 28 Tex. App. 79, 12 S. W. 408.

**4. Carrying in general.**—Defendant held not guilty of unlawfully carrying pistol handed him by another, who had borrowed it and was taking it home, and who took the weapon back shortly after he gave it to defendant to keep temporarily. *Wallace v. State*, 82 Cr. R. 658, 200 S. W. 836.

Where a physician carried a pistol around in his obstetrical case, and upon drawing in front of his office and house and leaving his automobile he saw a young man with whom he had had trouble, and returned to his automobile and took the pistol from the case and either put it in his pocket or carried it in his hand, held that trial court was justified in convicting him for unlawfully carrying on or about his person a pistol. *Robertson v. State* (Cr. App.) 228 S. W. 236.

**8. Intent of accused.**—Lack of evil intent, or intent to violate the law, in carrying a pistol unlawfully, is no justification. *Lewis v. State*, 84 Cr. R. 499, 208 S. W. 516.

**14. Carrying between residence and place of business.**—One who carries a pistol from his residence to his place of business, for the purpose of cleaning it, is not guilty of unlawfully carrying weapons. *Boissean v. State* (App.) 15 S. W. 118.

Employé who was directed by employer to carry a pistol from one place of business to another may lawfully execute such order with the bona fide intent of leaving it at place to which it is carried, provided the pistol is not carried habitually or in roundabout ways, or while he is loitering along the streets or unnecessarily deviating from the route to the place to which it is being carried. *Cassi v. State*, 86 Cr. R. 369, 216 S. W. 1099.

A person may carry a pistol from his home to his store or from one store to another with the bona fide intent of leaving it at the place to which it is carried, provided pistol is not carried habitually or in roundabout ways or while loitering along streets or unnecessarily deviating from the route to the place to which it is being carried. *Id.*

The fact that accused would be justified in carrying a pistol from his place of business to his residence does not authorize him to arm himself and seek an antagonist, although he found him en route to his home. *Moore v. State*, 86 Cr. R. 502, 217 S. W. 1036.

While one might have a right to carry a pistol from his home to another place, as to a farm, if he intended to leave the pistol there, he would have no right to carry it from his home to his farm, or from farm to farm, and back and forth, or even occasionally, merely to have the pistol with him. *Taylor v. State* (Cr. App.) 229 S. W. 552.

**15. Finding weapon and carrying it home.**—One who found brass knuckles on highway and picked them up and was carrying them without any unlawful purpose was not guilty of crime. *Tucker v. State* (Cr. App.) 232 S. W. 796.

**16. Carrying from place of gift or purchase.**—Where defendant had made trade for pistol, and unexpectedly met seller at social gathering, who turned pistol over to defendant, who carried it home, defendant was not guilty of violation of pistol law. *Gates v. State*, 82 Cr. R. 655, 200 S. W. 841.

**19. Carrying borrowed weapon home and returning same to lender.**—One who borrows a pistol and carries it home by the most practicable route does not violate the law prohibiting unlawful carrying of a pistol. *Wilson v. State*, 86 Cr. R. 356, 216 S. W. 881.

In a prosecution for unlawfully carrying arms, where it appeared that defendant got a pistol from his brother, to whom he had loaned it, and carried it 30 miles to another town, where he lived, the conviction could not be sustained; defendant having a right to take his pistol home. *Rosebud v. State*, 87 Cr. R. 267, 220 S. W. 1093.

**22. Evidence.**—Evidence that defendant lived in a neighborhood distant from the county seat, and beset with violent and lawless men, was properly excluded, since such facts offered no excuse for carrying the pistol. *O'Neal v. State*, 32 Cr. R. 42, 22 S. W. 25.

Offense of assault with prohibited weapon under Acts 33d Leg. c. 114, § 1 (art. 1024a), held, in connection with this article, not established by evidence. *Brinkley v. State*, 82 Cr. R. 150, 198 S. W. 940.

Evidence on prosecution for carrying a pistol, claimed by defendant to have been handed to him by a person in the house, held insufficient to show guilt beyond a reasonable doubt. *Bogus v. State*, 83 Cr. R. 356, 203 S. W. 597.

Evidence in a prosecution for unlawfully carrying a pistol held not sufficient to sustain a conviction. *Crockett v. State*, 84 Cr. R. 163, 205 S. W. 987.

In a prosecution for unlawfully carrying a pistol, evidence that defendant placed the pistol against the side or breast of one of the state's witnesses, and what he said in such connection, was admissible. *Dodaro v. State* (Cr. App.) 231 S. W. 394.

In a prosecution for unlawfully carrying brass knuckles, evidence held to warrant a conviction. *Tucker v. State* (Cr. App.) 232 S. W. 796.

In a prosecution for unlawfully carrying a pistol, where the defense was that it lacked a cylinder, the question held, under the evidence, for the jury. *Smith v. State* (Cr. App.) 232 S. W. 811.

**23. Charge.**—On an information charging defendant with carrying a pistol, the judge in his charge gave the provisions of this article, which relate to carrying a dagger, dirk, slung-shot, etc. Held, that the charge should have been confined to the specific weapon charged in the information. *Miller v. State* (App.) 18 S. W. 197.

Refusal to instruct as to acquittal if accused, charged with unlawfully carrying a pistol, borrowed pistol and was carrying it home by the most practicable route and came upon his brother engaged in trouble, and after the difficulty turned back to his brother's store to ascertain whether his brother was injured, and there left the pistol for a day or two, was error. *Wilson v. State*, 86 Cr. R. 356, 216 S. W. 881.

Where the state offered evidence of two pistol carryings, but relied on one, the jury should be charged that, unless defendant did on the occasion relied on carry a pistol, there could be no conviction. *Smith v. State* (Cr. App.) 232 S. W. 811.

In a prosecution for carrying a pistol which defendant claimed lacked a cylinder, a charge that the carrying of a part of a pistol which is not capable of being used for shooting is not a violation of the law, but it is illegal to carry a pistol whether a new one or an old one, a good one or a bad one, or whether all its parts are together at the time, was improper, the latter portion tending to mislead the jury. *Id.*

In a prosecution for unlawfully carrying a pistol, where defendant contended that the weapon lacked a cylinder, he is entitled to have that theory affirmatively presented by charges that there could be no conviction if the weapon did lack a cylinder. *Id.*

**Art. 476. [339] Not applicable, when, and to whom.**—The preceding article shall not apply to a person in actual service as a militiaman, nor to any peace officer in the actual discharge of his official duty, nor to the carrying of arms on one's own premises or place of business, nor to persons travelling provided, this exception shall not apply to any deputy constable, or special policeman who does not receive a compensation of forty dollars or more per month for his services as such officer, and who is not appointed in conformity with the statutes of this State authorizing such appointment; provided, further, that this exception shall not apply to the Game, Fish and Oyster Commissioner, nor to any deputy, when not in the actual discharge of his duties as such, nor to any game warden, or local deputy Game, Fish and Oyster Commissioner except when in the actual discharge of his duties in the county of his residence, nor shall it apply to any game warden or deputy Game, Fish and Oyster Commissioner who does not actually receive from the State fees or compensation for his services. [Acts 1871, p. 25; Acts 1918, 35th Leg. 4th C. S., ch. 91, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

See *Miller v. State* (App.) 18 S. W. 197.

**1. Officers in general.**—In a prosecution for unlawfully carrying a pistol, the court erred in not permitting accused to prove that he had been appointed, or thought he had been appointed and deputized, as city marshal, and was acting as such when he was charged with carrying the pistol, although such evidence did not show any legal appointment, since one who reasonably believed that he was appointed an officer, and exercised authority under that appointment, would not be guilty of violating the law in carrying a pistol. *Barnett v. State* (Cr. App.) 229 S. W. 519.

**2. Deputies and de facto officers.**—This article applies to a deputy-sheriff of any county while in any other county, whether in the pursuit of private or official business. *Clayton v. State*, 21 Tex. App. 343, 17 S. W. 261.

This article authorizes a deputy postmaster to carry a pistol only while he is actually engaged in the post office. *Love v. State*, 32 Cr. R. 85, 22 S. W. 140.

**5. Penitentiary or convict guard.**—A penitentiary guard, not in the lawful discharge of his duty as such guard, on the premises of the penitentiary, nor going nor returning to or from a place for the purpose of obtaining ammunition for his weapon, is liable to the penalties herein imposed. *West v. State*, 26 Tex. App. 99, 9 S. W. 485.

**9. Travelers.**—Where defendant went to a city 60 miles distant, taking with him his pistol to have it repaired, and was arrested on the train which he had boarded for home, he is a "person traveling." *Impson v. State* (App.) 19 S. W. 677.

Where traveler defects and turns aside from his journey on business disconnected with his journey, fact that he was originally a traveler does not exempt him from punishment for unlawfully carrying a pistol on or about his person. *Pecht v. State*, 82 Cr. R. 136, 199 S. W. 290.

In prosecution for unlawfully carrying a pistol on or about his person, question whether accused was at time a traveler is for jury. *Id.*

In prosecution for unlawfully carrying a pistol, defended on the ground that defendant was a traveler at the time of his arrest, and as such entitled to carry a pistol, the question of whether defendant's journey had ceased, or had been deflected from, at the time of his arrest, held for the jury. *Witt v. State* (Cr. App.) 231 S. W. 395.

10. **Premises or place of business.**—Where uncontradicted evidence showed that defendant carried pistol not only when he was in dance hall but back and forth to his home and when he took a lady home from the hall, charge that defendant had the right to carry pistol on premises (dance hall) over which he had control was inapplicable and properly refused. *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765.

Whether, under evidence introduced by defendant, charged with unlawfully carrying a pistol his relation to his father's home, where he used the weapon in frightening away trespassers, was such as to bring him within the exemption of the statute of persons carrying arms on their own premises, though he resided part of the time elsewhere, held a matter which, on defendant's objection to the charge and request for a special charge, should have been left for the jury. *Rather v. State*, 87 Cr. R. 624, 224 S. W. 776.

11. **Apprehension of attack and imminence of danger.**—One accused of unlawfully carrying pistol on or about his person cannot excuse charge on ground of imminent danger, when he had no such apprehension at time he armed himself. *Pecht v. State*, 82 Cr. R. 136, 199 S. W. 290.

If at time defendant carried his pistol he had reasonable grounds for fearing an unlawful attack upon his person and the danger was so imminent as not to admit of arrest of person about to make such attack, defendant should be acquitted. *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765.

If defendant believed at the time he carried pistol that he or his family were in danger of serious bodily injury, he had a right to carry pistol, provided there was insufficient time to have the party about to make the unlawful attack arrested. *Id.*

14. **Evidence.**—In prosecution for unlawfully carrying pistol on or about his person, evidence held sufficient to sustain conviction. *Pecht v. State*, 82 Cr. R. 136, 199 S. W. 290.

In action for unlawfully carrying pistol on or about his person, evidence held to warrant finding that accused was not at time a traveler, and that, if he had been, he deflected from his journey so as to lose protection of his status as a traveler. *Id.*

Evidence held to sustain conviction of defendant for unlawfully carrying a pistol on or about his person. *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765.

In a prosecution for unlawfully carrying a pistol, wherein defendant claimed that he heard a noise behind his house and took his pistol, and ran out the back door some 50 feet, where he met the officers and was arrested, and that the arrest was made on his own rented premises, evidence held not to sustain a conviction. *Rogers v. State*, 85 Cr. R. 421, 213 S. W. 637.

17½. **Charge.**—In a prosecution for unlawfully carrying a pistol, the trial court did not err in refusing to instruct that defendant could not be guilty if he carried the pistol from his home to his place of business, etc., when it was not carried habitually between such places, where the issue was not raised as presented in the requested charge. *Dodaro v. State* (Cr. App.) 231 S. W. 394.

#### **Art. 477. [340] Carrying arms in church or other assembly.**

**Validity.**—Art. 269, prohibiting any person, under penalty, from carrying a dangerous weapon on election day, during polling hours, within a half mile of the polls, and this article do not define the same offense, so that defendant, convicted upon indictment of the offense defined in article 269, may not object that the two provisions fix different punishments for the same offense, and are therefore not enforceable. *Cooper v. State*, 25 Tex. App. 530, 8 S. W. 654.

#### **Art. 479. [342] Arrest without warrant; officer failing punished.**

Cited in dissenting opinion, *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

## TITLE 10

## OFFENSES AGAINST PUBLIC MORALS, DECENCY AND CHASTITY

- Chap.  
 1. Unlawful marriages.  
 2. Incest.  
 3. Of adultery and fornication.

- Chap.  
 4. Bawdy and disorderly houses.  
 4a. Pandering.  
 5. Miscellaneous offenses.

## CHAPTER ONE

## UNLAWFUL MARRIAGES

Art.  
 481. "Bigamy" defined.

Art.  
 482. Preceding article not applicable, when.

## Article 481. [344] "Bigamy" defined.

1. **Nature and elements of offense in general.**—To bigamy, as to all other offenses, applies the law of principal and accessory, and one knowingly aiding and abetting, even as a party, is a principal; so a woman who knowingly married a married man is a principal. *Burgess v. State* (Cr. App.) 225 S. W. 182.

It is no defense that at the time of the second marriage defendant was temporarily insane from the recent use of intoxicants; a bigamous marriage being always void. *Hooter v. State* (Cr. App.) 225 S. W. 1093.

To authorize defendant's conviction of bigamy, it was necessary for state to prove that when defendant married he had been previously legally married to another woman, who was living when offense was committed. *Rogers v. State*, 83 Cr. R. 526, 204 S. W. 222.

6. **Mistake and duress.**—In a prosecution for bigamy, the fact that accused did not live with the bigamous wife after he learned of his mistake as to a divorce from a former wife was not material. *Busby v. State* (Cr. App.) 230 S. W. 419.

8. **Indictment and proof thereunder.**—Indictment for bigamy, charging that defendant unlawfully married a woman (naming her), when having a lawful former wife then living (naming her by her maiden name and her name after marriage to defendant), to whom he had theretofore been lawfully married, held sufficient. *Henton v. State* (Cr. App.) 209 S. W. 409.

9. **Evidence.**—In a prosecution for bigamy where accused claimed that at time of the second marriage he believed that a decree of divorce had been entered dissolving the former marriage, it was clearly his right to have before the jury the testimony of the bigamous wife that she had reported to him that his lawyer had told her that a divorce had been granted. *Busby v. State* (Cr. App.) 230 S. W. 419.

In prosecution for bigamy, evidence held insufficient to sustain conviction, in that it failed to establish that defendant, who married in Texas was the person who had married previously in Michigan, and in that it failed to show that at the time of his second marriage, if it was such, defendant's first wife was living. *Rogers v. State*, 83 Cr. R. 526, 204 S. W. 222.

In prosecution for bigamy involving issue of marriage to alleged first wife, evidence that the parties long openly lived together as husband and wife, and held themselves out as such, supplemented by declarations of the defendant to the effect that they were married, held sufficient to prove common-law marriage. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

In prosecution for bigamy involving issue of whether defendant was married to alleged first wife, there was no impropriety in receiving proof that a child was born to alleged first wife during her cohabitation with defendant. *Id.*

In prosecution for bigamy involving issue of whether defendant was married to alleged first wife, evidence held to support judgment of conviction irrespective of the question of a common-law marriage. *Id.*

## Art. 482. [345] Preceding article not applicable, when.

**Abandonment of spouse.**—In prosecution of second husband for desertion of wife, it was error to instruct concerning former husband that presumption of death from seven years' absence was absolute, being on weight of evidence, and it is immaterial that wife would be exempt from conviction of bigamy. *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

## CHAPTER TWO

## INCEST

Art.  
486. Punishment.  
488. Certain marriages prohibited.

Art.  
489. Relationship, how proved; proof of marriage unnecessary.

**Article 486. [349] Punishment.**

4. **Indictment and proof thereunder.**—As this article does not contain the word “knowingly” in defining “incest,” in an indictment charging that crime, it is not necessary to allege that defendant “knowingly” entered into an unlawful marriage. *Simon v. State*, 31 Cr. R. 186, 20 S. W. 716, 37 Am. St. Rep. 802.

5. **Evidence.**—See *Lawrence v. State*, 87 Cr. R. 61, 219 S. W. 460.

In a prosecution for incest, evidence held insufficient to justify conviction. *Bradshaw v. State*, 82 Cr. R. 351, 198 S. W. 942.

In a prosecution for incest, evidence as to previous acts of intercourse was admissible on the question of involuntary submission to defendant. *Bohannon v. State*, 84 Cr. R. 8, 204 S. W. 1165.

In a prosecution for incest, an instruction that the jury might consider other acts of intercourse between defendant and prosecutrix as evidence corroborating prosecutrix was erroneous. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

6. **Testimony of prosecutrix or paramour.**—A stepdaughter 19 years of age who consents to intercourse, being an accomplice in a prosecution for incest, her evidence must be corroborated. *Bradshaw v. State*, 82 Cr. R. 351, 198 S. W. 942.

In a prosecution for incest, where it was necessary that the testimony of the prosecuting witness be corroborated, her testimony given before the grand jury was hearsay and inadmissible. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

8. **Charge of court.**—In prosecution for incest, it is error to submit issue of relationship of niece, where there is evidence to show the relationship of half-niece, in view of statute defining the crime which makes a distinction between niece and half-niece. *Griffin v. State*, 83 Cr. R. 157, 202 S. W. 87.

Where it was necessary to corroborate the evidence of prosecuting witness in a prosecution for incest, where a statement by defendant before the grand jury that prosecutrix had left his house and that he was unaware of her pregnancy or that she had been having intercourse was introduced, it was error to fail to instruct that such statement could not be considered as a criminative fact; the statement in no way corroborating prosecutrix. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

**Art. 488. [351] Certain marriages prohibited.**

See *Bohannon v. State*, 84 Cr. R. 8, 204 S. W. 1165.

**Art. 489. [352] Relationship, how proved; proof of marriage unnecessary.**

**Proof of marriage.**—A defendant who is indicted for committing incest by marrying his niece may be convicted on proof of his cohabiting with her without proof of a formal marriage between them. *Simon v. State*, 31 Cr. R. 186, 20 S. W. 399, 37 Am. St. Rep. 802.

## CHAPTER THREE

## OF ADULTERY AND FORNICATION

Art.  
490. “Adultery” defined.

Art.  
494. “Fornication” defined.

**Article 490. [353] “Adultery” defined.**

5. **Habitual carnal intercourse.**—The court cannot lay down any hard and fast rule as to what constitutes habitual carnal intercourse within the meaning of the adultery statute. *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

Proof of occasional acts of carnal intercourse is not sufficient to show habitual intercourse. *Hafley v. State* (Cr. App.) 224 S. W. 1099.

8. **Indictment and proof thereunder.**—In adultery prosecution, complaint and information containing no allegation that the habitual carnal intercourse was “without living together” was fatally defective, such words being statutory statement and requirement. *Yates v. State*, 84 Cr. R. 590, 209 S. W. 407.

10. **Evidence.**—Testimony of accomplice as to nine specific acts of sexual intercourse between the 15th of August and the 25th of December at varying intervals, only three of which were corroborated, without proof of attending circumstances showing that the intercourse was habitual, held not sufficient to sustain a conviction of adultery by habit-

ual carnal intercourse without living together. *Cordill v. State*, 83 Cr. R. 74, 201 S. W. 181.

On trial under indictment for living together and having carnal intercourse, where state's witnesses had testified to seeing accused with the woman in very secreted place near certain mail box, evidence that the woman frequently went to mail box and remained there from 20 minutes to 2 hours was admissible. *Green v. State*, 83 Cr. R. 68, 201 S. W. 182.

In prosecution for unlawfully living with a woman not defendant's wife while he was lawfully married to another, evidence consisting of mere suspicious circumstances held insufficient to justify the verdict of guilty. *Childress v. State*, 85 Cr. R. 22, 210 S. W. 193.

In a prosecution of a married man for habitual carnal intercourse with a female not his wife, evidence held to sustain a conviction. *Webb v. State*, 86 Cr. R. 337, 216 S. W. 865.

In a prosecution for adultery, evidence held insufficient to show habitual carnal intercourse as charged in the indictment. *Hafley v. State* (Cr. App.) 224 S. W. 1099.

Evidence held to warrant a conviction of unlawfully having habitual carnal intercourse "without living together." *Burnett v. State* (Cr. App.) 228 S. W. 239.

#### Art. 494. [357] "Fornication" defined.

Cited, *Mosley v. State*, 82 Cr. R. 16, 198 S. W. 146.

**Elements of offense.**—In a prosecution for fornication, the state must show that the parties were single persons. *Stubblefield v. State*, 83 Cr. R. 48, 200 S. W. 1090.

**Indictment and information.**—An indictment charging that a man and woman had habitual carnal intercourse, but not alleging that they lived together at the time of such intercourse, or that they had the intercourse without living together, is fatally defective. *Hurt, J., dissenting. Jones v. State*, 29 Tex. App. 347, 16 S. W. 189.

## CHAPTER FOUR

### BAWDY AND DISORDERLY HOUSES

Art.		Art.
496.	"Bawdy house" and "disorderly house" defined.	498. Alluring females to visit same.
497.	"Assignment house" defined.	500. Punishment for keeping.

#### Article 496. [359] "Bawdy house" and "disorderly house" defined.

**Constitutionality.**—Arts. 496, 500, making a house disorderly where liquor is sold or kept for the purpose of sale, so as to require the seller to obtain an internal revenue license, are valid. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

**Conflict with other statute.**—This article is in direct conflict with, and repeals, arts. 157, 158, 160, levying an annual occupation tax on such business in prohibition territory, and no conviction can be had for failure to acquire the license. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Ordinances.**—A city by its ordinance cannot set aside the state penal laws prohibiting houses of prostitution. *Levy v. State*, 84 Cr. R. 493, 208 S. W. 667.

**Character of house.**—A combined retail grocery store and beer saloon, frequented by prostitutes and vagabonds for the purpose of drinking beer, does not constitute a disorderly house. *Harmes v. State*, 26 Tex. App. 190, 9 S. W. 487, 8 Am. St. Rep. 470.

A bawdyhouse is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation. *Clark v. State*, 86 Cr. R. 585, 218 S. W. 366.

— **Sale of liquor.**—Nonintoxicating malt liquor, as used in arts. 157, 158, 160, 496, is a fermented malt liquor, containing alcohol in quantities insufficient to produce intoxication when used as a beverage. *Claunch v. State*, 83 Cr. R. 382, 203 S. W. 891.

**Recognition.**—A recognition on appeal is sufficient, where it states that defendant is charged with "keeping a disorderly house," though it does not also state that defendant is owner or lessee of the house. *Reed v. State* (Cr. App.) 22 S. W. 969, reversing 21 S. W. 364.

**Indictment and information.**—An indictment for keeping a disorderly house is fatally defective which fails to allege that accused was the owner, lessee, or tenant of the house. *Lamar v. State*, 30 Tex. App. 693, 18 S. W. 788.

An indictment alleging that defendant "was the owner \* \* \* of a certain house. \* \* \* and did then and there knowingly permit the keeping in said house of a disorderly house, to wit, a house kept for prostitution, and where prostitutes were permitted to resort and reside for the purpose of plying their vocation," is sufficient. *Mansfield v. State* (Cr. App.) 24 S. W. 901.

Indictment for keeping disorderly house, where women of bad reputation were employed, held sufficient when in language of arts. 496 and 500, without any further description or designation of such women. *Limantia v. State*, 82 Cr. R. 430, 199 S. W. 619.

An indictment for keeping a disorderly house where liquor was sold and kept for

sale in violation of arts. 496; 500, held sufficient. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

**Evidence.**—In prosecution for keeping a disorderly house where liquors are sold, a certified copy of the record of the internal revenue liquor license to accused, which corresponded, as testified to by one witness, with a revenue license posted in appellant's place of business, was properly admitted in evidence. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

In prosecution for keeping a disorderly house where liquors are sold, under arts. 496, 500, a witness can testify to the general reputation of the house. *Id.*

In a prosecution for keeping a disorderly house, the state was properly permitted to introduce in evidence labels on bottles of liquor purchased to the effect that the contents contained less than 2 per cent. alcohol, and giving the name of the brewer. *Id.*

Since keeping a disorderly house is a continuing offense, witnesses may testify that they had seen posted in defendant's place of business an internal revenue license about the time sales of liquor were made: *Id.*

#### Art. 497. "Assignment house" defined.

**Indictment and information.**—A complaint that defendant kept a house to be used by "men for the purpose of meeting by mutual appointment made by another for the purpose of sexual intercourse" does not state an offense, and is a variance from information charging it was done for the purpose of men and woman meeting for such intercourse. *Reynolds v. State*, 82 Cr. R. 326, 198 S. W. 958.

#### Art. 498. Alluring females to visit same.

**Elements of offense.**—Assisting prostitute to ply her vocation in woods held not within pandering statute (art. 506a), which is directed against offense in connection with house of prostitution, but was within article 498. *Johnson v. State*, 83 Cr. R. 64, 201 S. W. 990.

#### Art. 500. [361] Punishment for keeping, or owner of the house having information that his house is being kept or used, etc.

1. **Constitutionality, repeal, and amendment.**—Arts. 496, 500, making a house disorderly, where liquor is sold or kept for the purpose of sale, so as to require the seller to obtain an internal revenue license, are valid. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

3. **Nature and elements of offense and persons liable.**—Whether or not a particular house is used as a bawdyhouse and whether the owner knew of its use are questions for the jury. *Rosborough v. Cerveni* (Civ. App.) 197 S. W. 319.

If defendant directly or for another kept or was concerned in keeping, or aided or assisted or abetted the persons who kept a disorderly house, by making appointments with men for the purpose of assignments with women in such house, he was guilty as charged of keeping or of unlawfully aiding, assisting, and abetting in keeping a disorderly house; defendant having made an "appointment" for the men and women within the definition of the term as arranging a meeting. *Spears v. State* (Cr. App.) 232 S. W. 326.

5. **Indictment, information and complaint.**—Where, on a trial for keeping a disorderly house, the complaint alleged that defendant "kept a disorderly house, to wit, a house for the purposes of prostitution, owned and occupied by defendant for purposes of prostitution," and the recognizance stated the offense to be that of keeping a disorderly house, to wit, a house for prostitution, and a house used and occupied by defendant, the appeal will be dismissed, as the recognizance does not allege that defendant was either the owner, tenant, or lessee of a disorderly house. *Reed v. State* (Cr. App.) 21 S. W. 364.

A complaint that defendant kept a house to be used by "men for the purpose of meeting by mutual appointment made by another for the purpose of sexual intercourse" does not state an offense, and is a variance from information charging it was done for the purpose of men and women meeting for such intercourse. *Reynolds v. State*, 82 Cr. R. 326, 198 S. W. 958.

Indictment for keeping disorderly house, where women of bad reputation were employed, held sufficient when in language of arts. 496 and 500, without any further description or designation of such women. *Lilimantia v. State*, 82 Cr. R. 430, 199 S. W. 619.

An indictment for keeping a disorderly house where liquor was sold and kept for sale held sufficient. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

8. **Evidence.**—In support of the allegation that the house kept by accused was a disorderly one, evidence of its general reputation as such was admissible, although not sufficient alone to establish the fact. *Cross v. State*, 85 Cr. R. 430, 213 S. W. 633; *McGary v. State*, 82 Cr. R. 54, 198 S. W. 574.

In prosecution for keeping a disorderly house, evidence held sufficient to make a question for the jury and to sustain a conviction. *Lacey v. State*, 83 Cr. R. 102, 201 S. W. 408.

In prosecution for keeping a disorderly house where liquors are sold, a certified copy of the record of the internal revenue liquor license to accused, which corresponded, as testified to by one witness, with a revenue license posted in appellant's place of business, was properly admitted in evidence. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

In prosecution for keeping a disorderly house where liquors are sold, a witness can testify to the general reputation of the house. *Id.*

Since keeping a disorderly house is a continuing offense, witnesses may testify that they had seen posted in defendant's place of business an internal revenue license about the time sales of liquor were made. *Id.*

In a prosecution for keeping a disorderly house, the state was properly permitted to introduce in evidence labels on bottles of liquor purchased to the effect that the contents contained less than 2 per cent. alcohol, and giving the name of the brewer. *Id.*

In a prosecution for keeping a disorderly house, it was error to admit testimony by police officers as to the reputation of the premises, where such officers did not have adequate knowledge thereof. *Schwimmer v. State*, 84 Cr. R. 227, 206 S. W. 521.

**10. Charge of the court.**—In a prosecution for keeping or permitting to be kept a bawdyhouse on premises leased and controlled by defendant, the charge of the court should submit to the jury the question whether or not defendant in fact occupied that relation to said premises. *Chadwick v. State*, 86 Cr. R. 269, 216 S. W. 397.

## CHAPTER FOUR A

### PANDERING

#### Article 506a. Pandering.

**Nature and elements of offense.**—Assisting prostitute to ply her vocation in woods held not within pandering statute, which is directed against offense in connection with house of prostitution, but was within article 498. *Johnson v. State*, 83 Cr. R. 64, 201 S. W. 990.

**Indictment and information.**—Indictment for pandering, following language prescribing offense, held sufficient. *Baldwin v. State*, 82 Cr. R. 50, 198 S. W. 305.

**Evidence—Admissibility.**—In prosecution of husband for pandering held, cross-examination of wife, who was principal state's witness, as to her past life, was proper for showing motives of wife and other state's witness who had been paying her attention. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

In prosecution of husband for procuring his wife to enter house of prostitution, wife having testified that relations with another man were brought about by brute force, held, it was proper to contradict her for impeachment, to show motive, and corroborate defendant. *Id.*

While right of one accused of crime to make bond is guaranteed, evidence in prosecution for pandering, that accused agreed to obtain bond for a prostitute and urged her to continue her vocation, that he whipped her and required her to remain at home, that he caressed her and received money from her while she was living in disorderly house, and that he made inquiries of officers who were watching house in which she lived was admissible. *Parker v. State*, 83 Cr. R. 81, 200 S. W. 1083.

In prosecution for pandering, evidence that accused while prostitute was living at another house struck her because he did not receive money enough from her is admissible, though charge submitted offense in connection with residence of prostitute at different address. *Id.*

Where in a prosecution for procuring a female to become an inmate of a house of ill fame, in which it was shown that she left place of accused and went to home of another, testimony that accused went to such home for purpose of bringing her back would be admissible regardless of whether he saw the female or whether she heard any conversation at such place to that effect. *Dollar v. State*, 86 Cr. R. 333, 216 S. W. 1087.

Where, in a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that she left place of accused and went to home of another was admissible as a predicate for further testimony that he attempted to induce her to return, but her reason for going, such as that her child was sick, would be of no importance. *Id.*

In prosecution for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of P., a prostitute, that she went to house in question and registered and occupied a room therein for the purpose of prostitution was admissible, though defendant was not present in the lobby of the house when P. entered and defendant's husband assigned P. a room. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

**Sufficiency.**—In prosecution for pandering, evidence held to establish defendant's guilt. *Baldwin v. State*, 82 Cr. R. 50, 198 S. W. 305.

In a prosecution for pandering, evidence held insufficient to sustain a conviction. *Baker v. State*, 82 Cr. R. 401, 199 S. W. 631.

In prosecution for pandering, evidence held sufficient to sustain conviction. *Parker v. State*, 83 Cr. R. 81, 200 S. W. 1083.

Evidence held insufficient to sustain conviction of pandering. *Johnson v. State*, 83 Cr. R. 64, 201 S. W. 990.

In a prosecution for procuring a female to become an inmate of a house of ill fame, evidence held sufficient to sustain a conviction. *Dollar v. State*, 86 Cr. R. 333, 216 S. W. 1087.

**Charge.**—In prosecution for pandering held, as main charge failed to present theory raised by defendant's evidence, court's refusal of charge presenting such theory was error. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.



In prosecution for pandering, where it was doubtful whether houses involved were houses of prostitution or where prostitution was encouraged or allowed within meaning of the law, those terms should be defined in charge. *Johnson v. State*, 83 Cr. R. 64, 201 S. W. 990.

## CHAPTER FIVE

### MISCELLANEOUS OFFENSES

Art.

513a. Dancing performances by women in tents.

513b. Same; punishment.

Art.

513c. Conduct of "baby farm" or maternity home without a license.

**Article 513a. Dancing performances by women in tents.**—It shall hereafter be unlawful for any person, persons, firm, troupe, company, corporation, or aggregation of persons, traveling from place to place, composed in whole or in part of women to show or exhibit in any dancing performances, or as dancers in a tent, enclosure, temporary structure, or in any location whatsoever; provided that it shall not be unlawful under this Act for any regularly organized show, theatrical company or troupe to show or exhibit dancing performances in permanently established Opera-houses, Play-houses, or Auditoriums; or for any licensed circus to give dancing exhibitions in connection with any regular performances, provided said circus exhibits for no longer period of time than one day in succession in any town or city in this state. [Acts 1919, 36th Leg., ch. 21, § 1.]

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

**Art. 513b. Same; punishment.**—Any person, persons, firm, troupe, corporation, company or aggregation of persons, violating any provision of this Act shall be deemed guilty of a misdemeanor and upon conviction therefor, shall be fined not less than \$100.00, nor more than \$500.00 and shall in addition thereto be sentenced to not less than thirty days, nor more than one year in the county jail in which county the offense is committed. [Id., § 2.]

**Art. 513c. Conduct of "baby farm" or maternity home without a license.**—It shall be unlawful for any individual, firm, association, manager, keeper or officer of any corporation to keep or conduct any "Baby Farm", lying-in hospital, hospital ward, maternity home or place for the reception, care or treatment of pregnant women without first having obtained a license required by Section 1 of this Bill [Art. 5732½, Civil Statutes, ante], and whosoever shall do so shall be subject to fine of not less than Fifty Dollars nor more than Five Hundred Dollars and in addition thereto, may be confined in the County jail for a period not to exceed twelve months. [Acts 1921, 37th Leg., ch. 76, § 4.]

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

## TITLE 11

## OFFENSES AGAINST PUBLIC POLICY AND ECONOMY

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|---|---|
| <p>Chap.<br/>1. Illegal banking, passing spurious money, and bank guaranty.<br/>2. Of lotteries and raffles.<br/>3. Bucket shops—defining and prohibiting same.<br/>4. Gaming.<br/>6. Betting on elections.<br/>6a. State wide intoxicating liquor prohibition.</p> | <p>Chap.<br/>7. Unlawfully selling intoxicating liquor.<br/>8. Violation of the law regulating the sale of intoxicating liquors.<br/>8a. Pool halls.<br/>9. Vagrancy.<br/>9a. Abandonment of wife or children.<br/>10. Miscellaneous offenses.<br/>11. Insurance companies.<br/>    Life insurance companies.<br/>    Lloyd's plan.</p> |
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## CHAPTER ONE

## ILLEGAL BANKING, PASSING SPURIOUS MONEY, AND BANK GUARANTY

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|---|---|
| <p>Art.<br/>514. Issuing bills to pass as money.<br/>524. Director borrowing funds.<br/>531a. Receiving deposits after failure to comply with requirements as to increase of capital stock.</p> | <p>Art.<br/>532. Receiving deposits when insolvent.</p> |
|---|---|

**Article 514. [368] Issuing bills to pass as money.**

**Elements of offense.**—Where debtor gave creditor a check without sufficient funds in the bank, went to the bank the following morning to make a deposit to meet the check, but on hearing that the check had been turned over to officers, took the money directly to the creditor and paid him, instead of depositing it in the bank, he was not guilty of issuing a check intended to circulate as money, in the absence of evidence that check was issued to creditor for any other purpose than to pay debt. *Jackson v. State* (Cr. App.) 231 S. W. 1095.

**Art. 524. Director borrowing funds.**

**Indictment and information.**—Indictment held to sufficiently charge the defendant bank president in a general way with becoming indebted to the bank, but not to authorize admission of evidence of transactions showing his indirect liability through membership in a firm to which the loan was made. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

**Evidence.**—Evidence in the prosecution of bank president for unlawfully borrowing money through secret connection with a partnership to which the loan was made, held insufficient to show that defendant was a partner, and through the partnership became indebted to the bank. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

**Art. 531a. Receiving deposits after failure to comply with requirements as to increase of capital stock.**—It shall hereafter be unlawful for any director, officer or employee of any State bank or banking corporation, organized under or subject to the general banking laws of this State, or any person for any such bank or banking corporation, to receive any deposits at any time after such bank or banking corporation has failed or refused, within the time required, to comply with any order or requirement of the State Banking Board, pursuant the provisions of Section 1 of this Act [Art. 564, Civil Statutes, ante], when its total demand and time deposits and savings accounts shall in the aggregate amount to more than the limitations placed upon deposits by Section 1 of this Act; and such acceptance of deposits by any director, officer, or employee of any such bank or banking corporation or by any persons therefor, shall be deemed a misdemeanor and punishable upon conviction by a fine of not less than one hundred dollars (\$100.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty days, nor more than ninety

days, or by both such fine and imprisonment; and each acceptance or receipt of a deposit in violation hereof shall constitute a separate offense. [Acts 1921, 37th Leg., ch. 54, § 2.]

Took effect April 2, 1921.

### Art. 532. Receiving deposits when insolvent.

**New debt.**—The transfer by a bank of all of its property and assets as security to another bank, which assumed its liabilities to creditors, did not create a new debt in violation of this article. *Harris v. Briggs* (C. C. A.) 264 Fed. 726.

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## CHAPTER TWO

### OF LOTTERIES AND RAFFLES

#### Article 536. [377] Dealing in futures.

**Elements of offense.**—Where the intention of the parties in a contract for the sale of cotton was that no actual cotton should ever be delivered by the vendor or received and paid for by the vendee, the contract is illegal, prohibiting dealing in cotton futures. *P. T. Talbot & Son v. Martindale* (Civ. App.) 211 S. W. 302.

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## CHAPTER THREE

### BUCKET SHOPS—DEFINING AND PROHIBITING SAME

Art.		Art.	
539.	Futures or dealing in futures defined.	545.	Proof prima facie.
543.	Penalty for making future contract.	546.	What constitutes prima facie case.

#### Article 539. Futures or dealing in futures defined.

**Interstate transactions.**—This article does not apply to a written contract between a resident of Texas and a grain company in Nebraska contemplating the interstate transportation and delivery of grain. *Merriam & Millard Co. v. Cole* (Civ. App.) 198 S. W. 1054.

**Civil actions.**—That seller in contract for future delivery of grain could, and if demanded would, have made a delivery, is not necessarily conclusive against delivery not having been intended by either party. *Clark v. Merriam & Millard Co.* (Civ. App.) 223 S. W. 869.

— **Validity of contract.**—Contract for sale of goods to be delivered at future date is invalid, if the seller does not then have the goods, nor intend a delivery, but only a settlement on the difference between contract and market price. *Merriam & Millard Co. v. Cole* (Civ. App.) 198 S. W. 1054.

A contract for future delivery of an article where it is contemplated by the parties thereto that such articles should not be delivered, but that settlement might be made by paying the difference in the contract price at the time of such delivery and the price named in the contract, is a "wager contract." *Fate v. Wilson Bros. Mercantile Co.* (Civ. App.) 208 S. W. 235.

If it was intention of parties to contract to deliver cotton that no cotton should be delivered, but that contract should be complied with by payment of difference in market value of cotton at time and place of delivery and price named in contract, it was a wager contract, and not enforceable. *Id.*

Where deed of trust was executed to secure grantee against loss in guaranteeing grantor's indebtedness, and the written guaranties were executed at time of execution of deed, but no money passed at such time, the guaranties and deed of trust did not become effective until the delivery of the guaranties by grantor to grantee, and, where delivered in settlement of cotton future transactions between them, the deed of trust and guaranties became a part of such illegal transaction. *Sanger v. Futch* (Civ. App.) 208 S. W. 681.

A contract of sale of cotton, delivered at the time, is not a wagering contract, because providing that the price shall be market price on any day, within a certain future period, selected on its arrival by the seller. *Smith v. Duncan* (Com. App.) 209 S. W. 140.

Where the intention of the parties in a contract for the sale of cotton was that no actual cotton should ever be delivered by the vendor or received and paid for by the vendee, the contract is illegal. *P. T. Talbot & Son v. Martindale* (Civ. App.) 211 S. W. 302.

A contract for the purchase of cotton, not intended by the parties to be settled by paying or receiving a margin or profit, but contemplating an actual delivery and pay-

ment, was not illegal as a future contract. *Puckett v. Wilson Bros. Mercantile Co.* (Civ. App.) 211 S. W. 642.

Contract by which seller sold cotton on consignment, and in which seller agreed to sell the cotton outright to buyer on or prior to specified date, retaining the option to take the price prevailing on any day from date of delivery to such specified date, held unenforceable; the transaction being a gambling transaction. *Moore v. H. Seay & Co.* (Civ. App.) 228 S. W. 610.

Whether a contract for sale of cotton is a "future contract" depends on the intention of the parties at the time of contracting, and if at that time their bona fide intention is that the cotton shall be actually delivered and paid for, the contract is not a "future contract"; otherwise if their intention is that the contract shall or may be settled by paying or receiving a margin or profit thereon. *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

— **Evidence.**—In a suit for balance due under written contract for purchase of oats, defended on the ground that it was a gambling contract not intending an actual delivery, undisputed evidence held to require a directed verdict for plaintiff. *Merriam & Millard Co. v. Cole* (Civ. App.) 198 S. W. 1054.

Evidence held to show a contract for sale of cotton was a mere gaming transaction or dealing in futures, the parties not contemplating actual delivery. *Honey v. Wilson Bros. Mercantile Co.* (Civ. App.) 209 S. W. 187.

Parol evidence is admissible to show that a written contract for the sale of cotton, legal and proper in form, was in fact entered into for the purpose of speculating in futures and with intention not to deliver the cotton purchased, but to pay the difference between the contract price and the price on a future named day, contrary to Laws 1907, c. 86. *Fenter v. Robinson* (Civ. App.) 230 S. W. 844.

#### Art. 543. Penalty for making future contract.

See *Pate v. Wilson Bros. Mercantile Co.* (Civ. App.) 208 S. W. 235.

#### Art. 545. Proof prima facie.

See *Puckett v. Wilson Bros. Mercantile Co.* (Civ. App.) 211 S. W. 642.

**Burden of proof.**—The burden is on plaintiff, in an action for the breach of a contract to deliver cotton in the future, to prove that actual delivery was bona fide intended. *Pate v. Wilson Bros. Mercantile Co.* (Civ. App.) 208 S. W. 235.

#### Art. 546. What constitutes prima facie case.

**Rebuttal of prima facie case.**—Under indictment for forging name of railroad's agent to bill of lading, in violation of Vernon's Ann. Pen. Code 1916, art. 1547, punishable by confinement for not less than 5 nor more than 15 years, conviction could not be had on showing violation of art. 924, denouncing crime of ordinary forgery, penalty for which, under art. 936, is imprisonment for not less than 2 or more than 7 years. *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

In an action for failure to deliver cotton, the most the court had a right to say was that the contract, because it was for delivery of cotton in the future, was prima facie or presumptively illegal; plaintiff buyer having the right to show it was in fact valid. *Puckett v. Wilson Bros. Mercantile Co.* (Civ. App.) 211 S. W. 642.

## CHAPTER FOUR

### GAMING

Art.	Art.
548. Playing cards in a public place.	559. Keeping or renting for.
549. What included in preceding article.	560. Betting at place resorted to.
551. Keeping or exhibiting table or bank.	563. Persons going in gaming house.
552. Table or bank includes, what.	572. Permitting a house to be used for gaming.
553. Games specifically enumerated.	573. [Superseded.]
554. Indictment.	574. Procedure in gaming cases.
555. Proof.	577. Pool selling or book making.
556. "Played," "dealt" and "exhibited" defined.	578. Betting on horse racing.
557. Gaming table, bank, etc., betting at.	

#### Article 548. [379] Playing cards in a public place.

10. **Private residence occupied by a family.**—A conviction for card playing cannot be sustained where the evidence shows but one sitting or playing in a private residence, and the information does not allege that the house was used for retailing spirituous liquors. *Rambo v. State* (Cr. App.) 24 S. W. 650.

Evidence, on prosecution for playing cards at a place not a private residence, held to show a tent to be a private residence. *Harris v. State*, 82 Cr. R. 196, 198 S. W. 956.

21. **Indictment or information—Description of place or house.**—An indictment charging that defendant permitted "a game of cards to be played upon his premises, the said

premises then and there being appurtenances to a public place, to-wit, a house for retailing spirituous liquors," is sufficient. *Ballew v. State*, 26 Tex. App. 483, 9 S. W. 765.

**26. Evidence.**—On indictment for playing cards "in a house for retailing spirituous liquors," proof that defendant played cards in a "saloon" does not sustain the allegation. *Springfield v. State* (App.) 13 S. W. 752.

To convict of playing cards "at a house for retailing spirituous liquors," it is not enough to show that the room in which the playing occurred was attached to the saloon, but it must be shown that it was used in connection with the business thereof. *Robinson v. State* (App.) 19 S. W. 894.

Evidence, on prosecution for playing cards in a place other than a private residence, held insufficient to show playing. *Harris v. State*, 82 Cr. R. 196, 198 S. W. 956.

**27. Instructions.**—An instruction, on a trial for playing cards at a gaming house, defining a "gaming-house" as "a house or part of a house where gaming is carried on as a business," is correct. *Anderson v. State* (App.) 12 S. W. 868.

#### Art. 549. [380] What included in preceding article.

See *Ballew v. State*, 26 Tex. App. 483, 9 S. W. 765.

#### Art. 551. [382, 388a] Gaming table, bank, etc., keeping or exhibiting.

See *Perez v. State*, 84 Cr. R. 184, 206 S. W. 192.

**2½. Repeal.**—See *Francis v. State* (Cr. App.) 233 S. W. 974.

**3. Offense in general.**—A conviction can be had even though defendant was not the owner of such table, or had no interest therein; exhibition for the purpose of gaming being sufficient to constitute the offense. *Lettz v. State* (Cr. App.) 21 S. W. 371.

**8. Gaming table or bank.**—"Craps" is not a banking game (*Chappell v. State*, 27 Tex. App. 310, 11 S. W. 411, followed). *Bell v. State* (Cr. App.) 21 S. W. 366.

**21. Indictment or information.**—An indictment charging the defendant with "unlawfully permitting a game with dice to be played and bet at a house under his control," the said "house being then and there a public place, to-wit, a house for retailing spirituous liquors," is good. *Robinson v. State*, 24 Tex. App. 4, 5 S. W. 509.

Where an indictment charges unlawful playing at a game of cards in a public place, and the evidence shows that the game played was "monte," the evidence will not sustain a conviction since different penalties are provided for "monte" and "playing with cards." *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416.

#### Art. 552. [383] Table or bank includes, what.

See *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416.

#### Art. 553. [384] Games specifically enumerated.

See *Evans v. State* (Cr. App.) 22 S. W. 18.

**Indictment or information.**—See *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416. "Faro" is one of the banking games specifically named in the statute, and to allege that the defendant bet at a "faro-bank" is to sufficiently allege the offense of which the defendant has been convicted. *Short v. State*, 23 Tex. App. 312, 4 S. W. 903.

#### Art. 554. [385] Indictment.

See *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416.

#### Art. 555. [386] Proof.

See *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416.

#### Art. 556. [387] "Played," "dealt" and "exhibited" defined.

See *Lyle v. State*, 30 Tex. App. 118, 16 S. W. 765, 28 Am. St. Rep. 893; *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416.

#### Art. 557. [388] Gaming table, bank, etc., betting at.

See *Lyle v. State*, 30 Tex. App. 118, 16 S. W. 765, 28 Am. St. Rep. 893.

**3. Betting in general.**—A recognizance on appeal from a conviction for crap playing must show that the game was not played in a private residence, since crap playing is not an offense *eo nomine* under this article, and the elements of the offense must be set out in the recognizance. *Roe v. State* (Cr. App.) 24 S. W. 28.

Each game or bet participated in or made by defendant charged with gaming was a separate offense. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

A conviction cannot be sustained on proof that defendant played a game of craps, without any showing that any bet was made on the game. *Walling v. State* (Cr. App.) 225 S. W. 1096.

**9. Betting at game played with dice.**—It is an offense to bet on any game played with dice, or remain in any place where such game is played, whether in private residence occupied by a family or elsewhere. *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

**16. Complaint, indictment or information.**—Indictment charged that appellant bet and wagered at "a certain faro-bank." Held sufficient, inasmuch as faro is one of the games specially denounced by statute. *Short v. State*, 23 Tex. App. 312, 4 S. W. 903.

22. **Evidence.**—Evidence held to show that defendant violated the statute, by betting or wagering money at a game with cards at a private residence commonly resorted to for the purpose of gaming. *Cagle v. State*, 82 Cr. R. 347, 200 S. W. 153.

In prosecution for unlawful gaming in a private residence, it was not error to admit testimony as to why defendant put quilts over the windows in his residence. *Id.*

A deputy sheriff could testify in prosecution for unlawful gaming that he had watched "a bunch going up" toward defendant's residence, and that he heard money rattling in the room and heard an argument as if defendant and another had fallen out over the game. *Id.*

Evidence on prosecution for shooting craps held insufficient for conviction. *Vaughn v. State*, 84 Cr. R. 166, 206 S. W. 50.

Evidence held insufficient to sustain conviction for the offense of unlawfully betting at a game of pool. *Yancey v. State*, 84 Cr. R. 281, 206 S. W. 843.

#### Art. 559. [388b] Keeping or renting for.

2. **Repeal.**—Art. 572 was not repealed by this article. *Allen v. State* (Cr. App.) 232 S. W. 517.

13. **Indictment or information—Keeping and being interested in keeping, etc.**—An indictment alleging that two persons named did unlawfully permit a game of monte "to be played in a house under his control, the said house being a public place," etc., is fatally defective, as not showing that the house was under defendants' control, or that of either of them. *Jones v. State* (App.) 19 S. W. 677.

18. **Evidence—Keeping or maintaining room, etc.**—Evidence held to sustain conviction of permitting the use of a house for purpose of gambling with dice. *Wright v. State*, 83 Cr. R. 559, 204 S. W. 767.

Evidence that defendant, in a prosecution for keeping a gaming house, had assisted the owner of the premises in finding a tenant after he himself had surrendered his lease, knowing or believing that the tenant would keep a gaming house, was not sufficient to sustain his conviction as keeper of such house. *Bell v. State*, 84 Cr. R. 197, 206 S. W. 516.

20. **Instructions.**—In a prosecution for keeping a gaming house, it was error to refuse to charge that defendant could not be convicted for gambling. *Bell v. State*, 84 Cr. R. 197, 206 S. W. 516.

#### Art. 560. [388c] Betting at places resorted to.

Cited, *Colchell v. State*, 23 Tex. App. 584, 5 S. W. 139.

#### Art. 563. [388f] Persons going in gaming house.

**Nature and elements of offense and persons liable.**—The statute against being present where gambling is being carried on applies only to onlookers, and not to those playing. *Harris v. State*, 82 Cr. R. 196, 198 S. W. 956.

It is an offense to bet on any game played with dice, or remain in any place where such game is played, whether in private residence occupied by a family or elsewhere. *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

**Evidence.**—The state's evidence on a prosecution for playing cards, being purely circumstantial, and entirely consistent with defendant's, that they were expecting to play cards on the coming of others, but had not begun, is insufficient for conviction. *Renfro v. State*, 82 Cr. R. 197, 198 S. W. 957.

**Art. 572. [389] Permitting a house to be used for gaming.**—If any person shall permit any game prohibited by the provisions of this chapter to be played in his house, or a house under his control, or upon his premises, or upon premises under his control, the said house being a public place, or the said premises being appurtenances to a public place, he shall be fined not less than twenty-five nor more than one hundred dollars. [Amended by Act March 5, 1881, p. 17.]

**Explanatory.**—This article was omitted from Vernon's Penal Code of 1916, in view of the decisions therein mentioned. In view of the later decision in *Allen v. State* (Cr. App.) 232 S. W. 517, it is inserted in this supplement as live law.

**Repeal.**—Art. 572, declaring that, if any person shall permit any game prohibited by the provisions of the chapter to be played in his house, or a house under his control, the house, being a public place, etc., shall be fined, was not repealed by art. 559, making it a felony for one knowingly to permit his premises to be used "as a place for the purpose of being used as a place to bet," etc., *Allen v. State* (Cr. App.) 232 S. W. 517. See, also, *Francis v. State* (Cr. App.) 233 S. W. 974.

**Indictment or information.**—An indictment under art. 572, declaring that, if any person shall permit any game prohibited by the provisions of the chapter to be played in his house, or a house under his control, the said house, being a public place, etc., shall be fined not less than \$25 or more than \$100, will not support a conviction for felony. *Allen v. State* (Cr. App.) 232 S. W. 517.

#### Art. 573. [390] [Superseded.]

See *Francis v. State* (Cr. App.) 233 S. W. 974.

**Art. 574. [391] Procedure in gaming cases.**

**Immunity to persons testifying.**—A person testifying before a grand jury in regard to gaming offenses is entitled to the protection of this article. *Elliott v. State* (App.) 19 S. W. 249.

In a prosecution for keeping a gambling house, where it appeared that previously defendant had been questioned in regard to keeping such house in connection with a homicide, held that a plea in abatement should have been sustained. *Dodson v. State* (Cr. App.) 232 S. W. 836.

**Art. 577. Pool selling or book making.**

Cited, *American Metal Co. v. San Roberto Mining Co.* (Civ. App.) 202 S. W. 360.

**Art. 578. Betting on horse racing.**

**Elements of offense.**—Where plaintiff agreed with another to run a horse race, the owner of the fastest horse to get stakes, and if either failed or refused to race, the other to have the stakes, such agreement was illegal, as betting on a horse race, and either party could rescind and recover his money from defendant stakeholder. *Leber, v. Dibrell* (Civ. App.) 216 S. W. 477.

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## CHAPTER SIX

### BETTING ON ELECTIONS

Art.

586. Penalty for betting on elections.

Art.

587. "Public election" defined.

**Article 586. [395] Penalty for betting on elections.**—If any person shall, whether before or after the happening of any public election held under authority of law within the State of Texas, or within any town, city, county, district, precinct or any other political sub-division within the State of Texas for any purpose whatever, wager or bet in any manner whatever upon the result of any such election, he shall be fined in any sum of not less than Twenty-five Dollars or more than One Thousand Dollars, or by confinement in the county jail for not less than twenty days or more than sixty days, or by both such fine and imprisonment. [Act Feb. 12, 1858, p. 167; Acts 1915, 34th Leg., ch. 22, § 1; Acts 1921, 37th Leg., ch. 51, § 1, amending art. 586, Penal Code.]

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

**Art. 587. [396] "Public election" defined.**—A public election, within the meaning of the preceding article, is any election held under authority of law within the State of Texas, or within any town, city, district, county, precinct or any other sub-division within the State of Texas for any purpose whatever. [Acts 1915, 34th Leg., ch. 22, § 2; Acts 1921, 37th Leg., ch. 51, § 2, amending art. 587, Penal Code.]

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

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## CHAPTER SIX A

### STATE WIDE INTOXICATING LIQUOR PROHIBITION

[See Constitution, art. 16, § 20, as amended.]

Art.

588 $\frac{1}{4}$ . Manufacture, sale, etc., of intoxicating liquors unlawful.588 $\frac{1}{4}$ a. Manufacture, sale, etc., of liquors containing in excess of 1 per cent of alcohol unlawful.588 $\frac{1}{4}$ a1. Sale for medicinal, mechanical, etc., purposes, permitted.588 $\frac{1}{4}$ a2. Same; not punishable under this act.588 $\frac{1}{4}$ a3. Witness not to be regarded as accomplice.

Art.

588 $\frac{1}{4}$ a4. Suspended sentence law not to apply588 $\frac{1}{4}$ aa. Definitions.588 $\frac{1}{4}$ b. Liquors described in sections one and two construed to include, what.588 $\frac{1}{4}$ bb. Person defined.588 $\frac{1}{4}$ c. Intoxicating liquor for beverage purposes for use in residence; denatured alcohol; denatured rum; medicinal purposes; toilet,

Art.	etc., preparations; storage in bonded warehouses.	Art.	588 $\frac{1}{4}$ l. Transportation of liquor without notice to carrier thereof unlawful.
588 $\frac{1}{4}$ cc.	Alcohol for non-beverage purposes; wine for sacramental purposes; permits to manufacture and sell.	588 $\frac{1}{4}$ ll.	Soliciting, etc., orders for liquor unlawful.
588 $\frac{1}{4}$ d.	Permits to manufacture and sell; issue; pharmacists; bonds of retailers.	588 $\frac{1}{4}$ m.	Action for damages for injuries caused by sale, etc., of liquors.
588 $\frac{1}{4}$ dd.	Same; contents; duration; wine for sacramental purposes.	588 $\frac{1}{4}$ mm.	Unlawful orders to carriers for delivery of liquor.
588 $\frac{1}{4}$ e.	Labels attached to containers.	588 $\frac{1}{4}$ n.	Transportation, etc., of liquor without certain information attached to packages unlawful.
588 $\frac{1}{4}$ ee.	Record of liquors manufactured or sold.	588 $\frac{1}{4}$ nn.	No property rights in liquors possessed, etc., unlawfully; seizure and destruction.
588 $\frac{1}{4}$ f.	Sale by wholesale and retail druggists; records.	588 $\frac{1}{4}$ o.	[Repealed.]
588 $\frac{1}{4}$ ff.	Physicians' prescriptions; permits.	588 $\frac{1}{4}$ oo.	Renting, keeping, etc., building, etc., for unlawful manufacture, etc., of liquor unlawful.
588 $\frac{1}{4}$ g.	Same subject; who may issue; filing; revocation of permit.	588 $\frac{1}{4}$ p.	Common nuisances; punishment.
588 $\frac{1}{4}$ gg.	Common carriers; permits.	588 $\frac{1}{4}$ pp.	Same; abatement; injunction; bond of owner of premises.
588 $\frac{1}{4}$ h.	Same; to whom deliveries may be made.	588 $\frac{1}{4}$ q.	Seizure and destruction of liquor; search warrant.
588 $\frac{1}{4}$ hh.	Same; records; form and contents; oath of consignee.	588 $\frac{1}{4}$ qq.	Punishment for violations of act; corporations.
588 $\frac{1}{4}$ i.	Forms of affidavits, records and prescriptions.	588 $\frac{1}{4}$ r.	Compensation to district or county attorney for bringing penalty.
588 $\frac{1}{4}$ ii.	Complaints of violations of law by pharmacists; revocation of permit.	588 $\frac{1}{4}$ rr.	Restraining violations of act.
588 $\frac{1}{4}$ j.	Place of delivery of liquor.	588 $\frac{1}{4}$ s.	Violations of injunction; punishment.
588 $\frac{1}{4}$ jj.	Advertising liquors, etc., unlawful.	588 $\frac{1}{4}$ ss.	Witnesses.
588 $\frac{1}{4}$ k.	Removal of prohibited liquors, etc.	588 $\frac{1}{4}$ t.	Pending prosecutions, etc.
588 $\frac{1}{4}$ kk.	Sale, etc., of compound, etc., for making intoxicating liquors.	588 $\frac{1}{4}$ tt.	Partial invalidity of act.

#### Art. 588 $\frac{1}{4}$ . Manufacture, sale, etc., of intoxicating liquors unlawful.

—That it shall be unlawful for any person, directly or indirectly, to manufacture, sell, barter, exchange, transport, export, deliver, take orders for, solicit, or furnish spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, or any other intoxicant whatever, or any equipment for making any such liquors, or to possess or receive for the purpose of sale any such liquors herein prohibited. [Acts 1919, 36th Leg. 2d C. S., ch. 78, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 61, § B (§ 1).]

Took effect Nov. 15, 1921.

**Explanatory.**—This act, taken in connection with the amendment of art. 16, § 20, of the state Constitution, and the prohibition amendment to the United States Constitution, and the act of Congress enacted pursuant thereto (the Volstead Act) supersede, or at least render inoperative many other state laws relating to intoxicating liquors. This act supersedes Acts 1918, 35th Leg., 4th C. S., ch. 24, on the same subject.

See *Todd v. State* (Cr. App.) 229 S. W. 515; *Thomas v. State* (Cr. App.) 230 S. W. 157; *Thomas v. State* (Cr. App.) 230 S. W. 159; *Chandler v. State* (Cr. App.) 230 S. W. 999.

**Validity.**—The power of the Legislature to make a given act penal is not limited to the permission of the Constitution, but exists where not specifically forbidden; and transporting, receiving, and possessing of intoxicating liquor may be made an offense although not named and forbidden by Const. art. 16, § 20. *Reeves v. State* (Cr. App.) 227 S. W. 668; *Banks v. State* (Cr. App.) 230 S. W. 994.

The legislative power of the state, by Const. art. 3, § 1, is vested in the Legislature, and except as restricted by other provisions the Legislature may exert all the police power of the state, including the power to prohibit the manufacture and sale of intoxicants. *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

Constitutional amendment adopted May 24, 1919, forbidding the manufacture and sale of intoxicants, held not violative of Const. art. 3, § 1, as attempting to have a statute enacted by direct vote of the people. *Berlew v. State* (Cr. App.) 225 S. W. 518.

Const. art. 16, § 20, as amended, prohibits the manufacture, sale, barter, and exchange of intoxicants except for certain purposes, and authorizes the Legislature to enact laws to enforce said section, and a law forbidding the transporting, receiving, or possessing intoxicating liquor would aid in enforcing and making more effective such constitutional section and is authorized. *Reeves v. State* (Cr. App.) 227 S. W. 668.

There is nothing in the Constitution of the state of Texas which denies to the Legislature the power to enact laws forbidding the manufacture or sale of intoxicating liquor, or even liquors with insufficient alcoholic content to produce intoxication. *Russell v. State* (Cr. App.) 228 S. W. 948.



Section 1 of the state-wide prohibition law of Texas, prohibiting the manufacture of liquors within the state, except for medicinal, etc., purposes, is within the police powers of the state, and not in conflict with the federal Constitution. *United States v. James* (D. C.) 256 Fed. 102.

— **Effect of national prohibition.**—The Dean Prohibition Law is not in conflict with the Eighteenth Amendment to the federal Constitution and Volstead Act, and affords a basis for a prosecution for sale of intoxicating liquor. *Robert v. State* (Cr. App.) 228 S. W. 230; *Franklin v. State* (Cr. App.) 227 S. W. 486; *Banks v. State* (Cr. App.) 227 S. W. 670; *Russell v. State* (Cr. App.) 228 S. W. 948; *Thomas v. State* (Cr. App.) 232 S. W. 826.

The term "appropriate legislation," as used in Const. U. S. Amend. 18, § 2, authorizing Congress and the several states to enforce such amendment by appropriate legislation, means legislation contemplated to make the amendment fully effective; that is, legislation adapted to carry out the objects the legislators had in view. *Ex parte Gilmore* (Cr. App.) 228 S. W. 199.

Constitution U. S. Amend. 18, § 2, providing that Congress and the several states shall have concurrent power to enforce such amendment by appropriate legislation, does not require that the state legislation shall be identical with that of Congress or be confined to an enforcement of the laws of Congress. *Id.*

There is nothing in the meaning of the term "concurrent," as contained in Const. U. S. Amend. 18, § 2, making the right of the states to pass appropriate legislation to enforce that amendment any more restricted than the power conferred upon Congress to effect the same result, except that the law of the state can affect only those within the state boundaries. *Id.*

**Nature and elements of offenses.**—A sale of intoxicating liquor is the transfer of title of property from one person to another. *Robert v. State* (Cr. App.) 228 S. W. 230.

If defendant moved on premises where there was paraphernalia for the manufacture of intoxicating liquor, and took possession of such paraphernalia and proceeded to use it, he was guilty of having in possession equipment to manufacture intoxicating liquor not for medicinal, etc., purposes, though the equipment was already in existence on the premises when he took charge of them. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

The act of selling intoxicating liquor is one offense and that of possessing such liquor is a separate and distinct offense, and previous conviction or acquittal of the sale of liquor does not bar prosecution for possession of the same liquor. *Chandler v. State* (Cr. App.) 232 S. W. 337.

**Designation of offenses.**—One convicted under this act should be adjudged guilty of manufacturing, selling, etc., intoxicating liquor, not for medicinal, sacramental, or scientific purposes, and judgment and sentence should specify the particular acts for which the accused has been convicted, and a sentence and judgment for violating the "state-wide intoxicating liquor prohibition law" were defective, although this act was denominated by compiler as "State-Wide Intoxicating Liquor Prohibition," such naming not being the act of the Legislature and fitting no offense. *Carr v. State* (Cr. App.) 230 S. W. 405.

**Jurisdiction.**—The United States District Court is not given exclusive jurisdiction over the offense of possessing equipment for making intoxicating liquor under the Volstead Act, but the state court still has jurisdiction of a prosecution therefor under the state Penal Code. *Andres v. State* (Cr. App.) 229 S. W. 503.

One may be convicted in the state courts for the unlawful manufacture of intoxicating liquors in violation of Const. art. 16, § 20, under the Eighteenth Amendment to the federal Constitution and the act of Congress thereunder. *Shaw v. State* (Cr. App.) 229 S. W. 509.

**Indictment or information.**—An indictment charging unlawful transporting, receiving, and possessing of liquors capable of producing intoxication but failing to state that such was not for medicinal, mechanical, scientific, or sacramental purposes which are excepted by the statute, is fatally defective. *Reeves v. State* (Cr. App.) 227 S. W. 668.

Indictment for having in possession equipment for manufacturing liquor capable of producing intoxication, containing a description of the various articles claimed to constitute the equipment, held not vague, indefinite, or uncertain. *Banks v. State* (Cr. App.) 227 S. W. 670.

An indictment for having in possession equipment for manufacturing liquor capable of producing intoxication, was not defective for failure to allege that defendant acquired the equipment subsequent to passage of the act. *Id.*

It was not necessary for an indictment for having in possession equipment for manufacturing liquor capable of producing intoxication, to negative matters of special defense such as might arise from possession of such equipment under statutory permit. *Id.*

The use of the word "and" between the words "scientific" and "sacramental" in an indictment, instead of "or," in negating the statutory exceptions, does not render the indictment void. *Bell v. State* (Cr. App.) 228 S. W. 232.

Where defendant was charged with operating a still, the indictment, describing the liquor as spirituous, vinous, and intoxicating liquor capable of producing intoxication, was sufficient. *Russell v. State* (Cr. App.) 228 S. W. 948.

An indictment, charging defendant with being in possession of intoxicating liquors not for medicinal, scientific, sacramental, or mechanical purposes, is sufficient. *Franklin v. State* (Cr. App.) 230 S. W. 592.

An indictment, charging that defendant "did possess" intoxicating liquor not for medicinal, etc., purposes, was sufficient, though not using the expression "had in his possession." *Rainey v. State* (Cr. App.) 231 S. W. 118.

**Admissibility of evidence.**—It would be no justification or excuse that one of the sales of liquor made by a person charged with pursuing the business of selling intoxicating liquors was made under the belief that the liquor was for a person who was ill, and evidence of that fact was properly excluded. *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

In a prosecution for making liquor, it was proper to allow the state to ask defendant whether he recalled the discovery of a still at a point near his residence; it appearing that the still was taken by officers to the county jail and there identified by the state's witness as the still which defendant had been operating. *Russell v. State* (Cr. App.) 228 S. W. 948.

In a prosecution for manufacturing intoxicating liquor, it is permissible for the state to ask defendant if the still discovered near his premises was not one he had been operating in a pasture, as testified to by the state's witness. *Id.*

In a prosecution for unlawful possession of intoxicating liquors, defendant should have been permitted to testify that in transporting the whisky he was acting for other parties as their agent, since it is not likely that the jury would have fixed the same amount of punishment for an agent's as for a principal's violation of the law. *Franklin v. State* (Cr. App.) 230 S. W. 692.

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor not for medicinal, etc., purposes, testimony that when defendant was arrested, on returning home from a purported visit to his mother-in-law, a small quantity of whisky was found in his possession, or in the car he was driving, of a similar character to the whisky found in jugs at his barn, was admissible. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

**Sufficiency of evidence.**—In a prosecution for the unlawful manufacture of intoxicating liquor, where defendant admitted that he made whisky, no further proof was required to show that the liquor was intoxicating. *Grandberry v. State*, 86 Cr. R. 232, 216 S. W. 164.

Evidence held to sustain conviction of illegal sale of intoxicating liquor. *Berlew v. State* (Cr. App.) 225 S. W. 518.

Evidence held insufficient to show that articles found in defendant's possession, which could be used in making intoxicating liquors in connection with other articles, were possessed by defendant for the purpose of manufacturing intoxicants for an unlawful purpose. *Williams v. State* (Cr. App.) 227 S. W. 316.

Where it appeared that defendant had been invited by another to ride in an automobile wherein liquor was subsequently found, and there was no evidence that he had possession of the liquor nor encouraged its transportation, the evidence was insufficient to sustain a conviction. *Richardson v. State* (Cr. App.) 228 S. W. 1094.

In a prosecution for having possession of equipment for manufacturing intoxicating liquors, for unlawful purposes, evidence of the possession of an oil stove, tubs, and barrels containing sour mash, which could be used in making corn whisky in connection with other utensils, would not support a conviction, without evidence, circumstantial or otherwise, that it was for the manufacture of intoxicating liquors for unlawful purposes. *Thomas v. State* (Cr. App.) 230 S. W. 156.

In a prosecution for having unlawful possession of intoxicating liquor, court properly refused to instruct the jury to return a verdict of not guilty on the ground that the state had failed to prove that defendant's possession of the liquor was not for lawful purposes, where it appeared that he was found in possession of two gallons of home-made whisky, and that he stated to the officer that he had gotten four gallons of same that morning, and had disposed of two gallons before night, and if the officers would let him alone he would dispose of the remainder, and then let the whole proposition alone. *Carr v. State* (Cr. App.) 230 S. W. 405.

Evidence held sufficient to sustain conviction for having in possession equipment for manufacturing liquor capable of producing intoxication for a purpose other than allowed by this act. *Banks v. State* (Cr. App.) 227 S. W. 670; *Same v. State* (Cr. App.) 230 S. W. 994.

In prosecution for unlawful possession of intoxicating liquors, evidence insufficient to sustain a conviction. *Chandler v. State* (Cr. App.) 231 S. W. 108.

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor not for medicinal, etc., purposes, evidence held sufficient to sustain conviction, though the top of a certain kettle enumerated as one of the articles of the equipment and necessary before the equipment could be used to make liquor was not found or accounted for. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

Evidence held to sustain conviction of having in possession intoxicating liquors not for medicinal, etc., purposes. *Thielepape v. State* (Cr. App.) 231 S. W. 773.

Evidence held sufficient to sustain conviction for the manufacture of intoxicating liquor not for medicinal, etc., purposes. *Id.*

In a prosecution for possessing equipment for the manufacture of intoxicating liquor, evidence held sufficient to support a conviction. *Chandler v. State* (Cr. App.) 232 S. W. 317.

In a prosecution for unlawful possession of intoxicating liquor, evidence held sufficient to show defendant's possession of the liquor was to make an unlawful sale. *Chandler v. State* (Cr. App.) 232 S. W. 337.

Evidence that defendant had on his premises a considerable quantity of intoxicating liquors and the equipment for its manufacture held sufficient to sustain a conviction for unlawful possession of the liquor, since the presence of the equipment indicates engaging in the business for unlawful purposes. *Thomas v. State* (Cr. App.) 232 S. W. 826.

**Questions for jury.**—In prosecution for transporting liquor into state on defendant's person, nature of defendant's relation to liquor found in his possession, bearing evidence of having been brought from Mexico, held issue of fact for jury; defendant's explana-

tion that he had found liquor and was taking it to police station not being conclusive. *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

Where witness testified that he drove for defendant an automobile in which the latter placed the liquor, if the witness knew that defendant was transporting whisky in violation of law, he was an accomplice whose testimony must be corroborated, and whether he did so know was a question which should have been submitted to the jury. *Franklin v. State* (Cr. App.) 230 S. W. 692.

**Charge.**—In a prosecution for transporting liquor into state on defendant's person, instruction, presenting defendant's theory he had found liquor and was taking it to police station, that if his explanation was reasonable and true or a reasonable doubt existed on the issue, to acquit him, held proper. *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

In a prosecution for transporting and having possession of intoxicating liquor, in view of the lack of supporting evidence, refusal of defendant's requested charge that, if the grips containing liquor were left in his room, and he did not know their contents, he could not be guilty, held proper. *Campbell v. State* (Cr. App.) 230 S. W. 695.

In prosecution for unlawfully possessing intoxicating liquor, an instruction that the word "possess" means the exercise of actual control, care, and management of the property is correct; the ownership of the property not being an essential element of its possession. *Thomas v. State* (Cr. App.) 232 S. W. 826.

**Decisions under Acts 1918, c. 24—Validity.**—The provision prohibiting the sale, barter, or exchange of intoxicating liquors throughout the state, violates Const. art. 16, § 20, relating to local option. *Ex parte Myer*, 84 Cr. R. 288, 207 S. W. 100.

The state wide prohibition law is unconstitutional. *Venn v. State*, 85 Cr. R. 151, 210 S. W. 534.

Section 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, in so far as it interfered with interstate commerce, was made valid by Webb-Kenyon Act (U. S. Comp. St. § 8739) and was not in conflict with any existing law. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 212 S. W. 845.

The act was not in contravention of Const. art. 16, § 20, giving the right to voters within certain prescribed limits to determine from time to time whether intoxicants shall be sold in such prescribed limits. *Id.*

It is not indefinitely framed or of such doubtful construction that it cannot be understood from the language in which it is expressed. *Id.*

There was no such repugnance or doubt as to the meaning of the provisions relating to transportation and receipt of intoxicating liquors as to render the same void. *Id.*

Zone Liquor Law, § 3 (art. 610g, post) was not repealed or superseded by the act nor was the latter act repealed or superseded by chapter 31 (art. 606a, post) relating to sales and transportation of intoxicating liquor. *Ex parte Roy*, 85 Cr. R. 626, 215 S. W. 322.

Despite Const. art. 16, § 20, declaring the Legislature shall enact a law whereby the qualified voters of any county, town, or city, etc., by majority vote may determine from time to time whether the sale of intoxicants shall be prohibited, under article 3, § 1, vesting the legislative power in the Legislature, it could enact Acts 35th Leg. 1918 4th Called Sess. c. 24, § 1, prohibiting the manufacture of intoxicants. *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

The act held not invalid as having been passed at a special session and not relating to a subject presented by the Governor, as required by Const. art. 3, § 40; he having mentioned the matter of intoxicants in his proclamation, and elaborated his views in a subsequent message. *Id.*

Acts 35th Leg. 4th Called Sess. (1918) c. 24, § 3, prohibiting transportation or importation into state of any spirituous liquors, held not inoperative as indirect violation of Const. art. 16, § 20. *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

The provision prohibiting transportation of intoxicating liquor, is constitutional, though section 2 of same act, prohibiting sale of intoxicating liquor, was invalid because the Constitution had prescribed the manner in which sales could be prohibited. *Coleman v. State*, 87 Cr. R. 240, 220 S. W. 1097.

— **Construction and application in general.**—Cited, *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

The state-wide statutory prohibition did not repeal the local option law. *Jarrott v. State*, 84 Cr. R. 544, 209 S. W. 663; *White v. State*, 84 Cr. R. 545, 210 S. W. 200.

Any law which might be in conflict therewith, as to transportation or receipt of intoxicants, would be repealed thereby by implication, notwithstanding other sections of the chapter provide that all other laws prohibiting or regulating sale of intoxicants shall remain in full force and effect. *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 212 S. W. 845.

One violating the Zone Liquor Law is not entitled to be punished under the later passed State-Wide Act, fixing a lighter punishment. *Ex parte Roy*, 85 Cr. R. 626, 215 S. W. 322.

Provisions art. 606a, relating to transportation and shipment of intoxicating liquors in territory where such liquor has been prohibited under local option law, will prevail in such territory over chapter 24, the state-wide prohibition law, since the acts of same session of Legislature must be taken as a whole and construed as one act. (*Per Morrow, J.*) *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

In a prosecution for transporting intoxicating liquor it was error to refuse an instruction authorizing acquittal if accused was transporting it home for his personal use. *Coleman v. State*, 87 Cr. R. 240, 220 S. W. 1097.

The Acts of the Thirty-Fifth Legislature (1918) Fourth Called Session, on the subject of intoxicating liquors, should be construed together, so that, under chapter 24, prohibiting the sale of intoxicating liquors, and chapter 23, amending and re-enacting the license laws, relator, regularly licensed to sell intoxicating liquors, could not be convicted of selling such liquors without a license on any theory that his license was revoked by chapter 24. *Ex parte Ford* (Cr. App.) 226 S. W. 410.

The act does not make punishable the possession of intoxicating liquor. *Carr v. State* (Cr. App.) 230 S. W. 405.

**Art. 588 $\frac{1}{4}$ a. Manufacture, sale, etc., of liquors containing in excess of 1 per cent of alcohol unlawful.**—That it shall be unlawful for any person, directly or indirectly, to manufacture, sell, barter, exchange, transport, export, deliver, solicit, or take orders for, or furnish any spirituous, vinous, or malt liquors, or medicated bitters, or any potable liquor, mixture, or preparation, containing in excess of one per cent of alcohol by volume, or any equipment for making such liquors, or to possess or receive for the purpose of sale any such liquors herein prohibited. [Acts 1919, 36th Leg. 2d C. S., ch. 78, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 61, § B (§ 2).]

**Validity.**—The Dean Law, relating to intoxicating liquors, is not void because of Const. U. S. Amend. 18, and the passage of the federal law known as the Volstead Act, because the state law gives to intoxicating liquors a definition varying from that prescribed by Congress, and because the penalties of the state and federal laws are different. *Franklin v. State* (Cr. App.) 227 S. W. 486.

Constitution held not to forbid the Legislature from making penal the sale for beverage purposes of liquor containing less than 1 per cent. of alcohol or prohibiting the transportation, possession, or delivery of such liquors. *Reeves v. State* (Cr. App.) 227 S. W. 668.

This article is valid though a federal law prohibits the transportation, etc., of liquor containing more than one-half of 1 per cent. of alcohol. *Ex parte Gilmore* (Cr. App.) 228 S. W. 199.

Under Const. U. S. Amend. 18, the state cannot render lawful the manufacture, sale, or transportation of liquor containing a greater percentage of alcohol than that prohibited by federal law. *Id.*

The Dean Law, prohibiting the manufacturing of spirituous liquor containing in excess of 1 per cent. of alcohol, held valid. *Burciago v. State* (Cr. App.) 228 S. W. 562.

**Nature and elements of offenses.**—Defendant could not be convicted of manufacturing spirituous liquor with more than 1 per cent. alcohol under the Dean Law, if he manufactured the liquor for medicinal purposes, notwithstanding his failure to secure a permit from the comptroller of public accounts or to comply with the other conditions specified in sections 7-11, since such failure did not make him guilty of manufacturing liquor for an improper purpose. *Burciago v. State* (Cr. App.) 228 S. W. 562.

**Evidence.**—In prosecution for manufacturing spirituous liquor with more than 1 per cent. of alcohol in violation of Dean Law, in which defendant claimed that he had been making the liquor for his own use for medicinal purposes, the admission of testimony that defendant had not obtained a permit from the federal government or comptroller of the state to manufacture liquor for medicinal purposes held proper; the failure to obtain permit being persuasive that he was not making the liquor for medicinal purposes. *Burciago v. State* (Cr. App.) 228 S. W. 562.

In prosecution for manufacturing spirituous liquor with more than 1 per cent. of alcohol, sheriff's testimony that it looked as if the mash had run over the edges of barrels in defendant's house and had dried held admissible. *Id.*

**Charge.**—In a prosecution for the unlawful sale of intoxicating liquors under the Dean Law, witnesses purchasing the liquor from defendants were particeps criminis and accomplices, and a conviction cannot be had on the testimony of one of them without corroboration, and it was error not to so charge. *Franklin v. State* (Cr. App.) 227 S. W. 488.

On a trial for selling intoxicating liquors, where the beverage sold was subsequently analyzed and found to contain a prohibited per cent. of alcohol, but defendant claimed it was not intoxicating when sold by him, the court, if requested, should charge that the jury should acquit if the liquor did not contain the prohibited percentage of alcohol at the time of the sale. *Gardner v. State* (Cr. App.) 229 S. W. 856.

**Art. 588 $\frac{1}{4}$ a1. Sale for medicinal, mechanical, etc., purposes, permitted.**—It shall not be unlawful for any person to manufacture, sell, barter, exchange, transport, export, deliver, solicit, take orders for, furnish, possess, or receive for the purpose of sale, barter, exchange, transport, export, or deliver spirituous, vinous, or malt liquors or medicated bitters for medicinal, mechanical, scientific, or sacramental purposes, subject to the provisions of this Act. [Acts 1921, 37th Leg. 1st C. S., ch. 61, § B, adding § 2a to Acts 1919, 36th Leg. 2d C. S., ch. 78.]

**Art. 588<sup>1</sup>/<sub>4</sub>a2. Same; not punishable under this act.**—The manufacture, sale, barter, exchange, transportation, exporting, soliciting, taking orders for, furnishing, and possessing of any of the liquors mentioned in this Chapter, if done for medicinal, mechanical, scientific, or sacramental purposes, and after a permit has been duly authorized and granted by the proper authorities, shall not be punishable under the terms of this Chapter. [Id., adding § 2b to Acts 1919, 36th Leg. 2d C. S., ch. 78.]

**Art. 588<sup>1</sup>/<sub>4</sub>a3. Witness not to be regarded as accomplice.**—Upon a trial for a violation of any of the provisions of this Chapter, the purchaser, transporter, or possessor of any of the liquors prohibited herein shall not be held in law or in fact to be an accomplice, when a witness in any such trial. [Id., adding § 2c to Acts 1919, 36th Leg. 2d C. S., ch. 78.]

**Art. 588<sup>1</sup>/<sub>4</sub>a4. Suspended sentence law not to apply.**—No person over twenty-five years of age convicted under any of the provisions of this Act shall have the benefit of the Suspended Sentence Law. [Id., adding § 2d to Acts 1919, 36th Leg. 2d C. S., ch. 78.]

**Art. 588<sup>1</sup>/<sub>4</sub>aa. Definitions.**—The words “intoxicating liquors,” or “liquors” hereafter used in this Act shall be held to include and comprehend all liquors referred to in the first and second sections of this Act and the said liquors prohibited by the said first and second sections of this Act will hereafter be referred to herein for convenience as “intoxicating liquors.” [Acts 1919, 36th Leg. 2d C. S., ch. 78, § 3.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 588<sup>1</sup>/<sub>4</sub>b. Liquors described in sections one and two construed to include, what.**—The various liquors described in Sections 1 and 2 of this Act [arts. 588<sup>1</sup>/<sub>4</sub>, 588<sup>1</sup>/<sub>4</sub>a] shall be construed to include all distilled malt, spirituous, vinous, fermented or alcoholic liquors and all alcoholic liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, which require a federal tax as a beverage, or which contain more alcohol than is necessary to extract the medicinal properties of the drug contained in such preparation and to hold the medicinal agents in solution and preserve the same. [Id., § 4.]

**Art. 588<sup>1</sup>/<sub>4</sub>bb. Person defined.**—The word “person” as used in this Act shall be held to include both natural persons and corporations, but where the offense is committed by a corporation, then the corporation shall be punished as prescribed in Section 36 [art. 588<sup>1</sup>/<sub>4</sub>qq] of this Act. [Id., § 5.]

**Art. 588<sup>1</sup>/<sub>4</sub>c. Intoxicating liquor for beverage purposes for use in residence; denatured alcohol; denatured rum; medicinal purposes; toilet, etc., preparations; storage in bonded warehouses.**—The provisions of this Act shall not prohibit the possession of intoxicating liquor for beverage purposes for use by the owner and members of his family, or bona fide guests, in a bona fide residence, if such liquors were purchased and deposited in such residence before this Act goes into effect. Nothing in this Act shall prohibit the manufacture, transportation, storage, and sale of denatured or pure ethyl alcohol, or denatured rum for use only in the industrial or mechanical arts or for scientific purposes or in chemical laboratories or hospitals, or to prevent the manufacture, transportation, sale and keeping and storing for sale any medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopeia or National Formulary or American Institute of Homeopathy, or of alcoholic, patent or proprietary medicines which do not require the payment of the Federal Tax as a beverage and which con-

tain no more alcohol than is necessary to extract the medicinal properties of the drug contained in such preparation, and to hold the medicinal agents in solution, and to preserve the same and which are manufactured and sold for legitimate and lawful purposes and not as beverages, or to prevent the manufacture and sale of bona fide alcohol toilet, or anti-septic preparations and solutions or flavoring extracts which do not require the payment of Federal tax as a beverage and which contain no more alcohol than is necessary for the extraction, solution and preservation of the agents contained therein, and which are manufactured and sold for legitimate and lawful purposes and not as beverages, and upon the outside of the bottle or package of each is printed in English conspicuously and legibly and clearly the quantity by volume of alcohol in such preparation.

The Manufacturer of flavoring extracts or toilet, medicinal, anti-septic preparations or solutions, patent or proprietary medicines, or preparations permitted to be manufactured by this Act shall be permitted to purchase, possess, transport and store alcohol necessary for the manufacture of said article, but not to be sold or given away, provided that such manufacturer shall secure a permit from the Comptroller, and provided that said manufacturer shall make a monthly report to be filed with the Comptroller on or before the 10th day of each month, showing the name and quantity of every such preparation, solution or medicine so manufactured, and the percentage of alcohol contained in each such preparation, solution or medicine. Provided further that said manufacturer shall, upon request of the Attorney General of the State, the Comptroller of the State, or the District or County Attorney of the county in which such manufacturer has his place of business, furnish to the officer making such request any information called for by such officer with reference to the manufacture, storage or sale of any such alcoholic preparation, solution or medicine, and any information with reference to the quantities and dates of sale and transportation of any such preparation, solution or medicine to any person or persons designated in such request. And provided further that any of the officers herein above named shall have the right at any reasonable time within business hours to examine the books and records and all data in the possession of such manufacturer with reference to the manufacture, storage or sale of such alcoholic preparations.

Nothing herein shall prevent the storage in United States bonded warehouses in the custody of a United States collector of internal revenue of all liquors manufactured prior to the taking effect of this Act or to prevent the transportation of such liquors for purposes not inhibited by this Act. [Id., § 6.]

**Art. 588 $\frac{1}{4}$ cc. Alcohol for non-beverage purposes; wine for sacramental purposes; permits to manufacture and sell.**—That alcohol for nonbeverage purposes and wine for sacramental purposes may be manufactured and sold as follows:

The Comptroller of Public Accounts may issue permits to persons, to manufacture and sell equipment for the manufacture of liquor not prohibited herein; to manufacture alcohol and wine; to manufacture alcoholic, patent or proprietary medicine, flavoring extracts and culinary preparations and other nonbeverage alcoholic preparations; to wholesale and retail druggists or pharmacists and to persons permitted to possess alcohol and wine for authorized purposes. Such permits shall not be in conflict with the prohibitions contained herein. [Id., § 7.]

**Effect of failure to comply with requirements.**—Defendant could not be convicted of manufacturing spirituous liquor with more than 1 per cent. alcohol under the Dean

Law, if he manufactured the liquor for medicinal purposes, notwithstanding his failure to secure a permit from the comptroller of public accounts or to comply with the other conditions specified in this article, since such failure did not make him guilty of manufacturing liquor for an improper purpose. *Burciago v. State* (Cr. App.) 228 S. W. 562.

**Art. 588 $\frac{1}{4}$ d. Permits to manufacture and sell; issue; pharmacists; bonds of retailers.**—A permit shall not be issued by the Comptroller to any person who has, within two years next preceding the issuing of the same, been adjudged guilty of violating any of the provisions of this Act, or of any permit, or of any law of this State, or of the United States, prohibiting or regulating the liquor traffic; nor shall a permit be issued for the purpose of selling such liquor at retail, unless such sale be made by a pharmacist designated in the permit and duly licensed by the State Board of Pharmacy, nor until a bond shall be given and approved, and the applicant has filed written application therefor setting forth the qualifications and the purposes for which the permit will be used, together with such other information as the Comptroller may require. The bond herein required of a retailer shall be made payable to the Governor of this State at Austin, in Travis County, Texas, shall be in the sum of One Thousand Dollars conditioned for the faithful observance of this Act; the bond shall be upon such form as may be drawn and prescribed by the Attorney General and for any breach of the same suit may be brought in the District Court of Travis County to recover the entire amount of same as a penalty for such violation of the law and breach of the bond. Said bond, if signed by personal sureties, must be signed by two solvent sureties, or, if by a surety company, then by a surety company authorized to transact business in the State of Texas. The bond shall be subject to the approval of the Comptroller and shall be filed in his office. The Attorney General shall bring all actions for breach of said bond in the name of the State. [Id., § 8.]

**Art. 588 $\frac{1}{4}$ dd. Same; contents; duration; wine for sacramental purposes.**—Such permit when issued shall contain date of issue, shall be in writing, signed by the Comptroller of Public Accounts, shall name and give the address of the person to whom issued, give location where such liquors, equipment or material is to be manufactured, kept, stored or sold, and fix the maximum quantity of such liquor permitted to be kept or stored and specifically designate and limit the acts permitted, give the name and address of all individuals authorized to do the permitted acts; provided the name and address of the agents, employes and servants of common carriers may be omitted by the Comptroller of Public Accounts from such permit, and such permit shall expire on the 31st day of December next succeeding the date of issue thereof.

Nothing in this act shall be construed as requiring that any priest, rabbi or minister of any religious denomination or sect to have a permit in order to purchase or receive shipments of wine for sacramental purposes; and nothing in this Act shall make it unlawful for any priest, rabbi or minister or any religious denomination or sect to purchase, order or receive, wine for sacramental purposes or for any common carrier to ship, transport, carry or deliver same to any priest, rabbi or minister of any religious denomination or sect for sacramental purposes only; provided, however, that where such shipment or purchase is made a record thereof shall be made and kept and the priest, rabbi or minister making such purchase or shipment shall be identified. Such quantities of wine may be purchased and kept on hand for sacramental purposes as may be necessary for the particular church or religious institution for the use and service of which same is purchased or shipped. [Id., § 9.]

**Art. 588 $\frac{1}{4}$ e. Labels attached to containers.**—All persons manufacturing alcohol or wine, or either, shall securely and permanently attach to any container of such liquor as the same is manufactured, and thereafter, persons possessing such liquor in wholesale quantities shall securely keep and maintain thereon, a manufacturer's label, stating name of manufacturer, kind and quantity of liquor contained therein, with a copy of the permit authorizing the manufacture thereof; provided further that every person having in his possession any intoxicating liquor, purchased after this act becomes effective, for permitted purposes, shall have pasted on or permanently attached to the container a copy of the prescription or affidavit as the same may be, upon which authority it was purchased as is provided for in this act. [Id., § 10.]

**Art. 588 $\frac{1}{4}$ ee. Record of liquors manufactured or sold.**—All persons authorized to manufacture alcohol shall keep a separate record of such liquors manufactured or sold, giving date and quantity of such liquor manufactured and sold, the quantity of such liquor on hand, name and address of persons to whom such liquor was sold, the name and address of all agents in any way connected with such manufacture, sale, or purchase, or the keeping, storing, delivering, consigning, and distribution of such liquor, the name and address of all common, or other carriers, receiving, transporting, and delivering said liquor, and a copy of the application on which the purchase or sale of such liquor was made, and a detailed account of the dispositions of such liquor. A copy of such record shall be sent to the Comptroller of Public Accounts every third month after the Act goes into effect by the 10th of the month for the quarter preceding. [Id., § 11.]

**Art. 588 $\frac{1}{4}$ f. Sales by wholesale and retail druggists; records.**—It shall be unlawful for a wholesale druggist to sell alcohol or wine, except in wholesale quantities, to persons having permits to purchase in such quantities. Such wholesale druggist shall keep an accurate record of all sales and label the containers of such liquor, setting forth the kind of liquor contained therein, by whom manufactured, and the person to whom sold. A copy of such record shall be sent to the Comptroller of Public Accounts every third month after this Act goes into effect by the 10th of the month for the quarter preceding. It shall be unlawful for a retail druggist or pharmacist to sell any liquor except alcohol for nonbeverage purposes or wine for sacramental purposes. Such druggist or pharmacist shall keep a record giving the name of the doctor issuing the prescriptions containing alcohol, the amount, date of sales, the name and signature of the purchaser, the person making the sale, and a copy of the prescription. [Id., § 12.]

**Art. 588 $\frac{1}{4}$ ff. Physicians' prescriptions; permits.**—Every physician who issues a prescription for ethyl alcohol, or any alcoholic liquor, shall first secure a permit from the Comptroller of Public Accounts, except as herein provided, and shall keep a record, alphabetically arranged in a separate book provided by the Comptroller of Public Accounts, which shall show: Date, amount, to whom issued, directions for use (Stating the amount and frequency of dose), and the druggist to whom addressed. Such physician shall send a copy of such record to the Comptroller of Public Accounts, not later than the fifth day of the month for the quarter preceding. [Id., § 13.]

**Art. 588 $\frac{1}{4}$ g. Same subject; who may issue; filling; revocation of permit.**—A physician who issues prescriptions must be in active practice, in good standing with his profession, not addicted to the use of



any narcotic drug, and have a permit as provided herein for issuing prescriptions. Such physician before issuing any prescriptions must make a careful personal, physical examination of the person to whom the alcohol is prescribed, and in no case issue such prescription to any person whom he has reason to believe will use alcohol for beverage purposes, nor prescribe more than a pint of alcohol to any person at a time. Nor shall such prescriptions be filled at any pharmacy or drug store in which the physician has any financial interest. For any shift or device by which intoxicating liquors may be improperly prescribed, or for any violation of this section, in addition to the penalty prescribed, for the first offense under this Act, the Comptroller of Public Accounts may suspend the permit of such physician to issue prescriptions for alcohol for a period of one year, and for the second offense, in addition to the punishment prescribed herein, the permit of such physician shall be deemed revoked forthwith. The revocation of such permit, if revoked by the court, shall be sent to the authority granting the permit and shall act as a ban to the granting of any further permit to such physician to issue prescriptions. [Id., § 14.]

**Art. 588<sup>1</sup>/<sub>4</sub>gg. Common carriers; permits.**—It shall be the duty of every railroad company, express company, or other common carrier that transports any liquor to secure first a permit from the Comptroller of Public Accounts and to keep correctly at the place of receipt for shipment, in typewriting or in a clear and legible hand, that the same may be easily read, a permanent alphabetically arranged record of the receipt of such liquors and the name and post office address, street address, or other description of domicile of the consignor and consignee, and the place of delivery. Nothing herein shall be construed to authorize the transportation of liquor for other than permitted purposes. [Id., § 15.]

**Art. 588<sup>1</sup>/<sub>4</sub>h. Same; to whom deliveries may be made.**—Common carriers may deliver liquor to persons who have permits to manufacture or possess the same in wholesale quantities, upon the presentation of a verified copy of the permits from the Comptroller of Public Accounts, and affidavit to the carrier that such liquor will not be used in violation of the law; and that the common carrier may also receive for shipment, and ship and deliver, liquor to persons for the uses permitted herein when affidavit is presented to the carrier that such liquor will not be used in violation of the law. The copy of the record hereinbefore mentioned shall be sent by the transportation company to the Comptroller of Public Accounts of the State where the delivery was made, not later than the 10th day of the month for the quarter next preceding. [Id., § 16.]

**Art. 588<sup>1</sup>/<sub>4</sub>hh. Same; records; form and contents; oath of consignee.**—The record to be kept by the transportation company at the place of delivery shall show: Name of consignor, consignee, kind of liquor and quantity; the number of permit from the Comptroller of Public Accounts; and the signature of the consignee.

The affidavit of the consignee to be attached to the above record shall be as follows:

State of \_\_\_\_\_ }  
County of \_\_\_\_\_ } ss.

\_\_\_\_\_ being duly sworn, deposes and says, that my address is \_\_\_\_\_ (or other definite description, giving street number or hotel); I am not a minor, nor of intemperate habits. I am the owner of a package in the office of a common carrier, to-wit: \_\_\_\_\_ It contains (giving amount and kind of liquor) \_\_\_\_\_ which I have ordered in writing

the \_\_\_\_\_ day of \_\_\_\_\_ upon the authority of permit No. \_\_\_\_\_; that the purpose for which I ordered such liquor is \_\_\_\_\_; that I have not received from any carrier or any person, nor have I had in my control at any place or places, more than \_\_\_\_\_ (amount) of alcohol or wine within the last three days preceding this date, and I do not have liquor on hand except \_\_\_\_\_; that I will not use any of such liquor nor allow anyone else to use such liquor for beverage purposes or for purposes other than herein stated.

Sworn to and subscribed in my presence \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

The agent of the common carrier is hereby authorized to administer the oath to the foregoing consignee, who, if not personally known to the agent, shall first be identified before the delivery of the liquor to him. The names and addresses of the person identifying the consignee shall be included in the record. The affidavit shall be made in the form prescribed, in a permanent record, and if such permanent record has not been furnished the carrier by the Comptroller of Public Accounts, after application for the same, then the affidavit of the consignee shall be pasted or permanently attached at the bottom of the record mentioned therein and a copy attached permanently to the container of such liquor. If such container is inclosed in a package with other material, then such copy shall be attached to it or pasted on it when it is taken from such package and before the liquor is delivered. [Id., § 17.]

**Art. 588 $\frac{1}{4}$ i. Forms of affidavits, records and prescriptions.**—The Comptroller of Public Accounts shall have printed forms of records, affidavits, and prescriptions, as provided herein, and shall furnish the same at cost to only such persons as are authorized by the terms of this Act to sell, transport, purchase, manufacture or use alcohol. The affidavits or prescriptions to be filed with the druggist shall be printed in book form, numbering such affidavit with a consecutive serial number from one to one hundred, and each book shall be given a number, and a stub in each book shall carry the same number as the affidavit or prescriptions, showing the copy of the record of such sale. The book containing such stub shall be returned to the Comptroller of Public Accounts when the affidavits or prescriptions are used, or not later than six months from the date that such book or affidavits and prescriptions were delivered to such druggist or physician. All unused, mutilated, or defaced blanks shall be returned with the book. No druggist or physician shall make such sale or issue such prescriptions, except on blanks herein provided. The form of such record shall be prescribed by the Comptroller of Public Accounts.

The Comptroller shall charge a fee of five dollars for each and every character of permit issued by him under this Act. [Id., § 19.]

**Art. 588 $\frac{1}{4}$ ii. Complaints of violations of law by pharmacists; revocation of permit.**—If at any time there shall be filed with the Comptroller of Public Accounts a complaint under oath setting forth that any pharmacist, who has a permit to sell alcohol for medicinal, mechanical, or scientific purposes, or wine for sacramental purposes, is not in good faith conforming to the provisions of this Act, or is guilty of violating this Act, the Comptroller of Public Accounts or his agent shall immediately issue an order citing such pharmacist to appear at a place in the State where he resides before the Comptroller of Public Accounts, on a day named not more than thirty days, nor fewer than fifteen days, from the issuing of such order, at which time the question of the cancel-

lation of such permit shall be heard. If it be found that such pharmacist is guilty of violating any of the provisions of this Act, such permit shall be revoked and no permit shall be granted to such person, firm, or corporation for two years thereafter. [Id., § 20.]

**Art. 588<sup>1</sup>/<sub>4</sub>j. Place of delivery of liquor.**—In case of a sale where a shipment or delivery of such intoxicating liquor is made by a common or other carrier the sale or delivery thereof shall be deemed to be made in the county wherein the delivery is made by such carrier, to the consignee, his agent, or employes. A prosecution for such sale or delivery may likewise be had in the county wherein the sale is made or from which the shipment is made, or in any county through which the shipment is made. [Id., § 21.]

**Art. 588<sup>1</sup>/<sub>4</sub>jj. Advertising liquors, etc., unlawful.**—It shall be unlawful to advertise anywhere, on land or water, by any means or method, intoxicating liquors, or to advertise the manufacture, method of manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom and at what price the same may be obtained, provided that the manufacturer of alcohol or wine and wholesale druggists having a permit under this act shall be allowed to send price lists to those to whom they are permitted to sell alcohol or wine under this act; it shall also be unlawful to permit any sign or billboard containing such prohibited advertisement to remain upon one's premises or to circulate any prohibited price list, order blank or other matter designed to induce or secure orders for such intoxicating liquors. The officers charged with the enforcement of this act are authorized to remove, paint over or otherwise obliterate any such advertisement from any sign, billboard or other place when it comes to his notice, and shall do so upon the demand of any citizen who has first requested the person in charge of such advertisement, or the owner of the property on which it is located and such person fail to remove such advertisement as required by law. Any advertisement or notice containing the picture of a brewery, distillery, bottle, keg, barrel, or box or other receptacle represented as containing intoxicating liquors, or designed to serve as an advertisement thereof, shall be within the inhibition of this section. It shall be unlawful for any newspaper or periodical to print in its columns statement concerning the manufacture or distribution of alcoholic liquors directly or indirectly, for which the said newspaper or periodical receives compensation of any kind, without printing at the beginning and at the close of said statement in type of the same size used in the body of the said article the following statement: "Printed as paid advertising." [Id., § 22.]

**Art. 588<sup>1</sup>/<sub>4</sub>k. Removal of prohibited liquors, etc.**—Within thirty days after the date when this act has become operative, every person except licensed pharmacists, wholesale druggists, manufacturing chemists, or hospitals or other places provided for herein to legally possess liquor, shall remove, or cause to be removed, all intoxicating liquors in his possession for prohibited purposes, and failure to do so shall be evidence that such liquor is kept therein for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this act; and provided further, that any licensed pharmacist, wholesale druggist, manufacturing chemist, or person in charge of hospital or other place having liquor or alcohol shall report to the Comptroller of Public Accounts within the thirty-days' period the kinds and amounts of intoxicating liquors, or the manufacture thereof,

shall be permanently removed and obliterated. Such signs shall be removed within five days after this act becomes operative.

All screens, stained glass, or other obstructions which prevent a clear view of the interior of any room or place where intoxicating liquors were sold as a beverage, within one year before this act became operative shall be removed or changed so as to give a permanent unobstructed view of the interior of said room or place, if beverages of any kind are sold therein. [Id., § 23.]

**Art. 588<sup>1</sup>/<sub>4</sub>kk. Sale, etc., of compound, etc., for making intoxicating liquors.**—It shall be unlawful to advertise, sell, deliver, or possess any preparation, compound, or table from which intoxicating liquor as a beverage is made, or any formula, directions, or recipes for making intoxicating liquors for beverage purposes. [Id., § 24.]

**Art. 588<sup>1</sup>/<sub>4</sub>l. Transportation of liquor without notice to carrier thereof unlawful.**—It shall be unlawful for any person to use or induce any railroad company, express company, or any other carrier, or any servant or employee thereof, or any person or persons, to carry, transport, or ship any package or receptacle containing liquors without notifying the carrier, its servant or agent, or any person who carries the same, of the true nature and character of the shipment. But failure to notify such carrier shall not be a defense for illegal transportation. [Id., § 25.]

**Art. 588<sup>1</sup>/<sub>4</sub>ll. Soliciting, etc., orders for liquor unlawful.**—It shall be unlawful for any person to solicit, or receive from any person for the purpose of forwarding for the person from whom received, any orders for intoxicating liquors from any person or to give any information how such prohibited liquors may be received or where such liquors are, or to send for such liquors, except for the purposes permitted by this Act. [Id., § 26.]

**Art. 588<sup>1</sup>/<sub>4</sub>m. Action for damages for injuries caused by sale, etc., of liquors.**—Every wife, husband, child, parent, guardian, or other person who shall be injured in person or property or means of support or otherwise by any intoxicated person by reason of the unlawful selling, giving, or furnishing or transporting to any person of the liquors mentioned shall have a right of action in his or her name against any person or persons or corporation who shall, by unlawful selling, transporting or giving any such orders, have caused or contributed to any such injury; and in any action provided for in this Section the plaintiff shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to and against his or her executors or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property. Such damages together with the costs of suit, shall be recoverable in an action before any court of competent jurisdiction; and in any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other. [Id., § 27.]

**Art. 588<sup>1</sup>/<sub>4</sub>mm. Unlawful orders to carrier for delivery of liquor.**—It shall be unlawful to give to any carrier, or any officer, agent or person acting or assuming to act for such carrier, an order requiring the delivery to any person of any liquor or package containing liquors consigned to or purporting to or claimed to be consigned to a person when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquors. [Id., § 28.]

**Art. 588<sup>1</sup>/<sub>4</sub>n. Transportation, etc., of liquor without certain information attached to packages unlawful.**—It shall be unlawful for any person to transport liquor or to receive or possess any liquors from a common or other carrier unless there appears on the outside of the package containing such liquors the following information:

Name and address of the consignor or seller, name and address of the consignee or persons receiving the liquor; kind and quantity of liquor contained therein and number of permit. Any consignee accepting or receiving any package containing any such liquors upon which appears a false statement, or any person consigning, shipping, transporting, or delivering and such package, knowing that such statement appearing on the outside in false, shall be deemed guilty of violating the provisions of this act. [Id., § 29.]

**Art. 588<sup>1</sup>/<sub>4</sub>nn. No property rights in liquors possessed, etc., unlawfully; seizure and destruction.**—No property rights of any kind shall exist in any intoxicating liquors manufactured or sold or kept for sale for beverage purposes in violation of law, and in all such cases the same may be searched for, seized, and ordered to be destroyed. [Id., § 30.]

**Art. 588<sup>1</sup>/<sub>4</sub>o. [Repealed.]**

Acts 1921, 37th Leg. 1st C. S., ch. 61, § A, expressly repeals section 31 of Acts 1919, 36th Leg. 2d C. S., ch. 78.

**Testimony of purchaser.**—A conviction for the unlawful selling of intoxicating liquors cannot be had under the Dean Law, in view of this article, making purchase unlawful, and art. 588<sup>1</sup>/<sub>4</sub>ss, which seeks to compel offenders to testify, and of arts. 74-88, defining principals, accomplices, and accessories, where the witness purchasing the liquor was not corroborated as required by Code Cr. Proc. art. 801. *Franklin v. State* (Cr. App.) 227 S. W. 486.

The rule prescribed by Code Cr. Proc. 1911, art. 801, that accomplice's testimony must be corroborated, applies, in a prosecution for the sale of intoxicating liquors, to witnesses purchasing; this article making the purchase unlawful, so that, even if the purchaser was not a principal offender with the seller, he is an offender, and his testimony would require corroboration, the identity of the offense not being essential. *Franklin v. State* (Cr. App.) 227 S. W. 487.

In a prosecution for the unlawful sale of intoxicating liquors under the Dean Law, witnesses purchasing the liquor from defendants were particeps criminis and accomplices, and a conviction cannot be had on the testimony of one of them without corroboration, and it was error not to so charge. *Franklin v. State* (Cr. App.) 227 S. W. 488.

In a prosecution for the unlawful possession of intoxicating liquors, where witness testified that he drove for defendant an automobile in which the latter placed the liquor, if the witness knew that defendant was transporting whisky in violation of law, he was an accomplice whose testimony must be corroborated, and whether he did so know was a question which should have been submitted to the jury. *Franklin v. State* (Cr. App.) 230 S. W. 692.

**Art. 588<sup>1</sup>/<sub>4</sub>oo. Renting, keeping, etc., building, etc., for unlawful manufacture, etc., of liquor unlawful.**—It shall be unlawful for any person to rent to another or to keep or to be in any way interested in keeping any premises, building, room, boat or place to be used for the purpose of storing, manufacturing, selling, transporting, receiving or delivering, or bartering or giving away intoxicating liquors in violation of this Act and any one who knowingly does so shall be guilty of violating this Act and shall be punished accordingly as provided in the penal Section [Art. 588<sup>1</sup>/<sub>4</sub>qq] hereof. [Acts 1919, 36th Leg. 2d C. S., ch. 78, § 32.]

**Art. 588<sup>1</sup>/<sub>4</sub>p. Common nuisances; punishment.**—Any room, house, building, boat, structure or place of any kind similar or dissimilar to those named, where intoxicating liquor is kept, possessed, sold, manufactured, bartered or given away, or to be transported to or transported from in violation of law, and all intoxicating liquors and all property kept in and used in maintaining such place are hereby declared to be a common nuisance and any person who maintains or assists in maintaining

such common nuisance shall be guilty of violating this act and shall be punished accordingly. [Id., § 33.]

**Art. 5881/4pp. Same; abatement; injunction; bond of owner of premises.**—The Attorney General or county or district attorney of the county where such nuisance, as defined in Section 33 of this Act [Art. 5881/4p], exists or is kept or maintained, may maintain an action in the name of the State of Texas to abate and perpetually enjoin such nuisance and upon judgment of the court ordering, such nuisance shall be abated, all intoxicating liquor, containers, utensils and instrumentalities used in the maintenance of such nuisance shall be ordered by the court to be destroyed, same shall be destroyed by any officer authorized to execute civil process; the court shall also order that the place where said nuisance is kept or maintained be closed for one year or until the owner, lessee, tenant or occupant thereof shall file bond with sufficient sureties to be approved by the court making the order in the penal sum of \$1,000.00, payable to the State of Texas, at Austin, Texas, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, stored, transported to or from, or given away in violation of law. In case of the violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State of Texas in the District Courts of Travis County, all suits to be brought by the Attorney General. In all cases where any person has been convicted of a violation of the provisions of this Act for acts done in keeping or maintaining the nuisance defined in Section 33 hereof, and such conviction has been final, then a certified copy of such judgment of conviction shall be considered as prima facie evidence of the existence of such nuisance in any action to abate the same. [Id., § 34.]

**Decisions under prior act.**—Under Act 35th Leg. (Fourth Called Sess.) c. 24, known as the "State-Wide Prohibition Law," injunction will lie to restrain a railroad from using its transportation facilities in the state for receiving, transporting, or delivering intoxicants except for medicinal, scientific, mechanical, or sacramental purposes. *Gulf. C. & S. F. Ry. Co. v. State* (Civ. App.) 212 S. W. 845.

**Art. 5881/4q. Seizure and destruction of liquor; search warrant.**—A search warrant may be issued under Title 6 of the Code of Criminal Procedure of this State for the purpose of searching for and seizing and destroying any intoxicating liquor possessed, sold or to be sold or transported, or to be transported, or manufactured in violation of this Act, and for the purpose of searching for and seizing and destroying any containers, instrumentalities for manufacture or of transportation used or to be used in the unlawful possession, sale, manufacture or transportation of intoxicating liquors. No warrant shall be issued to search a private dwelling occupied as such, unless some part of it is used as a store, shop, hotel or boarding house, or for some purpose other than a private residence, or unless the affidavits of two credible persons show that such residence is a place where intoxicating liquor is sold or manufactured in violation of the terms of this act.

The application for the issuance of and the execution of any such search warrant, and all proceedings relative thereto, shall conform as near as may be to the provisions of title 6 of the Code of Criminal procedure of this State, except where otherwise provided in this act.

In the event any such liquor or utensils, containers or instrumentalities herein referred to are found, the officer executing the warrant shall seize same. The liquor and articles so seized shall not be taken from the custody of officer by writ of replevin or other process, but shall be held by the officer to await the final judgment in the proceedings. [Id., § 35.]

**Art. 588<sup>1</sup>/<sub>4</sub>qq. Punishment for violations of act; corporations.**—Any person violating any of the provisions of this act shall be deemed guilty of a felony and upon conviction thereof shall be punished by confinement in the Penitentiary for any period of time not less than one (1) year or more than five (5) years.

Any corporation violating any of the provisions of this act shall be subject to a penalty in favor of the State of Texas, which shall be recoverable in an action in the name of the State to be brought by the Attorney General in any district court of Travis County or such action may be brought in the district court of any county where the offense is committed, by the Attorney General or by the county or district attorney of such county with the consent and approval of the Attorney General. In any such action for penalties, the State shall recover the sum of Five Hundred (\$500.00) Dollars for any violation of the law, provided that each separate violation of the law shall be considered a separate offense is within the terms of this section, or where the offense is of a continuing character, then each day shall be considered a separate infraction of the law, for which the penalty may be recovered. The officers, agents or servants of any corporation against which any such penalty suit may be brought shall not be excused from testifying on the ground that their testimony might incriminate them, but where they are called upon by the State to testify and do testify they shall not be prosecuted for their participation in those acts about which they have testified. [Id., § 36.]

**Validity.**—The Dean Law, relating to intoxicating liquors, is not void because of Const. U. S. Amend. 18, and the passage of the federal law known as the Volstead Act, because the state law gives to intoxicating liquors a definition varying from that prescribed by Congress, and because the penalties of the state and federal laws are different. *Franklin v. State* (Cr. App.) 227 S. W. 486.

A difference in the penalty prescribed by an act of Congress and a state law passed for the purpose of enforcing Const. U. S. Amend. 18, does not render the state law unconstitutional. *Ex parte Gilmore* (Cr. App.) 228 S. W. 199.

Court did not err, in a prosecution for violation of the prohibition law, in charging the penalty under the state law, instead of the punishment as prescribed in the Volstead Act of Congress. *Reece v. State* (Cr. App.) 228 S. W. 562.

An indictment, charging defendant with being in possession of intoxicating liquors not for medicinal, scientific, sacramental or mechanical purposes, is sufficient, and is not subject to be quashed on the theory that the Dean Law, under which it was drawn, conflicts with rulings on the federal law known as the Volstead Act, relating to parties becoming owners prior to such act going into effect in a case where defendant was shown to have been transporting whisky to other parties. *Franklin v. State* (Cr. App.) 230 S. W. 692.

**Testimony of purchaser.**—In a prosecution for the unlawful sale of intoxicating liquors under the Dean Law, witnesses purchasing the liquor from defendants were *particeps criminis* and accomplices, and a conviction cannot be had on the testimony of one of them without corroboration, and it was error not to so charge. *Franklin v. State* (Cr. App.) 227 S. W. 488.

In a prosecution for the unlawful possession of intoxicating liquors, where witness testified that he drove for defendant an automobile in which the latter placed the liquor, if the witness knew that defendant was transporting whisky in violation of law, he was an accomplice whose testimony must be corroborated, and whether he did so know was a question which should have been submitted to the jury. *Franklin v. State* (Cr. App.) 230 S. W. 692.

**Art. 588<sup>1</sup>/<sub>4</sub>r. Compensation to district or county attorney for bringing penalty suits.**—It is further provided that where penalty suits are brought in Section 36 of this Act [Art. 588<sup>1</sup>/<sub>4</sub>qq], with the consent and approval of the Attorney General, that the district or county attorney bringing the same shall receive as compensation for his services twenty-five (25) per cent. of the amount of penalties recovered and collected, which amount may be held by the district or county attorney recovering the same when he collects and pays over the balance of the judgment to the State. [Id., § 37.]

**Art. 588 $\frac{1}{4}$ rr. Restraining violations of act.**—In addition to all other remedies now provided by law and provided in this Act, the Attorney General is hereby authorized to enjoin the violation of any section or sections of this act, and suit therefor may be maintained in the name of the State of Texas in any District Court in Travis County, Texas, and for such purpose venue and jurisdiction is hereby conferred upon the district courts of Travis County, Texas; and the district or county attorney of any county, wherein any of the provisions of this act, are violated, is authorized to institute and maintain, in the district court of any such county, a suit in the name of the State to enjoin and prevent the violation of any section or sections of this act. This remedy by an injunction given in this section shall be cumulative of and in addition to the other provisions of this act providing penalties or creating and defining crimes and punishments, and may be maintained with or without prosecutions or penalty suits herein otherwise provided for. [Id., § 38.]

**Art. 588 $\frac{1}{4}$ s. Violations of injunction; punishment.**—Any person violating the terms of any injunction issued under the provisions of Section 38 of this Act [Art. 588 $\frac{1}{4}$ rr] shall be punished for contempt by fine of not less than One Hundred (\$100.00) Dollars nor more than Five Hundred (\$500.00) Dollars, and by imprisonment in the county jail for not less than thirty (30) days, nor more than six (6) months. [Id., § 39.]

**Art. 588 $\frac{1}{4}$ ss. Witnesses.**—No person shall be excused from testifying against persons who have violated any provisions of this act for the reason that such testimony will tend to incriminate him, but no person required to so testify shall be punished for acts disclosed by such testimony. [Id., § 40.]

**Corroboration of purchaser.**—A conviction for the unlawful selling of intoxicating liquors cannot be had under the Dean Law, in view of art. 588 $\frac{1}{4}$ o, making purchase unlawful, and this article, and of Pen. Code. arts. 74-88, defining principals, accomplices, and accessories, where the witness purchasing the liquor was not corroborated as required by Code Cr. Proc. art. 801. Franklin v. State (Cr. App.) 227 S. W. 486.

**Art. 588 $\frac{1}{4}$ t. Pending prosecutions, etc.**—All suits or actions, civil or criminal, pending under the law in force the day this Act takes effect, may be prosecuted to final judgment and such judgment entered in like manner with the same effect as though this Act was not passed and all rights and action, civil or criminal, accrued under any existing law are hereby preserved and saved and excepted from the operation and effect of this Act, and the same may be prosecuted by suit for recovery or conviction in like manner and to the same extent as might be done if this act was not passed. [Id., § 41.]

**Art. 588 $\frac{1}{4}$ tt. Partial invalidity of act.**—If any provisions of this act shall be held to be invalid, it is hereby provided that all other provisions of this act, which are not held to be invalid, shall continue in full force and effect. [Id., § 42.]



## CHAPTER SEVEN

## UNLAWFULLY SELLING INTOXICATING LIQUOR

Art.	Art.
589-591. [Superseded.]	610e. Shipment of liquors into ten mile zone prohibited.
593. [Superseded.]	610f. Sale of liquor within ten miles of shipbuilding plant prohibited.
594-606. [Superseded.]	610g. Carrying liquor into ten mile zone prohibited.
606a-606g. [Superseded.]	610h. Exceptions.
610a. Procuring liquor for soldiers or sailors prohibited.	610i. License for place within ten mile zone prohibited.
610b. Person in military or naval forces defined.	610j. Penalty.
610c. Penalty; suspended sentence not applicable.	610k. Injunction.
610d. Selling, etc., liquor within ten miles of military or naval station prohibited.	610l. Preference to causes under act.
	610m. Effect of partial invalidity.

## Articles 589-591. [Superseded.]

**Explanatory.**—These articles are made inoperative by the amendment of art. 16, § 20, of the state Constitution, and by Acts 1919, 36th Leg., 2d C. S., ch. 78, ante, arts. 588¼ to 588¾tt.

## ARTICLE 589

See Ex parte Segars, 32 Tex. Cr. R. 553, 25 S. W. 26.

1. **In general.**—This article was applicable to counties in which local option was adopted previous to its passage. Gearheart v. State, 81 Cr. R. 540, 197 S. W. 187.

Where election on question of prohibition was carried prior to Acts 31st Leg. (1st Called Sess.) c. 15, making it offense to pursue business of selling intoxicating liquors in prohibition territory, such act was applicable. Mackey v. State, 81 Cr. R. 630, 199 S. W. 482.

2. **Legislative power.**—Acts 35th Leg. (4th Called Sess.) c. 24, p. 37, prohibiting the sale, barter, or exchange of intoxicating liquors throughout the state, violates Const. art. 16, § 20, relating to local option. Ex parte Myer, 84 Cr. R. 288, 207 S. W. 100.

4. **Relation to other statutes and former jeopardy.**—The Zone Law could not substitute or repeal a local option law voted in by the people. Jarrott v. State, 84 Cr. R. 544, 209 S. W. 663.

The local option prohibition law was not repealed by Acts 35th Leg. (4th Called Sess.) c. 24, providing for state-wide prohibition, nor by the act of the Legislature establishing the ten-mile zone law. White v. State, 84 Cr. R. 545, 210 S. W. 200.

6. **Offense.**—If defendant had no interest in and did not reap any profits from sale of whisky but procured it as an accommodation, it would not constitute a sale. Alexander v. State, 84 Cr. R. 75, 204 S. W. 644; Amonett v. State, 83 Cr. R. 587, 204 S. W. 438.

Only an illegal sale that forms basis of conviction, and legal sales, or a sale for which defendant had been tried and convicted, would constitute no violation of law. Amonett v. State, 83 Cr. R. 587, 204 S. W. 438.

It would be no justification or excuse that one of the sales of liquor made by a person charged with pursuing the business of selling intoxicating liquors was made under the belief that the liquor was for a person who was ill. Mann v. State, 87 Cr. R. 142, 221 S. W. 296.

8. **Indictment.**—The offense of engaging in the business of selling liquors in prohibition territory, laid by the indictment as committed on or about a certain day, embraces a period of three years prior and up to the filing of the indictment. Jackson v. State, 82 Cr. R. 383, 200 S. W. 150; Alexander v. State, 84 Cr. R. 75, 204 S. W. 644; White v. State, 86 Cr. R. 420, 217 S. W. 389.

An indictment for pursuing business of selling intoxicating liquors is required to give name of alleged purchaser of liquor touching the two sales essential under the statute. Fisher v. State, 81 Cr. R. 568, 197 S. W. 189; Mackey v. State, 81 Cr. R. 630, 199 S. W. 482.

A person cannot be convicted for pursuit of occupation of selling intoxicating liquors, where the indictment alleges the making of a sale to each of two named persons within three years next preceding filing of the indictment, unless the sales are proven as alleged. Robinson v. State, 81 Cr. R. 448, 196 S. W. 186.

Proof of sale to purchaser not named in indictment would not constitute basis of conviction, though admissible as tending to show that he was pursuing such business. Amonett v. State, 83 Cr. R. 587, 204 S. W. 438.

Where two elections had been held at different times in the same county, both of which resulted in favor of local option, an indictment for following the business of selling intoxicants in that county may allege either election. Elam v. State, 87 Cr. R. 190, 220 S. W. 332.

10. **Evidence—Admissibility.**—Evidence of other offenses, see notes under art. 783, C. C. P. note 55.

Testimony of witness, on prosecution for engaging in liquor business in prohibition territory, that when on occasions he bought whisky from defendant he had a number of quarts on hand, is admissible. Jackson v. State, 82 Cr. R. 383, 200 S. W. 150.

On prosecution for engaging in liquor business in prohibition territory, evidence of receipt of shipments by defendant within the three years before filing of indictment is not too remote. *Id.*

Evidence of custom of whites to order whisky in name of negroes not being connected with defendant held not admissible for him on prosecution for engaging in liquor business in prohibition territory. *Id.*

In prosecution for pursuing business of selling intoxicating liquors in local option territory, where there was evidence of sale to one of alleged purchasers, evidence that defendant had been acquitted of charge of such sale was admissible. *Amonett v. State*, 83 Cr. R. 587, 204 S. W. 438.

In a prosecution for pursuing the occupation of a retail liquor dealer in a county where the sale was forbidden, where defendant did not put in issue his reputation, evidence as to his bad reputation as a seller of intoxicating liquors is inadmissible. *Alexander v. State*, 86 Cr. R. 606, 218 S. W. 752.

11. — **Sufficiency.**—Evidence held sufficient to sustain a conviction of engaging in the business of selling liquors in prohibition territory. *Jackson v. State*, 82 Cr. R. 383, 200 S. W. 150; *Smith v. State* (Cr. App.) 199 S. W. 466; *White v. State*, 82 Cr. R. 286, 199 S. W. 1117; *Morse v. State*, 83 Cr. R. 153, 201 S. W. 1158; *Goss v. State*, 83 Cr. R. 349, 202 S. W. 956; *Jennings v. State*, 84 Cr. R. 242, 206 S. W. 522; *Crockett v. State*, 84 Cr. R. 604, 209 S. W. 408; *Jones v. State*, 86 Cr. R. 261, 216 S. W. 183.

Testimony of one witness as to isolated sales was insufficient to establish that accused was engaged in "business." *Gearheart v. State*, 81 Cr. R. 540, 197 S. W. 187.

Under art. 597, proof of one sale of intoxicating liquor will warrant conviction; but in a prosecution under this article, three sales to the same person the same day, unaccompanied by other proof, is insufficient. *Young v. State*, 81 Cr. R. 656, 198 S. W. 148.

Evidence of three sales of liquor, and defendant's possession shortly before of about a gallon of whisky, held insufficient to support conviction for pursuing business of selling intoxicants. *Reese v. State*, 82 Cr. R. 447, 199 S. W. 469.

Proof of separate sales made by accused to the same individual on dates about two weeks apart is not sufficient to sustain a conviction for pursuing business of selling intoxicating liquor. *Elam v. State*, 87 Cr. R. 190, 220 S. W. 332.

13. **Instructions.**—Refusal of defendant's special instruction presenting his defense that he acted as agent merely, in one transaction held error. *Amonett v. State*, 83 Cr. R. 587, 204 S. W. 438.

#### ARTICLE 590

**Evidence.**—An examined verbatim copy of an internal revenue license for selling intoxicants, having been proven completely, was properly admitted in evidence. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

Since keeping a disorderly house, in violation of arts. 496, 500, is a continuing offense, witnesses may testify that they had seen posted in defendant's place of business an internal revenue license about the time sales of liquor were made. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

#### ARTICLE 591

Cited, *Gearheart v. State*, 81 Cr. R. 540, 197 S. W. 187.

**Number of sales.**—A person cannot be convicted of pursuit of occupation of selling intoxicating liquors, where the indictment alleges the making of a sale to each of two named persons within three years next preceding filing of the indictment, unless the sales are proven as alleged. *Robinson v. State*, 81 Cr. R. 448, 196 S. W. 186.

**Evidence.**—District attorney can ask a witness, who testified that he bought liquor from defendant, when, where, and how many times he bought it, where the times fixed were within three years next preceding filing of indictment for engaging in business of selling liquor. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 960.

Evidence in prosecution for engaging in business of selling intoxicating liquor in prohibition territory, held to sustain conviction. *Goss v. State*, 83 Cr. R. 349, 202 S. W. 956.

### Art. 593. [400] [Superseded.]

**Explanatory.**—This article is made inoperative by the amendment of art. 16, § 20, of the state Constitution and by Acts 1919, 36th Leg., 2d C. S., ch. 78, ante, arts. 588¼-588½tt.

See *Payne v. State* (App.) 19 S. W. 677.

**Indictment.**—An indictment, that defendant gave intoxicating liquor to one named, "then and there being under the age of 21 years, without the written consent of the parent \* \* \* of the said —, against the peace," etc., was too uncertain as to who was the minor and as to consent. *Earnest v. State*, 83 Cr. R. 41, 201 S. W. 175.

**Evidence.**—In prosecution for giving intoxicating liquor to minor, mere proof that girl obtaining liquor was only 17 was insufficient to warrant conviction, in the absence of evidence as to her size and development. *Earnest v. State*, 83 Cr. R. 41, 201 S. W. 175.

In prosecution for giving intoxicating liquors to minor, state must show that defendant knew of minority. *Id.*

**Charge.**—A charge that if the minor informed defendant, at the time the liquor was sold, that he was 21 years old, and if defendant believed such statement to be true, and on the strength of it sold him the liquor, the jury must acquit, does not change the rule of the statute, that defendant shall knowingly sell before conviction can be had. *Jones v. State*, 32 Cr. R. 110, 22 S. W. 149.

**Arts. 594-606.** [Superseded.]

**Explanatory.**—These articles are made inoperative by the amendment of art. 16, § 20, of the state Constitution, and by Acts 1919, 36th Leg., 2d C. S., ch. 78, ante, arts. 588¼-588½tt.

## ARTICLE 594

See *State v. Rohde* (Civ. App.) 25 S. W. 688, following *Drake v. State* (Sup.) 24 S. W. 790.

## ARTICLE 597

Cited, *Phillips v. State*, 23 Tex. App. 304, 4 S. W. 893.

**3. Relation to other statutes and former jeopardy.**—Acts 35th Leg. 4th Called Sess. chs. 5, 6, amending arts. 611 and 612, prescribing punishment for selling intoxicating liquor without a license, does not apply to local option territory. *Reed v. State*, 84 Cr. R. 335, 206 S. W. 937.

The local option prohibition law was not repealed by Acts 35th Leg. 4th Called Sess. ch. 24, providing for state-wide prohibition, nor by the 10-mile zone law. *White v. State*, 84 Cr. R. 545, 210 S. W. 200.

**5. License.**—Prosecution for sale of intoxicating liquor at retail without license in local option territory may be maintained under this article, but not under article 612, as amended by Acts 35th Leg. (Fourth Called Sess.), c. 6, § 1, such provision not applying to local option territory. *Buckner v. State*, 83 Cr. R. 554, 204 S. W. 327.

**6. Offense.**—Proof of one sale of intoxicating liquor will warrant conviction. *Young v. State*, 81 Cr. R. 656, 198 S. W. 148.

In a prosecution for selling intoxicating liquors in prohibition territory, it is no defense that the seller made no money, or that the liquor did not belong to him. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

If one desiring intoxicating liquor gave money to another, who gave it to defendant, and defendant bought liquor, and gave it to person who furnished money, it was sale by defendant within contemplation of local option law. *Lopez v. State*, 84 Cr. R. 422, 208 S. W. 167.

Whisky is per se an intoxicating liquor. *Landers v. State*, 85 Cr. R. 109, 210 S. W. 694.

**7. — Agents.**—Under local option law, one who sells intoxicating liquors or acts as agent of another selling intoxicating liquors is guilty of crime, but one who acts purely for accommodation of purchaser is not guilty of crime. *Chance v. State*, 85 Cr. R. 62, 210 S. W. 208.

**9. Indictment, information or complaint.**—See *Shipley v. State*, 84 Cr. R. 278, 208 S. W. 342.

Indictment held sufficient. *Coursey v. State*, 82 Cr. R. 272, 199 S. W. 1091; *Johnson v. State*, 83 Cr. R. 61, 200 S. W. 832; *Price v. State*, 83 Cr. R. 322, 202 S. W. 948.

An indictment charging selling liquor in dry territory to four persons named can be supported only by evidence that the sale was made to all four. *Price v. State*, 83 Cr. R. 322, 202 S. W. 948.

An indictment need only allege that a prohibition election was held, that the result was declared by an order of the commissioners' court, and that an order was made prohibiting the sale of liquor. *Wright v. State*, 83 Cr. R. 415, 203 S. W. 775.

The use of the words "declaring the result of the election" instead of the words "declaring the result of said vote." *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

**12. Evidence—Presumptions and burden of proof.**—State sustains burden of proving that local option election has been held and notice published, by proof of entry by county judge of fact that order of commissioners' court declaring result of election has been published. *Smith v. State*, 81 Cr. R. 446, 196 S. W. 519.

The state need not prove the sale was made with the purpose of evading the law. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

Defendant's attorney could waive proof of records showing that the local option law was in effect. *Landers v. State*, 85 Cr. R. 109, 210 S. W. 694.

**13. — Admissibility in general.**—Where liquor defendant was selling was taken out of box in basket, evidence that the basket containing the box and bottles was afterwards examined on same day and found to contain 11 bottles of whisky was admissible. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

Local option may be shown by oral testimony or agreement in the absence of objection. *Sullivan v. State*, 83 Cr. R. 477, 204 S. W. 1169.

Evidence as to whether defendant got anything out of the sale was properly excluded. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

Evidence that prior to sale defendant had purchased large quantities of liquors held not inadmissible. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

**15. — Weight and sufficiency.**—Evidence held to sustain conviction for illegal sale of intoxicating liquors in prohibition territory. *Thompson v. State*, 82 Cr. R. 36, 197 S. W. 994; *McCoy v. State*, 81 Cr. R. 518, 196 S. W. 543; *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326; *Jeffries v. State*, 82 Cr. R. 42, 198 S. W. 778; *Johnson v. State*, 83 Cr. R. 61, 200 S. W. 832; *Lee v. State*, 83 Cr. R. 532, 204 S. W. 110; *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535; *Benson v. State*, 85 Cr. R. 126, 210 S. W. 538; *Landers v. State*, 85 Cr. R. 109, 210 S. W. 694.

Evidence held insufficient to establish identity of defendant with the person who sold intoxicating liquors illegally. *Shepherd v. State*, 81 Cr. R. 522, 196 S. W. 541.

Evidence held sufficient to sustain finding that liquid sold was whisky and not cider, although no one tasted it. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

Evidence held sufficient to identify defendant as the party who sold beer to the alleged purchaser. *Hays v. State*, 83 Cr. R. 398, 204 S. W. 229.

17. **Instructions.**—Refusal to instruct that two sales of intoxicating liquors to person mentioned in indictment must be shown held reversible error. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

Where indictment alleged two sales of liquor to individuals named, and evidence showed sales alleged, instruction that to convict jury must find that accused did make as many as two separate sales, as charged in indictment, was proper. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

It was not error to fail to define offense of selling intoxicating liquors in violation of local option law. *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

It was not error to refuse special charge that state must prove that bottles introduced and labeled Budweiser, contained intoxicants where two sales charged had been fully proved by other evidence. *Head v. State*, 82 Cr. R. 211, 198 S. W. 581.

A charge that the ownership of the liquor was immaterial, if defendant was exercising control, etc., held correct, and applicable to the case. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

A contention that the court failed to charge affirmatively that prohibition was in force when the offense was committed is without merit, where the charge, filed in November, 1918, states that the sale of liquors has been prohibited in the county since the spring of 1910. *Edwards v. State*, 85 Cr. R. 19, 209 S. W. 743.

#### ARTICLE 598

**Evidence.**—Proof held to show clearly that defendant made an illegal sale of what he knew was whisky. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

#### ARTICLE 602

See *Franklin v. State* (Cr. App.) 227 S. W. 486.

**Validity.**—Under Const. art. 16, § 20, the legislature had power to enact this article. *Ezell v. State*, 29 Tex. App. 521, 16 S. W. 782.

**Construction and operation in general.**—An action on a retail liquor dealer's bond, being for purely statutory penalties in the nature of a punishment designed to prevent future statutory violations of regulatory provisions of the general liquor law, cannot be maintained after adoption of the local option law in the precinct where said dealer's business was carried on, such adoption either repealing or suspending the general liquor law as to such territory, and there being no statutory provision for keeping alive right of action for breaches of the bond prior to such adoption. *State v. Mitchell*, 110 Tex. 498, 221 S. W. 925.

**Accomplices.**—Testimony of prosecuting witness that he met accused, who had whisky, and asked accused to sell him some, and that accused did so, did not show that witness was accomplice. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

One who acts purely for accommodation of purchaser of intoxicating liquors is not guilty of crime. *Chance v. State*, 85 Cr. R. 62, 210 S. W. 208.

The special rule in local option cases, prescribed by this article, is inapplicable to sale to soldier contrary to Acts 35th Leg. 4th Called Sess. ch. 7. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804.

A stool pigeon, who, at the direction of an officer, purchased intoxicating liquor from defendant, was not an accomplice. *Canales v. State*, 86 Cr. R. 142, 215 S. W. 964.

Defectives who testified that they purchased liquor from defendant, but neither of whom made any other effort to induce him to engage in business, were not "accomplices." *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

#### ARTICLE 606

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

### Arts. 606a-606q. [Superseded.]

**Explanatory.**—These articles, consisting of Acts 1913, ch. 67, as amended by Acts 1913, 1st C. S., ch. 31, as amended by Acts 1917, 35th Leg., 3d C. S., ch. 18, as amended by Acts 1918, 35th Leg., 4th C. S., ch. 31, and as amended by Acts 1919, 36th Leg., ch. 95, are made inoperative by the amendment of art. 16, § 20, of the state Constitution, and by Acts 1919, 36th Leg., 2d C. S., ch. 78, ante, arts. 588¼-588½tt.

#### ARTICLE 606a

**Validity.**—Acts 35th Leg. 4th Called Sess. 1918, c. 31, amending Allison Shipping Law, was authorized under Const. art. 3, § 40, by proclamation calling for legislation to restrict liquor traffic and render liquor inaccessible to soldiers. *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Gulf, C. & S. F. Ry. Co. v. State* (Civ. App.) 212 S. W. 845.

Allison Shipping Law, as amended by Acts 35th Leg. 4th Called Sess 1918, c. 31, is not unconstitutional under Const. art. 16, § 20, relating to local option legislation to prohibit "sale" of intoxicants, being merely for purpose of making enforcement of local option law more effective in districts in which it is in force, and does not deny any right guaranteed by the federal Constitution. (Per Morrow, J.) *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

The provision prohibiting the possession of intoxicating liquor in public places, is valid and not in conflict with the Webb-Kenyon Act. *Harper v. State*, 86 Cr. R. 446, 217 S. W. 703.

The act, in so far as denouncing offense of unlawfully having and keeping intoxicating liquor in a public place in a locality in which sale is prohibited by local option, held valid. *Baldauf v. State*, 87 Cr. R. 228, 220 S. W. 550.

**Repeal.**—Provisions of this act will prevail in such territory over the state-wide prohibition law, since the acts of same session of Legislature must be taken as a whole and construed as one act. (Per Morrow, J.) *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

**Offense.**—This act does not prohibit the gift of whisky by one person to another, where there is no transportation; the provisions as to delivery relating to transportation. *Tolbert v. State*, 86 Cr. R. 459, 217 S. W. 153.

To make one guilty of the possession of intoxicating liquor in a public place it is not necessary that he intends to remain in the public place where he is charged with having possession of liquor. *Harper v. State*, 86 Cr. R. 446, 217 S. W. 703.

**Evidence.**—In a prosecution for unlawfully transporting, carrying, and delivering intoxicating liquor, etc., evidence held insufficient to sustain a conviction. *Tolbert v. State*, 86 Cr. R. 459, 217 S. W. 153.

Evidence held sufficient to show defendant's guilt of the possession of intoxicating liquor in a public place and to show that the liquor was not for use in his own home. *Harper v. State*, 86 Cr. R. 446, 217 S. W. 703.

**Charge.**—An instruction that, before defendant could be convicted for the unlawful possession of liquor, he must have had it in his possession at or around a railway depot as claimed, and the jury must find that it was a place to which persons resorted for the purpose of business and boarding trains for the purpose of transportation, etc., sufficiently defined "public place." *Harper v. State*, 86 Cr. R. 446, 217 S. W. 703.

#### ARTICLE 606e

**Offense.**—Instruction permitting conviction of vagrancy, in absence of evidence that acts occurred in prohibition territory, is erroneous. *Johnson v. State*, 83 Cr. R. 49, 201 S. W. 177.

#### ARTICLES 606g-606i

Cited, *Ex Parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex Parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

#### ARTICLE 606l

Cited, *Ex Parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

**Art. 610a. Procuring liquor for soldiers or sailors prohibited.**—It shall hereafter be unlawful for any person, directly or indirectly, to knowingly purchase for or to procure for, or to sell, give, or deliver to, or cause to be given or delivered to any person engaged or enlisted in the military or naval forces of the United States, or any person engaged or enlisted in the military or naval forces of any of the associates of the United States in the present war with Germany, any spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication. [Acts 1918, 35th Leg. 4th C. S., ch. 7, § 1.]

**Explanatory.**—This act being prohibitory in character, may be operative, notwithstanding the state-wide prohibition act, and the state and federal prohibition amendments. The act took effect March 11, 1918.

**Validity.**—The state Legislature cannot, on the ground of military necessity, pass a general prohibition law, under Const. art. 16, § 28, the federal government being able to take care of its army. *Ex parte Myer*, 84 Cr. R. 288, 207 S. W. 100.

State Legislature had power to make it a criminal offense to solicit a soldier in the service of the United States to meet a woman for the purpose of illicit intercourse. *Green v. State*, 84 Cr. R. 485, 208 S. W. 514.

**What constitutes offense.**—If certain bottles in defendant's possession contained wine which would intoxicate, and defendant left a bottle where his brother-in-law, a marine in the military forces of the United States, could get it by arrangement, defendant violated this act. *Gardner v. State*, 85 Cr. R. 343, 212 S. W. 169.

To constitute a violation of the law against selling or giving intoxicating liquors to soldiers, there must be some sort of parting with possession by the accused, and some sort of possession in the soldier for whom intended; the delivery being accomplished directly or indirectly, since the law to soldiers does not denounce the intent to so do, or even the attempt resulting in failure. *Wales v. State*, 86 Cr. R. 183, 217 S. W. 384.

**Indictment.**—Allegation that defendant "did then and there unlawfully and knowingly, directly and indirectly, purchase for and procure for, and did then and there give and deliver and did then and there cause to be given and delivered," is in the terms of this article, and contention that indictment is duplicitous because of such allegation cannot be sustained. *Crosby v. State*, 85 Cr. R. 297, 212 S. W. 168.

**Evidence.**—In a prosecution for selling whisky to a soldier, evidence held sufficient to corroborate testimony of witnesses who procured the sale for the purpose of securing evidence, if those witnesses were accomplices. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 504.

Evidence held to sustain conviction of procuring and delivering intoxicants to persons enlisted in military forces. *Crosby v. State*, 85 Cr. R. 297, 212 S. W. 168.

Evidence held insufficient to sustain defendant's conviction of having supplied in-

toxicating wine to his brother-in-law, a marine. *Gardner v. State*, 85 Cr. R. 343, 212 S. W. 169.

Where the state showed that defendant went to his own room and got a bottle of his own whisky, but failed to show that he delivered it to a soldier, he cannot be convicted of procuring it for a soldier, since he could not "procure" it from himself. *Wales v. State*, 86 Cr. R. 183, 217 S. W. 384.

In a prosecution for the unlawful sale or giving of intoxicating liquor to soldiers, evidence held insufficient, in view of the presumption of innocence, to sustain conviction. *Id.*

**Charge.**—A requested instruction, directing an acquittal if the defendant bought the whisky for himself, was incorrect. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804.

**Verdict.**—Verdict of jury held to solve, in favor of the state, any question of variance as to names of soldiers to whom liquor was given and names charged in indictment. *Crosby v. State*, 85 Cr. R. 297, 212 S. W. 168.

**Art. 610b. Person in military or naval forces defined.**—By the term "any person engaged in or enlisted in the military or naval forces of the United States" is meant all those persons who are actually enlisted in either of said forces and who is known by the person charged with said violation to be so engaged, or who is wearing the uniform or insignia required of him by the Government as a person in said service. [*Id.*, § 1a.]

**Art. 610c. Penalty; suspended sentence not applicable.**—Any person violating any provision of this Act shall, upon conviction, be confined in the State Penitentiary for a term not less than two nor more than five years, and each violation shall be a separate offense. In prosecution under this Act the defendant shall not be permitted to make application for the suspended sentence nor shall anyone upon conviction of a violation of this Act be entitled to any of the benefits of the Suspended Sentence Act. [*Id.*, § 2.]

**Art. 610d. Selling, etc., liquor within ten miles of military or naval station prohibited.**—From and after April 15, 1918, it shall be unlawful for any person in time of war between the United States and any other nation or country to sell, barter or exchange any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, within ten miles of any part of the land or buildings occupied or controlled by the government of the United States, or any department thereof, and used as a fort, arsenal, training camp, quarters, or place where soldiers are, or may hereafter, be camped, stationed, or quartered; aviation field or school where soldiers, sailors, marines, or aviators are being quartered, drilled, or trained for service in any branch of the United States army or navy, except as herein provided. [Acts 1918, 35th Leg. 4th C. S., ch. 12, § 1.]

**Explanatory.**—This act, being prohibitory in character, may be operative, notwithstanding the state-wide prohibition act and the state and federal prohibition amendments. See note under art. 610g. The act took effect March 16, 1918.

Cited, *Ex Parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Validity.**—This act is not unconstitutional, but is a valid exercise of police powers. *Ex parte Hollingsworth*, 83 Cr. R. 400, 203 S. W. 1102.

**Effect of state-wide prohibition act.**—One violating the Zone Liquor Law is not entitled to be punished under the later-passed State-Wide Act, fixing a lighter punishment. *Ex parte Roy*, 85 Cr. R. 626, 215 S. W. 322.

**Art. 610e. Shipment of liquors into ten mile zone prohibited.**—From and after April 15, 1918, it shall be unlawful for any person, firm, or corporation, in time of war between the United States and any other country, to ship or transport by or over any common carrier, express or service car, any spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication, into the zone or territory within ten miles of any part of the land or buildings occupied or controlled by the United States government or any department thereof, and used as a fort, arsenal, or training camp, aviation field or school where soldiers, sailors, marines or aviators are being quartered, drilled, or trained for service in

any branch of the United States army or navy, or are camped, quartered, or stationed. [Id., § 2.]

**Art. 610f. Sale of liquor within ten miles of shipbuilding plant prohibited.**—It shall hereafter be unlawful for any person in time of war between the United States and any foreign country to sell, barter or exchange any spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, within ten miles of any place used as a yard or place where ships are being built under contract with the government of the United States, except as herein provided. [Id., § 2a.]

**Art. 610g. Carrying liquor into ten mile zone prohibited.**—From and after April 15, 1918, it shall be unlawful for any person, in time of war between the United States and any other country, to carry, in any manner, any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, into the zone or territory within ten miles of any part of the land or buildings occupied or controlled by the United States government or any department thereof, and used as a fort, arsenal, training camp, aviation field or school where soldiers, sailors, aviators or marines are being held, quartered or trained for service in any branch of the United States army or navy; camps, quarters, or place where soldiers are, or may be, camped, stationed, or quartered, except as herein provided. [Id., § 3.]

**Not repealed.**—Zone Liquor Law, § 3, was not repealed or superseded by Acts 35th Leg. 4th Called Sess. 1918, c. 24, § 3 (art. 588¼ et seq. ante), nor was the latter act repealed or superseded by chapter 31, relating to sales and transportation of intoxicating liquor. Ex parte Royce, 85 Cr. R. 626, 215 S. W. 322.

**Art. 610h. Exceptions.**—The preceding articles shall not apply to the sale of wine for sacramental purposes, nor to the bona fide shipment or sale of alcoholic liquors as medicines, in case of actual sickness; but such alcoholic liquor shall only be sold in such zone or territory upon the prescription of a regular practicing physician, dated and signed by him and certified on his honor that he (the physician) has personally examined the applicant (naming him) and that he finds him actually sick and in need of the alcoholic liquor prescribed, as a medicine; provided, that a physician who does not follow the profession of medicine as his principal or usual calling, or who is in any way, directly or indirectly, engaged in the sale of such stimulants on his own account or as the agent, employé, or partner of others, shall not be authorized to give the prescription provided for in this article; and provided, further, that no person shall be permitted to sell more than once on the same prescription, nor upon a prescription which has been cancelled, nor on a prescription which is not dated, signed and certified as above required; provided, that every person selling such stimulants upon the prescription herein provided for shall cancel such prescription by endorsing on it the word "cancelled," and file the same away, and on the first day of May, 1918, and every month thereafter, file a duplicate of the said prescription with the clerk of the district court, accompanied by an affidavit, stating that he has sold no intoxicating liquor other than that named in the prescriptions filed, which said prescriptions shall be preserved by the clerk of the district court for a period of three years from and after the date of filing, subject to the inspection of the grand jury, district, county and precinct officers; provided that the preceding article shall not apply to the sale of ethyl alcohol in quantities of one gallon or more by or to any person, firm or corporation engaged in the wholesale drug business, or by, or to any owner, proprietor, agent or employee of any retail drug store, whether incorporated or un-incorporated in which drugs are com-

pounded, and employing a registered pharmacist for the purpose of being used in such retail drug business; provided further that every such person, firm, or corporation shall have first paid the taxes and procured the license required by Art. 7475, of the Revised Civil Statutes of Texas, and have complied with the law regulating such sales in local option territory. [Id., § 3a.]

**Art. 610i. License for place within ten mile zone prohibited.**—From and after April 15, 1918, it shall be unlawful for any judge, tax collector, county clerk, or person in authority, to issue any license or permit of any kind in time of war between the United States and any other country, authorizing or permitting any person or firm to engage in the business of selling, bartering, or exchanging spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in the zone or territory within ten miles of any part of the land or buildings occupied or controlled by the United States government or any department thereof, and used as a fort, arsenal, training camp, or aviation field, or school where soldiers, sailors, marines, or aviators are being held, quartered, drilled, or trained for service in any branch of the United States army or navy, except as herein provided. [Id., § 4.]

**Art. 610j. Penalty.**—Any person violating any provision of this Act shall be deemed guilty of a felony, and upon conviction therefor, shall be confined in the State penitentiary for a term of not less than two nor more than five years, and each violation shall constitute a separate offense; and no person in a prosecution for violation of this Act shall have the right to make application for the suspended sentence, nor shall any person, upon conviction of a violation of this Act, be entitled to the benefits of the Suspended Sentence Act. [Id., § 5.]

**Art. 610k. Injunction.**—The Attorney General is hereby authorized to enjoin the sale of spirituous, vinous or malt liquors capable of producing intoxication, in violation of this Act, or any conduct in violation of this Act, and suit therefor may be maintained in the name of the State of Texas in Travis County, Texas, and the District or County Attorney of any county wherein any sale of such liquors are made in violation of any term of this Act, or any conduct in violation of this Act, is hereby authorized to maintain, in the proper court of said county, or in Travis County, Texas, suit in the name of the State to enjoin and prevent such sale or other violation of this Act. [Id., § 6.]

**Art. 610l. Preference to causes under act.**—It shall be the duty of the courts of this State upon whose dockets may appear cases wherein parties are accused of violating the provisions of this Act to give such cases preference setting over ordinary felonies. [Id., § 7.]

**Art. 610m. Effect of partial invalidity.**—Should any section or part of this Act be held unconstitutional or invalid, such holding shall not affect any other portion of this Act, but those sections and parts not so held shall be and remain in full force and effect. [Id., § 8.]



## CHAPTER EIGHT,

VIOLATIONS OF THE LAW REGULATING THE SALE OF  
INTOXICATING LIQUORSArt.  
611-616. [Superseded.]Art.  
622-633. [Superseded.]**Articles 611-616. [Superseded.]**

**Explanatory.**—These articles, as amended and added to by Acts 1918, 35th Leg. 4th C. S., ch. 5, and Acts 1918, 35th Leg. 4th C. S., ch. 6, are made inoperative by the amendment of art. 16, § 20, of the state Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, ante, arts. 588¼-588¼tt.

## ARTICLE 611

Cited, *Ex Parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**Construction and operation in general.**—Acts 35th Leg. Fourth Called Sess. cc. 5, 6, amending arts. 611 and 612, does not apply to local option territory. *Reed v. State*, 84 Cr. R. 335, 206 S. W. 937.

**Offense.**—Where defendant gave prosecuting witness a bottle of whisky and received in payment money that had been shortly theretofore given prosecuting witness by a companion for that purpose, defendant was guilty under counts charging a sale directly and indirectly *Mansfield v. State*, 84 Cr. R. 182, 206 S. W. 195.

A club dispensing intoxicating liquors to members and guests in good faith is not engaged in the business of selling intoxicating liquors. *Country Club v. State*, 110 Tex. 40, 214 S. W. 296, 5 A. L. R. 1185.

## ARTICLE 612

Cited, *Ex Parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex Parte Davis*, 86 Cr. R. 168, 215 S. W. 341.

**In general.**—This article does not apply to local option territory. *Reed v. State*, 84 Cr. R. 335, 206 S. W. 937; *Buckner v. State*, 83 Cr. R. 554, 204 S. W. 327.

**Evidence.**—In a prosecution for the selling of malt intoxicating liquor without license, a showing only by witness' belief that defendant did not have a license is insufficient to sustain a conviction; the statute requiring a license for the selling of malt drinks, both intoxicating and nonintoxicating *Wales v. State*, 85 Cr. R. 391, 212 S. W. 503.

The evidence must show that defendant's illegal sale of intoxicating malt liquor occurred prior to the filing of the indictment therefor. *Id.*

In a prosecution for the selling of intoxicating malt liquor without license, where the witnesses testified they did not know whether the liquor was intoxicating or not, the evidence is insufficient to sustain a conviction. *Id.*

## ARTICLE 613

Cited, *Ex Parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Ex Parte Davis*, 86 Cr. R. 168, 215 S. W. 341.**Arts. 622-633. [Superseded.]**

**Explanatory.**—These articles are superseded and made inoperative by the amendment of art. 16, § 20, of the state Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, ante, arts. 588¼-588¼tt.

## ARTICLE 630

See *Janks v. State*, 29 Tex. App. 233, 15 S. W. 815.

**Offense.**—The prohibition clearly extends to all times between midnight and midnight; and the fact that an officer told defendant that he might lawfully open "after the election had closed" is no justification for having done so. *Jones v. State*, 32 Cr. R. 533, 25 S. W. 124.

## ARTICLE 630A

Cited, *Le Gois v. State*, 83 Cr. R. 460, 204 S. W. 320.

**In general.**—Where the defendant has pleaded guilty and there is evidence that he sold intoxicating liquors in violation of the statute, he is not in a position to complain that the evidence was not sufficiently specific in showing his guilt. *Terretto v. State*, 86 Cr. R. 188, 215 S. W. 329.

## CHAPTER EIGHT A

## POOL HALLS

Art.	Art.
633a. Maintaining or operating pool hall prohibited.	633b. Same; punishment.

**Article 633a. Maintaining or operating pool hall prohibited.**—On and after the 1st day of May, A. D., 1919, it shall be unlawful for any per-

son acting for himself or for others to maintain or operate a pool hall within this State. The term "pool hall" as herein used mean and include any room, hall, building or part of building, tent, or enclosure of any kind or character, similar or dissimilar to those named or any enclosed open space in which or where are exhibited for hire, revenue, price, fees, or gain of any kind; or for advertising purposes of any kind, any pool or billiard table or tables, or stands or structures of any kind or character on or in which are or may be played pool or billiards of any kind or character or any game, similar or dissimilar to the game of pool or billiards played with balls, cues or pins or any similar devices; any such table or tables, stands or structures of any kind or character used or exhibited in connection with any place where goods, wares or merchandise or other things of value are sold or given or where or upon which any money or thing of value is paid or exchanged, shall be regarded as a place where is exhibited the tables, stands, or structures herein referred to for hire, revenue and gain. [Acts 1919, 36th Leg., ch. 14, § 1.]

**Explanatory.**—This act supersedes Acts 1913, ch. 74, secs. 12, 13, 15, the provisions of which were declared unconstitutional by the Supreme Court, in *Ex parte Mitchell*, 109 Tex. 11, 177 S. W. 953. The act took effect May 1, 1919.

See *State v. Humphries*, 81 Cr. R. 322, 195 S. W. 194.

**Validity.**—In the title to this act, an act to prohibit pool halls, etc., and defining pool halls to be any place where games similar "or dissimilar" to pool are played, the quoted words may be disregarded as surplusage, and the act does not violate Const. art. 3, § 35, restricting laws to a single subject to be expressed in the title because it defines pool halls to include places where billiard tables are used. *Davis v. State* (Cr. App.) 225 S. W. 532.

**Art. 633b. Same; punishment.**—Any person or persons, who shall operate or maintain any pool or billiard hall as described herein, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five (\$25.00) dollars and not more than one hundred (\$100.00) dollars, or by confinement in the county jail for not less than thirty days nor more than one year, or by both such fine and imprisonment; provided that each day such pool or billiard hall is operated or maintained shall constitute a separate offense. [Id., § 2.]

For section 3 of this act, see ante, Civ. Stat. art. 4688a.

## CHAPTER NINE

### VAGRANCY

**Art.**  
634. "Vagrancy" defined.

**Art.**  
635. Person unlawfully soliciting orders for intoxicating liquors, vagrant.

#### Article 634. "Vagrancy" defined.

Cited, *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

1. **In general.**—A cabinet workman supporting himself by such work, and who was a regular certified commissioned Spiritualist, teaching and lecturing on Spiritualism, was not a "vagrant" even though he acted as a medium and charged for spiritual consultations, unless he was advertising himself as a clairvoyant or prophet of coming events or of having supernatural knowledge for the purpose of maintaining himself in whole or in part. *Staufer v. State*, 85 Cr. R. 1, 209 S. W. 748.

Although this article, would include one who was involuntarily out of employment, it cannot be reasonably so construed, and does not apply where accused was seeking regular employment, and in the meantime taking whatever odd jobs he could get. *Harris v. State* (Cr. App.) 229 S. W. 875.

5. **Common prostitutes.**—Vagrancy under Pen. Code, arts. 634-640, is a present condition; and one cannot be convicted thereof because previously a common prostitute, having abandoned such life. *Cox v. State*, 84 Cr. R. 49, 205 S. W. 131.

By statute, to constitute defendant a vagrant under the allegation that she was a common prostitute, it was necessary to show that she was such, which was not done, where no witness testified as to the necessary facts of intercourse with men. *Levy v. State*, 84 Cr. R. 493, 208 S. W. 667.

Where defendant in opening house of prostitution was justified so far as city authorities could justify her, and ceased to run house when notified by chief of police on May 20th that she must do so, and thereafter was not concerned in business, she was not guilty of vagrancy, through formerly running house of prostitution under complaint filed against her July 31st. *Id.*

**10. Evidence.**—Testimony of witnesses, having heard men say they had had intercourse with defendant, tried on a charge of being a prostitute, was hearsay. *Woods v. State*, 81 Cr. R. 403, 195 S. W. 858.

Evidence held insufficient to warrant conviction for vagrancy on the ground of defendant being a common prostitute, as distinguished from a prostitute. *Cox v. State*, 84 Cr. R. 49, 205 S. W. 131.

In a prosecution for vagrancy, evidence held not sufficient to sustain a conviction. *Bennett v. State*, 84 Cr. R. 159, 205 S. W. 987.

In prosecution for vagrancy by being common prostitute and running house of prostitution, testimony as to defendant's general reputation and general reputation of some of her associates, and general reputation of houses in her part of city, held inadmissible. *Levy v. State*, 84 Cr. R. 493, 208 S. W. 667.

In prosecution for vagrancy, evidence held insufficient to show that defendant was advertising as a clairvoyant, or as a prophet of coming events, or of having supernatural knowledge with respect to either present or future conditions, happenings, or events. *Staufers v. State*, 85 Cr. R. 1, 209 S. W. 748.

That accused was a common prostitute could not be established by proof of her reputation as such, or of the reputation of the house in which she lived. *Cross v. State*, 85 Cr. R. 430, 213 S. W. 638.

### Art. 635. Person unlawfully soliciting orders for intoxicating liquors, vagrant.

**Evidence.**—Instruction permitting conviction of vagrancy, of one who unlawfully solicits orders for intoxicating liquors vagrant, in absence of evidence that acts occurred in prohibition territory, is erroneous. *Johnson v. State*, 83 Cr. R. 49, 201 S. W. 177.

## CHAPTER NINE A

### ABANDONMENT OF WIFE OR CHILDREN

Art.	Art.
640a. Desertion and failure to support wife or children; penalty.	640c. Proof of marriage and paternity, etc.
640b. Order for support pendente lite; contempt.	640d. Venue.
	640f. Liberal construction; partial invalidity.

#### Article 640a. Desertion and failure to support wife or children; penalty.

Cited, *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326; *Gully v. Gully* (Sup.) 231 S. W. 97.

**Offense.**—As the fact that a wife refused to give up custody of her young children does not relieve the husband from his legal duty, to support and maintain them when they are in destitute and necessitous circumstances, in prosecution under such statute a refusal of motion to continue on account of absence of a witness who would testify to wife's refusal was not reversible error. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 355.

To convict husband under wife desertion statute, he must not only have deserted his wife, or have failed to support her, but it must have been willfully done. *Dickey v. State*, 82 Cr. R. 154, 198 S. W. 309.

In prosecution for wife desertion, part of state's case was to prove desertion was without justification. *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

In a prosecution for wife desertion, the state must show, not only that the husband willfully and without justification deserted his wife and neglected and refused to support and maintain her, but also that he left her in destitute and necessitous circumstances. *Wallace v. State*, 85 Cr. R. 91, 210 S. W. 206.

In a prosecution brought nine days after the alleged desertion of wife, no desertion was shown, where during such time defendant's father had paid her \$10 for him, and just prior to the alleged desertion the defendant had paid \$20 for groceries and left the wife credit on which to purchase groceries. *Id.*

To show guilt of offense of desertion of wife and children, it must appear that defendant deserted, neglected, or refused to provide for his wife and children under 16, that his conduct was willful and without justification, and that wife and children were in destitute and necessitous circumstances. *Mercardo v. State*, 86 Cr. R. 559, 218 S. W. 491, 8 A. L. R. 1312.

The term "willful," means not only with evil intent and malice, but also implies a set purpose or design. *Id.*

Where wife, at time of preferring charge against husband for desertion, had \$110, conviction will not be sustained; the wife not being in destitute and necessitous circumstances. *Davis v. State*, 86 Cr. R. 514, 218 S. W. 493.

To convict a husband of willful desertion and failure to support his wife, it must be affirmatively shown, not only that the husband unjustifiably deserted his wife, but also that his wife was in destitute circumstances. *Hood v. State*, 87 Cr. R. 222, 220 S. W. 550.

In order to make the desertion of the wife an offense under the statute, the prosecution must show that the wife was left in destitute and necessitous circumstances. *Barrow v. State* (Cr. App.) 225 S. W. 53.

Conviction for wife desertion cannot be had except upon proof that there was a willful desertion of the wife and that she was in destitute or necessitous circumstances. *Terrell v. State* (Cr. App.) 228 S. W. 240.

In a prosecution for desertion of his wife and his infant child, the fact that the two were provided for is no defense, for it is very rare that actual suffering results from such desertion. *Williams v. State* (Cr. App.) 232 S. W. 507.

**Justification.**—Husband, who left wife and daughters in home after endeavoring to persuade wife to remove with him that he might escape drink habit, and who, after removal, remitted what money he could spare, and offered to deed home to wife, who, with daughters, was making \$80 a month, did not violate statute denouncing wife desertion. *Green v. State*, 84 Cr. R. 151, 206 S. W. 93.

A husband, who when absent from his wife and children sent them \$125 each month of his earnings of \$150, and who when he returned was told by his wife that she would not have anything to do with him as such, or perform for him any of her duties as wife, was justified in refusing or failing further to support her. *Mercardo v. State*, 86 Cr. R. 559, 218 S. W. 491, 8 A. L. R. 1312.

"Justification" means a sufficient lawful reason why a person did or did not do the thing charged. *Id.*

After a husband found that by reason of the high cost of living his wages in the city were not sufficient to support him and his wife, and he believed that by going to the country and renting a farm he would better his position, he cannot be held criminally liable for wife abandonment, where he offered to take his wife with him, and she declined to go, claiming that her health demanded that she remain in the city with her mother. *Reid v. State* (Cr. App.) 229 S. W. 324.

Though a few days prior to the actual institution of a prosecution for desertion of his wife and infant child defendant offered to renew his conjugal relations, that offer is no bar to a prosecution for either the crime of desertion of a wife or desertion of the child, but can be considered merely on the question whether the desertion was willful. *Williams v. State* (Cr. App.) 232 S. W. 507.

**Indictment, information, or complaint.**—Information charging neglect to support four minor children named, and alleging that the "injured party" was under age of 16 held to sufficiently plead that each of the children was under such age. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855.

Complaint for wife desertion, following the language of the statute, and alleging that defendant deserted his "wife," naming her, held not insufficient as failing to allege defendant was married. *Turner v. State*, 84 Cr. R. 605, 209 S. W. 406.

Information, charging desertion of infant children without alleging the children to be in destitute and necessitous circumstances, held fatally defective. *Woodard v. State*, 86 Cr. R. 632, 218 S. W. 760.

**Evidence—Admissibility.**—In a prosecution for wife abandonment, which the husband sought to justify by showing that the wife's mother kept a reputed assignation house, the general reputation of the house was of itself some evidence that the wife knew of such reputation. *Trial v. State*, 84 Cr. R. 16, 205 S. W. 343, 725.

In a prosecution for abandonment of wife and child, evidence that the wife could have received support from defendant's father was improperly excluded; such evidence being pertinent on the question of intent and in mitigation. *Id.*

In a prosecution for failure to support minor children, testimony of defendant's father that his wife had a miscarriage at his house, caused by defendant's cruel treatment, was admissible, as showing defendant's attitude toward his wife and family. *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1042.

In a prosecution for failure to support minor children, the fact was admissible that defendant filed suit for divorce in a county before he had lived there six months, so that the suit was brought at a time and place when and where he had no legal right to file it and obtain divorce; the prosecution involving defendant's entire attitude towards his wife and children. *Id.*

In a prosecution for failure to support minor children, testimony of defendant's father that he had employed an attorney to represent defendant's wife in defendant's divorce suit was admissible for what it was worth, as showing the destitute condition of the wife and children of defendant at the time he forced them to take refuge with his father. *Curd v. State*, 217 S. W. 1043.

In a prosecution for wife desertion, testimony that defendant had been charged with shooting craps, and that a witness had gone on his bond when he was arrested, and testimony that defendant's wife was a good woman, was inadmissible as irrelevant. *Moore v. State*, 87 Cr. R. 24, 218 S. W. 1059.

In prosecution for child desertion, testimony of witness with whom defendant had left his children for six or eight months without payment therefor, in violation of his agreement to pay witness, that at the end of such period the children were taken to a particular orphanage, held admissible on issue of defendant's willful abandonment and desertion of the children. *Reid v. State* (Cr. App.) 226 S. W. 408.

— **Sufficiency.**—Evidence held insufficient to establish the offense by a father of willfully neglecting and refusing to provide for the support and maintenance of a child. *Joiner v. State*, 81 Cr. R. 524, 196 S. W. 523.

In a prosecution for wife desertion, evidence held insufficient to support conviction. *Dickey v. State*, 82 Cr. R. 154, 198 S. W. 309.

In a prosecution for desertion and failure to support a wife and child, evidence held sufficient to support a conviction. *Matthews v. State*, 84 Cr. R. 622, 209 S. W. 660.

In prosecution for willful desertion of wife, evidence held insufficient to support conviction. *Lamm v. State*, 85 Cr. R. 48, 210 S. W. 209.

Evidence held to sustain conviction of the offense of willful refusal to support defendant's two children, aged one and two years. *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1042.

When the testimony in a prosecution for willful failure or refusal to provide for wife and children, shows that defendant husband did not desert the wife but that she turned from him, and that he did not neglect or refuse to provide for her or her children but gave them most of his earnings, while at the time alleged they were not in distress but had house rent paid and money, conviction is against the law and the evidence, and will be reversed. *Mercardo v. State*, 86 Cr. R. 559, 218 S. W. 491, 8 A. L. R. 1312.

In a prosecution for wife desertion, evidence held insufficient to justify finding that defendant's wife was in necessitous circumstances, showing rather that she made a living herself, and that she drove defendant away from home. *Perry v. State*, 87 Cr. R. 226, 220 S. W. 549.

That the husband left his wife their home and the furniture, and some money, and that she could have procured goods on his credit, or could have returned to her father, who was able to support her, but instead secured employment and supported herself, held not to show that she was in destitute circumstances. *Hood v. State*, 87 Cr. R. 222, 220 S. W. 550.

Evidence held insufficient to sustain conviction for unlawfully, willfully, and without justification abandoning, neglecting, and refusing to provide for the support and maintenance of minor children under 16 years of age in destitute and necessitous circumstances. *Flowers v. State*, 87 Cr. R. 293, 221 S. W. 289.

Evidence, not making clear that defendant's child was in destitute or necessitous circumstances, and tending to negative any willful neglect on defendant's part, held insufficient to support judgment convicting him of desertion of the child. *Hollien v. State*, 87 Cr. R. 645, 224 S. W. 779.

In prosecution for child desertion, testimony that father left his children with person whom he agreed to pay specific amount a month and that after making first month's payment he left children with such person for six or eight months without payment therefor, held sufficient to sustain a conviction, in absence of evidence showing any excuse or justification for such conduct. *Reid v. State* (Cr. App.) 226 S. W. 408.

Conviction of wife desertion held not supported by the evidence. *Mikeska v. State* (Cr. App.) 228 S. W. 235.

In a prosecution against a husband and father for desertion, including the refusal to provide for the support and maintenance of his child, evidence held sufficient to sustain a conviction. *Williams v. State* (Cr. App.) 232 S. W. 507.

**Questions for jury.**—In a prosecution for abandonment, it was error to withdraw from the jury as matter of justification the reputation of the wife's mother and of houses which she kept, the statute leaving the determination of justification to the jury. *Trial v. State*, 84 Cr. R. 16, 205 S. W. 343, 725.

In prosecution for wife desertion, what conditions or facts justify the conclusion that desertion was without justification is for the jury, statute not defining them. *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

**Instructions.**—In a prosecution for wife desertion, the words "justification," "destitute," and "necessitous," used in the statute and the charge, did not require explanation or definition by the court. *Turner v. State*, 84 Cr. R. 605, 209 S. W. 406.

### Art. 640b. Order for support pendente lite; contempt.

See *Trial v. State*, 84 Cr. R. 16, 205 S. W. 343.

### Art. 640c. Proof of marriage and paternity, etc.

See *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855.

Cited, *Trial v. State*, 84 Cr. R. 16, 205 S. W. 725.

**Validity.**—This article held valid as against objection that Const. art. 3, § 36, providing that no law shall be revised or amended by reference to its title and requiring the amended section to be re-enacted and published at length, was not complied with, since such statute is complete within itself and is not an amendment of Code Cr. Proc. 1916, art. 795, providing that husband and wife in no case can testify against each other except in a criminal prosecution for an offense by one against the other, notwithstanding its effect is to restrict the operation of the latter statute. *Terrell v. State* (Cr. App.) 228 S. W. 240.

**Wife's testimony.**—The law making the wife incompetent to testify against her husband as to privileged communications is purely statutory, being embodied in Code Cr. Proc. 1916, arts. 794, 795, while this article makes husband or wife competent to testify to all relevant facts in a prosecution for wife desertion or for failure to support minor children. *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1043.

A wife was a competent witness against her husband, and complaint, sworn to by her, charging him with desertion of wife and child in destitute and necessitous circumstances, was not void. *Hollien v. State*, 87 Cr. R. 645, 224 S. W. 779.

**Art. 640d. Venue.**

**Allegation of venue.**—In a prosecution for wife desertion, an indictment for desertion, in support of which the prosecution does not expect to show continued destitution of the wife, must allege the desertion in the county in which it occurred, or there will be variance. *Hood v. State*, 87 Cr. R. 222, 220 S. W. 550.

A complaint for desertion of wife and child, which alleged that "in said county and state" defendant committed the acts complained of, with no reference elsewhere in the complaint to any county, is insufficient to show that the desertion occurred within the county where the prosecution was instituted. *Freeman v. State* (Cr. App.) 224 S. W. 1087.

**Art. 640f. Liberal construction; partial invalidity.**

See *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855.

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**CHAPTER TEN**
**MISCELLANEOUS OFFENSES UNDER THIS TITLE**

Art. 641. Pawnbroker failing to comply with the law.	Art. 641b. Junk dealers buying without affidavit.
641a. Junk dealers buying from minors without written consent of parent or guardian.	641c. Affidavits. 641d. Definitions. 649—1. Refusal to carry out plans for destruction of certain animals.

**Article 641. [414] Pawnbroker failing to comply with the law.**

**Municipal ordinances.**—Ordinance of city of El Paso imposing penalty for violation of ordinance regulating pawnbrokers different from that imposed by this article, held void, as to penalty imposed; there being no charter authority therefor. *Ex parte Goldburg*, 82 Cr. R. 475, 200 S. W. 386.

**Art. 641a. Junk dealers buying from minors without written consent of parent or guardian.**—If any person engaged in doing or following the business or occupation known or called "Junk Business" or "Junk Dealers" or agent, clerk or representative of any such person, who shall buy, take or receive anything, article, commodity or part thereof, for or in connection with said business or occupation from any person under the age of twenty-one without first receiving the written consent, together with the affidavit hereinafter required, from the guardian or parent, with whom the minor is residing, to so buy, take or receive such thing, article or commodity, or part thereof, shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. [Acts 1918, 35th Leg. 4th C. S., ch. 82, § 1.]

**Explanatory.**—Sec. 5 of the act repeals all laws in conflict. The act took effect 90 days after March 27, 1918, date of adjournment.

**Art. 641b. Junk dealers buying without affidavit.**—If any person engaged in doing or following the business or occupation known as, or called "Junk Business" or "Junk Dealers," or the agent, clerk or representative of any such person, who shall buy, take or receive any thing, article, commodity or part thereof for or in connection with said business or occupation, from any person without first receiving the affidavit hereinafter required from said person selling or delivering said thing, article, commodity or part thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. [Id., § 2.]

**Art. 641c. Affidavits.**—The affidavit required by the two preceding sections shall be in writing or be printed and be made only by the person selling or delivering the thing, article, commodity or part thereof to

the said "Junk Dealer" or "Junk Business" and shall be signed by the affiant, and if he be unknown to the purchaser or receiver of said thing, article, commodity, or part thereof, said affidavit shall also be signed by one or more identifying and identified witnesses, and it shall describe the thing, article, commodity or part thereof sold or delivered with accuracy sufficient to certainly identify same; it shall state when, from whom and where the said thing, article, commodity or part thereof was obtained and as to how the person selling or delivering, same came into possession thereof; said affidavit shall be made at the expense of the purchaser and be kept in a well bound book and be open to the free inspection of the public at all hours of the day. Any thing, article, commodity or part thereof found in the possession of said "Junk Dealer" or in said "Junk Business" not accompanied by said identifying and descriptive affidavit shall subject said "Junk Dealer" or the owner of said "Junk Business" or the agent, clerk or representative receiving same, to the punishment prescribed by the preceding sections of this Act, and each thing, article, commodity or part thereof so bought or received without said affidavit, shall constitute a separate offense. [Id., § 3.]

**Art. 641d. Definitions.**—The terms "Junk Dealer" and "Junk Business" as used herein, shall be construed to include every person, firm, corporation or association engaged in the business of buying or receiving second-hand articles or parts thereof other than in carload lots, of any and every nature and kind, except liquids, fuel, feed, foodstuffs and furniture. [Id., § 4.]

**Art. 649—1. Refusal to carry out plans for destruction of certain animals.**—When a land holder shall fail or refuse to carry out the plans furnished to the Commissioners' Court by the Commissioner of Agriculture, said land owner shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty (\$50.00) Dollars, nor more than One Hundred (\$100.00) Dollars. [Acts 1918, 35th Leg. 4th C. S., ch. 62, § 6.]

For the rest of this act see ante, Civ. St., arts. 6328e-6328j.

## CHAPTER ELEVEN

### INSURANCE COMPANIES

LIFE INSURANCE COMPANIES		Art.
Art.		690. Agent procuring by false representation.
684.	Shall invest funds how, penalty for violation.	
685.	[Superseded.]	
686.	Detailed medical examination of persons before entering into contracts of insurance, penalty.	
		LLOYD'S PLAN
		6937. Violation of requirements as to Lloyd's plan of insurance.

### LIFE INSURANCE COMPANIES

**Article 684. Shall invest funds how, penalty for violation.**—Any officer or director of any such company who shall knowingly and wilfully violate or assent to the violation of the provisions of this section [Art. 4811, Civil Statutes, ante] shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than five years. [Acts 1909, p. 287; Acts 1921, 37th Leg., ch. 77, § 1, superseding art. 684, Rev. Pen. Code.]

**Art. 685.** [Superseded.]

**Explanatory.**—Superseded by Acts 1921, 37th Leg., ch. 77, ante, arts. 4813, 4814, Civil Statutes.

**Art. 686.** Detailed medical examination of persons before entering into contract of insurance, penalty.—Any officer or agent or employé of such company violating the provision of this Section [Art. 4818, Civil Statutes, ante] or effecting or attempting to effect a contract of insurance contrary to the provisions hereof shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment in the county jail for not less than six months or by both such fine and imprisonment. [Acts 1909, p. 289; Acts 1921, 37th Leg., ch. 77, § 1, superseding art. 686, Rev. Pen. Code.]

**Art. 690.** Agent procuring by false representation.

**Elements of offense.**—The representations must not be mere false promises or professions as to future happenings or events, but must relate to something present or past. *Griffin v. State*, 85 Cr. R. 361, 212 S. W. 499.

To sustain a conviction, for procuring by fraudulent representations, payment of an obligation for the payment of a premium of insurance, there must be in existence at the time the fraudulent representations are made a complete binding obligation to pay an insurance premium. *Id.*

**Evidence.**—Facts held not to show the existence of an obligation, the payment of which was induced by fraudulent representations knowingly made by defendant. *Griffin v. State*, 85 Cr. R. 361, 212 S. W. 499.

## LLOYD'S PLAN

**Art. 693ll.**—Violation of requirements as to Lloyd's plan of insurance.—Any person, who, as principal attorney, agent, broker or other representative, shall engage in the business contemplated by this act [Arts. 4972<sup>1</sup>/<sub>4</sub>–4972<sup>4</sup>/<sub>4</sub>, Civil Statutes, ante], or any variety or part thereof, without complying with the requirements hereof, or who shall violate any of its provisions, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in an amount not exceeding Five Hundred (500.00) Dollars. [Acts 1921, 37th Leg., ch. 127, § 10.]

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

## TITLE 12

## OF OFFENSES AFFECTING PUBLIC HEALTH

Chap.	Chap.
1. Occupation and acts injurious to health.	6. Unlawful practice of medicine.
2. Sale of unwholesome food, drink or medicine, or mill products.	7. Dentistry.
3a. Cotton pest.	7a. Optometry.
4. Feed stuffs.	9. Nursing and embalming.
5. Cocaine and morphine.	10a. Veterinarians.
	11a. Sale of gasoline, etc.
	12. Ophthalmia Neonatorum.

## CHAPTER ONE

## OCCUPATION AND ACTS INJURIOUS TO HEALTH

Art.	Art.
694. Offensive trades and nuisances.	696a. Violation of sanitary rules for conduct of hotels, restaurants, etc.
695dd. Failure to test water supply, etc.	696b. Violation of sanitary rules for conduct of barber and beauty shops.
695e. [Repealed.]	



**Article 694. [423] Offensive trades and nuisances.**

**What constitutes public nuisance.**—"Unlawfully practicing medicine," within provisions of arts. 754, 755, cannot be enjoined as "trade business, or occupation injurious to health of those in the neighborhood," within meaning of this article and Code Cr. Proc. art. 148, authorizing injunction of injurious occupation after indictment therefor. *Crowder v. Graham* (Civ. App.) 201 S. W. 1053.

**Art. 695dd. Failure to test water supply, etc.**—In all cases where the authorities of any city, or town, or village, or any person, or firm, or corporation, or company, their officers and their receivers, or agents furnishing drinking water to cities or towns of Five Thousand (5000) inhabitants or less, shall fail or refuse to carry out the provisions of this Act, and shall furnish for public use, drinking water that is contaminated, impure and unclean, shall be guilty of a misdemeanor and shall be punished on conviction thereof by a fine in any sum not to exceed \$500.00 for any such offense, and upon any conviction of a second offense, its contract, franchise or charter shall be subject to forfeiture by proceedings to that effect, in an injunction proceeding brought by the State Authorities, or the District or County Attorney, which shall be heard and disposed of without undue delay as other injunction suits. [Acts 1919, 36th Leg., ch. 133, § 5.]

**Explanatory.**—For remainder of Acts 1919, 36th Leg., ch. 133, see ante, Civ. St. arts. 4595½-4595½c. The act took effect 90 days after March 19, 1919, date of adjournment.

**Art. 695e.** [Repealed by Acts 1919, 36th Leg., ch. 142, § 1.]

**Art. 696a. Violation of sanitary rules for conduct of hotels, restaurants, etc.**—That any individual, person, firm or corporation, who shall violate any provision of this Act [Arts. 4605½-4605½c, Civil Statutes, ante], shall upon conviction thereof in a court of competent jurisdiction, be fined in any sum not less than five (\$5.00) dollars nor more than one hundred (\$100.00) dollars, and provided further, that any individual, person, firm or corporation, who shall be convicted for a second offense under the provisions of this Act, shall be fined in a sum not less than twenty-five (\$25.00) dollars, nor more than two hundred (\$200.00) dollars. [Acts 1921, 37th Leg., ch. 66, § 5.]

**Explanatory.**—Sec. 6 repeals all laws in conflict. Took effect 90 days after March 12, 1921, date of adjournment.

**Art. 696b. Violation of sanitary rules for conduct of barber and beauty shops.**—Any person violating any of the provisions of this Act [Arts. 4605¾-4605¾q, Civil Statutes, ante] or failing or refusing to comply with the provisions of this Act, shall be deemed guilty of misdemeanor and upon conviction thereof, shall be punished by a fine of not less than ten dollars (\$10.00) nor more than (\$50.00) or imprisonment in the county jail for a period of not less than thirty days, nor more than ninety days, or by both such fine and imprisonment. [Acts 1921, 37th Leg., ch. 79, § 17.]

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

## CHAPTER TWO

SALE OF UNWHOLESOME FOOD, DRINK OR MEDICINE, OR  
MILL PRODUCTS

Art.	Art.
700. Drugs, confectionery, and foods, when deemed adulterated.	711. Penalty for violation of act.
704. Manufacture and sale of certain foods, discolored and adulterated.	711a. Violation of sanitary rules as to bakeries.
706. Sale of impure milk.	MILL PRODUCTS
708. Exemptions from provisions of act.	715. Penalty for violating any provision of this law.
710. Obstruction of officers.	

**Article 700. Drugs, confectionery, and foods, when deemed adulterated.**

**Validity.**—Statutory regulations against use of unwholesome food are within power of state to protect public health, so that statute prohibiting sale for food of meat of animal that has died otherwise than by slaughter is valid. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

**Nature and elements of offense and defenses.**—On a presentation for selling meat of a hog that had died otherwise than by slaughter, it was no defense that the meat was wholesome. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

Defendant, owner of hog which died otherwise than by slaughter, and person who sold meat for him, being coconspirators in so doing, act of one within scope and duration of conspiracy was binding on other, so whether defendant's agent was innocent or guilty through lack of or possession of knowledge of way hog died, his act in selling meat was one in which defendant was guilty. *Id.*

The terms "diseased animal" and "animal that died otherwise than by slaughter," can be separated, and the flesh of a diseased animal is within the prohibited class though the animal may have been slaughtered, the prohibition of sale for food of flesh of an animal that died otherwise being absolute, and not dependent on the jury's decision that the flesh of such animal was not fit for food; the fitness of the flesh not being open to inquiry. *Corzine v. State* (Cr. App.) 227 S. W. 1102.

**Art. 704. Manufacture and sale of certain foods, discolored and adulterated.**

**Elements of offense.**—Defendant is not guilty of a violation of a pure food law simply because sulphite is found in sausage meat sold by him; it being necessary that the sulphite be added willfully and knowingly, in view of arts. 46, 47, 704, 710, 711, and 715. *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

**Art. 706. Sale of impure milk.**

**Indictment or information.**—An information charging that defendant "did unlawfully and knowingly offer for sale" adulterated milk, is not open to the objection that it does not charge that defendant knew that the milk was adulterated. *Sanchez v. State*, 27 Tex. App. 14, 10 S. W. 756.

An information for selling milk adulterated by adding water, declaring it unlawful for any person to sell or expose for sale adulterated or impure milk, containing proviso that skimmed milk may be sold if the can or package it is taken from is marked "skimmed milk," was not defective because containing no negative allegation that the sale was not a sale of skimmed milk so marked, as the statute contains no proviso authorizing a sale of water nor because it did not show the name of the purchaser of the adulterated milk, as the offense consisted in the sale or exposure for sale of adulterated milk. *Quaternick v. State*, 84 Cr. R. 40, 204 S. W. 328.

**Evidence.**—In a prosecution for sale of milk adulterated by adding water, a conviction on conflicting evidence is binding on appeal. *Quaternick v. State*, 84 Cr. R. 40, 204 S. W. 328.

**Art. 708. Exemptions from provisions of act.**

Cited, *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

**Art. 710. Obstruction of officers.**

See arts. 4575a, 4575b, Civ. St., ante; *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

**Art. 711. Penalty for violations of act.**

See *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

**Jurisdiction.**—Under Acts 35th Leg. (1918, 4th Called Sess.) c. 28, creating criminal district court of Bowie county and giving it jurisdiction of all misdemeanor cases of which the county court "may now have exclusive jurisdiction," the criminal district court had not original jurisdiction of prosecution for selling adulterated milk, justice court

having jurisdiction thereof in view of arts. 698-716, prescribing punishment of fine of not more than \$200. *Eaton v. State*, 85 Cr. R. 612, 215 S. W. 100.

**Art. 711a. Violation of sanitary rules as to bakeries.**—Any person, firm or corporation who shall violate any of the provisions of this Act [Arts. 4595 $\frac{1}{4}$ -4595 $\frac{1}{4}$ d, 7846 $\frac{1}{2}$ , Civil Statutes, ante] shall be subject to a fine of not less than twenty-five dollars, nor more than two hundred dollars, and each continuance of any practice, act or condition prohibited herein shall constitute a separate offense within the meaning of this Act. [Acts 1921, 37th Leg., ch. 63, § 6.]

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

## MILL PRODUCTS

**Art. 715. Penalty for violating any provision of this law.**

See *Vaughn v. State*, 86 Cr. R. 255, 219 S. W. 206.

## CHAPTER THREE A

### COTTON PEST

Art. 729 $\frac{1}{2}$ .	Failure to report presence of pink bollworm.	Art. 729 $\frac{1}{2}$ a.	Violation of Pink Bollworm law.
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**Article 729 $\frac{1}{2}$ . Failure to report presence of pink bollworm.**—It shall be the duty of any person or persons upon whose premises any pink bollworm shall appear to report the presence of such cotton pest to the Commissioner of Agriculture of the State, and any failure, knowingly, on the part of any such person or persons to make such report promptly, shall upon conviction, subject such person or persons to a fine of not less than one hundred dollars, for each offense, and not more than five hundred dollars, and any person or persons who may know of the presence of the pink bollworm in any locality in this State, and who shall fail to report the location of such pest to the Commissioner of Agriculture shall, upon conviction, be subject to like fine. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 10; Acts 1919, 36th Leg., ch. 41, § 13; Acts 1920, 36th Leg. 3d C. S., ch. 42, § 18.]

**Explanatory.**—See arts. 4475-4475t, Civil Statutes, ante. Act took effect 90 days after June 18, 1920, date of adjournment. This provision was omitted from Acts 1921, 37th Leg. 1st C. S., ch. 41, which re-enacted the Pink Bollworm Law. As to whether this results in a supersession of this provision is a matter for judicial construction.

**Art. 729 $\frac{1}{2}$ a. Violation of Pink Bollworm law.**—Any person or persons who may transport any cotton or cotton products by any means from any territory in this State which has been quarantined and placed under restrictions by proclamation of the Governor of the State, in accordance with the authority conferred by the terms of this Act [Arts. 4475-4475s, Civil Statutes, ante], or any person or persons who shall violate any proclamation or any rule, regulation or other restriction authorized by this Act, or bring into the State any contaminated material, or any person or persons who shall plant, cultivate, grow, allow to grow, gather, transport or market cotton in or from any territory in this State, that has been quarantined and declared a non-cotton zone and placed under restrictions by any of the proclamations authorized by this Act, or any person or persons who shall fail to comply with any of the said rules and regulations so promulgated for the control and direction of cotton growing and marketing in any restricted or regulated zone; or who shall violate any proclamation, regulation or restriction

authorized by this Act; or any ginner who shall fail or refuse to disinfect cotton seed as provided for in this Act, or any person or persons who shall wilfully refuse or knowingly neglect to comply with any such proclamation, restriction or regulation promulgated and maintained for the protection of the cotton industry, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty (\$50.00) dollars and not more than five hundred (\$500.00) dollars, and each transaction of each product so shipped or transported, and each act in violation of the restrictions herein authorized governing the planting, growing, marketing and cleaning the fields, shall constitute a separate offense. The District Court of the county in which any criminal case is filed under the provisions of this section may, upon the application of either the State or of the defendant and a showing that the applicant cannot obtain a fair trial in that county, order a change of venue to an adjoining county or district. [Acts 1917, 35th Leg. 3d C. S., ch. 11, § 11; Acts 1919, 36th Leg., ch. 41, § 14; Acts 1920, 36th Leg. 3d C. S., ch. 42, § 20; Acts 1921, 37th Leg. 1st C. S., ch. 41, § 15.]

**Explanatory.**—Took effect Nov. 15, 1921. Sec. 16 of the act repeals all laws in conflict.

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## CHAPTER FOUR

### FEED STUFFS

Art.  
730-734. [Note.]

Art.  
735. Penalty for failure to fix statement, tag, or label.

#### Articles 730-734.

See *Meisner v. State* (Cr. App.) 232 S. W. 841.

#### Art. 735. Penalty for failure to fix statement, tag, or label.

**Offenses.**—This article held inapplicable to the sale of a sack containing cotton seed meal, such cotton seed meal being a concentrated feed stuff in view of art. 732, defining it as such, and not a concentrated commercial feeding stuff, in view of the statutes differentiating between the two. *Meisner v. State* (Cr. App.) 232 S. W. 841.

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## CHAPTER FIVE

### COCAINE AND MORPHINE

Art.  
747. Unlawful to sell or give away except on prescription, with certain provisos  
748. Unlawful for any practitioner of medicine, dentistry or veterinary to prescribe to habitual users.

Art.  
748a. Unlawful to manufacture for sale, etc., drugs with false statements on labels, etc.  
748b. Files of prescriptions.  
748c. Complaints.  
748d. Hindering Dairy and Food Commissioners.  
749. Penalty for violating this law.

**Article 747. Unlawful to sell or give away except on prescription, with certain provisos.**—It shall be unlawful for any person, firm, or corporation to sell, furnish or give away cocaine, derivations of cocaine, preparations containing cocaine or derivatives of cocaine; morphine, derivatives of morphine, preparations containing morphine or derivatives of morphine; opium, preparations containing opium; chloral hydrate or preparations containing chloral hydrate; canabis indica, canabis sativa, or preparations thereof or any drug or preparation from any canabis variety, or any preparation known and sold under the Spanish name of

"MARIHUANA" except upon the original written order or prescription of a lawfully authorized practitioner of medicine, dentistry, or veterinary medicine, which order, or prescription shall be dated and shall contain the name of the person for whom prescribed, or, if ordered by a practitioner of veterinary medicine shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order. Such written order, or prescription shall be permanently retained on file by the person, firm, or corporation who shall compound or dispense the article ordered or prescribed, and it shall not be compounded or dispensed a second time except upon the written order of the original prescriber for each and every subsequent compounding or dispensing. No copy or duplicate of such written order or prescription shall be made or delivered to any person, but the original shall at all times be open to inspection by properly authorized officers of the law. Provided, however, that the above provisions shall not apply to preparations containing not more than two grains of opium, or more than one-eighth grain of morphine, or not more than two grains of chloral hydrate, or not more than one-sixteenth grain of cocaine in one fluid ounce, or if a solid preparation, in one avoirdupois ounce, nor to preparations containing not more than one grain per ounce of solid extract of cannabis indica, cannabis sativa, or preparations thereof or any drug or preparation from any cannabis variety; nor to corn cures containing cannabis indica, or preparations of the cannabis variety. And provided, further, that the above provisions shall not apply to sales by wholesale jobbers, wholesalers and manufacturers to retail druggist, nor to sales at retail by retail druggists to regular practitioners of medicine, dentistry, or veterinary medicine, nor to sales made to manufacturers of proprietary or pharmaceutical preparations for use in the manufacture of such preparations; nor to sales to hospitals, colleges, scientific or public institutions. [Acts 1905, p. 45, § 1; Acts 1919, 36th Leg., ch. 150, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 61, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.  
See Hicks v. State (Cr. App.) 227 S. W. 302.

**Art. 748. Unlawful for any practitioner of medicine, dentistry or veterinary to prescribe to habitual users.**—It shall be unlawful for any practitioner of medicine, dentistry or veterinary medicine to furnish to or prescribe for the use of any habitual user of the same, any cocaine or morphine, or any derivative or compound of cocaine or morphine, or any preparation containing cocaine or morphine or their derivatives, or any opium or chloral hydrate, or any preparation containing opium or chloral hydrate, cannabis or any preparation thereof for the use of any person not under his treatment in the regular practice of his profession, or for any practitioner of veterinary medicine to prescribe any of the foregoing substances for the use of any human being. [Acts 1905, p. 46, § 2; Acts 1919, 36th Leg., ch. 150, § 2.]

Took effect 90 days after March 19, 1919, date of adjournment.  
See Hicks v. State (Cr. App.) 227 S. W. 302.

**Art. 748a. Unlawful to manufacture for sale, etc.; drugs with false statements on labels, etc.**—It shall be unlawful to manufacture for sale, offer or expose for sale, sell or exchange, any drugs, medicine or device advocated for the cure of diseases, if the package or label or any representation pertaining to same shall bear or contain any statement, design or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is misleading, false and fraudulent. [Acts 1919, 36th Leg., ch. 150, § 3.]

**Art. 748b. Files of prescriptions.**—Every pharmacy, store, drug store, factory, salesroom, laboratory that fills prescriptions of drugs named in Sections 1 and 2 of this Act [Arts. 747, 748] shall keep a file of such prescriptions, which may be inspected by the Dairy and Food Commissioner, his deputy, or agent. [Id., § 4.]

See arts. 4575a, 4575b, Civil Statutes, ante.

**Art. 748c. Complaints.**—The Dairy and Food Commissioner, or his inspectors or any person by him duly appointed for that purpose, shall make complaint and cause proceedings to be commenced against any person for the violation of any provision of this Act, and in such case he shall not be obliged to furnish security for costs; and he shall have in the performance of his duties all rights and privileges of a peace officer with power to enter into any factory, store, salesroom, drug store or laboratory, or place where he has reason to believe drugs are made, prepared, sold or offered for sale or exchange, and to examine the files and books of such places, store, drug store, pharmacy and salesroom. [Id., § 5.]

**Explanatory.**—By Acts 1921, 37th Leg., ch. 10, § 1 (Civ. St., ante, art. 4575a), the office of Dairy and Food Commissioner and the Dairy and Food Department are abolished, and the duties of the office and department transferred to the State Health Officer.

**Art. 748d. Hindering Dairy and Food Commissioner.**—Any person who shall wilfully hinder or obstruct the Dairy and Food Commissioner, or his inspectors, or other persons by him duly authorized in the exercise of the power conferred upon him by this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25.00 nor more than \$200.00. [Id., § 6.]

**Art. 749. Penalty for violating this law.**—Any person who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than Twenty-five (\$25.00) dollars, nor more than Two Hundred (\$200.00) dollars, or be imprisoned in the county jail for not less than one month nor more than one year, or punished both by such fine and imprisonment, in the discretion of the court. [Acts 1905, p. 46, § 3; Acts 1919, 36th Leg., ch. 150, § 7.]

See Hicks v. State (Cr. App.) 227 S. W. 302.

## CHAPTER SIX

### UNLAWFUL PRACTICE OF MEDICINE

<p><b>Art.</b> 750. Authority to practice registered in district clerk's office; change of residence recorded, where.</p> <p>752. Practitioners of medicine to receive verification license.</p> <p>753. Applicants other than those under previous article.</p>	<p><b>Art.</b> 754. Not to discriminate against any particular school.</p> <p>755. Shall be regarded as practicing medicine, when.</p> <p>756. Practicing in violation of law, penalty.</p>
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**Article 750. Authority to practice registered in district clerk's office; change of residence recorded, where.**

**6. Compliance with article.**—Defendant chiropractor, who, before practicing medicine, did not register with the district court of the county of his residence the certificate of some authorized board of medical examiners, evidencing his authority to practice medicine, violated this article, though the remainder of its requirements, with regard to stating under oath his age, etc., were complied with. Hicks v. State (Cr. App.) 227 S. W. 302.

**7. Persons liable.**—Prosecution for misdemeanor, under Pen. Code 1911, art. 756, for unlawfully practicing medicine without complying with art. 750, with reference to ob-

taining license, cannot be sustained under joint charge against two defendants; license being personal to individual. *Durston v. State*, 82 Cr. R. 637, 200 S. W. 524.

12. **Indictment and information**—Following language of statute.—Complaint and information for unlawfully practicing medicine, preferred under Pen. Code 1911, arts. 750, 755, averring conjunctively several matters in articles defining offense, and following substantially an approved form, were sufficient. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

15. **Burden of proof**.—The state must prove such absence from the record of the certificate. *Denton v. State*, 83 Cr. R. 67, 201 S. W. 183.

In prosecution for unlawfully practicing medicine, it devolves on state to prove defendant did not have license or diploma, with verification, and did not have it registered. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

16. **Admissibility of evidence**.—In prosecution for unlawfully practicing medicine, court properly excluded testimony of district clerk, offered by defendant, and record, in his office in register of physicians and surgeons, showing entries previously made under old law, then in force, but since repealed. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

#### Art. 752. Practitioner of medicine to receive verification license.

See *Hicks v. State* (Cr. App.) 227 S. W. 302.

#### Art. 753. Applicants other than those under previous article.

See *Hicks v. State* (Cr. App.) 227 S. W. 302.

#### Art. 754. Not to discriminate against any particular school.

See *Crowder v. Graham* (Civ. App.) 201 S. W. 1053.

**Questions for jury**.—Appellant's claim that the evidence shows he was engaged as a masseur and exempted under this article, from the provisions of article 750 requiring registration for practice of medicine, held not sustained as a matter of law; his occupation being for the jury. *Denton v. State*, 83 Cr. R. 67, 201 S. W. 183.

#### Art. 755. Shall be regarded as practicing medicine, when.

See *Hicks v. State* (Cr. App.) 227 S. W. 302.

**Unlawful practice**.—One who maintained offices where he treated any and all persons who might apply to him, for various and sundry disorders and diseases, without registering with the district clerk, in the manner and form required, was unlawfully practicing medicine, whether or not he claimed to be a physician or a practitioner of medicine. *Black v. State*, 86 Cr. R. 253, 216 S. W. 181.

**Indictment or information**.—Complaint and information for unlawfully practicing medicine, averring conjunctively several matters in articles defining offense, and following substantially an approved form, were sufficient. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

**Evidence**.—In prosecution for unlawfully practicing medicine, court properly excluded testimony of district clerk, offered by defendant, and record, in his office in register of physicians and surgeons showing entries previously made under old law, then in force, but since repealed. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

**Injunction**.—"Unlawfully practicing medicine," cannot be enjoined as "trade, business, or occupation injurious to health of those in the neighborhood," within meaning of art. 694 and Code Cr. Proc. art. 148, authorizing injunction of injurious occupation after indictment therefor. *Crowder v. Graham* (Civ. App.) 201 S. W. 1053.

#### Art. 756. Practicing in violation of law, penalty.

**Persons liable**.—Prosecution for misdemeanor, for unlawfully practicing medicine without complying with art. 750, with reference to obtaining license, cannot be sustained under joint charge against two defendants; license being personal to individual. *Durston v. State*, 82 Cr. R. 637, 200 S. W. 524.

## CHAPTER SEVEN

### DENTISTRY

Art.  
759-767. [Superseded.]

767a. Advertising for or soliciting business  
under assumed name.

Art.  
768. Penalty for violations of act.  
769. [Superseded.]

#### Articles 759-767. [Superseded.]

**Explanatory**.—Superseded by Acts 1919, 36th Leg. ch. 31, set forth as arts. 2403-2416a, Civil Statutes, ante, and arts. 767a, 768, post.  
Cited, *Cowell v. Ayers*, 110 Tex. 348, 220 S. W. 764.

**Art. 767a. Advertising for or soliciting business under assumed name.**—Any person who has been granted a license to practice dentistry or dental surgery, in this State, who shall advertise or solicit business under any nom de plume, or corporation name, or any other than his or her proper and legal name, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in Section 14 of this Act [Art. 768]; and each day so engaged shall constitute a separate offense. Provided further that any person or persons now practicing dentistry or dental surgery under a nom de plume or corporate name, may use his or their personal name as successor to the name now used, for a period of two years from the time of the passage of this Act, at the expiration of which time, the use of all such nom de plume or corporate names shall be discontinued. [Acts 1919, 36th Leg., ch. 31, § 12.]

**Art. 768. Penalty for violations of act.**—Any person who shall violate any provision of this act [Arts. 2403–2416a, Civil Statutes, ante] shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than (\$5.00) five dollars nor more than one hundred (\$100) dollars, or by confinement in the county jail of the county in which said conviction is had for any period of time, not to exceed six months, or by both such fine and imprisonment, for each offense; and it shall be the duty of the county or district attorney of any county of which any provision of this act may be violated to cause complaint to be filed against such person so offending, and to prosecute the same. [Acts 1897, ch. 97, §§ 12, 13; Acts 1905, p. 145; Acts 1919, 36th Leg., ch. 31, § 14.]

**Art. 769.** [Superseded by Acts 1919, 36th Leg., ch. 31, § 14, ante, art. 768.]

## CHAPTER SEVEN A

### OPTOMETRY

Art. 770½.	Violation of act relating to practice of optometry.	Art. 770½a.	Practicing without a license.
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**Article 770½. Violation of act relating to practice of optometry.**—Any person violating any of the provisions of this Act [Arts. 5763½–5763½p, Civil Statutes, ante], shall upon conviction thereof, be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term of not less than two months nor more than six months, or both, such fine and imprisonment, and each day of such violation shall constitute a new and separate offense. [Acts 1921, 37th Leg. 1st C. S., ch. 51, § 15.]

Took effect Nov. 15, 1921.

**Art. 770½a. Practicing without a license.**—Any one practicing optometry in this State, who shall prescribe or fit lenses for any diseased condition of the eye or for any disease of any other organ of the body that manifests itself in the eye, shall be deemed to be practicing medicine within the meaning of the statutes of this State defining the practice of medicine and prohibiting the practice thereof without a license, and any such person possessing no license to practice medicine shall be liable to prosecution for the unlawful practice of medicine without a license and, upon conviction thereof, shall be subject to the same penalties or punishment as is prescribed by law for the practice of medicine without a license. [Id., § 15a.]



## CHAPTER NINE

### NURSING AND EMBALMING

#### Article 784. [Superseded.]

Superseded by amendment of art. 4600, Rev. Civ. St. 1911, by Acts 1921, 37th Leg., ch. 92, § 1. See ante, art. 4600, Civil Statutes.

#### Art. 785. [Superseded.]

Superseded by amendment of art. 4601, Rev. Civ. St. 1911, by Acts 1921, 37th Leg., ch. 92, § 2. See ante, art. 4601, Civil Statutes.

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## CHAPTER TEN A

### VETERINARIANS

Art.

799a-799g. [Repealed.]

799h. Penalty for issue of license to veterinarians in certain cases.

Art.

799i. Power of grand jury, etc.

799j. Unlawful practice of veterinary medicine, surgery or dentistry.

**Articles 799a-799g.** [Repealed by Acts 1919, 36th Leg. 2d C. S., ch. 58, § 24, ante, Civ. St. art. 7324u.]

**Art. 799h. Penalty for issue of license to veterinarians in certain cases.**—It shall be a misdemeanor punishable upon conviction by a fine of not less than \$25.00 nor more than \$200.00 and disqualify from office on the board, for the board or any member thereof to issue any certificates provided for herein to any person only as set forth herein, or to give any applicant prior to examination a list of questions to be propounded at any examination. [Acts 1919, 36th Leg. 2d C. S., ch. 58, § 17.]

**Explanatory.**—Sec. 24 of this act repeals Acts 1911, ch. 76. For secs. 1-16, 19-22, 24, and 25 of this act see ante, Civ. St., arts. 7324a-7324v. The act took effect 90 days after July 22, 1919, date of adjournment.

**Art. 799i. Power of grand jury, etc.**—The grand jury of each county in this state is hereby given inquisitorial power over all offenses of violations of this Act, and the judge of the district courts of the state shall give the name of their charges to the grand jury; and it shall be the duty of the board of veterinary examiners, or any member thereof, to report any violations of this Act to the proper authorities. [Id., § 18.]

**Art. 799j. Unlawful practice of veterinary medicine, surgery or dentistry.**—Any person who practices or attempts to practice veterinary medicine, surgery or dentistry in this State, without first having complied with the provisions of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than two hundred dollars; and each day of such practice or attempt to practice shall constitute a separate offense. [Id., § 23.]

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## CHAPTER ELEVEN A

### SALE OF GASOLINE, ETC.

#### Articles 810a-810l.

See arts. 343d, 999½-999¾j.

## CHAPTER TWELVE

## OPHTHALMIA NEONATORUM

**Article 810 $\frac{1}{2}$ .** Violation of act.—All doctors, physicians, midwives, nurses, or those in attendance at child birth who shall be found guilty of violating this Act [Arts. 4605 $\frac{7}{8}$ , 4605 $\frac{7}{8}$ a, Civil Statutes, ante], shall be fined in the sum of not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars for each separate offense. [Acts 1921, 37th Leg., ch. 89, § 3.]

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

## TITLE 13

OF OFFENSES AFFECTING PROPERTY HELD IN COMMON  
FOR THE USE OF THE PUBLIC

Chap.	Chap.
1. Obstruction [or improper use] of navigable streams, and roads, streets and bridges.	5a. Libraries, museums, etc.
2. Offenses pertaining to public roads [drainage, levees], and irrigation.	6. Offenses relating to the protection of fish, birds and game.

## CHAPTER ONE

OBSTRUCTION [OR IMPROPER USE] OF NAVIGABLE  
STREAMS, AND ROADS, STREETS AND BRIDGES

Art.	Art.
812. Of roads, streets or bridges.	820b8. Violation of order of road officers to refrain from use of road at certain times.
814. Name of owner of automobile or motor vehicle to be registered.	820d. Lights on motor vehicles, motorcycles, and bicycles; glaring lights prohibited.
815. Speed of, regulated.	820i. Permitting operation by unlicensed chauffeur.
816. Not to be operated as to endanger life or limb.	820k. Law of the road.
820a. Operation of motor vehicle without number and seal; false seal or number; venue of prosecution; disposition of fines.	820l. Duties as to crossing of railroad tracks.
820aa. Operation of motor vehicles without number displayed; false or fictitious plate; motorcycles; plates to be kept clean and distinct.	820r. Local regulations prohibited; exceptions.
820aaa. Operating motor vehicle for hire without registration and license.	820t. Acting as chauffeur without license, etc.
820b1. Driving unmarked state motor vehicle.	820ww. Disposition of fines collected.
820b2. Use of state motor vehicle for purposes other than state business.	820y. Provisions cumulative.
820b3. Operating motor vehicle without proper number plate.	820yy. Penalty for violation of certain of foregoing provisions.
820b4. Operation of motor cycle without proper seal.	820z. Arrest without warrant.
820b5. Improper use of number plate or seal; cleaning marks.	820zz. Speed of commercial vehicles.
820b6. Operation of motor bus without compliance with registration law.	820zzz. Operation of unregistered commercial vehicles; weight of loads.
820b7. Violation of regulations as to weight of loads, tires, and rear view mirrors.	822a. Sale of vehicles with tires less than specified width prohibited.
	822b. Same; to whom applicable.
	822c. Same; penalty for violation.
	822d. [Superseded.]
	822e. Using roads in violation of orders of road superintendent.
	826. Wilful obstruction of public ditch or diversion of water.

**Article 812. [480] Of roads, streets or bridges.**

1. **Offense.**—The obstruction of a public highway is a nuisance. Santa Fé Town-Site Co. v. Norvell (Civ. App.) 207 S. W. 960.  
A commissioners' court has no authority under arts. 1370, 2241, 6859, 6860, 6861, to

lease any portion of the public highways for oil and gas wells, which will necessarily be obstructions thereof, notwithstanding such portion of the highway has been acquired by purchase and not condemnation, or the lessee also holds a lease from the owner of the fee of the land over which such portion of the highway runs as a right of way. *Boone v. Clark* (Civ. App.) 214 S. W. 607.

19. **Indictment.**—An indictment need not allege that the road was a first or second-class road, since, if it were a third-class road, that fact would be matter of defense. *Conner v. State*, 21 Tex. App. 176, 17 S. W. 157.

22. **Evidence—Sufficiency.**—In a prosecution for obstructing a public road, evidence held to sustain conviction. *Howard v. State*, 86 Cr. R. 288, 216 S. W. 168.

24. **Instructions—Wilful.**—In a prosecution for obstructing a public road, the definition of "wilful" by the court in his charge that by the term it was meant that defendant knew at the time of the alleged obstruction that the road was public, and that the obstruction was placed, if it was obstructed, with an evil intent, held sufficient. *Howard v. State*, 86 Cr. R. 288, 216 S. W. 168.

#### Art. 814. Name of owner of automobile or motor vehicle to be registered.

**Effect of violation.**—Failure of automobile driver to register car and place number thereon, held not to make him liable for damages in collision; there being no causal connection between such failure and the collision. *Mumme v. Sutherland* (Civ. App.) 198 S. W. 395.

#### Art. 815. Speed of, regulated.

See *Figueroa v. Madero* (Civ. App.) 201 S. W. 271.

**Repeal.**—Acts 35th Leg. c. 207, regulating speed of motor vehicles, repeals Acts 30th Leg. c. 96 (Vernon's Pen. Code, art. 815), providing that municipalities could fix their own speed ordinances. *Ex parte Wright*, 82 Cr. R. 247, 199 S. W. 486.

**Burden of proof.**—Although it was not necessary to allege upon what street accused drove his automobile at an unlawful rate of speed, yet where a certain street was alleged, it was necessary to prove it was on that particular street. *White v. State*, 82 Cr. R. 274, 198 S. W. 964.

**Excessive speed as negligence.**—The effect of this article is to make it negligence per se to drive an automobile at a greater speed than 18 miles an hour, and, if plaintiff's violation of such statute was the direct and proximate cause of the collision with defendant's interurban car at a street crossing, plaintiff was guilty of contributory negligence. *Southern Traction Co. v. Jones* (Civ. App.) 209 S. W. 457.

#### Art. 816. Not to be operated as to endanger life or limb.

See *Figueroa v. Madero* (Civ. App.) 201 S. W. 271.

#### Art. 820a. Operation of motor vehicle without number and seal; false seal or number; venue of prosecution; disposition of fines.

**Construction of act in general.**—Acts 35th Leg. c. 190, and chapter 207, as amended by Acts 1st Called Sess. 35th Leg. c. 31, creating state highway department, and providing for licensing of motor vehicles, held not a revenue measure, though the amounts realized from license fees greatly exceed expense of administering law. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**Amount of license.**—Where evidence did not show, and there was nothing in Acts 35th Leg., c. 190, and chapter 207 as amended by Acts 1st Called Sess. 35th Leg. c. 31, providing for licensing of motor vehicles, to show that licenses were excessive, it must be presumed they were reasonable. *Atkins v. State Highway Department* (Civ. App.) 201 S. W. 226.

**Civil actions.**—Operation of an automobile in violation of arts. 820a-820yy, is negligence per se when an accident is caused by the violation, and supports a civil action for damages for injuries inflicted by the person operating the machine. *Flores v. Garcia* (Civ. App.) 226 S. W. 743.

In an action for injuries sustained in a collision with automobile, it was not improper to plead arts. 820a-820yy, in hæc verba on the theory that it would improperly influence the minds of the jury. *Id.*

In an action for injury sustained by plaintiff in a collision with defendant's automobile which he alleged was being operated in violation of arts. 820a-820yy, an instruction that such statute had no application, and that the jury should not consider it in arriving at their verdict, was properly refused. *Id.*

#### Art. 820aa. Operation of motor vehicles without number displayed; false or fictitious plate; motorcycles; plates to be kept clean and distinct.

**Offense.**—In a prosecution under art. 820aa, as amended, against the president and general manager of a corporation, based on the operation by the corporation of a motor car on which the seal assigned by the highway department was not displayed, it is a defense that defendant procured a seal for such car, as he did for all the others, and gave orders for its attachment, which orders were not carried out through a change

in the personnel of the corporation's servants, and that defendant was ignorant that the car was operated without a seal. *Axtell v. State*, 86 Cr. R. 264, 216 S. W. 394.

**Art. 820aaa. Operating motor vehicle for hire without registration and license.**—Any person or agent of any person, or any agent or officer of any firm or corporation who operates any commercial motor vehicle or interurban commercial motor vehicle in carrying passengers or freight for hire between any cities, towns or villages of this State when such vehicle has not been duly registered and licensed as required by the next preceding section of this Act shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined in any sum not less than \$25 and not exceeding \$200; and each day such vehicle is so operated shall constitute a separate offense. [Acts 1919, 36th Leg., ch. 113, § 3 (§ 16b).]

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

**Art. 820b1. Driving unmarked state motor vehicle.**—Any person, driving any automobile, truck or other motor vehicle belonging to the State of Texas upon the streets of any town or city, or upon the highways of this State, without the inscription specified in Section 1 of this Act [Art. 7012½bb, Civil Statutes, ante], printed thereon, shall be fined in any sum not less than Twenty-five (\$25.00) Dollars, nor more than One Hundred (\$100.00) Dollars. [Acts 1921, 37th Leg., ch. 59, § 2.]

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

**Art. 820b2. Use of state motor vehicle for purposes other than state business.**—Any person who shall use any automobile, truck or other motor vehicle owned by the State of Texas, for any purpose except in the transaction of business for the State of Texas, shall be guilty of a misdemeanor and upon conviction thereof, shall be fined any sum not less than Five (\$5.00) Dollars nor more than Five Hundred (\$500.00) Dollars. [Id., § 3.]

**Art. 820b3. Operating motor vehicle without proper number plate.**—(a) Any person operating, or as owner permitting to be operated, on the public highways of this State, any motor vehicle during any calendar year, except the first calendar year after a renumbering is ordered as provided for herein, to which motor vehicle for the current year there is not attached a registration seal assigned for said vehicle, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding two hundred (\$200.00) dollars. Any person who shall operate, or as owner permit to be operated, a motor vehicle with a number plate or seal issued for a different motor vehicle attached thereto, shall be fined in any sum not exceeding two hundred (\$200.00) dollars. Any person who shall operate, or as owner permit to be operated, any motor vehicle to which there is not attached a license number plate or pair of license number plates issued for said vehicle, shall be fined in any sum not exceeding two hundred (\$200) dollars. [Acts 1921, 37th Leg. 1st C. S., ch. 44, § 1.]

**Explanatory.**—This article and the two articles following constitute subdivisions (a), (b), and (c) of section 18, chapter 190, Acts 1917, 35th Leg., as amended by Acts 1921, 37th Leg. 1st C. S., ch. 44. The first part of the section is set forth, ante, as art. 7012½b, Civil Statutes. Took effect November 15, 1921.

**Art. 820b4. Operation of motor cycle without proper seal.**—(b) Any person operating, or as owner permitting to be operated, on the public highways of this State, any motorcycle during any calendar year to which motor cycle there is not attached a registration seal assigned to said motor cycle, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding two hundred (\$200.00) dollars. [Id.]

See note under art. 820b3.

**Art. 820b5. Improper use of number plate or seal; cleaning marks.**—(c) No person shall attach to or display on any motor vehicle any number plate or seal assigned to a different motor vehicle or assigned to it under any other motor vehicle law other than by the Highway Department of this State, or any registration seal other than that assigned for the current year, or a homemade or fictitious number plate or seal. All letters, numbers and other identification marks shall be kept clear and distinct and free from grease or other blurring matter so that they shall be plainly seen at all times during daylight. Any person violating any provision of this Section shall be fined in sum not more than two hundred (\$200.00) dollars. [Id.]

See note under art. 820b3.

**Art. 820b6. Operation of motor bus without compliance with registration law.**—Any owner of a motor vehicle with a seating capacity of more than seven passengers who shall fail or refuse to comply with this Section [Art. 7012½, Civil Statutes] shall be fined in any sum not more than two hundred (\$200.00) dollars. [Acts 1921, 37th Leg. ch. 131, § 1 (§ 16); Acts 1921, 37th Leg. 1st C. S., ch. 52, § 1 (§ 16).]

**Art. 820b7. Violation of regulations as to weight of loads, tires, and rear view mirrors.**—Any person or persons driving or operating or permitting to be operated any vehicle whose gross weight exceeds the maximum weights prescribed herein, or which is not equipped with a rear view mirror or whose tire equipment does not meet the requirements of this act [Art. 7012½, Civil Statutes, ante] shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding two hundred (\$200.00) dollars. [Acts 1921, 37th Leg., ch. 131, § 1 (§ 16); Acts 1921, 37th Leg. 1st C. S., ch. 52, § 1 (§ 16).]

**Art. 820b8. Violation of order of road officers to refrain from use of road at certain times.**—Any party guilty of violating the provisions and directions of such order of the county road superintendent or road supervisor [Art. 7012½, Civil Statutes, ante] before or after it has been so approved by such judgment of the county judge shall be guilty of a misdemeanor and fined in any sum not exceeding \$200.00. [Acts 1921, 37th Leg. 1st C. S., ch. 52, § 1 (§ 16).]

**Art. 820d. Lights on motor vehicles, motorcycles, and bicycles; glaring lights prohibited.**—It shall be unlawful for any person to operate an automobile, motorcycle or bicycle, upon the public highways of this State, at night time, whose front lamps shall project forward a light of such glare and brilliancy as to seriously interfere with the sight of, or temporarily blind the vision of the driver of a vehicle approaching from an opposite direction. [Acts 1917, 35th Leg., ch. 207, § 9; Acts 1919, 36th Leg., ch. 161, § 1a.]

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

Validity.—Acts 36th Leg. (1919) c. 161, § 1a, amending this article, held void for indefiniteness; the glare and brilliancy not being described by any standard, in view of Penal Code, art. 6, and Const. art. 1, § 10. Griffin v. State, 86 Cr. R. 498, 218 S. W. 494.

**Art. 820i. Permitting operation by unlicensed chauffeur.**

**Chauffeur.**—A salesman for an oil company, who first used a horse-drawn vehicle and later used an automobile truck to transport the oils which he sold, it being his custom to take orders and deliver goods immediately, was not a chauffeur, where such salesman received a regular salary and no compensation for operation of the automobile truck, section 25 of the act defining a "chauffeur" as any person whose business or occupation is that of operating a motor vehicle for hire, hence such salesman could not be convicted of operating an automobile for hire without a license. Matthews v. State, 85 Cr. R. 469, 214 S. W. 339.

**Art. 820k. Law of the road.**—(a) The driver or operator of any vehicle in or upon any public highway in this State, shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and all other vehicles or traffic upon such highway, and wherever practicable shall travel upon the right hand side of such highway. Two vehicles which are passing each other in opposite directions, shall have the right of way and no other vehicle to the rear of either of such two vehicles shall pass or attempt to pass such two vehicles. On all occasions the driver or operator of any vehicle on or upon any public highway in this State shall travel upon the right hand side of such highway unless the road on the left hand side of such highway is clear and unobstructed for a distance of at least fifty yards ahead.

(b) Vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other one-half of the road as nearly as possible.

(c) Vehicles overtaking other vehicles proceeding in the same direction, shall pass to the left thereof and shall not again drive to the right until the road is reasonably clear of such overtaken vehicle.

(d) It shall be the duty of the driver, rider, or operator of a vehicle about to be overtaken and passed, to give way to the right in favor of the overtaking vehicle on suitable and audible signal, given by or on behalf of the operator, driver or other person in charge and control of such overtaking vehicle, if such overtaking vehicle be a motor vehicle.

(e) Excepting where controlled by such traffic ordinances or regulations enacted by local authorities, as are permitted under this Act, the operator of a vehicle approaching an intersection on the public highway shall yield the right-of-way to a vehicle approaching such intersection from the right of such first named vehicle.

(f) It shall be the duty of the person operating or in charge of an overtaking vehicle to sound audible and suitable signal before passing a vehicle proceeding in the same direction.

(g) All vehicles approaching an intersection of the public highway with the intention of turning thereat, shall, in turning to the right, keep to the right of the center of such intersection and in turning to the left, shall run beyond the center of such intersection, passing to the right before turning such vehicle to the left.

(h) In all passing and overtaking, such assistance shall be given by the occupants of each vehicle respectively to the other as the circumstances shall reasonably demand in order to obtain clearance and avoid accident.

(i) Every person having control or charge of any motor vehicle or other vehicle upon any public highway and approaching any vehicle drawn by horse or horses, or any horse upon which any person is riding, shall operate, manage and control such motor vehicle or other vehicle in such manner, as to exercise every reasonable precaution to prevent the frightening of any such horse or horses and to insure the safety of any person riding or driving the same; and if such horse or horses appear frightened, the person in control of such motor vehicle or other vehicle, shall reduce its speed, and if requested by signal of the hand, by the driver or rider of such horse or horses, shall not proceed further toward such animal or animals unless such movement be necessary to avoid injury or accident, until such animal or animals shall be under the control of the rider or driver thereof.

(j) The person in control of any vehicle moving slowly along upon any public highway, shall keep such vehicle as closely as possible to the right hand boundary of the highway, allowing more swiftly moving vehicles reasonably free passage to the left.

(k) The person in charge of any vehicle in or upon any public highway, before turning, stopping or changing the course of such vehicle, shall see first that there is sufficient space for such movement to be made in safety, and if the movement or operation of other vehicles may reasonably be affected by such turning, stopping or changing of course, shall give plainly visible or audible signal to the person operating, driving or in charge of such vehicle of his intentions so to turn, stop or change said course.

(l) Before attempting to pass any railroad train, interurban car or street car stopped for the purpose of receiving or discharging passengers, every operator in charge of a motor vehicle or motor cycle approaching the same from the rear and proceeding in the same direction shall bring such motor vehicle or motor cycle to a full stop and shall not start up or attempt to pass until the said railroad train, interurban car or street car has finished receiving and discharging its passengers; provided that cities of ten thousand inhabitants and over may provide by ordinance for the establishment of safety zones for the use and safety of such passengers contiguous to such railroad, interurban or street car tracks, and may maintain and establish such safety zones at such places and may provide by ordinance for the regulation of traffic in passing such safety zones, and when such safety zones are so established and ordinances are passed to regulate the traffic in passing same, the provisions of this subdivision requiring motor vehicles and motor cycles to come to a full stop until said railroad train, interurban car or street car has finished receiving and discharging its passengers, shall not apply at the places where safety zones are so established.

(m) Every motor vehicle, when moving along such portions of the road where the curvature of the road or highway prevents a clear view for a distance ahead of one hundred yards, shall be held under control, and the operator thereof in approaching curves or sharp turns in the road shall give a warning by his gong or other adequate signaling device.

(n) Police patrols, police ambulances, fire patrols, fire engines and fire apparatus in all cases while being operated as such, shall have the right-of-way with due regard to the safety of the public; provided that this provision shall not protect the driver or operator of any such vehicle or his employer or principal from the consequences of the arbitrary exercises of this right to the injury of another. [Acts 1917, 35th Leg., ch. 207, § 16; Acts 1919, 36th Leg., ch. 161, § 2; Acts 1920, 36th Leg. 3d C. S., ch. 53, § 1.]

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

Acts 1920, 36th Leg. 3d C. S. ch. 53, amending subd. (L) of this article, took effect 90 days after June 18, 1920, date of adjournment. The act amends subdivision L of sec. 16, Acts 35th Leg. ch. 207, as amended by Acts 1919, 36th Leg. ch. 161.

See *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 232.

**Validity.**—This article is obnoxious to the rule which requires some degree of certainty in informing one accused of crime of the nature of the accusation against him, and such provision is inoperative and unenforceable in so far as it undertakes to define an offense, in view of *Pen. Code 1911, arts. 1, 3. Russell v. State* (Cr. App.) 228 S. W. 566; *Snider v. State* (Cr. App.) 230 S. W. 146.

**Offenses.**—If operator of an automobile, who collided with a buggy, did not see the buggy by reason of his lights suddenly going out, and did not know that the buggy was in front of him, and was going slow and about to stop to fix his lights, he could not be held liable for not having given the passing or approaching signal required. *Russell v. State* (Cr. App.) 228 S. W. 566.

**Indictment, information, or complaint.**—A complaint charging that defendant, having control of a motor vehicle, while approaching a horse on which two persons were

riding did operate the vehicle so as to frighten the horse and cause the persons to be thrown, is insufficient to state an offense; for the pleading should state the names of the parties thrown from the horse so as to put defendant on notice. *Pinion v. State*, 87 Cr. R. 86, 219 S. W. 831.

An information stating that accused "did then and there, while driving a motor vehicle upon a public highway in said state and county, attempt to pass another vehicle by overtaking said vehicle, without then and there sounding audible and suitable signal before passing said vehicle going in the same direction," held to sufficiently charge the offense of failing to give signal on passing another vehicle. *Russell v. State* (Cr. App.) 228 S. W. 566.

**Evidence.**—Testimony that defendant and another were occupying the motor vehicle which frightened a horse is insufficient to show that defendant had control of the motor vehicle. *Pinion v. State*, 87 Cr. R. 86, 219 S. W. 831.

**Effect of violation.**—Where plaintiff was injured while passenger in jitney by collision with defendant's automobile, which violated traffic ordinance in not passing center of street intersection before turning to the left, negligence of the jitney driver in violating the speed ordinance was no defense, unless defendant's negligence had not concurred with the jitney driver's negligence in causing the injury; the jitney driver's negligence not being plaintiff's negligence. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

A truck driver cannot be relieved from the consequences of his failure to take proper action after discovering plaintiff's peril by claiming that he acted in an emergency, where the emergency was created by his own violation of the traffic laws and ordinances. *Alamo Iron Works v. Prado* (Civ. App.) 220 S. W. 232.

**Liability on ground of negligence.**—If defendant caused injury to plaintiff, a jitney passenger, by collision with the jitney, by turning his automobile to the left before reaching the center of the street intersection, in violation of the traffic ordinance requirement, his act was negligence per se. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

**Civil actions—Questions for jury.**—Whether plaintiffs suing for personal injuries could have seen defendant's automobile before driving on the bridge, which was too narrow for passing, and used due caution to prevent the collision, was for the jury. *Melton v. Manning* (Civ. App.) 216 S. W. 488.

— **Instructions.**—If unlawful turning of defendant's automobile to left before reaching center of street intersection was cause of collision with jitney, injuring plaintiff, passenger in the jitney, it was the proximate cause, whether it was the sole cause or concurred with the jitney driver's negligence, and instruction submitting the issue whether such turning was the cause of the accident was sufficient, without submitting the issue whether the jitney driver's negligence caused the collision. *Zucht v. Brooks* (Civ. App.) 216 S. W. 684.

### Art. 820/. Duties as to crossing of railroad tracks.

**Application.**—View of railroad crossing is "obscured," requiring one approaching such a crossing in a motor vehicle to proceed at not more than six miles an hour, etc., when one approaching is not able to see train at sufficient distance to enable him to take necessary steps for his safety. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

This article is inapplicable to one struck at a crossing where the view of the approaching train was obstructed. *Schaff v. Bearden* (Civ. App.) 211 S. W. 503.

This article does not apply to one merely riding in an automobile as a guest or companion, but having no control over the driver, and it would apply to such a one only when the driver's negligence should be imputable to him. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

A finding that automobilist could have crossed a railroad in safety, if he had reduced the speed of his car to 6 miles per hour, was not irreconcilable with a finding acquitting him of contributory negligence; the crossing not being obscured and this article not applying. *Hines v. Richardson* (Civ. App.) 232 S. W. 889.

**Burden of proof.**—In an action for injuries in a collision between a train and an automobile, the burden is on defendant to show by a preponderance of the evidence that the driver of the automobile violated this article, requiring him to reduce his speed to six miles per hour. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

**Evidence.**—In an action for death in a collision between a train and an automobile, evidence by defendant's witnesses that the automobile was running 15 miles an hour when approaching the crossing, but they could not say whether it reduced speed, and by plaintiff's witnesses that it was running very slowly, held to support special verdict, finding that speed was reduced to six miles an hour. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 224 S. W. 277.

**Instructions.**—In action against railroad for death at crossing of one driving automobile on plaintiff's request, court should have defined "crossing," and "view of the crossing," so that jury could have applied facts. *Texas & N. O. R. Co. v. Harrington* (Civ. App.) 209 S. W. 685.

In an action for personal injuries sustained by plaintiff, struck by defendant's railroad train at a crossing while riding in an automobile driven by another, where there were special findings that plaintiff exercised ordinary care for his own safety, and was not engaged in a joint enterprise with the driver, refusal to submit the question of whether the automobile was slowed down to a speed not greater than six miles



an hour within 30 feet of the crossing, held not reversible error; the findings of the jury being conclusive. *Baker v. Streater* (Civ. App.) 221 S. W. 1039.

**Acts constituting negligence.**—Although the violation of the law regulating the speed of automobiles operated on highways is negligence per se, and is punishable criminally, yet such negligence is not actionable for damages unless it was the proximate cause of the injury. *Schoellkopf Saddlery Co. v. Crawley* (Civ. App.) 203 S. W. 1172.

It is negligence per se to run an automobile upon a highway at a greater rate of speed than that permitted by statute and renders the driver liable for damages resulting therefrom. *Carvel v. Kusel* (Civ. App.) 205 S. W. 941.

Evidence that defendant's automobile was being operated on a city street at a speed of 20 miles an hour when a collision occurred warranted the jury in finding that he was operating the car negligently as a matter of fact and guilty of negligence per se as a matter of law. *Flores v. Garcia* (Civ. App.) 226 S. W. 743.

#### Art. 820r. Local regulations prohibited; exceptions.

See *McCutcheon v. Wozencraft* (Civ. App.) 230 S. W. 733.

**Repeal.**—This article repeals art. 815, providing that municipalities could fix their own speed ordinances. Ex parte *Wright*, 82 Cr. R. 247, 199 S. W. 486.

One being prosecuted under a city ordinance for speeding at the time this act, relating to speed of automobiles, went into effect, should be discharged under art. 16, because such act contains no saving clause as to pending actions. *Id.*

**Validity of ordinances.**—Municipal ordinance, licensing operation of automobiles for hire, held not in conflict with this act. Ex parte *Parr*, 82 Cr. R. 525, 200 S. W. 404.

Ordinance of Dallas of August 2, 1918, entitled one regulating local street transportation, and excluding from a certain zone regular lines of jitneys, held not in conflict with or repugnant to this act. *Gill v. City of Dallas* (Civ. App.) 209 S. W. 209.

Plaintiffs' business of leasing or hiring driverless automobiles to the general public held to be of a public nature, to contemplate and in fact make use of the streets of defendant city, and to affect the public welfare, so as to be subject to license and reasonable regulation by the city. *City of San Antonio v. Besteiro* (Civ. App.) 209 S. W. 472.

#### Art. 820t. Acting as chauffeur without license, etc.

**Chauffeur.**—An American soldier in active service, though he is required to operate a motorcycle with due care, is not a chauffeur within the state statute, and need not procure a state license as chauffeur. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

**Violation as negligence.**—That plaintiff, who was operating a motorcycle, had not procured a state license as a chauffeur will not excuse negligence of defendant in running down plaintiff with motorcar. *American Automobile Ins. Co. v. Struwe* (Civ. App.) 218 S. W. 534.

**Art. 820ww. Disposition of fines collected.**—Fines collected for violations of any of the provisions of this Act shall be used by the municipality or the counties in which the same are assessed, and to whom the same are payable, in the construction and maintenance of roads, bridges and culverts in the City or County where such convictions are had, and for the enforcement of the Traffic Laws regulating the use of the public highways of this State by motor vehicles and motorcycles. [Acts 1917, 35th Leg., ch. 207, § 37; Acts 1919, 36th Leg., ch. 161, § 3.]

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

#### Art. 820y. Provisions cumulative.

**Pending prosecutions.**—One being prosecuted under a city ordinance for speeding at the time this act, relating to speed of automobiles, went into effect, should be discharged under art. 16, because such act contains no saving clause as to pending actions. Ex parte *Wright*, 82 Cr. R. 247, 199 S. W. 486.

#### Art. 820yy. Penalty for violation of certain of foregoing provisions.

See *Axtell v. State*, 86 Cr. R. 264, 216 S. W. 394.

#### Art. 820z. Arrest without warrant.

See *Axtell v. State*, 86 Cr. R. 264, 216 S. W. 394.

**Art. 820zz. Speed of commercial vehicles.**—Commercial motor vehicles of the kinds and weights specified in this section shall not be operated on the public highways of this State at greater rates of speed than herein prescribed, as follows:

(A) Commercial motor vehicles equipped with pneumatic tires or cushion wheels.

Maximum Weight in Pounds, Including Gross Weight of Vehicle and Load:	Speed Limit Miles per hour:
2,001 to 4,000.....	18
4,001 to 6,000.....	15
6,001 to 8,000.....	12
8,001 to 10,000.....	12
10,001 to 12,000.....	10

(B) Commercial motor vehicles equipped with solid rubber tires:

Maximum Weight in Pounds, Including Gross Weight of Vehicle and Load:	Speed Limit Miles per hour:
1,500 to 2,000.....	16
2,001 to 6,000.....	12
6,001 to 8,000.....	12
8,001 to 10,000.....	10

Any person who shall operate a commercial motor vehicle at a greater rate of speed than that herein allowed shall be guilty of a misdemeanor and punished by a fine of not less than ten (\$10.00) dollars nor more than two hundred (\$200.00) dollars, or imprisonment in the county jail not more than thirty (30) days. [Acts 1921, 37th Leg., ch. 131, § 3; Acts 1921, 37th Leg. 1st C. S., ch. 52, § 3.]

Took effect Nov. 15, 1921.  
See arts. 7012½-7012½a-2, civil statutes, ante.

**Art. 820zzz. Operation of unregistered commercial vehicles; weight of loads.**—Any owner of a commercial motor vehicle or trailer who operates or permits the same to be operated on the public highways of this State without having first registered such vehicle or trailer as provided for in Section 1 of this Act [Art. 7012½ Civil Statutes, ante] or any such owner who operates or permits to be operated a commercial motor vehicle trailer that is loaded with a load weighing over ten per cent in excess of its registered carrying capacity, shall be deemed guilty of a misdemeanor and punished by fine not exceeding two hundred (\$200.00) dollars for each offense. [Acts 1921, 37th Leg., ch. 131, § 5; Acts 1921, 37th Leg. 1st C. S., ch. 52, § 5.]

**Art. 822a. Sale of vehicles with tires less than specified width prohibited.**—That it shall be unlawful from and after the passage of this Act for any person, firm, association or corporation to sell or offer for sale within the State of Texas any wagon or other road vehicle with an intended carrying capacity of more than two thousand pounds and not exceeding four thousand five hundred pounds which shall have a rim or tire on the wheels of same less than three inches in width; or any such wagon or other road vehicles with an intended carrying capacity of more than four thousand five hundred pounds which shall have a rim or tire on the wheels of same less than four inches in width. [Acts 1917, 35th Leg., ch. 74, § 1; Acts 1919, 36th Leg., ch. 154, § 1; Acts 1920, 36th Leg. 3d C. S., ch. 36, § 1.]

Took effect June 18, 1920.

**Art. 822b. Same; to whom applicable.**—This Act shall apply to all persons, firms, associations or corporations engaged in the sale of road vehicles, either at wholesale or retail, but shall not apply to individuals selling or offering for sale road vehicles purchased for their individual use. [Acts 1917, 35th Leg., ch. 74, § 2; Acts 1919, 36th Leg., ch. 154, § 2; Acts 1920, 36th Leg. 3d C. S., ch. 36, § 1 (§ 2).]

**Art. 822c. Same; penalty for violation.**—Any firm, association or corporation violating the terms of this Act, shall be subject to a penalty of not less than one hundred dollars nor more than one thousand dollars for each offense to be collected for the benefit of the county in which such violation may occur; and any person violating the terms of this Act shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars for each offense, and each sale or offer of sale in violation hereof shall constitute a separate offense. [Acts 1917, 35th Leg., ch. 74, § 3; Acts 1919, 36th Leg., ch. 154, § 3; Acts 1920, 36th Leg. 3d C. S., ch. 36, § 1 (§ 3).]

**Art. 822d.** [Superseded.]

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 3d C. S., ch. 36, set forth above as arts. 822a-822c.

**Art. 822e. Using roads in violation of orders of road superintendent.**—Any party guilty of violating the provisions and directions of such order of the county road superintendent [art. 6976½dd, Civil Statutes, ante] after it has been so approved by such judgment of the county judge shall be guilty of a misdemeanor and fined in any sum not exceeding \$200.00. [Acts 1921, 37th Leg. 1st C. S., ch. 42, § 9.]

Took effect Nov. 15, 1921.

**Art. 826. [485a] Wilful obstruction of public ditch or diversion of water.**

**Offenses.**—Where defendant did not obstruct the natural channel across his land, but built a levee to obstruct water, which had been diverted by other parties from another channel into the channel in question, he was not guilty of a "willful" diversion of waters from its proper channel. *Vajdak v. State*, 82 Cr. R. 251, 199 S. W. 476.

## CHAPTER TWO

### OFFENSES PERTAINING TO PUBLIC ROADS, [DRAINAGE, LEVEES], AND IRRIGATION

Art.

832. [Note.]

832a. Failure to do road duty.

Art.

837ii. Constructing levee, etc., without complying with law.

**Article 832. [491]**

Superseded as to certain counties by art. 832a, post.

**Indictment or information.**—An information under this article, must allege that defendant was liable under the law to work upon the public roads. *Bennett v. State*, 26 Tex. App. 671, 14 S. W. 336.

**Art. 832a. Failure to do road duty.**—If any person, liable to work upon the public roads, after being legally summoned, shall fail or refuse to attend, either in person or by able and competent substitute, or fail or refuse to furnish his team or tools at the time and place designated by the person summoning him, or, having attended, shall fail or refuse to perform good service or any other duty required of him by law, or the person under whom he may work, or if any one shall fail [Arts. 6976½s-6976½s, Civil Statutes, ante] to comply with any duty required of him, as provided by this law, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, fined in any sum not exceeding \$25.00. [Acts 1921, 37th Leg. 1st C. S., ch. 42, § 37.]

Took effect Nov. 15, 1921.

**Art. 837ii. Constructing levee, etc., without complying with law.**—From and after the taking effect of this Act it shall be unlawful for any person, corporation or levee improvement district, without first ob-

taining the approval of plans for the same by the State Reclamation Engineer, to construct, attempt to construct, cause to be constructed, maintain or cause to be maintained, any levee or other such improvement on, along or near any stream of this State which is subject to floods, freshets or overflows, so as to control, regulate or otherwise change the flood waters of such stream; and any person, corporation or district violating this section of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not more than one year, or by both such fine and imprisonment; and each day any such structure is maintained or caused to be maintained shall constitute a separate offense. \* \* \* Provided, that the provisions of this section shall not apply to dams, canals or other improvements made or to be made by irrigation, water improvements or irrigation improvements made by individuals or corporations. [Acts 1918, 35th Leg. 4th C. S., ch. 44, § 53.]

For the remainder of this act see, ante, Civ. St. arts. 5584½-5584½tt.

## CHAPTER FIVE A

### LIBRARIES, MUSEUMS, ETC.

**Article 867f. Wilfully injuring, defacing, etc., books, etc.**—That whoever wilfully injures or defaces any book, newspaper, magazine, pamphlet, manuscript, or other property belonging to any public library, reading room, museum, or other educational institution, by writing, marking, tearing, breaking, or otherwise mutilating, shall be punished by a fine not greater than the replacement value of the property injured, and that a copy of this article shall be posted in a conspicuous place in such library, reading room, museum, or other educational institution. [Acts 1919, 36th Leg. 2d C. S., ch. 60, § 1 (Civ. St. art. 5609b).]

## CHAPTER SIX

### OFFENSES RELATING TO THE PROTECTION OF FISH, BIRDS AND GAME

Art.	Art.
868. [Repealed.]	890. [Note.]
869. [Superseded.]	891. [Superseded.]
870. Taking fish by means of nets, etc., without consent of owner.	892, 893. [Note.]
871. Witnesses; immunity.	894, 895. [Superseded.]
872. Duty of person erecting dams or other obstructions.	896-898. [Note.]
872a. Closed season for crappies and bass.	899. [Superseded.]
872b. Length of bass which may be caught.	900. [Note.]
872c. Violation of preceding articles.	900½. Wild animals, wild birds, and wild fowl property of people.
872cc. Length of bass, white perch and crappies.	900½a. Game birds enumerated.
873. [Superseded.]	900½aa. Sale or purchase of game birds prohibited; penalty.
874-877e. [Note.]	900½b. Number of game birds permitted to be possessed; penalty.
878-881. [Superseded.]	900½bb. Open season for wild turkeys; proviso.
882. [Note.]	900½bbb. Open season for wild turkeys in certain counties.
883, 884. [Superseded.]	900½bbbb. Same; counties exempt.
884a, 884b. [Note.]	900½c. Open season for quail and Mexican pheasant; bag limit.
884c. [Repealed.]	900½cc. Open season for wild doves; bag limit.
884d. [Note.]	
885-888. [Note.]	
889, 889a. [Superseded.]	
889b. Open season for doves.	
889c, 889d. [Note.]	

- Art.  
900½d. Open season for wild duck, brant, geese, sandhill crane, plover, curlew, snipe, and shore birds; bag limit.
- 900½dd. Taking game birds out of season; penalty.
- 900½e. Taking, etc., more than bag limit; penalty.
- 900½ee. "Closed season," "open season" and "bag limit" defined.
- 900½f. Closed season for woodcock, wood-duck, prairie chicken, and pheasant; penalty.
- 900½ff. Possession, etc., during protected season prima facie evidence of guilt.
- 900½g. Bringing into state prohibited game birds, fowl or animals during closed season; penalty.
- 900½gg. Manner of killing or taking duck, etc.
- 900½h. Hours for killing duck, etc.
- 900½hh. Destroying or taking eggs of protected birds; penalty.
- 900½i. Netting, trapping, etc., game birds without permit; penalty.
- 900½ii. Hiring persons to hunt; penalty.
- 900½j. Shipping animals, etc., to and from taxidermist for mounting.
- 900½jj. Transportation of animals, etc., lawfully killed; affidavit.
- 900½k. Same; unlawful shipment; penalty; shipments from Mexico.
- 900½kk. Using hunting license of another; penalty.
- 900½l. Permits to kill animals, birds, etc., destroying crops.
- 900½ll. Taking or destroying nests or eggs of birds or fowl; penalty.
- 900½m. Seizure of birds, fowl, animals, etc., unlawfully taken or possessed.
- 900½mm. Killing, injuring, or taking or destroying nests or eggs of certain non-game wild birds; penalty.
- 900½n. License to owners of sail or power boats to carry hunting parties.
- 900½nn. Wild deer, antelope, Rocky Mountain sheep, and squirrel property of people; open season for deer; penalty.
- 900½o. Hours for hunting deer; penalty.
- 900½oo. Hunting with lamps or lanterns; penalty.
- 900½p. Bag limit of deer; female deer and fawn not to be taken; penalty.
- 900½pp. Transportation of deer; penalty.
- 900½q. Hunting deer with calls or decoys.
- 900½qq. Closed season for antelope and Rocky Mountain sheep; penalty.
- 900½r. Enforcement of laws by deputy Game Commissioners; penalty for violations of laws by.
- 900½rr. Purchase of game birds or animals for evidentiary purposes.
- 900½s. Possession of prohibited birds or animals prima facie evidence of guilt.
- 900½ss. Taking of wild birds, fowl, or animals for zoological gardens, parks, or propagation; taking eggs of wild birds, etc., for scientific purposes; procedure; penalty.
- 900½t. Hunting license for residents hunting outside county of residence; refusal to show license penalty.
- Art.  
900½tt. Hunting license for non-residents; penalty.
- 900½u. Contents of hunting license; duration of.
- 900½uu. Unlawful storage of game birds and animals; penalty.
- 900½v. Jurisdiction of prosecutions.
- 900½vv. Repeal.
901. Oysters culled from public beds, etc.; penalty; cancellation of license.
902. [Note.]
903. Unlawful to receive for shipment, when.
904. [Note.]
905. Unlawful to destroy or deface buoy.
906. Unlawful to catch fish, green turtle, etc.; how and when.
907. Catching fish, etc., by use of explosives or poison.
908. Fishing for oysters, fish, etc., for sale without license; penalty.
- 908a. Refusal to show license; penalty.
909. [Superseded.]
- 909a. Sale of certain fish of certain weight prohibited; penalty; venue of prosecution; sale of fish without head attached; penalty.
910. [Note.]
911. Catching fish or terrapin with drag seine during breeding season.
912. [Superseded.]
- 912a. Person fishing with drag seine to return fish of certain size to water.
913. Coast survey charts as evidence.
914. Closed season for oysters.
- 914a. Closed season for Green turtle; taking eggs of such turtle.
- 914b. Closed season for salt water terrapin.
915. [Note.]
916. [Superseded.]
917. Engaging in business of wholesale dealer in fish and oysters without license and payment of tax.
918. Selling uncultured oysters; penalty.
919. [Note.]
920. Theft from private oyster bed.
921. Selling oysters gathered for planting.
922. Gathering seed oysters without license.
- 923, 923a. [Superseded.]
- 923b. Closing overworked reefs; notice; penalty.
- 923c. [Note.]
- 923d. [Superseded.]
- 923e. Complaint before justice of the peace.
- 923f. [Superseded.]
- 923ff. What devices may not be used for fishing.
- 923fff. Use of metallic nets.
- 923ffff. Closing certain waters to use of nets; penalty.
- 923g. [Note.]
- 923gg. Having in possession or carrying on, over or into certain waters certain nets; penalty; destruction of boat or vehicle.
- 923ggg. Same; exceptions.
- 923gggg. Same; prima facie evidence of guilt.
- 923h. [Superseded.]
- 923i. [Note.]
- 923j. Using unlawful measurements for oysters.
- 923jj. Refusal to pay special tax on fish, shrimp and oysters.
- 923jjj. Refusal to pay tax on fish, oysters, shrimp, turtle, terrapin, clams, crabs, etc.

## Art.

923k, 923l. [Note.]  
 923m. Seining for drum fish; permit; superintendence.  
 923n. Taking away, disturbing, fishing or operating, etc., without permit; punishment.  
 923nn. Catching shrimp; permit; penalty.  
 923o. Mesh of seines for taking fish in salt waters; penalty.  
 923oo. Examination, etc., of seines for use in salt waters; tagging same; penalty.  
 923p. Fresh water streams and rivers, what are; unlawful use of nets in.  
 923pp. Gill or strike nets.  
 923q. Time when nets may not be used; artificial bait.  
 923qq. Unlawful entry into or trespass upon state fish hatchery or game preserve.

## Art.

923r. Taking, killing fish, birds or animals in hatchery or reservation.  
 923rr. Bringing birds or animals into hatchery or reservation which may injure fish, etc., kept therein.  
 923s. Sale, etc., of oysters taken from insanitary or polluted reefs.  
 923ss. Insanitary oyster containers.  
 923t. "Floating," "drinking" or "bloating" oysters.  
 923tt. Venue of prosecutions for sale of fish of unlawful size.  
 923u. License to take mussels, clams or naiad or shells thereof; penalty.  
 923uu. Hunting on area leased to Audubon Society.  
 923v. Same; penalty.

**Article 868. [Repealed.]**

**Explanatory.**—The subject-matter of this article was dealt with in Acts 1897, ch. 153; Acts 1903, ch. 119; Acts 1905, ch. 61; Acts 1907, chs. 75, 78. Acts 1911, ch. 110, re-enacts the article and expressly repeals Acts 1907, ch. 75. Acts 1913, ch. 135, sec. 2, expressly repealed art. 868, Penal Code. This would seem to supersede Acts 1911, ch. 110, especially in view of art. 907, Pen. Code, as amended by the repealing act of 1913, above referred to.

Acts 1919, 36th Leg., ch. 157, relating to the protection of game, and Acts 1919, 36th Leg. 2d C. S., ch. 73, relating to the protection of fish, supersede and supply most of the provisions of this chapter of the Penal Code, and of Title 63 of Revised Civil Statutes. Of Acts 1919, 36th Leg., ch. 157, section 1 is set forth ante, Civ. St. art. 4022, and post, this Code, art. 900½; section 2 is set forth ante, Civ. St., art. 4022a, and post, this Code, art. 900½a; sections 3-33 are set forth post, this Code, arts. 900½aa-900½qq; sections 34 and 35 are set forth ante, Civ. St., arts. 4039a, 4039b; sections 36-39 are set forth post, this Code, arts. 900½r-900½ss; sections 40 and 41 are set forth ante, Civ. St., arts. 4035a, 4035; and sections 42-47 are set forth post, this Code, arts. 900½t-900½vv. Of Acts 1919, 2d C. S., ch. 73, articles 1-10 are set forth ante, Civ. St., arts. 3974-3983; article 11 is set forth ante, Civ. St., art. 4018a; articles 12 and 13 are set forth post, this Code, arts. 923j, 923jj; articles 14 and 15 are set forth ante, Civ. St. arts. 3984, 3986; article 16 is set forth ante, Civ. St., art. 3987, and post, this Code, art. 917; articles 17-25 are set forth ante, Civ. St., articles 3990-3993, 3995-3999; article 26 is set forth post, this Code, art. 920; article 27 is set forth ante, Civ. St., art. 3999a, and post, this Code, art. 908; articles 28-49 are set forth post, this Code, arts. 908a, 905, 906, 923o, 923oo, 923m, 870, 907, 903, 872, 901, 911, 923gg, 923ggg, 923gggg, 923nn, 918, 914, 921, 922, 922jjj, 923b; article 50 is set forth ante, Civ. St., art. 4019c; articles 51-66 are set forth post, this Code, arts. 923e, 871, 909a, 913, 914a, 914b, 923qq, 923r, 923rr, 923s, 923ss, 923t, 923ff, 923fff, 923fff, 923p, 912a, 923pp, 923q, 872cc, 923tt; articles 67-74 are set forth ante, Civ. St., arts. 4016, 4018b, 4002, 4003, 4010, 4001, 4004, 4005, 4006, 4007, 4008, 4009; article 75 is set forth post, this Code, art. 923u; and articles 76, 76a and 77 are set forth ante, Civ. St., arts. 4018c-4018e.

**Art. 869. [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, art. 64, set forth post, as art. 923q.

**Art. 870. Taking fish by means of nets, etc., without consent of owner.**—Any person who shall take, catch, ensnare or trap any fish by means of nets or seines or by poisoning, polluting or by use of any explosives, or by muddying, ditching or draining in any lake, pool or pond in any county within this State without the consent of the owner of such lake, pool or pond, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten and no more than one hundred dollars, and, in all prosecutions under this law, the burden of proof of such consent of the owner shall devolve and be upon the defendant. [Act 1907, ch. 78, § 2; Act 1909, p. 96, repealed; Act 1911, ch. 110, § 5, superseded; art. 870, revised Pen. Code, superseded; Act 1911, ch. 113, § 3(2); Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 34.]

**Art. 871. Witnesses; immunity.**—Any court, office or tribunal having jurisdiction of the offense set forth in this chapter, or any district

or county attorney may subpoena persons and compel their attendance as witnesses to testify as to violations of any of the provisions of this law; and any person so summoned and examined shall not be liable to prosecution for any of the violations of this law about which he may testify; and a conviction of said offense may be had upon the unsupported evidence of an accomplice or participant. [O. C.; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 52.]

**Art. 872. [513] Duty of person erecting dams or other obstructions.**—It shall be the duty of every person, firm or corporation, municipal or private, who has heretofore erected, or who may hereafter erect any dam, water weir, or other obstruction, on any regular flowing stream within this State, on the written order of the Court of County Commissioners in the county in which such dam, weir or other obstruction has been erected or constructed, to build, construct and keep in repair fish ways, or fish ladders, at such dam, water weir, or obstruction, at the discretion of the Game, Fish and Oyster Commissioner so that at all seasons of the year fish may ascend above such dam, weir or obstruction, to deposit their spawn. Any person, firm or corporation, whether private or municipal, who shall erect such dam, weir or obstruction, or any firm, person or corporation, whether private or municipal, who shall own or maintain any such dam, obstruction or weir, who shall fail or refuse to build, construct and keep in repair such fish way, or fish ladder, within 90 days after having been notified by the Game, Fish and Oyster Commissioner of this State to do so, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than \$25.00 nor more than \$500.00; provided, that each week after the expiration of 90 days after receiving notice, as herein provided that such persons, firm or corporation, municipal or private, shall fail or refuse to build, construct and keep in repair, such fish ladder, shall constitute a separate offense. [O. C.; Act April 17, 1879, p. 100, § 1; Acts 1915, ch. 67, § 1, amending art. 872, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 37.]

**Art. 872a. Closed season for crappies and bass.**—It shall be unlawful for any person, firm, or corporation, or their agents, to take, catch, sein, entrap by any means, or have in their possession any crappie or bass taken from any public fresh waters of this State from the first day of March to the first day of May of any year. [Acts 1917, 35th Leg. 3d C. S., ch. 12, § 3; Acts 1918, 35th Leg. 4th C. S., ch. 87, § 3.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Explanatory.**—This article and arts. 872b, 872c, do not seem to be affected by the new acts relating to game and fish.

**Art. 872b. Length of bass which may be caught.**—If any person shall at any time catch or take from any public fresh water, river, lake, bayou, lagoon, creek, pond, or other natural or artificial public stream or pond of water within this State by use of any means whatsoever any bass of less than eight inches in length, he shall immediately return same back into such public water; and that unnecessary injuring of such fish shall be deemed an offense under the provisions of this Act; provided that each such fish shall constitute a separate offense. [Acts 1917, 35th Leg. 3d C. S., ch. 12, § 4; Acts 1918, 35th Leg. 4th C. S., ch. 87, § 4.]

See post, art. 872cc. See, also, note under art. 872a.

**Art. 872c. Violation of preceding articles.**—Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in any sum not

exceeding One Hundred Dollars. [Acts 1917, 35th Leg. 3d C. S., ch. 12, § 5; Acts 1918, 35th Leg. 4th C. S., ch. 87, § 5.]

See note under art. 872a.

**Art. 872cc. Length of bass, white perch and crappies.**—Any person who shall take or catch in the public waters of this State or have in his possession any bass of less length than eleven inches or any white perch or crappie of less length than seven inches, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than ten nor more than one hundred dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 65.]

See ante, art. 872b.

**Art. 873. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., 2d C. S., ch. 73. See post, arts. 901-923u.

**Arts. 874-877e.**

These articles do not seem to be affected by the new game and fish acts.

**Art. 878. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., ch. 157, §§ 1, 29, post, arts. 900½, 900½nn.

**Arts. 879-881. [Superseded.]**

**Explanatory.**—Superseded in part, if not in whole, by Acts 1919, 36th Leg., ch. 157, §§ 2, 25, 27, post, arts. 900½a, 900½ll, 900½mm.

**Art. 882.**

**Explanatory.**—This article is superseded in part by Acts 1919, 36th Leg., ch. 157, § 3, post, art. 900½aa, and probably as to the remainder by Acts 1919, 36th Leg., ch. 157, §§ 29, 31a, 33, post, arts. 900½nn, 900½p, 900½qq.

**Art. 883. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., ch. 157, § 18, post, art. 900½i.

**Art. 884. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., ch. 157, § 15, post, art. 900½gg.

**Art. 884a.**

**Explanatory.**—This article does not seem to be affected by Acts 1919, 36th Leg., ch. 157. See art. 900½bb.

**Art. 884b.**

**Explanatory.**—This article does not seem to be affected by the new acts relating to game and fish.

**Art. 884c. [Repealed.]**

**Explanatory.**—This article is repealed by Acts 1919, 36th Leg., ch. 157, § 47, post, art. 900½vv.

**Art. 884d.**

**Explanatory.**—This article does not seem to be affected by the new game and fish acts.

**Arts. 885-888.**

**Explanatory.**—These articles do not seem to be affected by the new game and fish acts.

**Art. 889. [Superseded.]**

**Explanatory.**—This article is superseded in part by Acts 1919, 36th Leg., ch. 157, post, arts. 900½-900½vv, and by Acts 1919, 36th Leg. 2d C. S., ch. 72, §§ 31a, 31b, post, arts. 900½p, 900½pp.

**Art. 889a. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., ch. 157, § 32, post, art. 900½q.



**Art. 889b. Open season for doves.**—From and after the passage it shall be unlawful for any person to kill any dove during the period of time embraced between the first day of February and the first day of December of any year; provided, however, that in those counties in this State lying north of a line marking the northern boundaries of the counties of Shelby, Nacogdoches, Angelina, Houston, Leon, Roberson, Falls, Bell, Lampasas, San Saba, McCullough, Concho, Tom Green, Irion, Reagan, Upton, Ward, Loving, Culberson, Hudspeth, and El Paso, it shall be unlawful for any person to kill any dove during the period of time embraced between the first day of November and the thirty-first day of August of any year. [Acts 1915, 34th Leg., 1st C. S., ch. 22, § 2, amending Acts 1915, 34th Leg., ch. 123, § 1; Acts 1918, 35th Leg., 4th C. S., ch. 72, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Explanatory.**—This article is probably superseded by Acts 1918, 36th Leg., ch. 157, § 7, post, art. 900½cc.

**Arts. 889c, 889d.**

**Explanatory.**—These articles do not seem to be affected by the new game and fish acts.

**Art. 890.**

**Explanatory.**—This article does not seem to be affected by the new game and fish acts. But see art. 900½j, post.

**Art. 891. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., ch. 157, §§ 21, 22, post, arts. 900½jj, 900½k.

**Arts. 892, 893.**

**Explanatory.**—These articles do not seem to be affected by the new game and fish acts set forth herein.

**Art. 894. [Superseded.]**

**Explanatory.**—This article is superseded in part by Acts 1919, 36th Leg., ch. 157, § 13, post, art. 900½ff.

**Art. 895. [Superseded.]**

**Explanatory.**—This article is superseded in part by Acts 1919, 36th Leg., ch. 157, § 38, post, art. 900½s.

**Arts. 896–898.**

**Explanatory.**—These articles do not seem to be superseded by Acts 1919, 36th Leg., ch. 157. See art. 900½m.

**Art. 899. [Superseded.]**

**Explanatory.**—This article is superseded by Acts 1919, 36th Leg., ch. 157, §§ 42-44, post, arts. 900½t-900½u.

**Art. 900.**

**Explanatory.**—This article does not seem to be superseded by Acts 1919, 36th Leg., ch. 157. See art. 900½t.

**Art. 900½. Wild animals, wild birds, and wild fowl property of people.**—All the wild animals, wild birds, wild fowl within the borders of this State are hereby declared to be the property of the people of the State. [Acts 1919, 36th Leg., ch. 157, § 1.]

See ante, notes to art. 868.

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

**Art. 900½a. Game birds enumerated.**—Wild turkeys, wild ducks, wild geese, wild grouse, wild brant, wild sandhill cranes, wild prairie chickens or pinnated grouse, wild pheasants, wild partridges, and wild quail of all varieties, wild doves of all varieties, wild pigeons of all

varieties, wild snipe of all varieties, wild shore birds, wild robins and wild Mexican pheasants, known as "chacalaca," and wild plover are hereby declared to be the game birds, within the meaning of this Act. [Id., § 2.]

See ante, art. 879.

**Art. 900½aa. Sale or purchase of game birds prohibited; penalty.**—Any person who shall sell, or any person who shall buy or any person who shall have in his or her possession for purpose of sale, or any person who shall have in his possession after purchase has been made either by himself or others, any of the birds or fowl enumerated and set forth in Section 2 of this Act [art. 900½a], shall be deemed guilty of a misdemeanor and shall be fined in a sum of not less than Ten (\$10.00) nor more than One Hundred (\$100.00) Dollars and the sale or purchase, or the possession of each bird after a purchase and sale shall be a separate offense. [Acts 1903, ch. 137; Acts 1907, p. 278; Acts 1919, 36th Leg., ch. 157, § 3.]

See ante, art. 882.

**Art. 900½b. Number of game birds permitted to be possessed; penalty.**—It is hereby declared to be unlawful for any person or agent, representative or manager for any firm or corporation, to have in his possession as the property of any one person, or as the property of himself or the property of such firm or corporation represented by him, more than seventy-five fowl or birds enumerated in Section 2 of this Act [art. 900½a], and any person having such birds or fowl in possession as interdicted or set forth shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200.00), and the possession of each bird or fowl over the number of seventy-five shall be a separate offense. [Acts 1919, 36th Leg., ch. 157, § 4.]

**Art. 900½bb. Open season for wild turkeys; proviso.**—The open season for killing wild turkeys shall be during the months of November and December provided that it shall be unlawful for any person to kill wild turkey hen, or to kill more than three wild turkey gobblers during any one year and any person violating the provisions of this Section of the law shall on conviction be fined not less than Ten (\$10.00) Dollars and not more than One Hundred (\$100.00) Dollars and each wild turkey gobbler killed above the prescribed number of three shall be a separate offense; and provided further, that it shall be unlawful to kill any wild turkeys in the counties of Cameron, Hidalgo, Willacy, Kenedy, Starr, Brooks, Jim Hogg and McMullen until November 1, 1926. [Acts 1919, 36th Leg., ch. 157, § 5; Acts 1921, 37th Leg. 1st C. S., ch. 31, § 1 (§ 5).]

Took effect Nov. 15, 1921.

**Art. 900½bbb. Open season for wild turkeys in certain counties.**—That from and after the passage of this Act the open season as defined by Section 11, Chapter 157, Acts Regular Session, Thirty-sixth Legislature, for killing wild turkeys in the Counties of Dimmit, Uvalde, Medina, Zavalla, Blanco, Llano, Kimble, Kerr, Real, Mason, Edwards, Menard, Sutton, Crockett, Comal, Hays, Frio, Maverick, Kinney, Val Verde, Terrell, Brewster, Presidio, Jeff Davis, Schleicher, Sterling, Tom Green, Irion, and Bandera, shall be for the months of November and December; provided, that it shall be unlawful for any person to kill wild turkey hens or to kill more than three wild turkey gobblers during any one year, and any person violating the provisions of this Act, shall on conviction be fined not less than ten dollars, and not more than one

hundred dollars for each wild turkey gobbler killed above the prescribed number of three shall be a separate offense. [Acts 1920, 36th Leg. 4th C. S., ch. 7, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 35, § 1.]

Took effect Nov. 15, 1921.

**Art. 900 $\frac{1}{2}$ bbbb. Same; counties exempt.**—From and after the passage of this Act the counties of Dimmit, Uvalde, Medina, Zavalla, Blanco, Kerr, Real, Mason, Edwards, Menard, Sutton, Crockett, Bandera, Jeff Davis, Schleicher, Tom Green, Sterling, Presidio, Comal, Hays, Frio, Maverick, Kinney, Val Verde, Terrell, Brewster, and Irion shall be exempt from the provisions of Section 5, Chapter 157, Acts of the Regular Session of the Thirty-sixth Legislature, page 290, in so far as that section fixes the time for open season on wild turkeys; and Section 5 of Chapter 157 of the General Laws of the State of Texas passed by the Regular Session of the Thirty-sixth Legislature, in so far as such section fixes the months of March and April as open season for killing wild turkey, be, and the same is hereby repealed. [Acts 1920, 36th Leg. 4th C. S., ch. 7, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 35, § 2.]

**Art. 900 $\frac{1}{2}$ c. Open season for quail and Mexican pheasant; bag limit.**—The open season for killing quail and Mexican pheasants, known as chacalaca, shall be during the months of December and January of each year, provided, that it shall be unlawful to kill more than the bag limit of fifteen of these game birds in one day, each variety of these shall be considered in making up the limit. [Acts 1919, 36th Leg., ch. 157, § 6.]

**Art. 900 $\frac{1}{2}$ cc. Open season for wild doves; bag limit.**—The open season for killing wild doves shall be the months of September, October, November and until the 15th day of December of each year; provided, it shall be unlawful for any person to kill more than the bag limit of fifteen wild doves in any one day. [Id., § 7.]

See ante, art. 889b.

**Art. 900 $\frac{1}{2}$ d. Open season for wild duck, brant, geese, sandhill crane, plover, curlew, snipe, and shore birds; bag limit.**—The open season for killing wild ducks of any kind, wild brant, wild geese, wild sandhill cranes, wild plovers, wild curlew, wild snipe of all kinds and wild shore birds shall be between October 16th and January 31st, both days inclusive; provided, that it shall be unlawful to kill more than the bag limit of twenty-five in any one day of wild ducks of all kinds, wild plovers, wild curlew, wild snipe of all kinds, and wild shore birds, or the bag limit of eight in any one day of each of the species of wild geese, wild brant, and wild sand hill cranes; provided, further, that the aggregate of twenty-five of all the above species of birds shall be the bag limit for any one day. Provided further, that it shall be unlawful to kill any wild wood duck, for a period of five years from the date of the enactment of this law. [Id., § 8.]

**Art. 900 $\frac{1}{2}$ dd. Taking game birds out of season; penalty.**—It shall be unlawful to kill or take any of the birds or fowls enumerated in Section 2 of this Act [art. 900 $\frac{1}{2}$ a], except during the open season as fixed by this Act for each kind of bird or fowl, and if any person shall kill, take or have in his possession, any of the birds or fowl enumerated and named in Section 2 of this Act, at any time of the year, except during the open season as provided for in this Act, he shall be deemed guilty of a misdemeanor and on conviction he shall be fined in a sum not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [Id., § 9.]

**Art. 900 $\frac{1}{2}$ e. Taking, etc., more than bag limit; penalty.**—If any person shall kill or have in his possession any more than the bag limit as set out in this Act, except as hereinafter provided for shipping purposes, he shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [Id., § 10.]

**Art. 900 $\frac{1}{2}$ ee. "Closed season," "open season" and "bag limit" defined.**—The term "closed season" shall mean the period of time in which it is unlawful to kill or take any of the game, animals, birds and fowl enumerated in this Act; and the term "open season" shall mean the period of time in which it is lawful to take and kill such game, animals, birds and fowl, and the term "bag limit" shall mean the number of wild animals, birds and fowl permitted to be killed in one day during the open season for such game, birds, animals and fowl. [Id., § 11.]

**Art. 900 $\frac{1}{2}$ f. Closed season for wood-cock; wood-duck, prairie chicken, and pheasant; penalty.**—It shall be unlawful for any person to kill, take or have in his possession within the period of five years from the passage of this Act any wild wood-cock, wild wood-duck, or wild prairie chicken or wild pheasant (except chalcalca) or pinnated grouse, and any person so killing or having in his possession any wild wood cock or wild wood duck or wild prairie chicken or wild pheasant (except chalcalaca) or pinnated grouse, shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [Id., § 12.]

**Art. 900 $\frac{1}{2}$ ff. Possession, etc., during protected season prima facie evidence of guilt.**—The possession, or the sale, or the purchase, or the possession after a sale, or the possession for the purpose of sale, of any fowl or bird or game quadruped as interdicted by this Act, shall apply to any bird or quadruped coming from without the State, and in prosecutions for violations of this Act, it shall be no defense that such bird or quadruped was not taken or killed within this State. [Id., § 13.]

**Art. 900 $\frac{1}{2}$ g. Bringing into state prohibited game birds, fowl or animals during closed season; penalty.**—It shall be unlawful to bring into this State for any purpose whatever, during the closed season, either alive or dead, any kind of wild game birds or fowl, or quadrupeds enumerated in this Act, or to bring into this State for sale or exchange or barter or shipment for sale any such birds or quadrupeds or fowl during the open season as set out in this Act, except as provided in Section 39 of this Act [Art. 900 $\frac{1}{2}$ ss]. Any person bringing such game, birds or fowls or quadrupeds into the State during the closed season or bringing such game birds or fowl or other quadruped for sale or barter or shipment for sale during the open season, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than ten dollars (10.00) nor more than two hundred dollars (\$200.00.) The bringing in of such game bird or fowl or animal or quadruped herein interdicted is hereby declared to be a separate offense. [Acts 1919, 36th Leg., ch. 157, § 14; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 14).]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900 $\frac{1}{2}$ gg. Manner of killing or taking duck, etc.**—It shall be unlawful to kill wild ducks, geese, brant, or sandhill cranes by any means other than the ordinary gun, capable of being held to and shot from the shoulder, and any person taking ducks or geese, or brant or sandhill cranes by snares, deadfalls, pens, or other trap devices, or who shall kill ducks or geese or brant or sandhill crane by means other than

that of the ordinary gun capable of being held to the shoulder, shall be deemed guilty of a misdemeanor, on conviction shall be fined not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100.00), and the killing or taking of each duck or goose shall be deemed a separate offense. [Acts 1919, 36th Leg., ch. 157, § 15.]

**Art. 900 $\frac{1}{2}$ h. Hours for killing duck, etc.**—It shall be unlawful to kill or to shoot at any duck or geese or brant or sandhill cranes between sunset and one-half hour before sunrise in any county of the State, and any person shooting at or killing any duck or geese or brant or sandhill cranes between sunset and one-half hour before sunrise in any county shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [Id., § 16.]

**Art. 900 $\frac{1}{2}$ hh. Destroying or taking eggs of protected birds; penalty.**—It shall be unlawful for any person to destroy or take the eggs of any bird which is protected against being killed or taken by this statute, except as provided in Section 39 of this Act [Art. 900 $\frac{1}{2}$ sss], and any person destroying or taking such eggs shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [Acts 1919, 36th Leg., ch. 157, § 17; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 17).]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900 $\frac{1}{2}$ i. Netting, trapping, etc., game birds without permit; penalty.**—It shall be unlawful, without first obtaining from the Game, Fish and Oyster Commissioner in writing, for any person to net, trap, ensnare or otherwise take any bird mentioned in Section 2 of this Act [Art. 900 $\frac{1}{2}$ a] and any person who sets a net or traps or other device for taking such birds, or snares or takes by such devices such birds mentioned, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00). [Acts 1919, 36th Leg., ch. 157, § 18.]

**Art. 900 $\frac{1}{2}$ ii. Hiring persons to hunt; penalty.**—It shall be unlawful for any person to hire or employ any other person by the payment of money or any other thing of value or by promise of the payment of money or any other thing of value, or to receive money or any other thing of value to hunt for any other person. And any person so hiring or employing any other person to hunt any wild birds mentioned in Section 2 [Art. 900 $\frac{1}{2}$ a], and wild animal mentioned in Section 29 of this Act [Art. 900 $\frac{1}{2}$ nnn], for himself, or any person receiving any money or any other thing of value or the promise of money or other thing of value to hunt shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00). Provided that if any person who has received money or other thing of value to hunt or a promise of money or other thing of value to hunt, shall testify against the person or persons employing him by the payment or the promise of payment of money or other thing of value to hunt, all prosecutions against him in the case in which he testified shall be dismissed. [Acts 1919, 36th Leg., ch. 157, § 19; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 19).]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900 $\frac{1}{2}$ j. Shipping animals, etc., to and from taxidermist for mounting.**—Any person shall have the right to ship or carry to and from a taxidermist for mounting purposes any specimen or part of specimen of any quadruped or wild animal or wild game bird or fowl

killed by him or any bird, or fowl or animal protected by the laws of the State. But before such shipment to or from such taxidermist is made, he must furnish the Agent of the transportation company an affidavit which must be approved by the Game, Fish and Oyster Commissioner or by some one of his deputies, in which he shall declare that he killed such specimen, and that he sends it to a taxidermist naming him and his place of business, and that he is not preserving such specimen for sale. And any person shipping such specimen without making such affidavit and furnishing it to the agent of the transportation company, and any agent of a transportation company receiving such specimen without such affidavit, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten nor more than one hundred dollars. [Acts 1919, 36th Leg., ch. 157, § 20.]

See ante, art 890.

**Art. 900 $\frac{1}{2}$ jj. Transportation of animals, etc., lawfully killed; affidavit.**—Nothing in this Act shall be construed to prohibit the carrying, transportation or shipment of any of the game, birds, or wild fowl mentioned in Section 1 of this Act [Art. 900 $\frac{1}{2}$ ], when lawfully taken or killed, from the place of shipment to the home of the person who killed the same; provided further, that the person desiring to ship or transport said game, birds, or fowl shall first make the following affidavit in writing before some officers authorized by law to administer oaths and deliver same to said railroad, or common carrier, or to the agent of said railroad or common carrier at the point of shipment, and upon filing the affidavit, such party shall be permitted to transport or transmit to his home any wild game, birds, when such number is permitted to be killed of the kind offered for shipment.

State of Texas, )  
County of \_\_\_\_\_)

Before me, the undersigned authority personally appeared \_\_\_\_\_ who, after being duly sworn, upon oath says:

I live at \_\_\_\_\_ in the county of \_\_\_\_\_ in the State of \_\_\_\_\_; that I have personally killed \_\_\_\_\_ which I desire to ship from \_\_\_\_\_ in \_\_\_\_\_ County, to my home, which game I killed for my own use and not for sale and same shall not be bartered or sold; that I have not killed more than the bag limit as provided by law of any wild game or wild birds, during the present hunting season.

Sworn to and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

[Acts 1919, 36th Leg., ch. 157, § 21; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 21).]

**Art. 900 $\frac{1}{2}$ k. Same; unlawful shipment; penalty; shipments from Mexico.**—The list thus prepared by the affiant shall be attached to the shipment, and shall not be removed during the period of transportation. If such game shipped is carried by the person killing it, it shall not be necessary to attach the list as herein before provided. Any person who so ships any game from the County in which it is killed without making the foregoing affidavit, or any agent of transportation line or agent of any express company, who receives such shipment without it is accompanied by such affidavit and list attached, or any auditor or conductor or other person in charge of any railroad train or transportation line, who knowingly permits any person to carry any game, birds or game fowl or game wild animals or quadrupeds, without such affidavit is made, as hereinbefore provided, shall be punished by a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars. And all express

agents and all conductors and auditors of trains and all captains of boats licensed under Section 28 of this Act [Art. 900<sup>1</sup>/<sub>2</sub>n], are hereby empowered to administer oaths necessary to the shipment of game, and for administering such oaths, they are hereby authorized to collect twenty-five cents from the persons making such oaths. It shall not be unlawful to ship or bring any wild game animals or wild birds from the Republic of Mexico to the State at any season and in any quantities, provided that the party bringing the same into the State shall procure from the Game, Fish and Oyster Commissioner or one of his deputies a permit to bring same into the State and shall procure from the U. S. Custom Officer at the port of entry a certificate showing that such game was taken or killed in the Republic of Mexico. [Acts 1919, 36th Leg., ch. 157, § 22; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 22).]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900<sup>1</sup>/<sub>2</sub>kk. Using hunting license of another; penalty.**—Any person who shall hunt under the license issued to any other person, or any person who shall permit any other person to hunt under a license issued to him shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten dollars nor more than one hundred dollars. [Acts 1919, 36th Leg., ch. 157, § 23.]

**Art. 900<sup>1</sup>/<sub>2</sub>l. Permits to kill animals, birds, etc.; destroying crops.**—Whenever any wild birds, or fowl, or wild animals or quadrupeds are destroying crops, the Game, Fish and Oyster Commissioner is hereby authorized to permit the killing of such wild birds, or fowl, or wild animals or quadrupeds without reference to the open or closed season and bag limit, or without reference to night shooting, but before such permission shall be granted, the Commissioner aforesaid shall be furnished a statement of facts sworn to by the party seeking such permit, with the endorsement of the county judge, to the fact that such crops are being destroyed and can only be preserved by the grant of such permit to kill such wild birds, wild fowl, wild animals or wild quadrupeds. Such permit when issued, shall distinctly state the time for which it is granted. [Id., § 24.]

**Art. 900<sup>1</sup>/<sub>2</sub>ll. Taking or destroying nests or eggs of birds or fowl; penalty.**—It shall be unlawful to take or destroy any nest or eggs of any wild bird or fowl mentioned in this Act as a game wild bird or wild fowl except as provided for in Section 39 of this Act [Art. 900<sup>1</sup>/<sub>2</sub>ss], and any person taking or destroying a nest or eggs of such wild birds shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten nor more than one hundred dollars. [Acts 1919, 36th Leg., ch. 157, § 25; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 25).]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900<sup>1</sup>/<sub>2</sub>m. Seizure of birds, fowl, animals, etc., unlawfully taken or possessed.**—All wild birds, wild fowl, wild animals or wild quadrupeds which have been killed or taken in any way or shipped, or which have been held in storage or have been found in restaurants contrary to the laws of this State, shall be seized without warning by the Game, Fish and Oyster Commissioner, or his deputy, and disposed of by the order of the Game, Fish and Oyster Commissioner or by his deputy by donating same to charitable institutions or to needy widows and orphans, if such birds, fowl, and animals mentioned are required to be placed in cold storage, such birds or animals shall be placed in a bill of cost against the defendant, or person from whom they were taken on his

conviction. And the Game, Fish and Oyster Commissioner or any of his deputies shall have the right to search the game bag or any other receptacle of any kind whenever such Commissioner or his deputy has reason to suspect that such game bag, or other receptacle or any buggy, wagon, automobile or other vehicle may contain game unlawfully killed or taken, and any person who refuses to stop such vehicle, when requested to do so by the Commissioner or his deputy, shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than ten dollars, nor more than one hundred dollars. [Acts 1919, 36th Leg., ch. 157, § 26.]

See ante, art. 896.

**Art. 900 $\frac{1}{2}$ mm. Killing, injuring, or taking or destroying nests or eggs of certain non-game wild birds; penalty.**—If any person shall wilfully kill or injure, or if any person shall take or destroy the nests or eggs of any mocking bird, nighthawk (known as the bull bat), blue bird, red-bird, finch, thrush, linnet, wren, martin, robbin swallow, cat-bird, nonpariel or scissortail, white or brown heron or sparrow hawk, he shall be deemed guilty of a misdemeanor and on conviction he shall be fined not less than ten (10.00) dollars nor more than one hundred (100.00) dollars. [Id., § 27.]

See ante, art. 887.

**Art. 900 $\frac{1}{2}$ n. License to owners of sail or power boats to carry hunting parties.**—It is hereby declared unlawful for any person owning or navigating any sail or power boat to receive on board of such boat for pay or hire any persons engaged in hunting, before such persons navigating or owning such boat shall have applied for and received a license from the Game, Fish and Oyster Commissioner granting him the right to receive and carry parties engaged in hunting for one year. Before such license is issued, the person applying for it shall pay to the Commissioner two (\$2.00) dollars and shall file with such Commissioner the name of his vessel, her motive power, the power of her engine or motors, her accommodations, for passengers, the number of her crew, the price to be charged per diem for the hire of such boat and shall file with the Game, Fish and Oyster Commissioner an affidavit that he will not violate any of the provisions of this Act. And will endeavor to prevent any one whom he carried on his boat from violating any of the provisions of this Act, and that he will not carry on his boat any hunter without his hunting license, and that on his return from carrying out any hunting party he will file with said Commissioner a statement embracing the names of those he carried out, their residences, the number of game killed by each of them on each day, and the disposition of such game. It shall be the duty of the Game, Fish and Oyster Commissioner if he grants the license, to furnish the person licensed with a condensed statement of birds or fowl, or animals which can be killed, together with the statement of the open and closed seasons, which the owner of such license shall post in the cabin of his boat, or in or on some other prominent part of his boat for the whole time of his license. The Game, Fish and Oyster Commissioner is empowered to enforce the provisions of this Section by the cancellation of the license without a refund or return of the license tax paid, and no license shall be renewed or issued him thereafter whenever any boat owner or navigator refuses or fails to comply with the provisions of this Section. Any person who carries out any hunting parties for reward or hire of any kind without procuring his license as provided for in this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined not



less than ten (\$10.00) dollars not more than two hundred (\$200.00) dollars. [Acts 1919, 36th Leg., ch. 157, § 28; Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1 (§ 28).]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900<sup>1</sup>/<sub>2</sub>nn. Wild deer, antelope, Rocky Mountain sheep, and squirrel property of people; open season for deer; penalty.**—All the wild deer, wild antelope, wild Rocky Mountain Sheep and wild squirrel, of this State are hereby declared the property of the people of the State. It shall be unlawful for any person to hunt or kill any wild deer, except in the months of November and December and any person hunting or killing a deer at any other time of the year shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars. [Acts 1919, 36th Leg., ch. 157, § 29.]

See ante, art. 882.

**Art. 900<sup>1</sup>/<sub>2</sub>o. Hours for hunting deer; penalty.**—Any persons who shall hunt or kill any deer between sunset and one-half hour before sunrise, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than ten dollars, nor more than two hundred dollars. [Id., § 30.]

**Art. 900<sup>1</sup>/<sub>2</sub>oo. Hunting with lamps or lanterns; penalty.**—It shall further be unlawful for any person at any time of the year to hunt deer or other game mentioned in this Act by the aid of what is commonly known as Hunting Lamps, or Lanterns or any other light used for the purpose of hunting at night and any person violating any provision of this Article shall be deemed guilty of an misdemeanor and upon conviction shall be fined in a sum not less than fifty (\$50.00) dollars nor more than two hundred (\$200.00) dollars, or by imprisonment of not less than thirty nor more than ninety days or both by fine and imprisonment. [Id., § 31.]

**Explanatory.**—The title and enacting part of Acts 1919, 36th Leg. 2d C. S., ch. 72, purports to amend this section of Acts 1919, 36th Leg., ch. 157, but the intent to amend, if such existed, seems not to have been carried out in the body of the act.

**Art. 900<sup>1</sup>/<sub>2</sub>p. Bag limit of deer; female deer and fawn not to be taken; penalty.**—It shall be unlawful for any person to kill more than three buck deer in any one season, said season being November and December of each year, and any person killing more than that number shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) Dollars. It shall be unlawful for any person at any season of the year to kill, take, trap or ensnare any wild female deer, or spotted fawn within this State, and any person violating the provisions of this Article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) Dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1, adding § 31a to Acts 1919, 36th Leg., ch. 157.]

See ante, art. 882.

**Art. 900<sup>1</sup>/<sub>2</sub>pp. Transportation of deer; penalty.**—It shall be unlawful to ship any deer or any part thereof by common carrier without the person shipping it shall make the affidavit prescribed in Section 21 of this Act [Art. 900<sup>1</sup>/<sub>2</sub>jj], and any person shipping or receiving for shipment as the agent of any transportation company, any deer or any part thereof, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than ten (\$10.00) dollars nor more

than one hundred (\$100.00) dollars, and any transportation company carrying such deer or any part thereof without the affidavit set forth in Section 21, or the owner of any boat or vessel or the corporation owning any such vessel, or boat transporting such deer or any part thereof, shall on conviction be fined not less than one hundred (\$100.00) dollars, nor more than eight hundred (\$800.00) dollars. And to recover this penalty the Game, Fish and Oyster Commissioner is required, through any County or District Attorney or the Attorney General to bring suit against such transportation company, owner of the boat, or the incorporation or firm owning such boat for the recovery of same. And the venue for the trial shall be either in any county of this State in which the transportation company operated or in Travis county, Texas. [Acts 1919, 36th Leg. 2d C. S., ch. 72, § 1, adding § 31b to Acts 1919, 36th Leg., ch. 157.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 900½q. Hunting deer with calls or decoys.**—It shall further be unlawful for any person, at any time of the year, within this State to use a deer call, whistle, decoy, call pipe, reed, or other device, mechanical or natural, for the purpose of calling or attracting the attention of any deer except by rattling of deer horns and any person hunting deer by such means or attempting to use any such means in hunting deer, as herein provided, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars or by imprisonment of not less than twenty nor more than ninety days, or both by said fine and imprisonment and each and every unlawful act shall constitute a separate offense. [Acts 1919, 36th Leg., ch. 157, § 32.]

**Art. 900½qq. Closed season for antelope and Rocky Mountain sheep; penalty.**—Any person who shall kill or take or have in his possession any wild antelope, or Rocky Mountain sheep within five years from the passage of this Act shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than fifty (\$50.00) dollars, nor more than five hundred (\$500.00) dollars. [Id., § 33.]

See ante, art. 882.

**Art. 900½r. Enforcement of laws by deputy Game Commissioners; penalty for violations of laws by.**—All Deputy Game Commissioners are hereby required to enforce the Game, Fish and Oyster Laws of this State, and any such Deputy who violates such laws shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than one hundred (\$100.00) dollars nor more than two hundred (\$200.00) dollars. [Id., § 36.]

**Art. 900½rr. Purchase of game birds or animals for evidentiary purposes.**—Any person who shall buy any game bird or animal, the sale of which is prohibited by this Act for the purpose of establishing testimony, shall not be prosecuted for such purpose. [Id., § 37.]

**Art. 900½s. Possession of prohibited birds or animals prima facie evidence of guilt.**—The possession of any wild game bird or any wild game fowl, or any wild game animal mentioned in this Act, during the time when killing or taking it is prohibited, either dead or alive, shall be prima facie evidence of the guilt of the person in possession, charged with having killed or taken such bird or animal during the time when killing or taking is prohibited by law. [Id., § 38.]

**Art. 900 $\frac{1}{2}$ ss. Taking of wild birds, fowl, or animals for zoological gardens, parks, or propagation; taking eggs of wild birds, etc., for scientific purposes; procedure; penalty.**—Provided, nothing in the law shall prevent the capture of wild birds or wild fowl or wild animals or wild quadrupeds for zoological gardens or parks or for propagation purposes, or taking of eggs of wild birds, and wild fowl for Scientific purposes, or public museums, but before any birds, fowl, animals, quadrupeds or eggs are taken, permission from the Game, Fish and Oyster Commissioner must be secured by the person desiring to secure them, making an application for the same with an affidavit, setting forth what birds, fowl, eggs, animals and quadrupeds and the number that he desires, and the purpose for which he desires them. And if any person desires to bring into this State any wild birds or wild animals, he shall apply to the Game, Fish and Oyster Commissioner for permission to do so attaching to such application an affidavit of the number and kind of birds or animals desired to be introduced and the Game, Fish and Oyster Commissioner can refuse the application in either case if in his judgment such application is not satisfactory. And if any person shall violate any provision of this Act, he shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine of not less than ten (10.00) dollars, nor more than one hundred (100.00) dollars. The Game, Fish and Oyster Commissioner shall at all times have the power to take, keep and transport to and within the State any of the wild birds, wild fowl, eggs thereof, and wild animals for the purpose of propagation, investigation and distribution. [Id., § 39.]

**Art. 900 $\frac{1}{2}$ t. Hunting license for residents hunting outside county of residence; refusal to show license; penalty.**—It shall be unlawful for any citizen of this State to hunt outside of the county of his residence with a gun without first having procured from the Game, Fish and Oyster Commissioner or one of his deputies or from the County Clerk of the County in which he resides a license to hunt, and for which he shall pay to the officer from whom he secures such license the sum of two (\$2.00) dollars; fifteen cents of which amount shall be retained by said officer as his fee for collecting. Any person hunting any game or birds protected by the laws of the State, and who shall refuse to show his license herein provided for to any sheriff, Deputy Sheriff, Constable, Game Commissioner, or Deputy Game Commissioner on demand shall be deemed guilty of a violation of the provisions of this law, and any person violating any of the provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not less than ten (10.00) dollars nor more than one hundred (100.00) dollars. [Id., § 42.]

**Art. 900 $\frac{1}{2}$ tt. Hunting license for nonresidents; penalty.**—It shall be unlawful for any non-resident of this State or alien to hunt in this State without first having secured from the Game, Fish and Oyster Commissioner, or his deputy, or County Clerk a license to hunt for which he shall pay the sum of fifteen (15.00) dollars; three dollars of which amount shall be retained by said officer as his fee for collecting, and if any non-resident of this State or alien shall hunt in this State without securing a license as provided he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not less than ten (10.00) dollars nor more than one hundred (100.00) dollars. [Id., § 43.]

**Art. 900 $\frac{1}{2}$ u. Contents of hunting license; duration of.**—All hunting licenses issued shall have printed on their backs the bag limit set

forth in this Act; they shall have printed across their face the year for which they are issued; they shall bear the name and residence of the person to whom they are issued and shall give the probable weight, height, age color of hair and eyes of such person, and shall have printed on them a statement to be subscribed in ink by the person to whom it is issued, that he will not exceed in any one day the bag limit as set forth in the license. Such license shall be dated on the day of issuance, and shall remain in effect, until the first day of September thereafter and shall entitle the holder thereof to the right to hunt in any county in this State. [Id., § 44.]

**Art. 900 $\frac{1}{2}$ uu. Unlawful storage of game birds and animals; penalty.**—All game birds, ducks, geese, brant and other water fowl and all animals named in this Act, as subjects to its provisions, may be possessed during the open season prescribed therefor, and for an additional ten days after such open season is closed, and it shall be unlawful after such ten days to place in storage or to keep in storage any wild game birds or wild animals or parts thereof, named in this Act, and any person owning or claiming such birds or animals or parts thereof after such ten days, or any person storing such birds or animals for such claimant or owner, shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than ten (10.00) dollars nor more than one hundred (100.00) dollars for each game bird, duck, goose, or brant or for such game animal or part of such game animal as has been so stored. [Id., § 45.]

**Art. 900 $\frac{1}{2}$ v. Jurisdiction of prosecutions.**—In the prosecution for violation of the game laws any justice court or county court of a county in which a violation occurs shall have jurisdiction for trial of such prosecution. [Id., § 46.]

**Art. 900 $\frac{1}{2}$ vv. Repeal.**—That all laws and parts of laws in conflict herewith be and the same are hereby repealed and Section 3, of Chapter 8, of the General Laws of the State of Texas passed by the Third Called Session of the Thirty-fifth Legislature, be, and the same is hereby repealed. [Id., § 47.]

**Art. 901. [525] Oysters culled from public beds, etc.; penalty; cancellation of license.**—It shall be unlawful for any person to fail or refuse to scatter the culls of such oysters as he may take from the oyster reefs as directed by the Game, Fish and Oyster Commissioner, and any person so failing or refusing to scatter such culls, as directed by the Commissioner, shall be deemed guilty of a misdemeanor and on conviction he shall be fined in a sum not less than ten nor more than one hundred dollars. And on such conviction the Game, Fish and Oyster Commissioner may cancel the license of the captain of the boat on which such person is employed or for which he is gathering oysters, and he shall also cancel the license to gather oysters of such person offending, and no new license shall be issued to such captain or to such person convicted for a period of three years. [Acts 1891, p. 155, § 2; Acts 1897, ch. 98, § 1; Acts 1913, ch. 135, sec. 1; amending art. 901, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 38.]

**Art. 902. [526]**

**Explanatory.**—This article does not seem to be superseded by the new game and fish acts set forth herein.

**Art. 903. [526a] Unlawful to receive for shipment, when.**—It shall be unlawful for any transportation company operating within this

State, its officers, agents or employees, to receive for shipment, or to ship, within the boundaries of this State, from the first day of May to the first day of September of any year, any oysters from any public bed or reef, for depositing or for marketing; provided that nothing in this chapter shall be construed as to prohibit any such transportation company, its officers, agents or employees, from shipping, or receiving for shipment, any oysters taken from a private bed located under the laws of this State, offered for shipment by the owner or owners, locator or locators, of such bed; such fact to be established by the written affidavit of the person or persons offering such oysters for shipment, made before an officer authorized to take oaths. Any officer, agent or employee of such transportation company violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction shall be fined for each offense not less than ten nor more than one hundred dollars. [Acts 1907, p. 233; Acts 1913, ch. 135, sec. 1, amending art. 903, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 36.]

**Art. 904. [528]**

**Explanatory.**—This article does not seem to be superseded by the new game and fish acts set forth herein.

**Art. 905. [529] Unlawful to destroy or deface buoy.**—Any person who shall deface, injure, or destroy or remove any buoy, markers or fence or any parts thereof, used to designate or enclose a private oyster bed or a location where oysters have been deposited to be prepared for market, without the consent of the owner thereof, any buoy, marker or sign placed or used by the Game, Fish and Oyster Commissioner for the purpose of designating any waters closed against fishing or oyster taking, without the consent of the Game, Fish and Oyster Commissioner, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty nor more than two hundred dollars. [Acts 1899, ch. 56; Acts 1901, p. 302; Acts 1913, ch. 135, § 1, amending art. 905, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 29.]

**Art. 906. [529b] Unlawful to catch fish, green turtle, etc.; how and when.**—It shall be unlawful for any person to catch or attempt to catch any fish, green turtle, loggerhead, terrapin or shrimp in any of the bays or navigable waters of this State, within the limits or within one mile of the limits of any city or town in this State, with seines, drags, fykes, set nets, trammel nets, traps, dams or weirs. A town or city in the meaning of this Act shall be a collection of one hundred families within an area of one square mile. Any one violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty-five nor more than two hundred dollars. In all prosecutions under the provisions of this Act, the identification of the boat from which such violation or violations occur shall be prima facie evidence against the owner, lessee, person in charge or master of such boat. It shall be the duty of such town to establish and maintain the buoys stakes or other marks designating the limits of the one mile within which such seines shall be hauled and such nets set. [Acts 1897, p. 213; Acts 1913, p. 269, ch. 135, § 1, amending art. 906, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 30.]

**Art. 907. [529c] Catching fish, etc., by use of explosives or poison.**—The catching, taking or killing of fish, green turtle or terrapin in

any of the salt waters or fresh waters, lakes or streams in the State by poison, lime, dynamite, nitroglycerine, giant powder or other explosives, or by the use of any drugs, substances or things deleterious to fish life, is hereby prohibited; and any person offending against this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than two hundred dollars, and by confinement in the county jail not less than thirty nor more than ninety days. [O. C.; amended Acts 1897, p. 125; Acts 1913, ch. 135, § 1, amending art. 907, revised Pen. Code; Acts 1919, 36th Leg., 2d C. S., ch. 73, art. (sec.) 35.]

**Indictment or information.**—Information, charging that defendant did unlawfully catch and take and unlawfully attempt to catch and take fish from a certain stream and pool by the use of dynamite and other explosives put in said water, is sufficient to charge an offense. *Shipp v. State* (Cr. App.) 232 S. W. 840.

**Art. 908. Fishing for oysters, fish, etc., for sale without license; penalty.**—Any person who fishes in the public waters of this State for oysters, fish, shrimp, turtle, terrapin, crabs, clams and other marine life for market or sell such product of such waters, without first procuring a license to do so shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten and not more than fifty dollars. [Acts 1897, p. 125; Acts 1913, ch. 135, § 1, amending art. 908, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 27.]

**Explanatory.**—This is a part of Acts 1919, 36th Leg. 2d C. S., ch. 73, art. 27. For the remainder of said art. 27 see ante, Civ. St., art. 3999a.

**Art. 908a. Refusal to show license; penalty.**—It shall be the duty of any person fishing for market or for the sale of the marine life set forth in Article 27, in the waters of this State to carry with him the license to do so as issued him as provided in said Section 27, and shall show it to the Game, Fish and Oyster Commissioner when requested to do so. Any person having such license and refusing to show it to the Commissioner or his deputy as aforesaid, when requested to do so, shall on conviction, be fined in a sum of not less than five nor more than twenty-five dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 28.]

For art. 27 of this act, see ante, art. 908; and, ante, Civ. St. art. 3999a.

**Art. 909. [529e] [Superseded.]**

**Explanatory.**—This article is superseded by arts. 909a, 923ff-923ffff, post.

**Art. 909a. Sale of certain fish of certain weight prohibited; penalty; venue of prosecution; sale of fish without head attached; penalty.**—It shall be unlawful for any person to sell or offer for sale or to have in his possession for sale, or to have in any mercantile business establishment, or in any market where merchandise is disposed of any red fish or channel bass of greater length than thirty-two inches or less than fourteen inches; any salt water or speckled sea trout of less length than twelve inches; any sheepheads of less than nine inches in length; any flounder of less than twelve inches in length; any pompano of less than nine inches in length; and any Spanish mackerel of less than fourteen inches in length. Any person violating any of the provisions of the above part of this article shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum not less than ten dollars nor more than fifty dollars. The place of sale or offering for sale shall for the purpose of this Act to establish venue be either the place from which such fish are shipped or where the fish are found or offered for sale; and it shall be unlawful in selling or offering for sale

any fish mentioned in this article to sever the head from the body, and all fish marketed or sold, as mentioned in this article, must be weighed and sold with the head attached, and any person selling or offering for sale any fish hereinbefore mentioned shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five dollars and no more than one hundred dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 53; Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1 (Art. 53).]

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

**Art. 910. [529f]**

**Explanatory.**—This article is superseded in part by arts. 914a, 914b.

**Art. 911. [529g] Catching fish or terrapin with drag seine during breeding season.**—It shall be unlawful for any person to catch any fish in the tidal or coastal waters of the State during the months of June, July and August of each year by the use or employment of any drag seine or net, or to drag any seine or net or other device, except a minnow seine for catching bait of not more than twenty feet in length or a shrimp seine as hereinafter provided in Article 50 of this Act, in such coastal and tidal waters; and it shall be unlawful for any person at any time to place or set or drag any net or seine or use any other device or method for taking fish, other than with the ordinary pole and line or cast net, or minnow seine for catching bait of not more than twenty feet in length, within the waters of San Luis Pass, which leads from Matagorda Bay to the Gulf of Mexico; Brown's Cedars Pass, which leads from Matagorda Bay to the Gulf of Mexico; Pass Cavallo, which leads from Matagorda Bay to the Gulf of Mexico, between the town of Matagorda and the mouth of Caney Creek; Cedar Bayou which leads from Mesquite Bay to the Gulf of Mexico; Aransas Pass which leads from Aransas Bay to the Gulf of Mexico; Corpus Christi Pass which leads from Corpus Christi Bay to the Gulf of Mexico; and all other passes connecting the bays and tidal waters of the State with the Gulf of Mexico, or within one mile of such passes, or within the waters of any pass, stream or canal leading from one body of Texas Bay or coastal waters into another body of such water. And the Game, Fish and Oyster Commissioner, whenever he has reason to believe it is best for the protection and conservation and increase of fish life, or to prevent their destruction in the bays or part thereof, or such tidal waters of the State, to close such bays or parts thereof, or such tidal waters against all forms and kinds of seining or netting, or using gigs, spears and lights, he is hereby authorized to close such waters against fishing with any seine, net, spears; gigs, lights or other devices, except with a hook and line or cast net or minnow seine of not more than twenty feet in length. But before such closing of bays or parts thereof, or of other tidal waters against such seining and netting, and the using of gigs, spears and lights, the Game, Fish and Oyster Commissioner shall give notice of his intention to close such bays, or parts thereof or such tidal waters for two weeks prior to such closing by posting notices near such waters and after the date set for such closing and which shall appear in such notices of the proposed closing of such waters, it shall be unlawful to drag a seine, or set a net or use a gig, spear or lights in taking fish in such bays and parts of bays and such tidal waters for that period of time that the said Commissioner shall, in such notices, declare they shall be closed. Any person who shall drag any seine or set any net or use any gig or spear or light to take fish in such closed waters, shall be deemed guilty of a misdemeanor, and

on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars, and shall be confined in the county jail for a term of not less than thirty nor more than ninety days, and any net, seine or boat used or employed in the violation of this Act shall be and is hereby declared a nuisance and the Game, Fish and Oyster Commissioner or his deputy shall abate and destroy the same and no suit shall be maintained in the courts against him for such abatement and destruction. [Acts 1897, ch. 98; Acts 1899, ch. 56; Acts 1909, p. 329; Acts 1913, ch. 135, § 1; Acts 1913, 1st C. S., ch. 23, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 39.]

**Art. 912.** [529h] [Superseded.]

**Explanatory.**—This article is superseded by arts. 912a, 923o, post.

**Art. 912a. Person fishing with drag seine to return fish of certain size to water.**—Any person dragging a seine or engaging in taking fish in a set net shall return to the water all fish under and above size according to the measure or weight herein established, and all other fish except sharks, gars, rays turtle and terrapin, saw fish and cat fish, except the gulf-topsail cat, which may be retained, and any person not returning such fish to the water as required by this article, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty and no more than one hundred dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 62.]

See ante, art. 912.

**Art. 913.** [529i] **Coast survey charts as evidence.**—All United States Coastal Survey Charts covering the coast of Texas shall be admissible as evidence in all prosecutions under this Act. [O. C.; Acts 1913, ch. 135, sec. 1, amending art. 913, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 54.]

**Art. 914.** [529j] **Closed season for oysters.**—It shall be unlawful for any person to take or catch oysters from any public beds, or reefs, for sale or for market, from the first day of April to the first day of September of each year. Any person offending against this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars, and each day shall constitute a separate offense; provided, that part of the Laguna Madre, south and west of Baffin's Bay be excepted and exempted from the operation of this article. [Acts 1907, ch. 126; Acts 1909, p. 331; Acts 1913, ch. 135, § 1, amending art. 914, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 45.]

**Art. 914a. Closed season for Green turtle; taking eggs of such turtle.**—It shall be unlawful for any person to take or kill or have in his possession at any time within five years from the passage of this Act, any sea turtle, known as the Green turtle, and it shall be unlawful to destroy or take the eggs of such turtle and any person who shall take, kill or have in his possession within such five years, or who shall destroy or take the eggs of such turtle shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not less than fifty nor more than one hundred dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 55.]

**Art. 914b. Closed season for salt water terrapin.**—It shall be unlawful for any person to take, kill, or have in his possession any salt water terrapin, except during the months of November, December, January and February, and any person killing taking or having in his



possession any salt water terrapin at any time except during the months of November, December, January and February, shall be guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty nor more than one hundred dollars. [Id., art. (sec.) 56.]

See ante, art. 910.

**Art. 915. [529j½]**

**Explanatory.**—This article does not seem to be superseded by the new game and fish acts set forth herein.

**Art. 916. [529l] [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, art. 27, set forth, ante, as art. 908.

**Art. 917. Engaging in business of wholesale dealer in fish and oysters without license and payment of tax.**—And any person, firm or corporation or association of persons or any officer, agent or employé of any company, corporation or association of persons, who shall engage in the business of a wholesale dealer in fish and oysters or either, without procuring a license to follow said business or without paying the tax and fee required by this article [Art. 3987, Civil Statutes, ante] shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars; and each day such business may be engaged in, in violation of this article, shall constitute a separate offense, and upon conviction for pursuing said occupation without payment of the tax and fee required by law or for any other violation of the game, fish and oyster law, the license of such dealer shall be forfeited. [Acts 1909, p. 327; Acts 1913, ch. 135, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 16; Acts 1920, 36th Leg. 3d C. S., ch. 44, § 1 (art. 16).]

**Explanatory.**—This article is a part of article 16 of Acts 1920, 36th Leg. 3d C. S., ch. 44. For the remainder of said article 16, see ante, Civ. St., art. 3987. The act took effect 90 days after June 18, 1920, date of adjournment.

**Art. 918. [529n] Selling unculled oysters; penalty.**—Any person offering for sale, or who shall sell, any cargo of oysters which shall contain more than five per cent young oysters, shall be deemed guilty of a misdemeanor and upon conviction, shall be fined not less than ten dollars, nor more than two hundred dollars. Any oyster that measures less than three and one half inches from hinge to mouth shall be deemed a young oyster for the purpose of this and the preceding article. The Game, Fish and Oyster Commissioner is authorized to permit the taking of oysters from any reef he may designate, of less size than three and one-half inches, but it shall be unlawful to take oysters from reefs other than those designated by such commissioner, and any one taking such oysters smaller in measurement than three and one-half inches from hinge to mouth from other than such reefs as designated by such commissioner, shall be deemed guilty of a misdemeanor and upon conviction, shall be fined in a sum of not less than twenty-five nor more than two hundred dollars. [Acts 1897, ch. 98; Acts 1909, p. 327; Acts 1913, ch. 135, § 1, amending art. 918, revised Penal Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 44.]

**Art. 919. [529o]**

**Explanatory.**—This article does not seem to be superseded by the new game and fish acts set forth herein.

**Art. 920. [529p] Theft from private oyster bed.**—Any person taking the oysters placed on private reefs or any person taking oysters from beds or deposits made for the purpose of preparing them for market, without the consent of the owner of the private reef or of the owner

of the oysters who has deposited them to prepare them for market, under the provisions of the foregoing article 25, shall be deemed guilty of theft and on conviction shall be punished by confinement in the penitentiary for a term of not less than one and not more than two years. [O. C.; Acts 1913, ch. 135, § 1, amending art. 920, revised Penal Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 26.]

For article 25 of Acts 1919, 36th Leg. 2d C. S., ch. 73, see ante, Civ. St. art. 3999.

**Art. 921. [529t] Selling oysters gathered for planting.**—It shall be unlawful for any person gathering oysters for planting or depositing for preparations for market, on locations obtained from the State or on private property, to sell, market or in any way dispose of oysters so gathered at the time of gathering, for any other purpose than planting, or preparing for market, provided, this shall not be considered as meaning the right to dispose of a location or oyster bed. Any person offending against this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than fifty nor more than two hundred dollars. [Acts 1897, ch. 98; Acts 1907, p. 238; Acts 1913, ch. 135, § 1, amending art. 921, revised Penal Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 46.]

**Art. 922. [529u] Gathering seed oysters without license.**—It shall be unlawful for any person, firm, corporation or joint stock company to gather seed oysters for planting without having first obtained a permit or license to do so from the Game, Fish and Oyster Commissioner, or his deputy, said permit or license to designate the reef or beds from which the applicant is allowed to gather seed oysters, or oyster to be prepared for market as provided in Article 25 of this Act and any person, agent, employee or officer of a firm, corporation or joint stock company gathering or having gathered oysters for planting or oysters to be prepared for market, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than fifty dollars, nor more than two hundred dollars. [Acts 1899, p. 77; Acts 1913, ch. 135, § 1, amending art. 922, revised Pen. Code; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 47.]

For article 25 of Acts 1919, 36th Leg. 2d C. S., ch. 73, see ante, Civ. St., art. 3999.

**Arts. 923, 923a. [Superseded.]**

**Explanatory.**—Superseded by Acts 1919, 36th Leg. 2d C. S., ch. 73, arts. 13, 48, 50, set forth as arts. 923jj, 923jjj, of Penal Code, and art. 4019c, Civil Statutes, ante.

**Art. 923b. Closing overworked reef; notice; penalty.**—Whenever the Game, Fish and Oyster commissioner believes that any public reef is being overworked or damaged in any way, or where such reef has been worked under his supervision, he may close such reef against any one taking oysters from it, but before he closes such reef he shall give two weeks' notice of such closing by posting notices in such fish houses as are in two towns nearest such reefs. In such notices he shall state the date of closing and the time for which such reefs shall be closed, and any person taking oysters from such reefs within the time closed by such Commissioner he shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars. [Acts 1913, ch. 135, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 49.]

**Art. 923c.**

**Explanatory.**—This article does not seem to be superseded by the new game and fish acts set forth herein.

**Art. 923d. [Superseded by art. 923b.]**

**Art. 923e. Complaint before justice of the peace.**—Complaints against any person for the violation of the game, fish and oyster law of this State may be made before any justice of the peace of the county in which the offense is charged to have been committed, and he shall have jurisdiction to try and dispose of the case; provided the penalties prescribed for such offenses are within the jurisdiction of justices of the peace. [Acts 1913, ch. 135, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 51.]

**Art. 923f.** [Superseded.]

**Explanatory.**—This article is superseded by arts. 923ff, 923p, post.

**Art. 923ff. What devices may not be used for fishing.**—It shall be unlawful for any person to take or catch fish in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State, by any other means than by the ordinary hook and line or trot line, or by a set or drag net or seine, the meshes of which are three inches square or trammel net the meshes of any part of which are less than three inches square, or by a minnow seine of more than twenty feet in length, and it shall be unlawful for any person to place in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State any net or other device or trap for taking or catching fish other than a set or drag net or seine the meshes of which are less than four inches square. Any person violating any provision of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined any sum not less than twenty-five nor more than one hundred dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 60.]

See ante, art. 923f.

**Art. 923fff. Use of metallic nets.**—It shall be unlawful for any person to set or drag in any of the public waters of this State, any net or seines made of wire or other metallic substance and any one so setting or dragging any net or seines made of wire or other metallic material, shall be declared guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty and no more than one hundred dollars. And the Game, Fish, and Oyster Commissioner shall destroy such nets and seines as nuisances where found. [Id.]

**Art. 923ffff. Closing certain waters to use of nets; penalty.**—Provided, that the Game, Fish and Oyster Commissioner is authorized to close any of the waters mentioned in this Section against the use of nets or seines or any particular kind of such nets and seines whenever he thinks that such closing is necessary or best to protect and conserve the fish in such waters. But before closing such waters against the use of seines or nets or any particular kind of seine or net, he shall give notice by posting his intentions for two weeks, at not less than three stores or other places in proximity to such waters.

Any person who shall fish with a net or seine in such closed waters or who shall use such particular kind of net or seine, as forbidden in such waters, after the notice given as above required, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five and no more than one hundred dollars. [Id.]

See ante, art. 923ff.

**Art. 923g.**

**Explanatory.**—This article does not seem to be superseded by the new game and fish acts set forth herein.

**Art. 923gg. Having in possession or carrying on, over or into certain waters certain nets; penalty; destruction of boat or vehicle.**—Any per-

son who shall carry on, or over, or into the waters of such passes leading from the inland bays or tidal waters of this State to the Gulf of Mexico, any seine or net except a cast net used for catching bait, or a minnow net not exceeding twenty feet in length, or shall carry by vehicle or in any other way, any seine or net except a cast net used for catching bait or a minnow seine not exceeding twenty feet in length, to any point or place within one mile of such passes, or shall have in his possession within one mile of such passes any net or seine except a cast net for catching bait, or a minnow seine not exceeding twenty feet in length, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined in a sum not less than twenty-five dollars and no more than two hundred dollars, and shall be confined in the county jail for not less than thirty nor more than ninety days. And any boat or vehicle used in carrying any seine or net, except a cast net used for catching bait, or a minnow seine more than twenty feet in length, into or on or over waters of such passes, and any seine or net carried into or found within one mile of such passes, or found in the possession of any one within one mile of such passes, shall be and is hereby declared a nuisance, and it shall be the duty of the Game, Fish and Oyster Commissioner or his deputies, to abate and destroy the same and no suit shall be maintained in the courts against them for such abatement and destruction. Provided nothing in this law shall apply to the carrying of nets and seines over closed waters within one mile of any town. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 40.]

**Art. 923ggg. Same; exceptions.**—Nothing in the foregoing articles [Arts. 911, 923gg] shall apply to vessels engaged in carrying freight or passengers, and engaged as sea-going vessels in coast and foreign trade, and licensed and recognized as such by the Federal Government. And provided further, that the Game, Fish and Oyster Commissioner may grant permits to persons desiring to fish, to carry their boats, nets and seines, and vehicles into, over and on such passes or closed waters or on land to within the mile limits of such passes, and at what time such boats, vehicles, nets and seines shall be taken away from such mile limit and such passes. [Id., art. (sec.) 41.]

**Art. 923gggg. Same; prima facie evidence of guilt.**—In all prosecutions under Articles 39 and 40 of this Act [Arts. 911, 923gg], the identification of the boat or vehicle or the seine or net by which or from which the violation of the law occurred, shall be prima facie evidence against the owner or party last in charge of such boat or against the owner of the vehicle or seines or net. [Id., art. (sec.) 42.]

**Art. 923h.** [Superseded.]

See ante, art. 917.

**Art. 923i.**

**Explanatory.**—This article does not seem to be superseded by the new game and fish act set forth herein.

**Art. 923j. Using unlawful measurements for oysters.**—Any person who shall use any measurement other than that established in Article 10 of this Act for the measurement of oysters in the purchase and sale of oysters, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in a sum of not less than ten and not more than twenty-five dollars, and any person who shall fill the measuring box, as adopted in Article 10 of this Act, in the buying and selling of oysters, higher than two and one-half inches in the center of such measuring box,

shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than ten nor more than twenty-five dollars. Acts 1913, ch. 135, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 12.]

For article 10 of this act see ante, Civ. St., art. 3983.

**Art. 923jj. Refusal to pay special tax on fish, shrimp and oysters.**—Any person who shall not pay, or who shall refuse to pay the tax imposed on the purchase and sale of fish, oysters, turtle, terrapin and shrimp, as imposed in Article 10 of this Act, or who shall not pay or shall refuse to pay the taxes established and fixed by the Game, Fish and Oyster Commissioner in Article 10 of this Act, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty nor more than one hundred dollars, and if such person shall be a licensed fish dealer or fisherman or oysterman his license as a fish dealer or fisherman shall be canceled and not reissued for a period of three years. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 13.]

For article 10 of this act see ante, Civ. St., art. 3983.

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 923jjj. Refusal to pay tax on fish, oysters, shrimp, turtle, terrapin, clams, crabs, etc.**—If any person shall refuse to pay any tax provided in this Act on any fish, oysters, shrimp, turtle, terrapin, clams, crabs or other marine life which he has sold, he shall be deemed guilty of a misdemeanor, and, upon conviction shall be fined in a sum of not less than ten nor more than one hundred dollars. [Id. art. (sec.) 48.]

**Arts. 923k, 923l.**

**Explanatory.**—These articles do not seem to be superseded by the new game and fish acts set forth herein.

**Art. 923m. Seining for drum fish; permit; superintendence.**—Any person leasing an oyster claim or oyster reef in waters where seining is prohibited may apply to the Game, Fish and Oyster Commissioner for permission to seine for drum fish in such waters. In his application he shall make oath that the drum fish are seriously damaging his oysters, and that if he is permitted to seine for such drum fish in such waters, he will not take or destroy any other food fish, but will throw them back into the water. If the Commissioner is satisfied that such damage is being done he may grant such permission to the person applying for it, specifying in such permit the length of time in which it is to be used, and the claim or reef on which it is to be used. And such Commissioner shall assign a deputy fish and oyster commissioner to superintend such seining and no seine shall be dragged except in his presence, and for which a person obtaining the permission to seine, as set forth above, shall pay to the Game, Fish and Oyster Commissioner \$2.50 per day, to be placed in the special fish and oyster fund, for such services. The person granted such permission shall board the deputy fish and oyster commissioner during his superintendence of such seining. If the person obtaining the permission shall violate any of the provisions of this Act, he shall be prosecuted and punished under the criminal laws of this State applicable in such cases. [Act 1913, ch. 146, § 1, amending art. 4018, Rev. St. 1911; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 33.]

**Art. 923n. Taking away, disturbing, or operating, etc., marl, sand, shells, etc., without permit; punishment.**—If any person, association of persons, corporate or otherwise, shall, for himself or itself, or for or on behalf of or under the direction of another person, association of persons, corporate or otherwise, take or carry away, any marl, sand

or shells or mudshell or gravel included in this Act, or shall disturb any of said marl, sand, shells or mudshell or gravel or oyster beds or fishing waters or shall operate in or upon any of said places for any purpose other than that necessary or incident to navigation or dredging under State or Federal authority, without first having obtained a written permit from the Game, Fish and Oyster Commissioner for the territory in which such operation is carried on, such person, association of persons, corporate or otherwise, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of money not less than ten dollars nor more than two hundred dollars; and each days operation shall constitute a separate offense. [Acts 1911, p. 120, ch. 68, sec. 9; Acts 1913, ch. 154, § 1; Acts 1919, 36th Leg. 2d C. S.; ch. 74, § 1 (§ 8).]

For the proviso to this article, as originally enacted, see ante, Civ. St., art. 4021k. For the remainder of Acts 1919, 36th Leg. 2d C. S., ch. 74, see ante, Civ. St., arts. 4021b-4021i.

**Art. 923nn. Catching shrimp; permit; penalty.**—The Game, Fish and Oyster Commissioner is hereby authorized to permit the use of any shrimp seine or other device for catching shrimp in the tidal waters of this State. Any person desiring to use such seine shall apply to the Game, Fish and Oyster Commissioner, or his deputy, for a permit to use such seine, net or other contrivance for catching shrimp and such commissioner or his deputy shall fix and establish the mesh, construction, depth and length of such seine or net or other contrivance so that it shall not be used for other purposes than in taking shrimp, and he shall tag seine officially and issue such permit he shall state in what waters and localities such seines or nets shall be used. And any person using such shrimp seine or other contrivance for catching shrimp in the tidal waters of this State without the permit herein provided for, or who shall use any seine or contrivance or net in any waters or locality, other than that stated in such permit, shall be guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars and such nets and seines or contrivances thus used in violation of this article shall be and is hereby declared a nuisance and the Game, Fish and Oyster Commissioner or his deputy shall abate and destroy the same and no suit shall be maintained in the courts for such abatement and destruction. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 43.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 923o. Mesh of seines for taking fish in salt waters; penalty.**—The mesh of all seines and nets used for taking fish in the salt waters of this State, not including the bag, shall not be less than one and one-half inch square mesh. The mesh of the bags and for fifty feet on each side of the bags, shall not be larger than a one inch square mesh. No seine of over fifteen hundred feet shall be dragged or pulled in the salt waters of this State, and any person dragging such seine or dragging two seines which are connected or tied together to secure a longer haul than fifteen hundred feet, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five, nor more than one hundred dollars. And the Game, Fish and Oyster Commissioner shall destroy such seines of illegal length or tied together or connected for unlawful use, as a nuisance and no suit shall be maintained against him therefor. [Acts 1913, ch. 146, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 31.]

**Art. 92300. Examination, etc., of seines for use in salt waters; tagging same; penalty.**—All seines and nets used in the salt waters of

this State shall be examined by the Game, Fish and Oyster Commissioner or one of his deputies to see that they conform to the requirements of this law as to length and size of mesh, and if they are found to conform to such requirements, the Game, Fish and Oyster Commissioner shall tag such seines or nets with a metal tag on which shall be indented the number of such seine and net; the cost of such tag, twenty-five cents, to be paid by the owner of such seine or net. The Game, Fish and Oyster Commissioner shall then issue, to the owner of it, a permit to use such seine or net for one year from the date of such permit. And such permit shall state the name of the owner of such net, the date on which it was issued, the size of the mesh and the length and kind of such net. The Game, Fish and Oyster Commissioner shall keep a record book in which the date of the issuance of such permit, the name of the owner, the number of the tag, the size of the mesh and the length of such seine or net shall be kept. It shall be the duty of the owner of the seine or net to keep the tag attached to such seine or net on such seine or net, and where a seine or net is used without such tag being attached, it shall be prima facie evidence that such net is an unlawful seine or net and is hereby declared to be a nuisance and the Game, Fish and Oyster Commissioner shall abate and destroy the same and no suit for damages for such destruction shall be brought against him therefor. Any person who shall drag, haul or set any net in the salt waters of this State without first having such net examined by the Commissioner aforesaid, and tagged and a permit as provided for in this Article issued by the Game, Fish and Oyster Commissioner or his deputy, shall be deemed guilty of a misdemeanor, and on conviction he shall be fined in a sum of not less than twenty dollars and not more than one hundred dollars, and the seine or net shall be destroyed as herein provided as a nuisance. [Acts 1919, 36th Leg. 2d C. S., ch. 73, art. (sec.) 32.]

**Art. 923p. Fresh water streams and rivers, what are; unlawful use of nets in.**—All fresh water rivers and streams in this State and all lakes, lagoons and bodies of rivers, except tidal bays or coastal waters, such as bays and gulfs, shall be and are hereby declared to be fresh water streams and rivers to their mouths, for the purpose of this Act, and it shall be unlawful to set nets or drag seines or fish in other ways in such streams, rivers and their connecting lakes, lagoons and bodies of water mentioned, except in conformity with the laws herein enacted to govern, apply and control in fresh water fishing. [Id., art. (sec.) 61.]

**Art. 923pp. Gill or strike nets.**—Whenever a net described or mentioned in this law as a trammel, strike, gill, hoop, pound, purse or other kind of a net, the standard net of such variety or kind or the usual or ordinary kind of such net as manufactured and sold as in or to the trade is meant. No strike or gill net shall be licensed or permitted in the tidal coastal or fresh waters of this State with a lead line of over three-sixteenths of an inch in diameter. And any person using or having in his possession any gill or strike net which has on it a lead line of more than three-sixteenths of an inch in diameter, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than twenty-five and no more than one hundred dollars. [Id., art. (sec.) 63.]

**Art. 923q. Time when nets may not be used; artificial bait.**—It shall be unlawful for any person to catch any fish in the public fresh waters of this State with any seine or net other than a minnow seine, not exceeding twenty feet in length, or to drag any seine, except such

specified minnow seine, or to set any net, in the public fresh waters of this State during the months of March and April, or to fish with any artificial bait or line of any kind in the fresh public waters of this State during the months of March and April. And any person who shall catch any fish with a seine or net in the public fresh waters of this State or who shall drag or set any net for the purpose of catching fish in the fresh public waters of this State, or shall use an artificial bait or line in fishing in such public fresh waters in this State during the months of March and April, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five dollars, and not more than one hundred dollars. Provided, that where a city, town or other municipality owns any reservoir, lake or other pool of water, it shall exercise all control over it in regard to the taking of fish from it and this Article shall not apply to such waters as mentioned. [Id., art. (sec.) 64.]

**Art. 923qq. Unlawful entry into or trespass upon State fish hatchery or game preserve.**—It shall be unlawful to enter or trespass on any State fish hatchery or reservation set apart for the propagation or keeping of birds, fowls and animals of the State, and any person so entering and trespassing on the grounds of such hatcheries or on the grounds set apart by the State for the propagation and keeping of birds and animals, without the permission of the Game, Fish and Oyster Commissioner, or Deputy Game, Fish and Oyster Commissioner in charge of such reservation, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in the sum of not less than ten nor more than twenty-five dollars, and such trespasser as mentioned may be summarily ejected from such hatcheries, or grounds. [Id., art. (sec.) 57.]

**Art. 923r. Taking, killing fish, birds or animals in hatchery or reservation.**—Any person who shall take, injure or kill any fish kept by the State in its hatcheries, or any bird or animal kept by the State on its reservation grounds or elsewhere for propagation or exhibition purposes, shall be guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty nor more than two hundred dollars. [Id.]

**Art. 923rr. Bringing birds or animals into hatchery or reservation which may injure fish, etc., kept therein.**—It shall be unlawful to bring into or keep on any fish hatchery or reservation for the propagation or exhibition of any birds, fowls or animals, any cat, dog, or other animal calculated to kill or injure any fish, bird or animal, and any cat, dog, or other predacious animal found on the grounds of such hatcheries or reservations as mentioned, is hereby declared to have become nuisances by their presence on the grounds of such hatcheries and reservations as mentioned, and the Game, Fish and Oyster Commissioner or his Deputy in charge as aforesaid shall abate and destroy them as nuisances and no suit for damages shall be maintained against such officials therefor. [Id.]

**Art. 923s. Sale, etc., of oysters taken from insanitary or polluted reefs.**—It shall be unlawful for any person, firm or corporation to ship, sell or have in his possession for the purpose of sale any oysters or other fish taken from insanitary or polluted oyster reefs or beds. For the purpose of this Act, any reef or bed of oysters which have been declared by the Food and Drug Commissioner of this State as insanitary or polluted, shall be within the meaning of this Act insanitary and pol-



luted. Any person or firm or corporation, who or which shall sell or have in his possession for the purpose of sale, oysters from such insanitary and polluted reefs shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five and not more than two hundred dollars. [Id. art. (sec.) 58.]

**Art. 923ss. Insanitary oyster containers.**—Any container or receptacle for oysters which has not been thoroughly cleaned before oysters are placed in it, is hereby declared to be insanitary, and any such persons selling oysters from such receptacle or shipping oysters in such receptacle, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five nor more than one hundred dollars. [Id., art. (sec.) 59.]

**Art. 923t. "Floating," "drinking" or bloating oysters.**—It shall be unlawful for any person, firm or corporation to ship into or in this State, sell or have in his possession for the purpose of sale, any oyster or other shell fish in which any formaldehyde or other preservative has been placed, or any oysters or other shell fish which have been subjected to "floating," "drinking," or "bloating" in water containing less salt than in which they are grown, or oysters or other shell fish to which water has been added either directly or indirectly or in the form of melted ice. Provided that unpolluted salt cold or ice water may be used in washing shucked or shelled oysters or other shell fish, if the washing does not continue any longer than the minimum time necessary for chilling and any person who engages in "floating," "drinking" or "bloating" oysters in this State or who ships into or in this State such oysters or who has in his possession, sells or offers to sell any such oyster is guilty of a misdemeanor, and on conviction shall be fined in the sum of not less than twenty and no more than two hundred dollars. [Id.]

**Art. 923tt. Venue of prosecutions for sale of fish of unlawful size.**—In all prosecutions for the sale of fish of unlawful size, the place of such sale is hereby established for the purpose of venue to be either at the place of such shipment or at the place of the receipt of such shipment or in any County through which such shipment may pass at the discretion of the State. [Id., art. (sec.) 66.]

**Art. 923u. License to take mussels, clams or naiad or shells thereof; penalty.**—It shall be unlawful for any person, firm or corporation to take from the public waters of this State for sale, any mussels, clams or naiad or shells thereof without first obtaining a license from the Game, Fish and Oyster Commissioner; said license shall be in such form as may be determined by the said Commissioner but shall state the water in which the licensee may operate. The applicant shall pay to the said Commissioner, as a license fee, the sum of ten dollars and in addition thereto the sum of twenty-five dollars for permission to use a dredge. Said license shall expire one year from the date of issuance. Any person violating any of the provisions of this Article shall, upon conviction, be fined not less than ten dollars nor more than one hundred dollars. [Id., art. (sec.) 75.]

**Art. 923uu. Hunting on area leased to Audubon society.**—After such lease [Arts. 5404i, 5404j, Civil Statutes, ante], has been recorded it shall be unlawful for any person whomsoever except a representative, an agent or an employé of said Association or a peace officer of the State of Texas or of the United States to enter upon such leased area

without the knowledge and consent of said Association for the purpose of catching or killing any bird or birds or for the purpose of taking any bird or bird eggs or for the purpose of destroying any bird nests or bird eggs; it shall be unlawful for any person whomsoever to catch, kill or maim any bird or birds on any such leased area or to catch, kill or maim any bird or birds on or above said area by any means whatsoever even though such person may be above or outside of such leased area; it shall be unlawful for any person whomsoever to discharge any firearms or other explosive on or above any leased area, or to land, tie or anchor any fishing boat within any such leased areas; provided, nothing herein shall be construed to prohibit any representative, agent or employe of said Association from catching, killing or destroying within any such leased area any bird or birds and any animal that may be known to prey upon bird life or bird eggs nor to prohibit such representative, agent or employe from taking bird eggs and catching and carrying away any bird or birds for propagation or conservation or scientific purposes only, nor to prohibit persons from taking refuge on any leased area on account of storms. [Acts 1921, 37th Leg. 1st C. S., ch. 20, § 3.]

Took effect Nov. 15, 1921.

**Art. 923v. Same; penalty.**—Any person who shall violate any of the provisions of this Act [Arts. 540-i, 540-j, Civil Statutes, ante] shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine in a sum not less than twenty-five dollars and not to exceed five hundred dollars or by imprisonment in the county jail for a term not less than ten days nor more than six months or by both such fine and imprisonment. The provisions of this section shall be construed to be cumulative of other statutes upon the same subject and not to repeal any other such statute. [Id., § 4.]

## TITLE 14

### OF OFFENSES AGAINST TRADE, COMMERCE AND THE CURRENT COIN

Chap.

1. Of forgery and other offenses affecting written instruments.
2. Forgery of land titles, etc.
5. Public warehousemen and warehouses.
- 5a. Gas utilities.
7. False weights and measures.
- 7b. Containers, grades and packs.
- 7c. False advertising.

Chap.

8. Of offenses by public weighers.
- 8b. Live stock commission merchants.
- 8d. Loan brokers.
- 8j. Emigrant agents.
- 8k. Interference with common carriers.
- 8l. Sale of gasoline, etc.
9. Miscellaneous offenses.

#### CHAPTER ONE

#### OF FORGERY AND OTHER OFFENSES AFFECTING WRITTEN INSTRUMENTS

Art.

924. "Forgery" defined.
926. Intent to injure, etc., necessary.
933. Filling up over signature.
936. Penalty.
937. Passing forged instruments.

Art.

943. Mutilate, destroy, deface any book, record, etc.
- 946a. Forgery of will.
- 946b. Same; limitation of prosecutions.

#### Article 924. [530] "Forgery" defined.

See *Pope v. State* (Cr. App.) 219 S. W. 1119; *Hale v. State* (Cr. App.) 219 S. W. 1119.

1. **Nature and elements of offense.**—Where defendant forged a note with intent to defraud, the offense was complete, though the note was not delivered to the payee. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

In a prosecution for forgery consisting of writing in a check a larger amount than authorized by its maker, the fact that the defendant used an innocent agent to fill out the fraudulent check which defendant indorsed did not release defendant. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

**3. — Nature and apparent efficacy of instrument.**—It is settled law that a forged instrument must be such as, if true, would create, increase, diminish, discharge, or defeat a pecuniary obligation or would transfer or in some manner affect property. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

Even though county superintendent of public schools could not execute a negotiable order to a bank to pay certain money to T., if such order was payable to "T., or bearer," and T. indorsed the same, he thereby guaranteed genuineness thereof, and would be liable, although unenforceable against bank or maker, so that false indorsement of payee's name would constitute forgery. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

A duplicate deposit slip can become the subject of forgery. *Williams v. State*, 86 Cr. R. 640, 218 S. W. 750.

**4. — Particular instruments.**—A defendant, who, with intent to injure and defraud, signed seller's name to an order without lawful authority was guilty of forgery. *Chadwick v. State* (Cr. App.) 232 S. W. 842.

**8. Swindling distinguished.**—In a prosecution for forgery committed by the insertion in a check of a larger amount than defendant was authorized by maker to insert, the contentions of the defendant, appellant, that such acts would make a case of swindling and not of forgery, cannot be sustained, since if he so exceeded his authority it would constitute forgery and not swindling, and if the case be one of swindling or forgery it must be prosecuted as forgery. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

In a prosecution for forgery by writing into a check a larger amount than authorized by its maker, the action of an employé of another bank in ascertaining from the payee bank, at the defendant's request, whether or not the payee bank would pay any amount filled in, did not change the crime from forgery to swindling; there being nothing to show that the maker of the check authorized the payee of bank to make such statement to the officer of the other bank. *Id.*

**16. Indictment—Description of or setting forth instrument in general.**—That a forged instrument is legally sufficient to create, increase, diminish, discharge, or defeat a pecuniary obligation or to transfer or affect property must appear either from the face of the instrument or by additional averments in the indictment of extrinsic facts necessary to charge forgery. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

An indictment for forgery of a check or passing a forged instrument held not ambiguous for failure to show that the check was such an instrument as would diminish the obligation or transfer the property to the party whose name appeared as signer. *Gumpert v. State* (Cr. App.) 229 S. W. 329.

**18. — Facts extrinsic to instrument.**—In prosecution of tax collector for forgery, indictment for forgery of items on delinquent tax report, after its approval by commissioners' court, and certificate, in view of *Vernon's Sayles' Ann. Civ. St.* 1914, arts. 1402-1498, permitting a credit for delinquent taxes, was insufficient where it did not expressly allege that defendant was a tax collector. *Powell v. State*, 83 Cr. R. 584, 204 S. W. 439.

Where alleged forged instrument did not show on its face how it might work fraud, the indictment should contain averments of extrinsic facts disclosing how the instrument would create a liability and an indictment alleging that defendant sent a telegram reading, "Send jewelry here. 304 Main Ave.," signed by the name of another, without averments of extrinsic facts, was insufficient, since instrument did not disclose how a liability might arise. *Young v. State*, 84 Cr. R. 179, 206 S. W. 197.

An indictment for forgery setting out a written instrument which on its face would have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner affected any property whatever, requires no explanatory averments. *Martin v. State*, 85 Cr. R. 89, 209 S. W. 668.

Forged instrument, reading, "Fort Worth, Texas, May 4, 1918. Received of the Fort Worth National Bank \$100.00 for account of I N Bank, Groveton," with signature, held within this article, defining "forgery," so that indictment for forgery setting out such instrument required no explanatory averments. *Id.*

**19. — Designation or description of parties.**—An indictment which sets out the forged note by its tenor need not allege that the payee, a bank, is a corporation; the bank not being the injured party. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

Failure of indictment for forgery to embrace averments explaining the words, "I N Bank, Groveton," the forged instrument being an acknowledgment of the receipt of \$100 for the account of I N Bank, held not to render the indictment subject to quashal on motion. *Martin v. State*, 85 Cr. R. 89, 209 S. W. 668.

An averment in an indictment for forgery and for passing a forged instrument of the name of the person to be defrauded was unnecessary. *Gumpert v. State* (Cr. App.) 229 S. W. 329.

**21. — Issues, proof and variance.**—Under indictment for forging name of railroad's agent to bill of lading, in violation of art. 1547, punishable by confinement for not less than 5 nor more than 15 years, conviction could not be had on showing violation of this article, denouncing crime of ordinary forgery, penalty for which, under article 936, is imprisonment for not less than 2 or more than 7 years. *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

If, in a prosecution for forgery, there is an effort to show the words of the instrument declared on mean anything other than what they naturally import, the variance is available on objection to the evidence. *Martin v. State*, 85 Cr. R. 89, 209 S. W. 668.

There is a fatal variance between an indictment charging forgery of the name "Bickerell" to a check and proof that the name forged was "Bicknell." *Wallace v. State*, 87 Cr. R. 527, 222 S. W. 1104.

In a prosecution for forging a check given in payment for a hat, there was no variance because the check offered in evidence bore the words "a satisfied customer" following the signature, as they were not a part of the instrument, and it was not necessary to incorporate them. *Criner v. State* (Cr. App.) 229 S. W. 860.

In prosecution for forgery of check, indorsements on check at the time it was offered in evidence did not authorize objection upon the ground of variance; the indorsements not being a part of the document declared upon. *Mettall v. State* (Cr. App.) 232 S. W. 315.

**24. Evidence—Admissibility.**—Passing forged check with knowledge of forgery is circumstance against defendant charged with forgery. *Johnson v. State*, 82 Cr. R. 585, 200 S. W. 522.

In prosecution of superintendent of schools for forging names of payees on checks drawn by him, evidence that money drawn on had been deposited in bank was material and admissible. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

In a prosecution for forgery committed by defendant's writing a larger amount than authorized in a check payable to defendant, signed by prosecuting witness, evidence with reference to a note prosecuting witness had signed with defendant and had to pay showing the defendant's indebtedness to the prosecuting witness held proper as bearing upon the question whether witness gave defendant authority to draw on such witness for the sum placed in the check. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

In a prosecution for forgery consisting of writing a larger amount in a check than the maker signing it had authorized defendant to write, defendant's indorsement of the check was proper evidence. *Id.*

Evidence that a fictitious name was signed to the instrument is a circumstance against its genuineness. *Mettall v. State* (Cr. App.) 232 S. W. 315.

**27. — Weight and sufficiency.**—In prosecution of two defendants for forgery, evidence held to support a conviction of one only. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

Evidence held insufficient to show definitely defendant's connection with forgery alleged. *Sanders v. State*, 83 Cr. R. 110, 201 S. W. 411.

Evidence held insufficient to sustain a conviction of forgery of a duplicate deposit by change of date and amount, defendant denying making the change; expert opinion that alteration was in his handwriting being based on a single figure, and his wife testifying to having made the alteration for an innocent purpose. *Williams v. State*, 86 Cr. R. 640, 218 S. W. 750.

In a prosecution for forging the name of another to a check, evidence held sufficient to support verdict of guilty, the forgery being indisputable, as well as the fact that defendant presented and cashed the check on the date it was written, falsely representing that he was the payee named, and writing as his the payee's name on the back, while his undisputed handwriting was before the jury for comparison. *Bird v. State*, (Cr. App.) 225 S. W. 749.

Evidence held to sustain conviction of forgery of check. *Mettall v. State* (Cr. App.) 232 S. W. 315.

In the absence of direct evidence, circumstantial evidence is available to prove forgery. *Id.*

**28. Instructions and questions for jury.**—In prosecution for forgery, in which defendant was charged with having forged seller's name to order, instruction submitting the question whether defendant was authorized to act for seller held improper, in that the submission therein of whether defendant's representations that seller handled millinery supplies were fraudulent, and as to whether they induced buyer to make order, and to pay half of the freight, confused the issues. *Chadwick v. State* (Cr. App.) 232 S. W. 842.

### Art. 926. [532] Intent to injure, etc., necessary.

**Offense.**—In every contested forgery case a fraudulent intent on part of accused must be shown. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

Where defendant, at the request of another, who represented that he could not write, drew a check and signed the name of a third person, and defendant acted innocently and without any intention to defraud, he is not guilty of a forgery. *Flores v. State*, 86 Cr. R. 267, 216 S. W. 185.

### Art. 933. [539] Filling up over signature.

**Offense.**—In a prosecution for forgery committed by the insertion in a check of a larger amount than defendant was authorized by maker to insert, the contentions of the defendant, appellant, that such acts would make a case of swindling and not of forgery, cannot be sustained, since if he so exceeded his authority it would constitute forgery and not swindling and if the case be one of swindling or forgery it, must be prosecuted as forgery. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

In a prosecution for forgery by writing into a check a larger amount than authorized by its maker, the action of an employé of another bank in ascertaining from the payee bank, at the defendant's request, whether or not the payee bank would pay any amount filled in, did not change the crime from forgery to swindling; there being nothing to show that the maker of the check authorized the payee of bank to make such statement to the officer of the other bank. *Id.*

**Charge.**—In a prosecution for forgery consisting in defendant's writing in a check signed by prosecuting witness and placed in defendant's hands a larger amount than authorized, an instruction that if defendant had the right to fill in the check for any amount, or believed he had that right, or there was a reasonable doubt upon these propositions, the jury should acquit, held sufficient. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

### Art. 936. [541] Penalty.

See *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

**Separate offenses.**—As the Code makes forgery and the passing of a forged instrument distinct crimes with different punishments, a person may be separately tried for forging and for uttering the same instrument; and an acquittal of the former is no bar to a conviction of the latter. *Hooper v. State*, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

### Art. 937. [542] Passing forged instrument.

Cited, *Reyna v. State*, 26 Tex. App. 666, 14 S. W. 455; *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

**Offenses.**—As the Code makes forgery and the passing of a forged instrument distinct crimes with different punishments, a person may be separately tried for forging and for uttering the same instrument; and an acquittal of the former is no bar to a conviction of the latter. *Hooper v. State*, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

One who presents a false check to a paying teller, and disappears when the teller steps into another part of the bank, without accepting the check or paying the money thereon, and calls an officer, is guilty of attempting to pass a forged instrument. *McConnell v. State*, 85 Cr. R. 409, 212 S. W. 498.

The forged instrument includes a forged check made either by the person passing it or by another. *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238.

Guilty knowledge that the instrument was forged is an essential element of the offense of passing a forged instrument under the statute as it was before the enactment of the statute. *Id.*

**Indictment.**—An averment in an indictment for forgery and for passing a forged instrument of the name of the person to be defrauded was unnecessary. *Gumpert v. State* (Cr. App.) 229 S. W. 329; *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

Where a count of an indictment charges an attempt to pass a forged instrument on a certain person, and also charges that he "did pass" it, without stating whom he passed it on, the latter part is fatally defective, and should be regarded as surplusage. *Smith v. State*, 81 Cr. R. 534, 197 S. W. 589.

Both an attempt and a passing may be charged conjunctively in the same count; both being embraced in the same definition and made punishable in the same manner. *Id.*

In an indictment for passing a forged check, which is an ordinary commercial instrument, no purport clause is necessary. *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238.

A check is complete without indorsement, so that an allegation that the indorsement thereon was false is unnecessary in an indictment for passing a forged check. *Id.*

An indictment for forgery of a check or passing a forged instrument held not ambiguous for failure to show that the check was such an instrument as would diminish the obligation or transfer the property to the party whose name appeared as signer, nor as showing the check to have been drawn on two banks. *Gumpert v. State* (Cr. App.) 229 S. W. 329.

Indictment charging that defendant did "unlawfully attempt to pass as true to O. a forged instrument in writing, \* \* \* which said instrument in writing the said G. [defendant] then and there knew to be forged," held sufficient as against contention that it did not allege in the statutory language, that defendant "knowingly" attempted to pass the instrument; the allegation that he knew it to be forged being sufficient. *Jennings v. State* (Cr. App.) 229 S. W. 525.

Indictment charging the defendant with attempting to pass a forged instrument, must allege that defendant knew at the time he passed or attempted to pass the instrument that it was forged. *Id.*

**Issues, proof and variance.**—In a prosecution for passing a forged instrument, the instrument must be introduced in evidence and that fact appear in the record. *Pyor v. State* (Cr. App.) 225 S. W. 374; *McConnell v. State*, 85 Cr. R. 409, 212 S. W. 498.

In a prosecution for passing a forged instrument, there was a fatal variance between an indictment charging the passing of a draft dated January 18 and evidence showing the passing of a check dated January 20. *Pyor v. State* (Cr. App.) 225 S. W. 374.

Proof that the forged instrument which defendant is charged with passing was drawn on the "First National Bank of Corsicana" constituted a fatal variance from the indictment, averring that it was intended for the "First National Bank of Waco," *Burks v. State* (Cr. App.) 225 S. W. 1094.

Evidence showing that the forged instrument defendant is charged with passing was passed to "I. W. Kestner" constituted a clear variance from the indictment, alleging that defendant passed the instrument to "I. W. Kiersky." *Id.*

In prosecution for attempting to pass a forged instrument, the proof must show that defendant knew at the time he passed or attempted to pass the instrument that it was forged. *Jennings v. State* (Cr. App.) 229 S. W. 525.

**Evidence—Admissibility.**—In prosecution for passing forged check, where prosecuting witness whose name appeared therein denied its authenticity, evidence that he occasionally gambled for money was properly rejected, where no effort was made to show that check in question was result of such transaction. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

In prosecution for passing forged check, which defendant claimed he received as consideration for his assignment of lease, testimony that witness told defendant he had no right to sublease land was proper, tending to show that lease alleged to have been transferred was of little value. *Id.*

In prosecution for passing forged check, where it appeared in general way that defendant was insolvent, defendant's evidence that neither prosecuting witness, whose name appeared on check, nor bank which gave defendant credit on account of deposit, had instituted civil suit against him was properly excluded. *Id.*

In prosecution for passing forged check, that defendant was familiar with signature of prosecuting witness whose name was appended to check, and that he claimed to have received it in consideration of his assignment of lease, but was unable at trial to produce assignee, were admissible. So was defendant's possession of forged instrument evidence against him, and testimony by payee-indorser that check was not given to him or indorsed by him was admissible. *Id.*

— **Sufficiency.**—Evidence held to sustain conviction of passing forged check. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

In prosecution for passing forged check, evidence held sufficient to sustain finding of guilty. *Barnes v. State*, 83 Cr. R. 207, 202 S. W. 949.

In prosecution of county judge for passing forged check pursuant to approval by commissioners' court of account with fictitious person, evidence held to sustain conviction. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

### Art. 943. Mutilate, destroy, deface any book, record, etc.

**Offense.**—The written answers of applicants for teachers' certificates to questions asked on examination, which must be forwarded to the state superintendent of education and kept by him until delivered to the state board of examiners for grading, are papers required by law to be kept by a state officer, so that their malicious destruction is a felony. *Smith v. State*, 87 Cr. R. 219, 220 S. W. 552.

After the answers of applicants for teachers' certificates to the examination questions had been delivered to an employé of the state superintendent, they were thereafter in his keeping, so that one who procured them from the express company, by which they were shipped to the state superintendent, and destroyed them, was guilty of destroying documents in the keeping of a public officer. *Id.*

**Indictment.**—In an indictment for violation of this article, the commission of the offense by altering, changing, mutilating, destroying, and injuring the documents may be alleged conjunctively, though they are inconsistent with each other. *Smith v. State*, 87 Cr. R. 219, 220 S. W. 552.

Where the prosecution relied on the destruction of documents in the keeping of a state officer for conviction, it was not necessary to allege the manner of destruction, and allegations of alteration were surplusage, so that the indictment was not invalid for failure to state the manner of alteration. *Id.*

**Art. 946a. Forgery of will.**—It shall be unlawful for any person to execute what purports to be the Last Will and Testament of another, without the consent of such other person, and any person so offending shall be guilty of forgery and shall be punished by confinement in the State Penitentiary for a term of not less than two years, nor more than seven years. [Acts 1919, 36th Leg., ch. 72, § 1.]

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

**Art. 946b. Same; limitation of prosecutions.**—Prosecutions under this Act may be begun at any time after the commission of said offense and within five years after the death of said purported testator but not thereafter. [*Id.*, § 2.]

## CHAPTER TWO

## FORGERY OF LAND TITLES, ETC.

Art.  
947. "Forgery of patents," etc., defined.

Art.  
949. Knowingly uttering forged instruments.

**Article 947. [550] "Forgery of patents," etc., defined.**

Cited, *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

**Indictment.**—An indictment charging the intent of defendant in aiding in the forgery of a deed, to be to injure and defraud, charges this offense. *Roberts v. State*, 85 Cr. R. 196, 211 S. W. 219.

**Art. 949. [552] Knowingly uttering forged instruments.**

Cited, *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

## CHAPTER FIVE

## PUBLIC WAREHOUSEMEN AND WAREHOUSES

Art.  
977k. [Note.]  
977m. False packing or fraudulent certificate of classification.

## VIOLATION OF UNIFORM WAREHOUSE RECEIPTS ACT

977o. Issue of warehouse receipt when goods have not been received.  
977p. Issue of receipt containing false statements.

Art.  
977q. Issue of duplicate receipt without marking same.  
977r. Issue of receipt not stating ownership in certain cases.  
977s. Delivery of goods without obtaining receipt.  
977t. Deposit of goods without title, etc., and obtaining receipt therefor not stating lack of title, etc.

**Article 977k.**

See arts. 977o-977t, post, which would seem to supersede this article.

**Art. 977m. False packing or fraudulent certificate of classification.**

**Validity.**—This article is not so indefinite as to be unconstitutional or violative of art. 6, the quoted words having a clear meaning as required by arts. 9 and 10, in view of Code Cr. Proc. arts. 58 and 59. *Ex parte Montgomery*, 86 Cr. R. 636, 218 S. W. 1042.

**Offense.**—This article prohibits the false packing of bale of cotton with intent to defraud by placing sand, earth, stones, or other foreign substances in the bale of cotton or in some other way doing something to such bale of cotton that the reasonable result would be to defraud the persons dealing therewith. *Ex parte Montgomery*, 86 Cr. R. 636, 218 S. W. 1042.

**Indictment or information.**—In prosecution for falsely packing, an indictment or information should charge the particular matter constituting the act or fraud relied on by the state in a given case, by charging that defendant with intent to defraud did falsely pack a bale of cotton by then and there placing certain sand, earth, stones, or other foreign substance in said bale of cotton so that the reasonable result thereof would be to defraud the persons dealing with said bale. *Ex parte Montgomery*, 86 Cr. R. 636, 218 S. W. 1042.

## VIOLATIONS OF UNIFORM WAREHOUSE RECEIPTS ACT

**Art. 977o. Issue of warehouse receipt when goods have not been received.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under the actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for such offense by imprisonment not exceeding five

years, or by a fine not exceeding five thousand dollars, or by both. [Acts 1919, 36th Leg., ch. 126, § 50.]

**Explanatory.**—This article, and the five articles next following, constitute part IV of the Uniform Warehouse Receipts Act (Acts 1919, 36th Leg., ch. 126, p. 215). For the remainder of this act, see ante, Civ. St. arts. 7827½–7827½zzz.

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

**Art. 977p. Issue of receipt containing false statements.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [Id., § 51.]

**Art. 977q. Issue of duplicate receipt without marking same.**—A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "Duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in Section 14 [Civ. St. Art. 7827½g], shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. [Id., § 52.]

**Art. 977r. Issue of receipt not stating ownership in certain cases.**—Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [Id., § 53.]

**Art. 977s. Delivery of goods without obtaining receipt.**—A warehouseman, or any officer, agent or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in Sections 14 and 36 [Civ. St. Arts. 7827½g, 7827½r], be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [Id., § 54.]

**Art. 977t. Deposit of goods without title, etc., and obtaining receipt therefor not stating lack of title, etc.**—Any person who deposits goods to which he has no title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [Id., § 55.]



## CHAPTER FIVE A

## GAS UTILITIES

**Article 977½. Violation of Gas Utilities Act.**—For the wilful violation of the provisions hereof [Arts. 4042½–4042½q, Civil Statutes, ante] on the part of persons, firms, and corporations owning, operating, or controlling gas pipe lines it is hereby provided that the owners, officers, agents, and employees of such gas pipe lines who may be guilty thereof shall be deemed guilty of a misdemeanor and each violation of such provisions shall be deemed a separate offense and upon conviction thereof the party violating same shall be fined in a sum not less than fifty dollars nor more than one thousand dollars and may be further punished by confinement in the county jail for not less than ten days, nor more than six months. [Acts 1920, 36th Leg. 3d C. S., ch. 14, § 15.]

Took effect 90 days after adjournment which occurred June 18, 1920.

## CHAPTER SEVEN

## FALSE WEIGHTS AND MEASURES

Art.	Art.
990. Penalty for using.	992dd. Violations of act relating to weights and measures.
992a. Paying public weigher to weigh falsely.	992e. Use, etc., of false weights and measures.
992b. Shipping falsely weighed commodities.	992f. Violations of act relating to weights and measures.
992c. Buying or selling commodities with greater or less number of pounds per bushel than fixed by standards.	993. Prevention of flow of water, electric or gas current through meter, etc.
992d. Sale of commodities unmarked as to quantity.	

**Article 990. [572] Penalty for using.**

**Offense.**—The law does not require that, in order to ascertain that a quantity of wood is a cord, it shall be piled 8 feet long, 4 feet high, and 4 feet wide, but any other measurement or pile that contains a full cord would be sufficient. *Sacks v. State*, 83 Cr. R. 560, 204 S. W. 430.

**Evidence.**—In prosecution for using false measure for measuring cordwood, evidence held not to sustain conviction. *Sacks v. State*, 83 Cr. R. 560, 204 S. W. 430.

**Art. 992a. Paying public weigher to weigh falsely.**—Any person, firm or corporation who shall request a public weigher, deputy public weigher or any person employed by him, or pay to him any money, or give him anything to weigh any produce, commodity or article, falsely or incorrectly, or who shall request a false or incorrect certificate of weights or measures, or weight sheet, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Twenty-five (\$25.00) Dollars, nor more than Two Hundred and Fifty (\$250.00) Dollars, and in addition thereto may be imprisoned in the county jail for a term of not less than thirty days, nor more than six months at the option of the jury trying him. [Acts 1919, 36th Leg., ch. 76, § 12.]

For the remainder of this Act, see ante, Civ. St., arts. 7833a–7833o.  
Took effect 90 days after March 19, 1919, date of adjournment.

**Art. 992b. Shipping falsely weighed commodities.**—It shall be unlawful for any person, firm or corporation, association of persons, or partnership, to ship to any one in this State any commodity, produce or thing, on which the weight is necessary to be given, at any other than the true weight of such commodity. Anyone who shall ship any commodity at other than the true weight properly certified to, shall be guilty

ty of a misdemeanor, and may be fined in any sum not less than One Hundred (100) Dollars, nor more than Five Hundred (500) Dollars, and may be imprisoned in the county jail for any term not more than twelve months, or both such fine and imprisonment, at the option of the jury trying him. [Id., § 14.]

**Art. 992c. Buying or selling commodities with greater or less number of pounds per bushel than fixed by standards.**—Whoever in buying any of the articles of property mentioned in Section 5 of this Act, or mentioned in the Governor's proclamation defining what constitutes a unit in conformity with the provisions of Sections 5 and 6 of this Act, shall take any greater number of pounds thereof to the bushel, barrel or cubic yard, or divisible merchantable quantity of bushel, barrel, cubic yard or lineal yard, or in selling any of said articles, shall give any less number of pounds thereof to the bushel, barrel, cubic or lineal yard, or divisible merchantable quantity of a bushel, barrel, cubic or lineal yard than is allowed by this State, with intent to gain an advantage thereby, except where expressly authorized so to do by special contract or agreement to that effect, shall be liable to the party injured in double the amount of the property wrongfully taken, or not given, and in addition thereto, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Twenty Dollars (\$20.00), nor more than Two Hundred Dollars (\$200.00). [Acts 1919, 36th Leg., ch. 130, § 7.]

For sections 1-6 of this act see ante, Civ. St. arts. 7846¼-7846¼f.  
Took effect 90 days after March 19, 1919, date of adjournment.

**Art. 992d. Sale of commodities unmarked as to quantity.**—All articles of food stuff, feed or other commodity which are sold in packages shall in all instances contain the net weight of the produce or commodity other than drugs so sold in such packages or containers, and shall not include the weight of the package or container. No person shall sell or offer for sale food, feed or other commodity in package form unless the quantity of the contents be plainly and conspicuously marked on the outside of the package or container giving the weight, measure or numerical count of the contents thereof. Provided, however, that reasonable variations may be permitted and tolerances and exemptions allowed under such rules and regulations as may be made from time to time by the Commissioners of Markets and Warehouses. Anyone selling any article or commodity in violation of this Section shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$25.00 nor more than Two Hundred Dollars, (\$200.00), and each and every package so sold shall constitute a separate offense. An offense defined in this Section shall apply to all parties selling same within this State, and to parties outside of this State that sell merchandise in violation of this Act within this State. No penalty, fine, imprisonment or confiscation shall be enforced against any person for the violation of the provisions of this section as to stocks of goods now on hand, but shall apply to all new stocks purchased after the taking effect of this Act. [Id., § 8.]

**Art. 992dd. Violations of act relating to weights and measures.**—Any person violating such standards or tolerances shall be guilty of a misdemeanor and punished by a fine, or a fine and imprisonment, as hereinafter provided and set forth. [Acts 1919, 36th Leg., ch. 131, § 5.]

For sections 1-22, 24, 30 of this act, see ante, Civ. St. arts. 7846¼, 7846¼g-7846¼zzz.

**Art. 992e. Use, etc., of false weights and measures.**—Any person, who, by himself, or his employé, or agent, or as the employé or agent

of another, shall use, in the buying or selling of any commodity, or retain in his possession a false weight or measure, or weighing or measuring instrument or shall offer or expose for sale, or sell, except as hereinbefore specifically allowed in this Act, or use or retain in his possession any weight or measure or weighing or measuring instrument which has not been sealed by a sealer within one year, or who shall dispose of any condemned weight or measure, or weighing or measuring instrument contrary to law, or any person, who, by himself, or his employé or agent, or as the employé or agent of another, shall sell or offer or expose for sale, or use or have in his possession for the purpose of selling or using, any device or instrument to be used to, or calculated to falsify, any weight or measure, and any person, who, by himself, or his employé, or agent, or as the employé or agent of another, shall sell or offer or expose for sale, any commodity, produce, article or thing in a less quantity than the true net weight, or true net measure thereof, or in a less quantity than he represents it to be or contain, shall be guilty of a misdemeanor. Possession of such false weights or measures or weighing or measuring instruments shall be prima facie evidence of the fact that they were intended to be used in the violation of law. [Id., § 23.]

**Art. 992f. Violations of act relating to weights and measures.**—Any one violating any of the provisions of this Act, wherein the same has been denominated as a misdemeanor, upon conviction, shall be fined not less than Ten Dollars (\$10.00), nor more than Two Hundred Dollars (\$200.), and every day such misdemeanor is committed, shall constitute a separate offense. [Id., § 29.]

**Issues, proof and variance.**—To obtain a prosecution for selling bread of insufficient weight, in violation of an order and regulation by the superintendent of weights and measures, the state must disclose by averment the making of the order, and establish by proof the allegation thus made. *Carlson v. State* (Cr. App.) 232 S. W. 807.

**Art. 993. Prevention of flow of water, electric or gas current through meter, etc.**

See *Fuson v. Abilene Gas & Electric Co.* (Civ. App.) 219 S. W. 208.

#### WEIGHT OF BREAD LOAVES

See art. 711a, Penal Code, ante, relating to both purity and standard weight prescribed by art. 7846½, Civil Statutes.

## CHAPTER SEVEN B

### CONTAINERS, GRADES AND PACKS

**Article 993½a. Violation of regulations as to grade and pack of fruits and vegetables.**—Any grower, shipper, packer, shipper's agent, common carrier, or transportation company, agent, receiver or representative of such company, who shall violate any of the provisions of this Act [Arts. 7846a-7846g, Civil Statutes, ante] relating to standards of grade and pack, or who shall refuse to conform to the standards of grade and pack as herein above established, or hereafter to be established, under the provisions of this Act, or who shall refuse to submit to the inspector employed by the association or the shipper's agent handling the products for the growers, or a representative of the State Department of Agriculture empowered to make such inspection, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not more than one hundred (\$100.00) dollars. [Acts 1917, 35th Leg., ch. 181, § 8; Acts 1917, 35th Leg. 3d C. S., ch. 6, § 1; Acts 1918, 35th Leg. 4th C. S., ch. 63, § 1.]

Took effect April 2, 1918.

**CHAPTER SEVEN C  
FALSE ADVERTISING**

Art.  
993¾. False statements advertising mat-  
ter.

Art.  
993¾a. Same; evidence.

**Article 993¾. False statements advertising matter.**—Any person, firm, corporation or association, who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates, or places before the public or causes directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this State, in a newspaper, or other publication, or in the form of a book, notice, handbill, window display card or price tag, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, as to its character or cost, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is known by said person, firm, corporation or association, or could have been known by use of reasonable diligence or inquiry to be untrue, deceptive or misleading in any material particular as to such matters or things so advertised, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars (\$10) nor more than two hundred dollars (\$200) for each offense; provided, however, that the provisions of this Act shall not apply to any owner, publisher, agent or employee of a newspaper or other publication, periodical or circular, who in good faith, and without knowledge of the falsity of the character of such advertisement, causes to be published, or takes part in the publication of such advertisement. [Acts 1921, 37th Leg., ch. 38, § 1.]

**Art. 993¾a. Same; evidence.**—In a prosecution under this Act such statement, trade name or trademark, with the name, signature, mark or identification of the person, firm, corporation, partnership, association, shall be considered prima facie evidence of the publication of such statement, trade name or trademark by the person, firm, corporation, partnership, association, referred to therein. [Id., § 2.]

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**CHAPTER EIGHT  
OF OFFENSES BY PUBLIC WEIGHERS**

Art.  
995a. False certificates of weights and  
measures; false weight sheets.

Art.  
995b. Violations of act by public weighers.  
995c. Same.

**Article 995a. False certificates of weights and measures; false weight sheets.**—All certificates of weights and measures or weight sheets as provided for in this Act shall contain the accurate and correct weight of any and all commodities weighed when issued by public weighers. Any public weigher, or deputy public weigher, who shall issue any certificate of weights and measures or weight sheet giving false weights or measures of any article, or commodity weighed or measured by him,

or his representative or deputy, to any person, firm or corporation, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than Twenty-five (\$25) Dollars, nor more than two Hundred and Fifty (\$250) Dollars, and may be imprisoned in the county jail for a term of not less than thirty days nor more than six months, and in addition thereto, he shall be suspended from office, and not permitted to continue the business of public weighing any longer. [Acts 1919, 36th Leg., ch. 76, § 11.]

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

**Art. 995b. Violations of act by public weighers.**—Any person, firm, or corporation, or agent or representative of such corporation, who shall engage in the business of weighing for the public, or shall grant or issue a certificate or weight sheet, upon which a purchase or sale is made, without complying with the terms of this Act, shall be guilty of a misdemeanor, and shall be fined in any sum not less than Twenty-five (\$25.00) Dollars, nor more than Two Hundred (\$200.00) Dollars, and each and every certificate so granted by him, or weight sheet issued by him, shall constitute a separate offense. [Id., § 13.]

**Art. 995c. Same.**—Any sealer, deputy sealer, inspector or local sealer appointed under the provisions of this Act, or discharging any of the duties of a sealer of weights and measures in this State, who shall seal any weight, measure, balance or apparatus before testing and making the same conform with the standards of the State or who shall condemn any weight, measure, balance or apparatus without first testing the same, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than Twenty-five Dollars (\$25.00), nor more than Two Hundred Dollars (\$200), and shall be immediately suspended from office. [Acts 1919, 36th Leg., ch. 131, § 28.]

## CHAPTER EIGHT B

### LIVE STOCK COMMISSION MERCHANTS

Art. 999g-999i. [Repealed.]	Art. 999i(3). Appropriation or use of proceeds of live stock sold.
999i(1). Failure to give or maintain bond.	999i(4). Posting of copy of bond.
999i(2). Failure to remit proceeds of stock sold.	

#### Articles 999g-999i. [Repealed.]

**Explanatory.**—Repealed by Acts 1921, 37th Leg., ch. 91, § 14, set forth, ante, as art 3832i, Civil Statutes.

**Art. 999i(1). Failure to give or maintain bond.**—Any person who shall advertise or solicit business as a live stock commission merchant or who shall in any way pursue the occupation of a live stock commission merchant without first having made the bond required by this Act [Arts. 3832c-3832i, Civil Statutes, ante]; or shall fail to keep and maintain said bond in full force and effect as required by this Act, shall be deemed guilty of a violation of this Act and upon conviction thereof shall be punished by imprisonment in the State penitentiary for not less than one year nor more than two years, or shall be fined in a sum not less than Five Hundred (\$500.00) Dollars nor more than Five Thousand (\$5,000.00) Dollars or by both such fine and imprisonment. [Acts 1921, 37th Leg., ch. 91, § 8.]

**Art. 999i(2). Failure to remit proceeds of stock sold.**—Any person engaged in the business of a live stock commission merchant, as is defined by this Act [Arts. 3832c–3832i, Civil Statutes, ante], who shall intentionally fail and refuse, within forty-eight hours after the sale of any live stock consigned to him to remit the net proceeds thereof to the person rightfully entitled to receive the same, or to such person, firm or corporation as said party or parties rightfully entitled thereto shall direct, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than One Hundred (\$100.00) Dollars, nor more than One Thousand (\$1,000.00) Dollars, or by imprisonment in the county jail for not less than one month, nor more than twelve months, or by both such fine and imprisonment. [Id., § 9.]

**Art. 999i(3). Appropriation or use of proceeds of live stock sold.**—Any person engaged in the business of live stock commission merchant, as defined by this Act [Arts. 3832c–3832i, Civil Statutes, ante] who shall appropriate or use for any purpose other than remitting to such person, firm or corporation entitled to receive the same, any portion of the net proceeds of live stock so sold by such live stock commission merchant, shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the State penitentiary for any term of years not less than two nor more than four. [Id., § 10.]

**Explanatory.**—Sec. 11 of the act relates to false swearing, and is set forth, ante, as art. 317d. The act took effect September 1, 1921. See art. 3832i, Civil Statutes, ante.

**Art. 999i(4). Posting of copy of bond.**—It shall be the duty of every live stock commission merchant at all times to keep conspicuously posted in the main office of his principal place of business a certified copy of the bond herein provided [Arts. 3832c–3832i, Civil Statutes, ante] to be furnished to him by the County Clerk under Section 5 of this Act, and failure on the part of such live stock commission merchant so to do shall constitute a misdemeanor, punishable by a fine not to exceed One Hundred (\$100.00) Dollars. Each day said certified copy of such bond shall not be posted as provided for herein shall constitute a separate offense. [Id., § 12.]

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## CHAPTER EIGHT D

### LOAN BROKERS

#### Article 999j. "Loan broker" defined.

**Validity.**—This act which requires every private citizen engaged in such business, not only to give a bond, but to file a written irrevocable power of attorney naming the county judge of the county as his duly authorized agent, for the purpose of accepting service and consenting that service of any civil process upon such judge shall be valid, is unconstitutional. *Juhan v. State*, 36 Cr. R. 63, 216 S. W. 873.

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## CHAPTER EIGHT J

### EMIGRANT AGENTS

Art.  
999½. Engaging in business of emigrant  
agent in violation of law.

Art.  
999½a. Engaging in business of emigrant  
agent without payment of occupa-  
tion tax.

**Article 999½. Engaging in business of emigrant agent in violation of law.**—Any person engaging in the business governed and regulated

by this Act [Arts. 5246-101 to 5246-105, 5246-107 Civil Statutes, ante], except in accordance with the provisions hereof and except he be licensed, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than three hundred dollars for each such offense, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or by both such fine and imprisonment. Provided nothing in this Act shall be construed to apply to municipal employment bureaus or employment agencies operated purely for charitable purposes. [Acts 1917, 35th Leg. 3d C. S., ch. 36, § 6; Acts 1920, 36th Leg. 4th C. S., ch. 13, § 7.]

**Offense.**—Any person who does acts inhibited by this article, without license as required, may be prosecuted although using a guise or trade-name. *Judge Lynch International Book & Publishing Co. v. State*, 84 Cr. R. 459, 208 S. W. 526.

**Indictment or information.**—Information, alleging that the *Judge Lynch International Book & Publishing Company* then and there as a firm and private employment agency carried on the business of an emigrant agent without first having obtained a license, charges either a firm or corporation and is insufficient, since this article mentions "any person" only as punishable. *Judge Lynch International Book & Publishing Co. v. State*, 84 Cr. R. 459, 208 S. W. 526.

**Art. 999½a. Engaging in business of emigrant agent without payment of occupation tax.**—Any person, firm or private employment agency who shall engage in or pursue the occupation or business of emigrant agent, as that term is defined by the statutes of this State, without first paying the occupation tax provided in the foregoing section [Art. 7356a, Civil Statutes, ante], shall be deemed guilty of misdemeanor, and upon conviction thereof shall be fined in any sum not less than the amount of such taxes due, and not more than double that sum, and in addition thereto may be imprisoned in the county jail for any length of time not more than one year. [Acts 1920, 36th Leg. 4th C. S., ch. 14, § 2.]

Took effect 90 days after Oct. 2, 1920, date of adjournment.

## CHAPTER EIGHT K

### INTERFERENCE WITH COMMON CARRIERS

Art.

999¾. "Common carrier" defined.

999¾a. "Commerce" defined.

999¾b. Policy of state declared.

999¾c. Interference with persons engaged in transporting commerce.

999¾d. Conspiracy to intimidate employes.

999¾e. Acts constituting intimidation, etc.

999¾f. Who are persons engaged in transporting commerce.

999¾g. Not applicable to peace officers.

999¾h. Punishment.

999¾i. Proclamation by Governor on failure of local authorities to act.

Art.

999¾j. Same; exercise of police jurisdiction by Governor.

999¾k. Same; governor's power exclusive.

999¾l. Indictment; venue.

999¾m. Change of venue on application of state.

999¾n. Attorney General to assist in prosecution.

999¾o. Martial law not to be declared; use of State Rangers.

999¾p. Martial law may be declared; act cumulative; repeal.

**Article 999¾.** "Common carrier" defined.—The words "common carrier" for the purposes of this Act are defined and shall be construed to mean any railway corporation, any express company, any interurban railway company, any street car company, any ship, dock, wharf company, any pipe line company, engaged in the transportation of freight, express or passengers. [Acts 1920, 36th Leg. 4th C. S., ch. 5, § 1.]

Took effect 90 days after Oct. 2, 1920, date of adjournment.

**Art. 999¾a. "Commerce" defined.**—The word "commerce" for the purposes of this Act is defined and shall be construed to mean any freight, express or passengers being handled or transported by any common carrier as herein defined. [Id., § 2.]

**Art. 999<sup>3</sup>/<sub>4</sub>b. Policy of state declared.**—The uninterrupted management, control and operation of the common carriers of this State is declared to be of vital importance to the welfare of the people of this State. It is therefore declared to be the policy of this State that the same shall not be impeded or interfered with by any person, association of persons, individually or collectively, or by any corporation, its agents or employes. [Id., § 3.]

**Art. 999<sup>3</sup>/<sub>4</sub>c. Interference with persons engaged in transporting commerce.**—It shall be unlawful for any person or persons by or through the use of any physical violence or by threatening the use of any physical violence, or by intimidation or threatening destruction of his property to interfere with or molest or harass any person or persons engaged in the work of loading or unloading or transporting any commerce within this State. [Id., § 4.]

**Art. 999<sup>3</sup>/<sub>4</sub>d. Conspiracy to intimidate employes.**—It shall be unlawful for any two or more persons to conspire together to prevent or attempt to prevent by the use of physical violence or intimidation or by threats of physical violence or by abusive language spoken or written to any person engaged in loading or unloading or transporting any commerce within this State or performing the duties of such employment. [Id., § 5.]

**Art. 999<sup>3</sup>/<sub>4</sub>e. Acts constituting intimidation, etc.**—Every person who shall through any act or written communication or conversation with any person or persons engaged in loading, unloading or transporting any commerce by any common carrier in Texas or with the father, mother, wife, sister, brother, child or children of such person or persons while so engaged or during the hours of day or night while not engaged in such work and when employed for such work which is reasonably calculated, intended or designed to cause such person or persons so engaged to desist from performing such work through fear of physical violence or destruction of his property shall be deemed to have intimidated, molested or harassed such person or persons engaged in the work of loading or unloading or transporting commerce within this State. [Id., § 6.]

**Art. 999<sup>3</sup>/<sub>4</sub>f. Who are persons engaged in transporting commerce.**—The term “person or persons engaged in the work of loading or unloading or transporting commerce in this State” as used in this Act shall be construed as including any person or persons employed in any way in the docks, wharves, switches, railroad tracks, express companies, compresses, depots, freight depots, pipe lines, or approaches or appurtenances to or incident to or used in connection with the handling of commerce by common carriers within this State. This section by naming certain occupations and work shall not be construed to exclude any other occupation or work not named, but reasonably incident to and necessary for the transportation of commerce in this State by common carriers. [Id., § 7.]

**Art. 999<sup>3</sup>/<sub>4</sub>g. Not applicable to peace officers.**—The provisions of this Act shall not apply to peace officers in the discharge of their lawful duties. [Id., § 8.]

**Art. 999<sup>3</sup>/<sub>4</sub>h. Punishment.**—Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprison-



ment in the county jail for a term of not less than thirty days nor more than one year, or by both such fine and imprisonment; provided, however, should any person violating any of the provisions of this Act use any physical violence upon, or threaten the life of any person engaged in the work of loading or unloading, or transporting any commerce, as defined in this Act, he shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State penitentiary for a term of not less than one year or more than five years. [Id., § 9.]

**Art. 999<sup>3</sup>/<sub>4</sub>i. Proclamation by Governor on failure of local authorities to act.**—If at any time the movement of commerce by common carriers of this State or any of them is interfered with in violation of the provisions of this Act, and the Governor of this State, after investigation, becomes convinced that the local authorities were failing to enforce the law, either because they were unable or unwilling to do so, the Governor shall, in order that the movement of commerce may not be interfered with, forthwith issue his proclamations declaring such conditions to exist and describing the area thus affected. [Id., § 10.]

**Art. 999<sup>3</sup>/<sub>4</sub>j. Same; exercise of police jurisdiction by Governor.**—Upon the issuance of the proclamation provided for in the preceding section, the Governor shall exercise full and complete police jurisdiction of the area described in the proclamation whether the same be all within or partly within, or partly without the limits of any incorporated city or county; the exercise of said police jurisdiction by the Governor, as above set out, shall supersede all police authority by any and all local authority, provided that the Governor shall not disturb the local authorities in the exercise of police jurisdiction, at any place outside the district described in his proclamation. [Id., § 11.]

**Art. 999<sup>3</sup>/<sub>4</sub>k. Same; governor's power exclusive.**—No peace officer of the State of Texas shall be permitted to make arrests after the Governor's proclamation has become effective, in the territory embraced by such proclamation, except officers acting under the authority of the Governor under the provisions of this Act. Persons arrested within the district shall be delivered forthwith to the proper authorities for trial. [Id., § 12.]

**Art. 999<sup>3</sup>/<sub>4</sub>l. Indictment; venue.**—Indictment for violation of the provisions of this Act may be returned by the grand jury of the county in which the violation occurs, or by the grand jury of any county adjoining the county in which the territory embraced in the Governor's proclamation is situated. Any person indicted may be prosecuted and tried in the county in which the indictment is returned, but no indictment shall be returned in any county except where the offense occurred, until after the Governor has issued his proclamation as provided for herein. Provided that nothing in this Act as to change of venue shall in any manner abridge the right of the defendant to apply for and secure a change of venue under the existing laws of this State, the same as if the indictment had been returned to the county where the offense is alleged to have been committed. [Id., § 13.]

**Art. 999<sup>3</sup>/<sub>4</sub>m. Change of venue on application of state.**—When the provisions of this Act have been violated by any person or persons and the grand jury of the county in which the offense was committed have returned an indictment the district judge in whose court the indictment may be returned shall grant a change of venue upon motion

made by the Attorney General representing this State, or at his direction, or by the local prosecuting attorney. The motion for a change of venue shall be sufficient if it sets out that the offense charged is prohibited by the provisions of this Act, and that on account of local conditions, preferences, prejudices or influence, it is the opinion of the Attorney General that a fair and impartial trial can not be had in the county where the indictment is found. Upon the filing and presenting of such motion it will be the duty of the district judge in whose court such case may be pending to immediately issue a proper order changing the venue of such case to such other county as the court may select not subject in the opinion of the Attorney General to like conditions and objections. [Id., § 14.]

**Art. 999<sup>3</sup>/<sub>4n</sub>. Attorney General to assist in prosecution.**—The Attorney General, when directed by the Governor, shall assist the district or county attorney in the prosecution of all offenses committed within the territory embraced by said proclamation for all violations of the provisions of this Act. [Id., § 15.]

**Art. 999<sup>3</sup>/<sub>4o</sub>. Martial law need not be declared; use of State Rangers.**—The provisions of this Act shall be effective without a declaration of martial law. The State Rangers may be used in the enforcement of the provisions of this Act; if a sufficient number of Rangers are not available the Governor is authorized to employ any number of men to be designated as special Rangers and such men shall have all the power and authority of the regular Rangers, and shall be paid the same salary as the Rangers are paid, and such salaries shall be paid out of the appropriation made to the executive office for the payment of rewards and the enforcement of the law. [Id., § 16.]

**Art. 999<sup>3</sup>/<sub>4p</sub>. Martial law may be declared; act cumulative; repeal.**—Nothing in this Act shall be construed as limiting the power and authority of the Governor to declare martial law and to call forth the militia for the purpose of executing the law, when in the judgment of the chief executive it is deemed necessary so to do. This Act shall be construed as cumulative of existing laws of this State, and shall not be held to repeal any of the same except where in direct conflict herewith. [Id., § 17.]

## CHAPTER EIGHT L

### SALE OF GASOLINE, ETC.

Art.	Art.
999%. Sale of gasoline, benzine, naptha, etc., unlawful, when.	999% <sup>f</sup> . Conduct of tests.
999% <sup>a</sup> . Marking packages.	999% <sup>g</sup> . Weights and measurements.
999% <sup>b</sup> . Name of manufacturer to be shown.	999% <sup>h</sup> . Sealing inaccurate measuring devices.
999% <sup>c</sup> . Flashing temperature.	999% <sup>i</sup> . Commencement of prosecutions.
999% <sup>d</sup> . Standards.	999% <sup>j</sup> . Punishment for violations of act.
999% <sup>e</sup> . Minimum requirements.	

**Article 999%<sup>g</sup>. Sale of gasoline, benzine, naptha, etc., unlawful, when.**—It shall hereafter be unlawful for any person, firm, association of person or corporation, to sell gasoline, benzine, naptha, or other similar product of petroleum, capable of being used for illuminating, heating or power purposes, under any other than the true name of said products; and such petroleum products shall be subject to inspection

by the proper authorities as provided in this Act. [Acts 1919, 36th Leg., ch. 125, § 1.]

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

**Civil liability.**—Where one purchased coal oil from a merchant for the purpose of resale, it becomes the merchant's duty, not only to the purchaser, but to the public, to deliver coal oil, and not gasoline. *Cohn v. Saenz* (Civ. App.) 211 S. W. 492.

**Art. 997 $\frac{7}{8}$ a. Marking packages.**—It shall hereafter be unlawful for any person, firm, association of persons, corporation or carrier selling or transporting for hire any gasoline, benzine, naphtha or other highly inflammable substance made from petroleum to fail to plainly mark the packages containing the same in accordance with the regulations of the Interstate Commerce Commission unless such regulations should conflict with the provisions of this Act. [Id., § 2.]

**Art. 997 $\frac{7}{8}$ b. Name of manufacturer to be shown.**—It shall be unlawful for any person, firm, association of persons, corporation or carrier selling or transporting for hire any gasoline, benzine, naphtha or other similar product of petroleum, to fail to truly label in large letters showing the name of the manufacturer and the place of manufacture of the products, any tank car, barrel, cask, tank wagon, receptacle or reservoir in which any petroleum product shall be shipped or stored within this State, or from which sales or delivery of the same are to be made. [Id., § 3.]

**Art. 997 $\frac{7}{8}$ c. Flashing temperature.**—It shall hereafter be unlawful for any person, firm, association of persons or corporation to sell any product of petroleum to be used for illuminating purposes unless such petroleum product is such that it will not flash at a temperature less than 110 degrees Fahrenheit. [Id., § 4.]

**Art. 997 $\frac{7}{8}$ d. Standards.**—It shall hereafter be unlawful for any person, firm, association of persons or corporation, to sell as gasoline any substance, liquid or product or petroleum which falls below the standard and definition of gasoline as provided in this Act. [Id., § 5.]

**Art. 997 $\frac{7}{8}$ e. Minimum requirements.**—For the purpose of this Act the word GASOLINE whether used alone or in connection with other words shall apply only to the petroleum products complying with the following minimum requirements:

- (a) Boiling point must not be higher than 60° C, (140° F).
- (b) Twenty per cent of the sample must distill below 105° C, (221° F).
- (c) Forty-five per cent must distill below 135° C, (275° F).
- (d) Ninety per cent must distill below 180° C, (356° F).
- (e) The end or dry point of distillation must not be higher than 220° C, (428° F).
- (f) Not less than ninety-five per cent of the liquid will be recovered from the distillation.
- (g) Gasoline to be high grade, refined and free from water and all impurities, and shall have a vapor tension not greater than 10 pounds per square inch at 100 degrees Fahrenheit temperature. [Id., § 6.]

**Art. 997 $\frac{7}{8}$ f. Conduct of tests.**—The apparatus and methods of conducting all tests and arriving at proper standards of gasoline and other products under this Act shall be those now or hereafter authorized and used by the U. S. Bureau of Mines. [Id., § 7.]

**Art. 997 $\frac{7}{8}$ g. Weights and measurements.**—It shall hereafter be unlawful for any person, firm, association of persons, corporation or car-

rier, to use any scales, measure or measuring device in the handling or sale of petroleum products unless the same is true and accurate according to the standard of weights and measures under the laws of the State of Texas, and it shall be unlawful for any such person, firm, association of persons, corporation or carrier, to use any pumping device unless the same is correct according to such standard at three (3) speeds, fast, slow and medium. [Id., § 8.]

**Art. 9997/8h. Sealing inaccurate measuring devices.**—It shall be the duty of the inspector to seal and forbid the use of any inaccurate measuring device until such time as the defeat is corrected. The breaking of said official seal shall be prima facie evidence of a violation of this Act and it shall be unlawful for any person, firm, association of persons, corporation or carrier, to refuse to permit the inspector provided for in this Act, to inspect and seal, if deemed necessary, any such measuring device, or to break the seal after being placed by such inspector. [Id., § 9.]

**Art. 9997/8i. Commencement of prosecutions.**—The Food and Drug Commissioner, or his inspectors, or any person duly appointed by him for that purpose, shall make complaint and cause proceedings to be commenced against any person for the violation of any provision of this Act, and in such case he shall not be obliged to furnish security for costs. The Food and Drug Commissioner, or his inspectors, or any person by him duly appointed for that purpose shall have in the performance of their duties the power to inspect any factory, store, sales-room, car, warehouse, premises or place where he has reason to believe petroleum products are made, prepared, stored, sold, transported, or offered for sale or exchange, and take samples, and test measuring devices. [Id., § 10.]

Sec. 11 of the act is set forth, ante, as art. 343d.

**Explanatory.**—By Laws 1921, 37th Leg., ch. 10, § 1 (Civ. St., ante, art. 4575a), the office of Dairy and Food Commissioner and the Dairy and Food Department are abolished, and the duties of the office and department transferred to the State Health Officer.

**Art. 9997/8j. Punishment for violations of act.**—Any person who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than Twenty-five (\$25.00) dollars nor more than Two Hundred (\$200.00) dollars, or be imprisoned in the County jail for not less than one month nor more than one year or punished both by such fine and imprisonment. [Id., § 12.]

CHAPTER NINE

MISCELLANEOUS OFFENSES

<p>Art. 1007a. Violations of act relating to agricultural seeds.</p> <p>1007b. Violations of act relating to corpo-</p>	<p>Art. rations dealing in bills of lading, etc.</p> <p>1007c. Conducting business under assumed name without filing certificate.</p>
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**Article 1007a. Violations of act relating to agricultural seeds.**—Whoever offers or exposes for sale within this State any agricultural seed, defined in Section one of this Act [Civ. Stat. art. 143¼], without complying with the requirements of Sections two and three of this Act [Civ. Stat. arts. 143¼a, 143¼b], or whoever falsely marks or labels any agricultural seeds under Section two of this Act, or “mixture” under Section three of this Act, or whoever shall prevent the Commissioner

of Agriculture, or his duly authorized agents from inspecting said seeds and collecting samples as provided in Section seven of this Act [Civ. Stat. art. 14<sup>3</sup>/<sub>4</sub>f], shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Hundred Dollars; provided, however, that no prosecution for violation of this Act shall be instituted except in the manner following:

When the Commissioner of Agriculture believes, or has reason to believe, that any person has violated any of the provisions of Section two, three and eight of this Act, he shall cause notice of such fact together with full specification of this Act or omission constituting the violation, to be given to said person, who either in person or by agent or attorney, shall have the right under such reasonable rules and regulations as may be prescribed by said Commissioner of Agriculture to appear before said Commissioner of Agriculture and introduce evidence, and said hearing shall be private. If, after said hearing or without such hearing, in case said person fails or refuses to appear, said Commissioner shall decide and decree that any, or all of said specifications have been proven to his satisfaction, he may in his discretion so certify to the proper prosecuting law officer for violation of this Act, transmitting with said certificate a copy of the specifications and such other evidence as he shall deem necessary and proper, whereupon said prosecuting attorney shall prosecute said person according to law. [Acts 1919, 36th Leg. 2d C. S., ch. 62, § 8.]

For the remainder of this act see ante, Civ. St. arts. 14<sup>3</sup>/<sub>4</sub>-14<sup>3</sup>/<sub>4</sub>j.  
Took effect Oct. 27, 1919.

**Art. 1007b. Violations of act relating to corporations dealing in bills of lading, etc.**—Every officer, director, employé and agent of any corporation chartered under this Act [Art. 1121—80, Civil Statutes, ante] who shall knowingly violate any provision of this Act, or shall knowingly cause such corporation to violate same, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$200.00 nor more than \$1,000.00, or by confinement in the County jail not less than three months nor more than one year or by both such fine and imprisonment. [Acts 1919, 36th Leg. 2d C. S., ch. 4, § 2.]

Took effect July 9, 1919.

**Art. 1007c. Conducting business under assumed name without filing certificate.**—Any person or persons owning, carrying on or conducting or transacting business aforesaid, who shall fail to comply with the provisions of this Act [Arts. 5950<sup>1</sup>/<sub>2</sub>-5950<sup>1</sup>/<sub>2</sub>d, Civil Statutes, ante] shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and each day any person or persons shall violate any provisions of this Act shall be deemed a separate offense. [Acts 1921, 37th Leg., ch. 73, § 6.]

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

## TITLE 15

## OF OFFENSES AGAINST THE PERSON

Chap. 1. Assault and assault and battery. 2. Aggravated assault and battery. 2a. Assault with prohibited weapon. 3. Of assault with intent to commit some other offense. 4. Of maiming, disfiguring and castration. 5. False Imprisonment. 6. Offenses against minors. 7. Of kidnaping and abduction. 8. Rape. 9. Of abortion. 11. Of homicide. 12. Of justifiable homicide. 3. By officers in the performance of a duty, and by other persons under certain circumstances.	Chap. 12. Of justifiable homicide—Continued. 4. Defense of person or property. 13. Of excusable homicide. 14. Homicide by negligence. 1. In the performance of a lawful act. 2. In the performance of an unlawful act. 15. Of manslaughter. 16. Of murder. 18. General provisions relating to homicide.
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## CHAPTER ONE

## ASSAULT AND ASSAULT AND BATTERY

Art. 1008. "Assault and battery" defined. 1009. Intent presumed, and "injury" defined. 1012. Any means capable of injury sufficient.	Art. 1013. "Coupled with an ability to commit" defined. 1014. When violence does not amount to. 1015. Degree of force permissible. 1016. Verbal provocation no justification. 1020. Abusive language an offense.
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**Article 1008. [587] "Assault and battery" defined.**

Cited, *Gordon v. State*, 23 Tex. App. 219, 4 S. W. 833.

**Offense.**—Custom for superintendent of schools of city to chastise pupils existed in violation of principles of civil law and of provision of Criminal Code denouncing use of unlawful violence upon another's person, and custom was not defense to superintendent when sued for assault by pupil whom he chastised. *Prendergast v. Masterson* (Civ. App.) 196 S. W. 246.

Where collision between defendant's automobile and that in which injured party was riding was an accident brought about by defendant's negligence and without intent to commit an assault, there could be no conviction under statute defining assault and battery. *Coffey v. State*, 82 Cr. R. 481, 200 S. W. 384.

In prosecution of passenger for murder of street car conductor, where there was evidence that the conductor, while the car was in motion pushed passenger off from platform, causing him to fall on his back, instruction that, if the conductor ejected passenger, causing him bodily pain, "such as was reasonably calculated to produce passion," the passenger could not be convicted of a higher degree of homicide than manslaughter, held erroneous, since such ejection from car constituted an assault and battery, and was sufficient to reduce the crime to manslaughter without specific proof of pain and without proof that it was calculated to produce passion. *Mickle v. State* (Cr. App.) 227 S. W. 491.

One who presents at another a shotgun, whether loaded or unloaded, with the intent to alarm and under circumstances calculated to effect that object is guilty not of an aggravated assault, but of simple assault. *Hall v. State* (Cr. App.) 230 S. W. 690.

**Indictment—Inclusion in other offense.**—In a prosecution for shooting at another with a shotgun, simple assault was not involved, and failure to submit it as an issue was not error. *Gillum v. State*, 83 Cr. R. 396, 204 S. W. 225.

Both by statute and under decisions conviction may be had for simple assault under a charge of aggravated assault. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

**Evidence.**—In a prosecution for assault, evidence that defendants ordered prosecuting witness to desist in working upon a public road, one having in his possession a large rock and the other a stick, and threatening him with injury if he failed, held to show an offense. *Haverbekken v. State*, 86 Cr. R. 260, 291, 216 S. W. 397, 398.

As bearing on malice, it may be shown that as a result of the trouble, the day before the assault, between the person assaulted and defendant, charged with the assault, defendant had been discharged from his employment. *Mayes v. State* (Cr. App.) 222 S. W. 571.

**Art. 1009. [588] Intent presumed, and "injury" defined.**

See *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96; *Mickle v. State* (Cr. App.) 227 S. W. 491.

Cited, *Coffey v. State*, 82 Cr. R. 481, 200 S. W. 384.

**Offense.**—A man's taking hold of a woman without her consent, and in such a way as to cause in her a sense of shame, or a disagreeable emotion of the mind, is sufficient to constitute an assault, and the slightest degree of force would constitute a battery. *Poldrack v. State*, 86 Cr. R. 272, 216 S. W. 170.

**Evidence.**—Evidence that defendant grabbed the alleged injured female with one hand, and put his other hand on her body at or near her privates, accompanying such acts with an insulting proposal to her, if believed by the jury, would justify a verdict of guilty of assault and battery. *Poldrack v. State*, 86 Cr. R. 272, 216 S. W. 170.

**Art. 1012. [591] Any means capable of injury sufficient.**

See *Mickle v. State* (Cr. App.) 227 S. W. 491.

**Art. 1013. [592] "Coupled with ability to commit" defined.**

See *Hunt v. State* (App.) 13 S. W. 858.

Cited, *Flournoy v. State*, 25 Tex. App. 244, 7 S. W. 865.

**Requisites of offense.**—Defendant and his brother, being armed with rifles, intercepted an editor on the public road, and demanded a written retraction of an article reflecting on defendant's brother. The editor hesitated, whereupon defendant threw a shell into his rifle, and the retraction was signed. Held, that the offense of assault was complete. *Ray v. State* (Cr. App.) 21 S. W. 540.

If defendant shot merely to frighten deceased, not to injure him, he committed a simple assault only, under this article. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

**Charge.**—On trial for aggravated assault, instruction, in the language of subd. 3, as to use of weapon in angry manner, held not fundamental error, as authorizing conviction for offense not charged. *Clayton v. State*, 81 Cr. R. 385, 197 S. W. 591.

**Art. 1014. [593] When violence does not amount to.**

See *Mickle v. State* (Cr. App.) 227 S. W. 491.

**SUBD. 1**

**2. Parent and child.**—It is statutory that a father has the right of moderate correction of his child. *Walden v. State* (Cr. App.) 232 S. W. 523.

**4. Teacher and pupil.**—Teacher may lawfully inflict on pupil who has violated rules of school corporal punishment by chastising him in moderate and humane manner, but the superintendent of schools of city of Marshall, incorporated by Sp. Acts 31st Leg. c. 6, was not a "teacher" and if he was as such a public officer, he did not therefore have a right to chastise a pupil in the high school; such right not being conferred by law on any public officer as such. *Prendergast v. Masterson* (Civ. App.) 196 S. W. 246.

Where superintendent of schools of city was not authorized by rules of school board as superintendent to take control of high school to exclusion of teachers therein, because he did so he had no right as teacher to inflict corporal punishment on pupil. *Id.*

Though a moderate correction of a pupil by his teacher does not amount to an assault and battery, under Pen. Code 1879, art. 490, § 1, yet, if the teacher exceeds his authority, he may be convicted of an assault. *Spear v. State* (Cr. App.) 25 S. W. 125.

*Vernon's Ann. Pen. Code 1916*, art. 1014, requires that punishment of a pupil by a teacher be moderate, but what is moderate punishment in a given case is to a large extent a question of fact or a mixed question involving fact. *Harris v. State*, 83 Cr. R. 468, 203 S. W. 1089; *Gibson v. Same*, 83 Cr. R. 215, 203 S. W. 1091.

For the purpose of chastising a pupil, a school-teacher may take him beyond the schoolhouse or grounds. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

Under the statute authorizing a school-teacher to punish his pupils moderately, if the punishment passes beyond that point, and is immoderate, or for the purpose of revenge, or maliciously done, the right does not exist, and the right of self-defense in the pupil obtains. *Id.*

**SUBD. 2**

**6½. Preventing offense.**—If defendant shot plaintiff for the purpose of preventing theft, burglary, etc., on his premises at night, and it reasonably appeared by plaintiff's acts or words coupled with acts that it was plaintiff's purpose to commit one of such offenses, the shooting was justifiable. *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

**SUBD. 4**

**7. Defense of property.**—Where title to house was in dispute and defendant was in possession, his use of force to prevent entry by one which another claimant was attempting to put in possession, held not an assault. *McGlothlin v. State*, 82 Cr. R. 374, 198 S. W. 784, L. R. A. 1918C, 530.

**SUBD. 5**

**8. Arrest.**—An officer making a lawful arrest may use reasonable means necessary, taking care that the force used is commensurate with the necessity. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

In a prosecution of a town marshal for aggravated assault and infliction of serious bodily injury, evidence held to sustain a finding that the injured party was not making a forcible resistance to arrest. *Id.*

## SUBD. 6

9. **Self-defense.**—Where prosecuting witness struck defendant on head with fist, but when defendant drew his pistol retreated, and was fired at by defendant after he had got some distance up the street, and after he had gotten into an automobile and started away, defendant was guilty of assault. *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 897.

The criminal law rule that a defensive assault is justifiable when it reasonably appears to the aggressor that he is about to be assaulted whether his antagonist contemplated an assault or not does not apply in civil actions for assault, and the aggressor must prove that plaintiff was culpably responsible for the deceptive appearances to escape liability. *Chapman v. Hargrove* (Civ. App.) 204 S. W. 379.

If complainant reached for a singletree with a view of hitting appellant, who then grabbed it, the jury, if they so believed, should have acquitted appellant of assault, and such questions were for the jury. *Mathis v. State*, 84 Cr. R. 347, 206 S. W. 528.

If defendant's wife made an assault upon him or was trying to assault him at the time, he had the right to use necessary force to escape, and would not be guilty of assault. *Hays v. State*, 84 Cr. R. 349, 206 S. W. 941.

Where complaining witness made an unlawful assault upon defendant which produced a reasonable apprehension of death or serious bodily injury at hands of complaining witness in defendant's mind, an attack by defendant upon complaining witness to protect himself from the danger or apparent danger was in justifiable self-defense. *Ware v. State*, 86 Cr. R. 505, 217 S. W. 946.

10. — **Charge.**—Although the rule is that it is unnecessary to charge on threats not made antecedent to difficulty but as a part of it, yet, where victim between first encounter and the one in question made a threat which was heard by defendant, the jury should in connection with charge on self-defense be informed as to the law of threats. *Turner v. State*, 84 Cr. R. 267, 206 S. W. 689.

In a prosecution for assault to murder, the issues being presented in the form of assault to murder, aggravated assault, simple assault, and self-defense, the court erred in limiting defendant's right of self-defense to the question of danger of death or serious bodily harm as applied to the question of simple assault, and should have presented self-defense so as to meet the case as made by the facts; the right not depending under all circumstances, on whether defendant's life was in danger or his body threatened with serious danger. *Jupe v. State*, 86 Cr. R. 573, 217 S. W. 1041.

**Art. 1015. [594] Degree of force permissible.**

See *Mickle v. State* (Cr. App.) 227 S. W. 491.

**Art. 1016. [595] Verbal provocation no justification.**

See *Mickle v. State* (Cr. App.) 227 S. W. 491.

**Verbal provocation.**—Though complainant's language was of provoking nature, mere words did not justify an assault, though they may be given as a matter of extenuation. *Mathis v. State*, 84 Cr. R. 347, 206 S. W. 528.

**Art. 1020. [599] Abusive language an offense.**

**Offense.**—A recognizance which states that defendant is charged with the offense of using abusive language in a manner calculated to provoke a breach of the peace is not sufficient, since the language, to constitute an offense, must be used to or in the presence of the person likely to be provoked to a breach of the peace. *Harris v. State* (Cr. App.) 20 S. W. 708.

## CHAPTER TWO

## AGGRAVATED ASSAULT AND BATTERY

Art.	Art.
1022. Definition.	1024. Punishment.
1022a. Willful driving of motor vehicle against another.	

**Article 1022. [601] Definition.**

## IN GENERAL

1. **Offense.**—Where collision between defendant's automobile and that in which injured party was riding was an accident brought about by defendant's negligence and without intent to commit an assault, there could be no conviction under statute defining aggravated assault. *Coffey v. State*, 82 Cr. R. 481, 200 S. W. 384.

Where accused, in vigorous assaults on him by deceased and companions, had one hand cut and the other broken, if accused fought not for the purpose of killing, but for the purpose of resisting the assaults, he would not be guilty of punishable homicide in killing deceased, but at most of aggravated assault. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.



5. — **Inclusion in other offenses.**—Accused may be convicted of aggravated assault, although evidence would sustain conviction for assault with intent to murder. *Munoz v. State*, 81 Cr. R. 629, 197 S. W. 871.

Under Code Cr. Proc. arts. 771, 772, defendant under 21 years of age, indicted for assault with intent to rape, could be convicted of an aggravated assault on the female; the proof showing indecent familiarity with the person of the female against her will and without her consent. *Hand v. State* (Cr. App.) 227 S. W. 194.

5½. **Self-defense.**—In a prosecution for aggravated assault, where defendant claimed to have fired the shot in defense of his brother, the circumstances surrounding the beginning of the affray between the brother and the prosecuting witness, which were unknown to defendant, did not affect his right to defend his brother. *Carson v. State* (Cr. App.) 230 S. W. 997.

In a prosecution for aggravated assault, the issue of mutual combat as a limitation upon the right of self-defense does not arise alone from the fact that the parties to the affray were mutually engaged in it, but arises out of an antecedent agreement to fight, and the agreement must be proved by direct testimony or inferred from circumstances. *Id.*

6. **Evidence.**—In a prosecution for aggravated assault, evidence held sufficient to support a conviction. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

In prosecution for aggravated assault, testimony as to all that occurred held admissible. *Bennett v. State*, 83 Cr. R. 268, 202 S. W. 730.

In prosecution for aggravated assault, where assaulted party was stabbed by defendant and another, testimony as to wounds doctor found was admissible, though wound under arm seemed to have been inflicted by person other than defendant. *Id.*

Evidence held sufficient to sustain a conviction of aggravated assault by a school teacher by reason of the manner of punishing a pupil. *Harris v. State*, 83 Cr. R. 468, 203 S. W. 1089; *Gibson v. Same*, 83 Cr. R. 215, 203 S. W. 1091.

In prosecution for aggravated assault, evidence that prosecutrix's general reputation in community for chastity and virtue was bad held admissible. *Kerr v. State*, 83 Cr. R. 474, 204 S. W. 107.

In prosecution for assault to murder, defended on ground of self-defense, conviction for aggravated assault held contrary to the evidence. *Ware v. State*, 86 Cr. R. 505, 217 S. W. 946.

Evidence held to sustain verdict of aggravated assault. *Lang v. State*, 86 Cr. R. 644, 218 S. W. 764.

In a prosecution for an aggravated assault, the exclusion of evidence that the person assaulted was a common thief was not error, in view of the court's qualification, stating that all that was attempted to be shown by defendant's witness was that while such person worked for witness some lumber was stolen. *Hahn v. State*, 87 Cr. R. 22, 218 S. W. 1058.

Evidence held sufficient to identify defendant as the person committing an aggravated assault. *Mayes v. State*, 87 Cr. R. 512, 222 S. W. 571.

7. **Charge.**—In prosecution for assault to murder, evidence held to require a charge on aggravated assault, although defendant relied on self-defense. *Bolin v. State*, 83 Cr. R. 590, 204 S. W. 335.

In a prosecution for assault with intent to rob, where the indictment included a charge on aggravated assault, the issue of aggravated assault should be submitted to the jury. *Smiley v. State*, 87 Cr. R. 528, 222 S. W. 1108.

In prosecution of an infant for assault with intent to rape, a charge that he could be convicted of no higher grade of offense than simple assault was properly refused. *Hand v. State* (Cr. App.) 227 S. W. 194.

In a prosecution for aggravated assault, evidence defendant armed himself when his brother called for help on being attacked by prosecuting witness, and that the attack was resumed when defendant appeared with his gun and dared prosecutor to hit his brother, does not raise the issue of mutual combat as limiting the right of self-defense, so that it was error to give an instruction on that issue. *Carson v. State* (Cr. App.) 230 S. W. 997.

9. **Conviction of simple assault or assault and battery.**—Both by statute and under decisions conviction may be had for simple assault under a charge of aggravated assault. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

#### SUBD. 1

9¼. **Assault on officer.**—To constitute an aggravated assault on an officer, it must appear that the person assaulted was an officer in the discharge of his duties, and that the assault was made as an interruption of his official duties. *Curlin v. State*, 84 Cr. R. 602, 209 S. W. 666.

One who shot and wounded an officer, believing that he was attempting to rob him, is not guilty of assault with intent to murder, or even of an aggravated assault. *Walker v. State* (Cr. App.) 232 S. W. 509.

9½. **Evidence.**—Evidence that defendant accosted a justice, while latter was going from the post office to his office with some papers, before going out to show a man some land, and struck him down on receiving an affirmative answer to question whether the justice was going to issue certain papers in his official capacity, held insufficient to show an aggravated assault on an officer in the discharge of his duties. *Curlin v. State*, 84 Cr. R. 602, 209 S. W. 666.

9¾. **Charge.**—In a prosecution for assault to murder a police officer who had defendant in custody, requested special charge that defendant was guilty of an aggravated assault only if his action in shooting at the officer was prompted by passion re-

sulting from an illegal arrest held properly refused as without support in evidence. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

## SUBD. 4

19½. **Evidence.**—Evidence held insufficient as to decrepitude of assaulted party to sustain conviction of aggravated assault. *Whitener v. State*, 83 Cr. R. 281, 203 S. W. 48.

## SUBD. 5

21. **Offense.**—In order to convict of aggravated assault upon a female, it is not necessary to show that there was created in mind of prosecutrix a sense of shame or other disagreeable emotion of mind. *Hopson v. State*, 84 Cr. R. 619, 209 S. W. 410.

In order to convict one of aggravated assault upon female, it is not necessary to show that indecent familiarity injured person of prosecutrix. *Id.*

Where defendant, for the purpose of freeing himself from deceased when she would not let him go until he had paid her for sexual privilege accorded, choked her to death without any purpose to kill, the offense would be aggravated assault. *Lang v. State*, 86 Cr. R. 644, 218 S. W. 764.

In prosecution for aggravated assault, sole ground of aggravation charged being that injured party was a female, accused should be afforded the benefit of the law as applied in criminal cases of an honest mistake of fact if the prosecuting witness was wearing the apparel of a man and presented the appearance of one, and accused was misled into the belief that she was a man, without fault or want of care upon his part, since such mistake would have mitigated the offense. *Vyoral v. State (Cr. App.)* 224 S. W. 889.

An assault by an adult man upon a child can be justified on the right to protect property from trespass only if the circumstances made the assault necessary. *Anderson v. State (Cr. App.)* 226 S. W. 414.

22. — **“Adult” and “child.”**—A boy of 17 years is not an “adult male.” *Galbraith v. State (App.)* 13 S. W. 607.

In prosecution for aggravated assault on female, that female was not adult would not render assault simple assault. *Hopson v. State*, 84 Cr. R. 619, 209 S. W. 410.

29. **Indictment—Assault on female.**—A complaint that C. S. did commit the offense of aggravated assault upon the person of his wife, M. S., without alleging that C. S. is an adult male, charges a simple assault only, and will not support an information for aggravated assault. *Schrader v. State (App.)* 17 S. W. 1101.

A complaint which charged that defendant, “an adult male, did unlawfully commit aggravated assault in and upon the person of one Mary Loo D., the said \_\_\_\_\_ then and there being a female,” sufficiently charged that the person assaulted was a female. *Dickerson v. State*, 85 Cr. R. 378, 212 S. W. 497.

30. — **Assault on child.**—A count, charging an aggravated assault by an adult male upon a child, need not allege the means used in committing the assault. *Anderson v. State (Cr. App.)* 226 S. W. 414.

32. **Evidence.**—In prosecution of a school-teacher for aggravated assault on a pupil, the accused may testify as to intent with which whipping was given, but his statement will not be conclusive against other evidence tending to contradict it. *Harris v. State*, 83 Cr. R. 468, 203 S. W. 1089; *Gibson v. Same*, 83 Cr. R. 215, 203 S. W. 1091.

33. — **Assault on wife.**—On the trial of a man for assaulting his wife, the physical facts testified to, and the testimony of the wife in connection with her res gestæ statements, held amply sufficient to support a conviction of aggravated assault. *Needham v. State*, 82 Cr. R. 78, 197 S. W. 988.

Under evidence of wife that she was about to strike defendant husband, and that he either struck her with his fist or hand and ran, and that she chased him with a view of giving him a beating with a club, husband would not be guilty of aggravated assault. *Hays v. State*, 84 Cr. R. 349, 206 S. W. 941.

34. — **Assault on female.**—Evidence held to warrant a finding that defendant in assaulting a female was not acting in self-defense. *Nobles v. State*, 83 Cr. R. 46, 200 S. W. 1090.

In a prosecution for aggravated assault on a female, that defendant went to the female's house after the assault and said that he would bust her jaws was admissible to show whether he intended to injure her at the time of the assault, or struck her in self-defense. *Id.*

35. — **Assault by parent.**—In prosecution of father for aggravated assault on seven year old son, the son's testimony that “he hit me on the jaw with his fist and kicked me with his foot” held insufficient to sustain conviction, being insufficient to create presumption of physical injury or immoderate punishment. *Walden v. State (Cr. App.)* 232 S. W. 523.

37. **Charge—Assault on female.**—In a prosecution for assault with intent to rape, where it appeared that the assault was made on the female in the presence and plain view of a number of people at a public gathering, it was error to refuse an instruction as to aggravated assault. *Everett v. State*, 82 Cr. R. 407, 199 S. W. 631.

In a prosecution for aggravated assault on a female, it was error to refuse to charge that, even if defendant committed an assault, but did not use any unlawful violence with intent to injure her, to acquit him, and to refuse to instruct on self-defense, where defendant testified that the assault was made in self-defense. *Nobles v. State*, 83 Cr. R. 46, 200 S. W. 1090.

In prosecution for aggravated assault, held that, under circumstances, court should have charged that if jury believed defendant placed arm around prosecutrix without

intention to injure her or her feelings, and with probable grounds to believe act would not be objectionable to her, to acquit. *Kerr v. State*, 83 Cr. R. 474, 204 S. W. 107.

In prosecution for assault to rape, court's charge on aggravated assault held sufficient, rendering it unnecessary to give special requested charge upon that subject. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In prosecution for murder, court did not err in submitting issue of aggravated assault in view of defendant's statement in his confession that he did not intend to kill deceased, but choked her in order to free himself. *Lang v. State*, 86 Cr. R. 644, 218 S. W. 764.

#### SUBD. 6

**40. Offense.**—Assault upon female child in which defendant took improper liberties is aggravated assault; being one disgracing her. *Cirul v. State*, 83 Cr. R. 8, 200 S. W. 1088.

The terms of subd. 6, stating that any assault becomes aggravated when the instrument or means used is such as inflicts disgrace, etc., are broad enough to make the act of a male person, guilty of indecent familiarity with a female without her consent and against her will, an aggravated assault. *Hand v. State* (Cr. App.) 227 S. W. 194.

**41. Evidence.**—In a prosecution for assault to rape, resulting in conviction of aggravated assault, evidence held to show that the treatment of the injured female by defendant produced feelings of constraint and shame and such humiliating emotions of the mind in her. *Hand v. State* (Cr. App.) 227 S. W. 194.

**42½. Charge.**—An instruction that if defendant, convicted of aggravated assault on a female, did not intend to injure prosecutrix or cause her a sense of shame or other disagreeable emotion, or if he had good reason to believe his advances would not create a sense of shame, or if in fact they did not create a sense of shame, defendant would not be guilty of a higher offense than simple assault, held not to state a correct principle of law, nor warranted by the evidence. *Hand v. State* (Cr. App.) 227 S. W. 194.

In a prosecution for assault to rape, resulting in conviction of aggravated assault where there was testimony without contradiction that defendant placed his hands on prosecutrix's limbs without her consent, omission of the court to tell the jury that they must believe the assault was with an instrument or means which could inflict disgrace, held harmless to defendant; such an assault as defendant committed being uniformly held to be with such means and instrument. *Id.*

#### SUBD. 7

Cited, *Coffey v. State*, 82 Cr. R. 481, 200 S. W. 384.

**43. Offense.**—That owner of cattle inflicted a minor injury to defendant's fence in hurriedly crossing the fence to head off his cattle did not justify defendant, who was 6 feet 2 inches in height, weighing 200 pounds, in beating cattle owner, who weighed only 150 pounds, until unconscious, with a rock and a stick. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

**49. Evidence—Serious Injury.**—In prosecution for aggravated assault, evidence held insufficient to show character of seriousness required to render assault aggravated. *Royston v. State*, 81 Cr. R. 514, 196 S. W. 542.

In prosecution of town marshal for aggravated assault, evidence held sufficient to sustain a finding that a "serious bodily injury" was inflicted. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

In prosecution for aggravated assault, where it was charged that serious bodily injury had been inflicted, evidence held insufficient to sustain conviction. *Young v. State*, 86 Cr. R. 621, 218 S. W. 754.

In a prosecution for aggravated assault, evidence that defendant struck prosecuting witness with a pitchfork making a gash four inches long in his head, laying the bone bare, and rendering prosecuting witness unconscious or semiconscious for 24 hours, the wound being a serious one calculated to produce death, was sufficient to support a finding of guilty of aggravated assault in that serious bodily injury was inflicted. *Knight v. State*, 87 Cr. R. 134, 220 S. W. 333.

#### SUBD. 8.

**51. Offense.**—Where a person shoots at one who tells his father in his presence that his mother and his father's wife were sustaining illicit relations with another person, he would only be guilty of manslaughter if he killed him, and in the absence of a killing only an aggravated assault. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

Where defendant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against a threatened assault by the deceased, conviction cannot be for a higher grade of offense than aggravated assault. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 800.

If the action of defendant in shooting at an officer who had him in custody was prompted by passion resulting from a legally adequate cause, that is, an illegal arrest, his offense was not assault to murder, but merely aggravated assault. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

Defendant negro, who to repel a threatened assault by a white man with rocks struck the white man on the arm with a pistol, the pistol slipping and cutting the other's head, was not guilty of an aggravated assault, where he refrained thereafter from using the pistol either as a bludgeon or to shoot. *Hilliard v. State*, 87 Cr. R. 15, 218 S. W. 1052, 8 A. L. R. 1316.

If defendant was not actuated by malice aforethought, he was not guilty of assault with intent to murder; if he had the specific intent to kill under circumstances

that would have constituted manslaughter, his assault, which failed to kill, did not constitute assault to murder, but was an aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

If defendant was not actuated by malice aforethought, he was not guilty of assault with intent to murder; if he had the specific intent to kill under circumstances that would have constituted manslaughter, his assault, which failed to kill, did not constitute assault to murder, but was an aggravated assault. *Id.*

One who presents at another a shotgun, whether loaded or unloaded, with the intent to alarm and under circumstances calculated to affect that object is guilty not of an aggravated assault, but of simple assault. *Hall v. State* (Cr. App.) 230 S. W. 690.

**52. Deadly weapon.**—A shotgun usually can be considered a "deadly weapon," but not necessarily so. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

A pistol used as a bludgeon is not a "deadly weapon" per se. *Hilliard v. State*, 87 Cr. R. 15, 218 S. W. 1052, 8 A. L. R. 1316.

If the use of a pocket-knife in the manner in which it was used did not show evidently an intention to kill, the law excludes the idea that defendant who used the knife did intend to kill, and there is no presumption of intention to kill under such circumstances, and the offense would not be higher than aggravated assault, though death actually resulted. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

In prosecution for murder evidence as to deadly character of weapon and nature of difficulty held to warrant a charge on aggravated assault. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

**55. Indictment and information.**—Where an information charging aggravated assault with a gun did not allege that the gun was presented under circumstances not amounting to an intent to maim, nor that it was presented with the intent to alarm under circumstances calculated to effect that object, and the pleader used the word "anger" instead of "angry," it was not error to refuse to quash the information, the pleader having charged a complete offense when he alleged that defendant, with a gun, the same being a deadly weapon, did commit an aggravated assault, under which the court would be authorized to charge on simple assault on the theory that the weapon was used to alarm. *Hall v. State* (Cr. App.) 230 S. W. 690.

**58. Evidence.**—On trial for an aggravated assault, it appeared that defendant held an uncocked gun in his left hand, so that he could have fired it at S., while his brother cursed and threatened S., but he made no effort to shoot; and that he created in S.'s mind an apprehension of bodily harm. Held, that as no violence was attempted, nor any gestures accompanied with words made, which showed an immediate intention on the part of defendant to inflict violence on S., he was not guilty. *Flournoy v. State*, 25 Tex. App. 244, 7 S. W. 865.

In prosecution for assault to murder, issue of aggravated assault held properly submitted. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

In prosecution of a negro for assault to murder a white man, who, with others, was searching the premises of his friend, for stolen hogs, in view of circumstances and evidence, held, that trial court should have instructed at defendant's request on issue of aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

**59. — Deadly weapon.**—In a prosecution for wife murder by defendant, shown to have been committed with a hammer, in the absence of evidence that there was no intention to kill, the issue of aggravated assault was not raised, so as to require submission thereof to the jury. *Beaupre v. State* (Cr. App.) 206 S. W. 517.

**61. Charge.**—On trial for aggravated assault with a gun, instruction as to defendant's right to carry the gun held not called for. *Clayton v. State*, 81 Cr. R. 385, 197 S. W. 591.

On trial for homicide committed in a fight with a pocketknife, held, that court should have charged on aggravated assault. *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616.

In view of arts. 1147-1149, where accused struck deceased with ax handle, held, that charge on aggravated assault should have been given. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

In prosecution for murder or negligent homicide in first degree, court should have instructed on question of aggravated assault on theory that, if defendant shot to hit, the No. 4 shot with which his gun was loaded, in combination with the distance at which he thought he was from deceased, were not calculated to kill. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

In homicide prosecution, charge on provoking difficulty should inform jury that, if defendant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against the threatened assault by deceased, conviction could not be for a higher grade of offense than aggravated assault. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 800.

In homicide prosecution, where there was evidence raising the question of provoking the difficulty, court in charging on aggravated assault properly instructed jury that if the killing was under sudden passion, without intent to kill, with weapon not reasonably calculated to inflict death or serious bodily injury, and defendant had not provoked difficulty and was not justified, he would be guilty of no higher offense than aggravated assault. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

**62. Self defense or defense of another.**—If defendant negro fired upon officers under the defensive theory, to protect his friend from an assault made on him by either or both officers, defendant was not guilty of assault with intent to murder, though he may have fired too quickly, or have fired under circumstances showing no deliberation, which may constitute aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

## SUBD. 9

**63. Offense.**—Defendant who twice struck the prosecuting witness in the jaw with his fists, knocking him down, without causing serious bodily injury and without causing an abrasion of the skin, held not guilty of aggravated assault by premeditated design and by a use of means calculated to inflict serious bodily injury. *Adair v. State* (Cr. App.) 226 S. W. 413.

If defendant charged with manslaughter had provoked the difficulty, and had done so with the intention to produce an occasion whereby he might assault deceased, and if the assault actually made by him was under the influence of sudden passion or excitement, and with an instrument not calculated or likely to produce death, he would not be guilty of a higher grade of offense than an aggravated assault, even though he did provoke the difficulty. *Mason v. State* (Cr. App.) 228 S. W. 952.

**Art. 1022a. Willful driving of motor vehicle against another.**

**Construction and operation in general.**—As this article, relative to aggravated assault by gross negligence of operator of motor vehicle, did not become effective until July, prosecution begun in January preceding could not be sustained. *Coffey v. State*, 82 Cr. R. 481, 200 S. W. 384.

The purpose of this article, held not to be to change the law of homicide, but to add a new clause to the law of aggravated assault. *Worley v. State* (Cr. App.) 231 S. W. 391.

**Indictment or information.**—In prosecution for aggravated assault by collision on highway, information held insufficient for failure to charge that defendant either "willfully or with gross negligence" collided with another vehicle. *Tarver v. State*, 83 Cr. R. 275, 202 S. W. 734.

**Art. 1024. [603] Punishment.**

**Discretion.**—The extent of the punishment where guilt is established rests in the discretion of the jury, unless the jury is waived, as it may be in misdemeanor cases, in which case it is in the discretion of the trial judge, and the appellate court will not review the exercise of such discretion. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

**Excessive punishment.**—Where defendant without provocation, pursuant to a previously conceived plan, came up behind prosecuting witness and struck him down with beer bottle, verdict assessing punishment at \$500 fine and imprisonment in county jail for 12 months is not excessive so as to be subject to review on appeal. *Odom v. State* (Cr. App.) 200 S. W. 833.

Where defendant pleaded guilty to an aggravated assault, and the evidence shows he stabbed the person named in the breast with a pocketknife striking a rib, and the record discloses no extenuating circumstances except that defendant is aged, punishment by a \$200 fine and 60 days in the county jail as assessed by the jury will not be set aside as excessive. *Joseph v. State* (Cr. App.) 204 S. W. 320.

## CHAPTER TWO A

## ASSAULT WITH PROHIBITED WEAPON

**Article 1024a. The offense defined.**

**Offense.**—A conviction for assault, under an indictment charging that defendant, while unlawfully carrying or having about his person a pistol, did make an assault, etc., is not a bar to a subsequent prosecution for unlawfully carrying a pistol, for the two offenses are entirely distinct, and averments as to unlawfully carrying a pistol might be rejected as surplusage, particularly as this article, expressly provides for punishment of an assault while unlawfully carrying a pistol. *Young v. State*, 87 Cr. R. 184, 222 S. W. 1103.

**Evidence.**—In prosecution for assault with prohibited weapon, held error to exclude accused's testimony that he feared the prosecutor, and asked protection from officers, which was refused. *Brinkley v. State*, 82 Cr. R. 150, 198 S. W. 940.

Offense of assault with prohibited weapon held, in connection with art. 475, relating to unlawfully carrying weapons, not established by evidence. *Id.*

**CHAPTER THREE**  
**OF ASSAULTS WITH INTENT TO COMMIT SOME OTHER**  
**OFFENSE**

Art.		Art.	
1025.	Assault with intent to maim.	1030.	With intent to rob.
1026.	With intent to murder.	1031.	In attempt at burglary.
1027.	"Bowie knife" and "dagger" defined.	1032.	Ingredients of the offense.
1029.	With intent to rape.		

**Article 1025. [604] Assault with intent to maim.**

Cited, Gordon v. State, 23 Tex. App. 219, 4 S. W. 883.

**Art. 1026. [605] With intent to murder.**

1. **Offense.**—Defendant, who, with another, had gone to steal a farmer's seed cotton in a wagon standing in a field guarded by the farmer, and who, after their arrest by the farmer, and while he was forcing them at pistol point to go to his house, shot at him with intent to kill, held guilty of assault to murder. *Daggett v. State*, 84 Cr. R. 455, 208 S. W. 171.

If the action of defendant in shooting at an officer who had him in custody was prompted by passion resulting from a legally adequate cause, that is, an illegal arrest, his offense was not assault to murder, but merely aggravated assault. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

2. — **Intent.**—Where defendant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against a threatened assault by the deceased, conviction cannot be for a higher grade of offense than aggravated assault. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 800.

If the action of defendant in shooting at an officer who had him in custody was prompted by passion resulting from a legally adequate cause, that is, an illegal arrest, his offense was not assault to murder, but merely aggravated assault. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

If defendant negro fired upon officers under the defensive theory, to protect his friend from an assault made on him by either or both officers, defendant was not guilty of assault with intent to murder, though he may have fired too quickly, or have fired under circumstances showing no deliberation, which may constitute aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

One who shot and wounded an officer, believing that he was attempting to rob him, is not guilty of assault with intent to murder, or even of an aggravated assault. *Walker v. State* (Cr. App.) 232 S. W. 509.

3. — **Malice.**—If defendant was not actuated by malice aforethought, he was not guilty of assault with intent to murder; if he had the specific intent to kill under circumstances that would have constituted manslaughter, his assault, which failed to kill, did not constitute assault to murder, but was an aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

11. **Indictment—Intent and malice.**—An indictment, alleging that defendant made an assault upon I. J. with intent to kill the said I. J., sufficiently charged assault with intent to murder, although the word "murder" was not used. *Johnson v. State*, 84 Cr. R. 474, 208 S. W. 520.

13. — **Issues, proof and variance.**—Under an indictment charging an assault upon M. with the intent to murder him, the state could prove that the shot which wounded him was fired at E. with intent to murder E.; the fact that M. was the victim rendering it no less an assault with intent to murder. *Jones v. State* (Cr. App.) 231 S. W. 122.

15. **Evidence.**—In prosecution for assault to murder brother of assaulted person was improperly permitted to take off coat and exhibit it to jury, indicating where it was cut and blood which resulted from wounds he received from defendant's brother. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

In a prosecution for assault to murder a police officer having defendant in custody, testimony of another officer that when he pulled defendant from the car in which he was riding with the assaulted officer he asked him what he shot the latter for, and defendant told him "the damn policeman had tried to shoot him," was admissible as *res gestae*. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

In a prosecution for assault to murder, wherein defendant set up self-defense, testimony of defendant's wife as to knife cuts on his shirt sleeve was legitimate. *Jupe v. State*, 86 Cr. R. 573, 217 S. W. 1041.

In a prosecution for assault with intent to murder resulting in conviction of aggravated assault, testimony of an eyewitness as to the conduct and language of defendant and the assaulted party at the time of the conflict and immediately before was admissible as original testimony against defendant. *Kirkland v. State*, 86 Cr. R. 595, 218 S. W. 367.

Evidence as to defendant's general reputation for honesty and fair dealing was not admissible, in a prosecution for assault with intent to murder a peace officer, who stopped accused in the nighttime and interrogated him as to his destination; officer not making any accusation against accused when accosting him, and accused being per-

mitted without restriction to introduce evidence as to his general reputation as a peaceable, law-abiding, and quiet citizen. *Walker v. State* (Cr. App.) 232 S. W. 509.

16. — **Intent and motive.**—In prosecution for assault to murder, that after assault, when assaulted person's brother fell on bed, defendant said, "God damn you, I will kill you, too, while I am at it," was admissible against defendant as bearing on intent. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

In prosecution for assault to murder, resulting in conviction of aggravated assault, if state had proved defendant had been named as corespondent in divorce petition which assaulted person had filed against his wife, fact would not have been admissible, in absence of circumstances bringing it to defendant's knowledge. *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 897.

18. — **Circumstances reducing grade of offense.**—In prosecution for assault to murder committed on a merchant, defendant's testimony that, on morning of the assault, and before he saw the merchant, he conversed with another merchant who had a mortgage on defendant's crop, and that such other merchant told him that he had got supplies already from the merchant assaulted, and that he would refuse further credit until such other bill was paid, was inadmissible for defendant, not tending to justify or mitigate offense. *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554.

19. — **Threats against accused, and character of person assaulted.**—In prosecution of defendant for assault with intent to murder his son-in-law, evidence that victim had married defendant's daughter to avoid a prosecution for seduction and that he had undertaken to produce an abortion upon her held admissible as explanatory of a conversation between defendant and victim just preceding difficulty and as bearing upon question of who began difficulty. *Bolin v. State*, 83 Cr. R. 590, 204 S. W. 335.

In a prosecution for assault to murder, the good reputation of the prosecutor was not admissible in evidence as an original proposition. *Jupe v. State*, 86 Cr. R. 573, 217 S. W. 1041.

20. — **Sufficiency.**—In prosecution for shooting at another, evidence held sufficient to warrant conclusion that defendant intended to kill so as to justify verdict of guilty of assault to murder. *Gillum v. State*, 83 Cr. R. 396, 204 S. W. 225.

In prosecution for assault to murder, evidence held sufficient to sustain jury finding that accused, in shooting, intended to kill. *Carter v. State*, 84 Cr. R. 333, 206 S. W. 936.

In a prosecution for assault to murder, contention that defendant's gun was "lame" when he assaulted the officer was not borne out by the record, in view of his own testimony that the gun was in the same condition as when hunting with it the previous day, etc. *Drawhorn v. State*, 84 Cr. R. 600, 209 S. W. 415.

Evidence held sufficient to support verdict of guilty of assault to murder through striking deceased with a knife. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Evidence held to warrant submission of issue of assault to murder. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

Evidence held sufficient to sustain a conviction of assault with intent to murder. *Reese v. State*, 87 Cr. R. 245, 220 S. W. 1096.

Where prosecuting witness testified that, when he was having trouble with one negro, another negro cut him in the back of the neck, and one of the two cut him in the front of the neck, and also three times in the hip, a conviction of assault with intent to murder was justified. *Douglas v. State* (Cr. App.) 229 S. W. 326.

In a prosecution for assault with intent to murder an officer, evidence held sufficient to sustain a conviction. *Walker v. State* (Cr. App.) 232 S. W. 509.

21. **Charge.**—In view of presumption of innocence, evidence establishing facts which if true, would mitigate or excuse assault to murder, required an instruction on the law applicable thereto, regardless of the source from which the evidence came, and notwithstanding it presented a defensive theory out of harmony with that advanced by defendant. *Knight v. State*, 84 Cr. R. 395, 207 S. W. 315.

22. — **Intent and malice.**—In prosecution for assault to murder, committed while defendant was under arrest by farmer for having attempted to steal seed cotton, court properly refused charges on justification from apprehension of bodily injury, passion, etc., uncalled for by evidence. *Daggett v. State*, 84 Cr. R. 455, 208 S. W. 171.

Where in beginning of difficulty accused's father alone was in danger when defendant shot at prosecuting witness, and where later father was not present, when defendant again shot at the prosecuting witness, it was reversible error for the court to charge simply that if defendant shot to defend himself, or in defense of another, he would be entitled to an acquittal. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

23. — **Grade of assault.**—In a prosecution for assault to murder a police officer who had defendant in custody, refusal to defendant of his requested special charge that he was guilty of an aggravated assault only if his action in shooting at the officer was prompted by passion resulting from an illegal arrest held properly refused as without support in evidence. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

In a prosecution for assault to murder, held, that court properly refused to charge on an affray. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

### Art. 1027. [606] "Bowie-knife" and "dagger" defined.

"**Bowie knife.**"—Where an indictment charged an assault with intent to murder with a bowie knife, and the evidence showed an assault with a butcher knife, there was no variance. *Hernandez v. State*, 32 Cr. R. 271, 22 S. W. 972.

**Art. 1029. [608] With intent to rape.**

Cited, *Gordon v. State*, 23 Tex. App. 219, 4 S. W. 883.

1. **Offense.**—An assault with intent to rape involves an assault upon a woman with intent to gratify defendant's passion at all events, notwithstanding resistance on her part. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

Where an assault with intent to rape is made, abandonment of the attempt is no excuse. *Everett v. State*, 82 Cr. R. 407, 199 S. W. 631.

2. — **Female under age of consent.**—In prosecution for assault to commit rape on a girl under 15 years of age, force and consent are not material issues. *Reese v. State*, 83 Cr. R. 394, 203 S. W. 769.

In assault with intent to rape, female being under age of consent, only so much force is required as may be necessary to effect penetration. *Wooldridge v. State*, 86 Cr. R. 348, 217 S. W. 143.

One who takes hold of a child under 15 years of age and handles her in such a manner as, under the circumstances, demonstrates a present intent to at once so subject the child to his power, she consenting or not, so as to accomplish the act of intercourse, is guilty of an assault with intent to rape a child under the age of consent. *Carter v. State*, 87 Cr. R. 299, 221 S. W. 603.

Defendant, who did not touch 13 year old prosecutrix, but who made improper proposals to her and unsuccessfully pursued her, held not guilty of assault with intent to rape. *Armstead v. State* (Cr. App.) 232 S. W. 519.

6. **Indictment.**—An indictment alleging that defendant did then and there attempt to ravish a female under the age of 15 years other than his wife is sufficient to charge an assault with intent to rape, for the word "attempt" is more comprehensive than the word "intent," implying both the purpose and an actual effort to carry that purpose into execution, and hence it includes an intent. *Cirul v. State*, 83 Cr. R. 8, 200 S. W. 1088.

7. — **Included offenses.**—Where an assault is made, conviction cannot be had for an attempt to rape. *Miller v. State*, 84 Cr. R. 168, 206 S. W. 524.

9. **Evidence.**—A girl being assaulted may use every means in her power to cause assailant to desist, and threats to tell, whether of the assault then being made or of other matters, if made in an effort to defend against assault or before it is ended, may be given in testimony. *Hensley v. State*, 85 Cr. R. 260, 211 S. W. 590.

11. — **Other acts and transactions.**—In a prosecution for assault with intent to rape a female under the age of consent, court properly admitted testimony of a meeting between defendant and the prosecutrix on the night preceding that of the alleged assault, as against an objection that it related to a different time and place, since it tended to show the relations of the parties leading up to the occasion of the alleged assault. *Gibbs v. State* (Cr. App.) 227 S. W. 1107.

14. — **Physical condition, complaints and declarations of female.**—In prosecution for assault with intent to rape defendant's daughter, daughter's testimony that just before defendant ceased his attack she said, "If you don't stop treating me like you are, I am going to tell the way you always treated me ever since I was little," was admissible as part of *res gestæ*. *Hensley v. State*, 85 Cr. R. 260, 211 S. W. 590.

In prosecution for assault with intent to rape daughter, evidence of witness who saw defendant push daughter back on the bed, that daughter said at such time, "Papa, if you don't quit that I will tell something on you that will cause my brother to kill you," was admissible as part of *res gestæ*. *Id.*

15. — **Sufficiency.**—In a prosecution for assault with intent to rape a female under the age of consent, evidence held to sustain a conviction. *Gibbs v. State* (Cr. App.) 227 S. W. 1107; *Jenkins v. State*, 83 Cr. R. 446, 203 S. W. 595; *Reese v. State*, 83 Cr. R. 394, 203 S. W. 769; *Beason v. State*, 84 Cr. R. 449, 208 S. W. 164; *Grace v. State*, 84 Cr. R. 338, 206 S. W. 938.

Evidence held insufficient to sustain a charge of assault with intent to rape a girl under 15 years of age. *Thompson v. State*, 82 Cr. R. 524, 200 S. W. 168; *Carter v. State*, 87 Cr. R. 299, 221 S. W. 603.

Whether physical condition of defendant, due to use of intoxicants, was such that he could not commit assault with intent to rape, held, under the evidence, for the jury. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

Evidence held to sustain conviction of assault with intent to rape 16 year old daughter. *Hensley v. State*, 85 Cr. R. 260, 211 S. W. 590.

In prosecution for assault with intent to rape, evidence as to the nonage of prosecutrix held sufficient. *Wooldridge v. State*, 86 Cr. R. 348, 217 S. W. 143.

Conviction of assault with intent to rape held warranted, although prosecutrix testified that defendant had sexual intercourse with her, while a doctor who examined her testified that in his opinion a man could only have had partial intercourse. *Id.*

Evidence held insufficient to support a conviction of assault with intent to rape by force, in not authorizing a finding of intent to use such force as would overcome any opposition that might reasonably be made under the circumstances. *Barnes v. State* (Cr. App.) 228 S. W. 225.

16. **Charge.**—In prosecution for assault to rape, court's charge on aggravated assault held sufficient, rendering it unnecessary to give special requested charge upon that subject. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

A charge requested by defendant in a prosecution for assault with intent to rape a female under the age of consent held properly refused as being confusing. *Gibbs v. State* (Cr. App.) 227 S. W. 1107.

17. — **Grade of assault.**—In a prosecution for assault with intent to rape, where it appeared that the assault was made on the female in the presence and plain view of



a number of people at a public gathering, it was error to refuse an instruction as to aggravated assault. *Everett v. State*, 82 Cr. R. 407, 199 S. W. 631.

In prosecution for assault to commit rape, evidence held not to call for instruction on aggravated assault. *Reese v. State*, 83 Cr. R. 394, 203 S. W. 769.

In prosecution for assault to commit rape, it was error for the court to submit to the jury the law of attempt to commit rape. *Miller v. State*, 84 Cr. R. 168, 206 S. W. 524.

### Art. 1030. [609] With intent to rob.

Cited, *Gordon v. State*, 23 Tex. App. 219, 4 S. W. 883.

**Offense.**—To sustain conviction of assault with intent to rob, the evidence must show a specific intent to rob. *Smiley v. State*, 87 Cr. R. 528, 222 S. W. 1108.

If defendant made assault on prosecuting witness solely for the purpose of obtaining money which defendant in good faith believed prosecuting witness owed him, he was not guilty of assault with intent to rob, though he used force or threats, which, in the absence of the claim of right in good faith made, would have amounted to an assault with intent to rob. *Barton v. State* (Cr. App.) 227 S. W. 317.

**Variance.**—Under a count charging an assault to rob two persons jointly, the defendant cannot be convicted if the assault was made on only one of such persons. *Barton v. State* (Cr. App.) 227 S. W. 317.

**Evidence.**—Evidence held insufficient to sustain a conviction of assault with intent to commit robbery. *Moffett v. State*, 83 Cr. R. 284, 202 S. W. 960.

In prosecution for assault with intent to commit robbery, in which defendant claimed that he was merely attempting to enforce payment of debt owed him by prosecuting witness, the question of whether defendant's claim was made in good faith or as a pretext to cover fraudulent intent held for the jury. *Barton v. State* (Cr. App.) 227 S. W. 317.

**Charge.**—In a prosecution for assault with intent to rob, where the indictment included a charge on aggravated assault, the issue of aggravated assault should be submitted to the jury. *Smiley v. State*, 87 Cr. R. 528, 222 S. W. 1108.

### Art. 1031. [601] In attempt at burglary.

Cited, *Gordon v. State*, 23 Tex. App. 219, 4 S. W. 883.

### Art. 1032. [611] Ingredients of the offense.

Cited, *Gordon v. State*, 23 Tex. App. 219, 4 S. W. 883.

**Indictment.**—Under Const. art. 1, § 10, guaranteeing accused the right to demand the nature and cause of the accusation, in charging an assault with intent to commit another offense, it is necessary only to allege such matters as bring the offense within the definition of an assault coupled with an intention to commit such other offense, naming it, without giving the constituent elements of the offense intended to be committed. *Jones v. State* (Cr. App.) 231 S. W. 122.

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## CHAPTER FOUR

### OF MAIMING, DISFIGURING AND CASTRATION

#### Article 1033. [612] "Maiming" defined.

**Offense.**—A front tooth is a member of the body within the comprehension of the maiming statute. *Keith v. State* (Cr. App.) 232 S. W. 321.

**Self-defense.**—The principle of self-defense is not limited to cases of homicide, but may be a defense to maiming. *Keith v. State* (Cr. App.) 232 S. W. 321.

**Evidence.**—In a prosecution for maiming, testimony of prosecuting witness that he was called before the federal grand jury to testify against defendant, and that he saw defendant at the time of the latter's trial, in connection with defendant's statements at the time of the assault, was admissible to show defendant's motive. *Keith v. State* (Cr. App.) 232 S. W. 321.

In a prosecution for maiming evidence of a threat made by defendant a few minutes before the difficulty, in sight of prosecuting witness, held admissible, it being reasonably certain that the latter was meant, though no one was named. *Id.*

In a prosecution for maiming, evidence held insufficient to justify submission of the law as to an act resulting from uncontrollable rage, sudden resentment or terror, rendering accused incapable of cool reflection. *Id.*

**Charge.**—In a prosecution for maiming, the truth of defendant's testimony as to his having been informed of a threat against him by prosecuting witness, and as to a demonstration indicating an intention to cut defendant just prior to the assault, was for the jury, its status as an issue of fact not being destroyed because supported by defendant's testimony alone (*Vernon's Cr. St.* vol. 2, p. 481), so that the court erred in not charging affirmatively on the law of threats in connection with self-defense. *Keith v. State* (Cr. App.) 232 S. W. 321.

In a prosecution for maiming, there was no error in refusing to instruct the jury touching defendant's right to seek the injured party for an explanation as to certain charges made by him, such an instruction being required only where the court qualifies the right of accused to act in self-defense. *Id.*

In a prosecution for maiming, a charge defining a "willful act" as one done with evil intent, and "malice" as denoting a wrongful act intentionally done without just cause or excuse, was sufficient on the question of intent. *Id.*

In a prosecution for maiming, where there is no question as to the loss of a member of the body nor of justification, the only question being whether the injury was inflicted willfully or maliciously, there was no error in refusing a charge on simple assault. *Id.*

## CHAPTER FIVE

### FALSE IMPRISONMENT

#### Article 1039. [618] "False imprisonment" defined.

**Offense.**—The fact that defendant's employé commanded plaintiff, who was suspected of shoplifting, to return to defendant's store, and laid one hand on plaintiff's arm, whereupon plaintiff returned without objection or resistance, does not show "false imprisonment" which requires detention by violence or threat. *S. H. Kress & Co. v. De Mont* (Civ. App.) 224 S. W. 520.

## CHAPTER SIX

### OFFENSES AGAINST MINORS

Art.		Art.
1050.	Employment in dangerous or immoral occupations.	1053. Permitting minor to remain in pool room, etc.
1050e.	Employment of children under 15 in certain occupations prohibited; penalty.	1054. Selling or giving intoxicating liquor to minor.
1050f.	Employment of children under 17 in certain occupations prohibited; penalty.	1055a. Causing, etc., delinquency of minors.

#### Article 1050. Employment in dangerous or immoral occupations.

**Construction and operation in general.**—In view of Acts 35th Leg. c. 103, § 121 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—30), the Workmen's Compensation Act does not apply to infants employed around dangerous machinery in violation of this article. *Waterman Lumber Co. v. Beatty* (Civ. App.) 204 S. W. 448.

Act March 6, 1917, arts. 1050e—1050f, regulating and prohibiting child labor, repealed this article. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

**Prohibited employments.**—A log-loading machine, track-laying outfit, or a locomotive engine propelled by steam, is a "dangerous machine." *Waterman Lumber Co. v. Beatty* (Civ. App.) 204 S. W. 448.

This article held inapplicable to employment by railroad of call boy who was required, in the discharge of his duties, to pass over and upon numerous tracks, frogs, and switches; railroads not being "other establishment using dangerous machinery," within the statute, in view of the ejusdem generis rule of construction. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

**Violation as negligence.**—Employment of a servant under 15 years of age to work around dangerous machinery is negligence per se, and a servant may recover although not engaged at the very place of work he was primarily employed to do. *Waterman Lumber Co. v. Beatty* (Civ. App.) 204 S. W. 448.

Tram railroads, log-loading appliances, and an engine, permanently used in manufacturing logs into lumber, were a part of the defendant lumber company's establishment, so as to make the company liable to such minor for injuries received while sanding the track from the footboard of the engine. *Waterman Lumber Co. v. Beatty*, 110 Tex. 225, 218 S. W. 363.

Employer's violation of this article was not prima facie evidence of negligence on part of employer in action for injuries to infant employed in violation thereof, where such statute at the time of the trial had been repealed by Act March 6, 1917, arts. 1050e—1050f. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

#### Art. 1050e. Employment of children under 15 in certain occupations prohibited; penalty.

**Repeal.**—This act repealed art. 1050, prohibiting the employment of children under 15 years of age in particular work. *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

#### Art. 1050f. Employment of children under 17 in certain occupations prohibited; penalty.

See *Galveston, H. & H. R. Co. v. Anderson* (Civ. App.) 229 S. W. 998.

**Art. 1053. Permitting minor to remain in pool room, etc.**

**Offense.**—That the owner of a billiard hall may be guilty of permitting a minor to play pool or billiards therein, it is necessary that he must have known the minor played and permitted him to do so. *Wright v. State*, 86 Cr. R. 434, 217 S. W. 152.

**Art. 1054. Selling or giving intoxicating liquor to minor.**

**Offense.**—In a prosecution for selling liquor to a minor, it appeared that the father sent his boy, 12 years old, for the liquor purchased, but did not give written authority for the same. Held, that the vendor violated this article. *Yakel v. State*, 30 Tex. App. 391, 17 S. W. 943.

Alcohol is an intoxicating liquor, and it is an offense to sell it to a minor without the written consent of his parents or guardians, though he intended to burn it in a lamp used by his customers in lighting cigars purchased by them from him. *Rucker v. State* (Cr. App.) 24 S. W. 902.

In prosecution for giving intoxicating liquors to minor, state must show that defendant knew of minority. *Earnest v. State*, 83 Cr. R. 41, 201 S. W. 175.

**Art. 1055a. Causing, etc., delinquency of minor.**—If any person shall in any manner cause, encourage or contribute to the delinquency of any minor who is under the age of seventeen years, he shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the County Jail no exceeding one year, or by both such fine and imprisonment. By the term "Delinquency" as used in this article is meant the using of tobacco in any form, the drinking of intoxicating liquor, the taking of such minor into a house or place where prostitutes or lewd women are permitted to resort or reside, or knowingly permitting any such minor to remain in any such house or at any such place, the forming of the habit of using any harmful or injurious drug, or any act which tends to debase or injure the morals, health or welfare of such minor. In all prosecutions under this clause of the statute, the general reputation of the women who resort or reside or who may be found at any such place for chastity, may be admitted in evidence. [Acts 1918, 35th Leg. 4th C. S., ch. 52, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

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## CHAPTER SEVEN

### OF KIDNAPING AND ABDUCTION

Art.

1059. "Abduction" defined.  
1060. Of female under fourteen.

Art.

1062. Punishment.

**Article 1059. [629] "Abduction" defined.**

**Degree of offense.**—In a prosecution for abduction, where the indictment did not charge that after the abduction defendant married the girl, and it appeared that he abducted her with the intent of forcing her into a marriage with himself, he was guilty only of a misdemeanor, punishable by fine and a charge authorizing a conviction for felony pursuant to art. 1062, denouncing abduction with intent of forcing the woman into prostitution, was erroneous. *De Hart v. State*, 87 Cr. R. 21, 218 S. W. 1047.

**Art. 1060. [630] Of female under fourteen.**

See *Mason v. State*, 29 Tex. App. 24, 14 S. W. 71.

**Art. 1062. [632] Punishment.**

**Degree of offense.**—In a prosecution for abduction, where the indictment did not charge that after the abduction defendant married the girl, and it appeared that he abducted her with the intent of forcing her into a marriage with himself, he was guilty only of a misdemeanor, punishable by fine, and a charge authorizing a conviction for felony pursuant to art. 1062, denouncing abduction with intent of forcing the woman into prostitution, was erroneous. *De Hart v. State*, 87 Cr. R. 21, 218 S. W. 1047.

## CHAPTER EIGHT

## RAPE

Art.	Art.
1063. "Rape" defined.	1067. Penetration only need be proved.
1064. Definition of "force."	1069. Punishment.
1065. What threat sufficient.	1070. Conviction may be had for attempt.
1066. "Fraud" defined.	

**Article 1063. [633] "Rape" defined.**—Rape is the carnal knowledge of a woman without her consent, obtained by force threats or fraud, or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent, and with or without the use of force, threats or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of eighteen years, other than the wife of the person, with or without her consent, and with or without the use of force threats or fraud. Provided, that if the woman is fifteen years of age or over, the defendant may show in consent cases, she was not of previous chaste character' as a defense. [O. C. 523; Acts 1891, p. 96; Acts 1895, p. 79; Acts 1918, 35th Leg. 4th C. S., ch. 50, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**4. Offense—Capacity to consent.**—If prosecutrix was insane at the time of the act, under the statute defendant's offense would have been rape. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

**5. — Female under age of consent.**—Though the age of consent was elevated after defendant's alleged act of intercourse, such change cannot affect the offense of statutory rape. *Jackson v. State* (Cr. App.) 224 S. W. 1110.

In a prosecution for statutory rape upon a girl between 15 and 18 years of age, no conviction can result where it is shown that the prosecutrix was of previous unchaste character; the use of the word "defense" in such statute precluding any other meaning. *Norman v. State* (Cr. App.) 230 S. W. 991.

A "chaste woman," signifies one who has had no carnal knowledge of men as applied to an unmarried woman, and an "unchaste unmarried woman" is one who has had carnal knowledge of men. *Id.*

**8. Indictment.**—An indictment for assault with intent to rape, alleging "did then and there unlawfully in and upon" L., "a female, make an assault with the intent then and there," etc., sufficiently alleges that the injured party is a female. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

**9. — Female under age of consent.**—In prosecution for carnal knowledge of female under 15, in violation of this article, it was necessary for state to allege that prosecutrix was under 15 at time of offense. *Nolan v. State*, 84 Cr. R. 150, 206 S. W. 92.

It is not necessary that an indictment charging rape upon a girl under 18 years of age negative her previous unchastity nor to refer to the matter of consent. *Kerley v. State* (Cr. App.) 230 S. W. 163.

In an indictment for statutory rape, an allegation that prosecutrix was under 15 years of age was favorable to accused, the statutory age of consent being 18 years, as thereby the pleader placed a greater burden on the state than required by law; and was not objectionable on the ground that an acquittal thereunder on proof that prosecutrix was over 15 would not bar a subsequent prosecution by indictment charging her to be under 18. *Young v. State* (Cr. App.) 230 S. W. 414.

In an indictment for statutory rape, an allegation that prosecutrix was under 15 years of age was favorable to accused, the statutory age of consent being 18 years, as thereby the pleader placed a greater burden on the state than required by law. *Id.*

**19. Evidence—Character of female.**—Accused's defense in his trial for rape, asserting that prosecutrix had intercourse with another person on the night in question and not with accused, was sufficient to justify introduction by state of evidence supporting general reputation of prosecutrix for chastity. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

In a prosecution for rape, it was error to exclude evidence of specific acts of immorality, and that prosecutrix was in the habit of bestowing her carnal favors indiscriminately, as affecting her credibility and as a mitigating fact affecting the penalty. *Calhoun v. State*, 85 Cr. R. 496, 214 S. W. 335.

In a prosecution for statutory rape, it was proper, after defendant had asked prosecuting witness if any one else had been familiar with her, to permit her to state that no one else had had carnal connection with her prior to this offense. *Brooks v. State* (Cr. App.) 227 S. W. 673.

In a prosecution for statutory rape upon a female between 15 and 18 years of age defendant was entitled to supplement direct evidence tending to show unchaste character

in the prosecutrix by showing circumstances such as are often used by the prosecution in the proof of sexual relations, such as declarations of the prosecutrix, her association and relations with other men, and her opportunities for improper relations. *Norman v. State* (Cr. App.) 230 S. W. 991.

In a prosecution for statutory rape upon a female between the ages of 15 and 18, where the defense was previous unchaste character, accused had the burden of showing her unchaste character, not by reputation, but by specific acts. *Id.*

In a prosecution for statutory rape upon a female between 15 and 18 years of age, evidence of the want of chastity prior to the time she attained the age of consent was available to show previous unchaste character as a defense. *Id.*

20. — **Age of female.**—In prosecution for carnal knowledge of female under 15, testimony of doctor, who examined prosecutrix that he would take her to be less than 15, her relatives being available as witnesses, but not testifying to her age, was insufficient to prove case beyond reasonable doubt. *Nolan v. State*, 84 Cr. R. 150, 206 S. W. 92.

22. — **Other offenses.**—In a prosecution for statutory rape, it was incompetent to introduce in evidence circumstances showing that defendant had been guilty of illicit intercourse with his wife prior to their marriage, since it tended to prove a different offense and was calculated to prejudice the rights of the defendant. *Norman v. State* (Cr. App.) 230 S. W. 991.

24. — **Incriminating circumstances.**—It was proper to admit proof describing the ground and the finding of the woman's comb on the day after the offense was alleged to have been committed. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

In a prosecution for assault on rape, it was error to permit prosecutrix to testify over objection that subsequently defendant came to her mother's house, and she hid from him because of fear; such testimony not being *res gestæ*, nor otherwise shown admissible. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

In a prosecution for statutory rape, matters showing the movement and situation of prosecutrix at times she was met by defendant anterior and leading up to the crime were admissible, and it was not objectionable to permit her to state that her father and elder brother were away from home at the time of these occurrences; it appearing that she first reported them to neighbors and officers. *Brooks v. State* (Cr. App.) 227 S. W. 673.

That prosecutrix in statutory rape case was not personally present or connected with a transaction such as what occurred when accused came out to her father's home in his automobile on the Sunday following the alleged rape, or that the transaction occurred after the commission of the offense, would be no ground of objection to evidence thereof, if it shed light on the rape. *Young v. State* (Cr. App.) 230 S. W. 414.

In prosecution for statutory rape, where prosecutrix had testified that the intimacy between herself and accused was confined almost exclusively to rides with him in his automobile, and that he had taken her out several times, and had her out in his car on the occasion of the alleged intercourse, the fact that he came to her home with his car a few days thereafter would be an admissible fact. *Id.*

In prosecution for statutory rape, where prosecutrix had testified that the intimacy between her and accused was confined to rides with him in his automobile, testimony of prosecutrix's brother that the same man who had taken prosecutrix out several times in his car came to the front of the house where prosecutrix lived with her family, and that on that occasion her father talked rough to him, was admissible, no details of the conversation being given. *Id.*

26. — **Female's condition, complaints and declarations.**—In prosecution for rape, defendant may show that on being taken in charge prosecutrix said her brother was in room with her, and that she changed accusation to defendant, when told that otherwise her brother would be prosecuted, but that if it were defendant he alone would be prosecuted. *Mizell v. State*, 81 Cr. R. 241, 197 S. W. 300.

In a prosecution for statutory rape, evidence that prosecutrix, just after the alleged offense told the witness what had occurred, is admissible as outcry. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

In a prosecution for statutory rape, testimony of prosecutrix, who just after the alleged offense told the witness what had occurred, is admissible as sustaining the prosecutrix, in view of the effort of the defendant to show that the whole transaction was simulated, and that the prosecution was the result of animus against him. *Id.*

In prosecution for rape on child under age of consent, appearance and condition of prosecutrix becomes material, where there is denial of fact of intercourse, and testimony of experts is always admissible to show conditions rendering intercourse with some one likely. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

28. — **Articles connected with commission of offense and physical conditions about locus in quo.**—Admission of testimony describing the scene of the assault on rape, and the evidences thereof upon the ground, held without error. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In prosecution for assault with intent to rape, testimony of witness for state that after he and others were informed of what had happened they went directly to prosecutrix's house and made investigation, found a hat, found blood on each of two beds, etc., held admissible. *Grace v. State*, 84 Cr. R. 338, 206 S. W. 938.

In prosecution for rape on child under age of consent, testimony of witness who discovered defendant in the act, and of a deputy sheriff as to physical indications at spot held admissible as corroboration of prosecutrix as showing acts of intimacy, and as tending to rebut defendant's testimony. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

32. — **Sufficiency in general.**—Evidence held insufficient to sustain a conviction of rape. *Pickereil v. State*, 81 Cr. R. 326, 195 S. W. 191.

Evidence in prosecution for rape of a child nine years old held insufficient to show penetration beyond a reasonable doubt. *Galaviz v. State*, 82 Cr. R. 377, 198 S. W. 946.

Where the examination of a prosecuting witness shows that her testimony on which a conviction for rape is based was induced by threats and coercion, her testimony is not sufficiently creditable to sustain a conviction. *Venable v. State*, 84 Cr. R. 354, 207 S. W. 520.

A conviction for rape of defendant's stepdaughter under 15 years of age, where prosecutrix denied the intercourse, cannot be sustained on the theory that suspicious circumstances induced the jury to believe defendant guilty, where intercourse is positively denied by prosecutrix, and there is no evidence except remote circumstances tending to impeach her. *Doherty v. State*, 84 Cr. R. 552, 208 S. W. 932.

In a prosecution for rape of a 15 year old girl, evidence held sufficient to prove defendant's guilt beyond controversy. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

In prosecution for rape on insane woman, competent evidence held insufficient to prove act of intercourse by defendant. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

In a prosecution for rape on a girl under 15, verdict held not subject to attack on appeal for want of sufficiency of testimony. *Jackson v. State* (Cr. App.) 224 S. W. 1110.

Evidence held sufficient to sustain a conviction of the crime of rape upon a girl between 13 and 14 years of age. *Williams v. State* (Cr. App.) 225 S. W. 173.

In a prosecution for statutory rape, evidence held to show defendant's guilt beyond a reasonable doubt, so as not to warrant setting aside the verdict and remanding for new trial. *Cook v. State* (Cr. App.) 228 S. W. 213.

**33. — Corroboration of female.**—Evidence corroborating complaining witness' testimony held sufficient to justify conviction for rape. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

The court will scrutinize with extreme care the testimony of the injured female, but such rule will not be used where her testimony is sufficiently corroborated. *Id.*

In a prosecution for rape, evidence that at a time remote from that of intercourse prosecutrix, in absence of defendant, showed witness place where intercourse took place, and told him what occurred there, was of a hearsay nature, in no way corroborative of the girl's testimony, and inadmissible. *Villafranco v. State*, 84 Cr. R. 195, 206 S. W. 357.

Testimony by 13 year old prosecutrix as to penetration, though scrutinized with more than ordinary care, as required, held sufficient evidence of offer by defendant to buy off prosecution, being corroborative of the girl's story, notwithstanding inconsistent statements made by her to the justice of the peace, for which she offered a reasonable explanation. *Blackmon v. State*, 87 Cr. R. 173, 220 S. W. 93.

Corroboration of prosecutrix is not required by law to support a conviction of statutory rape, and her credibility, like that of other witnesses, is a question for the jury in view of Code Cr. Proc. art. 786, making the jury the judge of facts and weight of evidence. *Cook v. State* (Cr. App.) 228 S. W. 213.

Corroboration of prosecutrix is not required by law to support a conviction of statutory rape. *Id.*

**36. Charge.**—Although indictment for rape included offense of assault with intent, a request, submitting lesser charge was properly refused, where evidence did not raise the question. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

The court's refusal to give a special charge requested by defendant that the jury be instructed not to consider the evidence of force, or that there was blood or wounds on the 15 year old injured female, was proper where the indictment contained counts charging rape both statutory and by force. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

### Art. 1064. [634] Definition of "force."

Cited, *Williams v. State* (App.) 13 S. W. 609; *Rodgers v. State*, 30 Tex. App. 510, 17 S. W. 1077.

**Force as element of offense.**—In rape or assault with intent to rape, female being under age of consent, only so much force is required as may be necessary to effect penetration. *Wooldridge v. State*, 86 Cr. R. 348, 217 S. W. 143.

**Evidence.**—In view of this article and art. 1065, evidence in rape trial held not to justify taking it away from jury. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

### Art. 1065. [635] What "threat" sufficient.

**Evidence.**—In view of art. 1064, and this article, as applicable to rape, evidence in rape trial held not to justify taking it away from jury. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

### Art. 1066. [636] "Fraud" defined.

Cited, *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963.

### Art. 1067. [637] Penetration only need be proved.

**Penetration as element of offense.**—To constitute rape, it is unnecessary that the penetration should be perfect, nor that there should be an entering of the vagina or rupture of the hymen; the entering of the vulva or labia being sufficient. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

The law requires penetration as an element of rape, but not to any particular extent. *Blackmon v. State*, 87 Cr. R. 173, 220 S. W. 93.

Penetration is an essential element of the crime of rape. *Mullins v. State* (Cr. App.) 225 S. W. 164.

**Art. 1069. [639] Punishment.**

See *Stevenson v. State*, 83 Cr. R. 21, 201 S. W. 1018.

**Extent of punishment.**—In prosecution for rape, evidence of want of consent by prosecutrix held not sufficient to warrant the imposition of the death sentence. *Calhoun v. State*, 85 Cr. R. 496, 214 S. W. 335.

**Charge.**—In a prosecution for rape, it was proper to submit to the jury the death penalty, although the prosecutor stated that he would not insist upon the death penalty. *Kerley v. State* (Cr. App.) 230 S. W. 163.

**Art. 1070. [640] Conviction may be had for "attempt."**

**Attempt.**—In prosecution for assault to commit rape, it was error for the court to submit to the jury the law of attempt to commit rape. *Miller v. State*, 84 Cr. R. 168, 206 S. W. 524.

Where an assault is made, conviction cannot be had for an attempt to rape. *Id.*

## CHAPTER NINE OF ABORTION

Art.	Definition and punishment.	Art.	Attempt at.
1071.	Definition and punishment.	1073.	Attempt at.
1072.	Furnishing the means; an accomplice.		

**Article 1071. [641] Definition and punishment.**

**2. Offense.**—One who gave a pregnant woman medicine, and told her not to use it until he gave her instructions with reference to its use, was not guilty of abortion, if she used the medicine when he was not present and without his instructions, and procured an abortion. *Tonnahill v. State*, 84 Cr. R. 517, 208 S. W. 516.

**3. Principals and accomplices.**—One who has been unduly intimate with a female, and arranges with a physician for an abortion, and takes the female to the physician, is guilty as a principal, although not actually present on occasion of premature birth; what was done being result of conspiracy. *Hammett v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

**4. Indictment.**—An indictment conforming strictly to the statute is sufficient. *Hunter v. State*, 81 Cr. R. 471, 196 S. W. 820.

Under an indictment charging that an abortion was procured by administering medicine calculated to produce an abortion, and did then and there destroy the life of the fetus in the womb, and did then and there by the use of the means aforesaid procure an abortion, a conviction could not stand for procuring a premature birth by such means. *Tonnahill v. State*, 84 Cr. R. 517, 208 S. W. 516.

**5. — Different counts, duplicity and election.**—A count charging that defendant furnished to A., a pregnant woman, an instrument for the purpose, on A.'s part, of procuring an abortion of herself therewith, he knowing the purpose intended by said A., and said means being calculated to produce that result, and did, by means of such instrument so furnished, procure an abortion of A., was bad for duplicity. *Wandell v. State* (Cr. App.) 25 S. W. 27.

**7. Evidence.**—In prosecution for abortion, victim's testimony on direct examination that certain medicines had been procured from doctor other than defendant was immaterial. *Earnest v. State*, 83 Cr. R. 257, 202 S. W. 739.

Under an indictment charging that an abortion was procured by administering medicine calculated to produce an abortion, and did then and there destroy the life of the fetus in the womb, the burden was on the state to show beyond a reasonable doubt that the child was alive at the time of the administration of the medicine, and that the medicine was administered for the purpose of destroying the fetus while in the womb. *Tonnahill v. State*, 84 Cr. R. 517, 208 S. W. 516.

Testimony by prosecutrix which, if believed, showed cessation of menstruation after several acts of intercourse and operations by defendant, who stated a baby had started, but he got it, after which menstruation began again, is admissible and is sufficient to sustain the conviction though contradicted by defendant. *Earnest v. State*, 87 Cr. R. 651, 224 S. W. 777.

There are no established rules by which pregnancy may be established in a prosecution for abortion, and where the evidence showed cessation of menstruation after intercourse and a statement by defendant, when he operated on prosecutrix, that a baby had started, the conviction cannot be reversed for failure to establish pregnancy. *Id.*

**Art. 1072. [642] Furnishing the means; an accomplice.**

**Indictment.**—A count charging that defendant furnished to A., a pregnant woman, an instrument for the purpose, on A.'s part, of procuring an abortion of herself therewith, he knowing the purpose intended by said A., and said means being calculated to

produce that result, and did, by means of such instrument so furnished, procure an abortion of A., was bad for duplicity. *Wandell v. State* (Cr. App.) 25 S. W. 27.

**Art. 1073. Attempt at.**

**Means used.**—The means used need not almost produce an abortion. *Hunter v. State*, 81 Cr. R. 471, 196 S. W. 820.

**Evidence.**—The defendant was charged with administering cotton root tea for the purpose of producing an abortion. Expert witnesses for the state testified that, while the books said that an abortion was liable to follow the administration of cotton root tea, they knew nothing of it by personal observation, and thought that as administered to the prosecuting witness by defendant it would not produce an abortion. Held that, the jury should have found for the defendant. *Williams v. State* (App.) 19 S. W. 897.

Evidence held sufficient to sustain a conviction of attempted abortion. *Hunter v. State*, 81 Cr. R. 471, 196 S. W. 820.

**Indictment.**—An indictment conforming strictly to the statute is sufficient. *Hunter v. State*, 81 Cr. R. 471, 196 S. W. 820.

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**CHAPTER ELEVEN  
OF HOMICIDE**

**Article 1084. [654] Body of deceased must be found.**

**Corpus delicti.**—In prosecution for murder, two things were necessary to make out defendant's guilt, namely, death of deceased, and the criminal connection of defendant therewith. *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749.

**Evidence.**—In prosecution for homicide, evidence held sufficient to establish corpus delicti, although no witness testified to seeing the body after the killing, notwithstanding this article. *Johnson v. State*, 83 Cr. R. 376, 203 S. W. 903.

Where the evidence showed that death necessarily resulted either from suicide or the criminal agency of another, the only motive for either being to avoid the disgrace of pregnancy by defendant, and that when last seen alive deceased was in good health and appearance and going away on a trip for which she made careful preparation, and when next seen her dead body was floating in deep water in a river, with baling wire so wrapped about her legs as to make walking impossible, with a loop suggesting use of a weight, the body showing results of strangulation, and her laundry bag, also wired, was near the body, the corpus delicti was established. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

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**CHAPTER TWELVE  
OF JUSTIFIABLE HOMICIDE.**

**3. BY OFFICERS IN THE PERFORMANCE OF A DUTY, AND BY OTHER PERSONS UNDER CERTAIN CIRCUMSTANCES**

- Art.  
1092. By officer in execution of lawful order.  
1094. Qualification of the foregoing.

**4. IN DEFENSE OF PERSON OR PROPERTY**

- Art.  
1105. In preventing other felonies.  
1106. Presumption from use of weapon.  
1107. In protecting person or property from other attacks.  
1108. Retreat not necessary.  
1109. Requisites of the attack.  
1110. Circumstances justifying in defense of property.

**3. BY OFFICERS IN THE PERFORMANCE OF A DUTY, AND BY OTHER PERSONS UNDER CERTAIN CIRCUMSTANCES**

**Article 1092. [662] By officer in execution of lawful order.**

**Homicide by posse member.**—In a prosecution for murder committed upon a negro in course of an unjustifiable assault made by defendant as a member of a posse and other members upon the wife of deceased, refusal of the trial court to instruct on the law of justifiable homicide held not erroneous, the homicide not having been justifiable under any phase of the evidence. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

**Art. 1094. [664] Qualification of the foregoing.**

Cited, *Mays v. State* (App.) 19 S. W. 504.



## SUBD. 3

5½. Private citizens making arrest.—A private citizen, while engaged in making an unlawful arrest and restraining the person arrested by threats with a pistol, loses the right of perfect self-defense. *Rutland v. State*, 224 S. W. 1088.

## SUBD. 5

7½. Manner of executing process.—Where a posse member knew that his companions were making an illegal assault upon a negro's wife to compel her to reveal the whereabouts of a criminal, though he was ignorant of the particular character of the force used by his companions, his ignorance did not render lawful his acts in attempting to restrain the negro with a shotgun when he was endeavoring to go to the assistance of his wife, nor render justifiable the killing of the negro. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

## 4. DEFENSE OF PERSON OR PROPERTY

## Art. 1105. [675] In preventing other felonies.

See *Cochran v. State*, 28 Tex. App. 422, 13 S. W. 651; *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390; *Lewis v. State* (Cr. App.) 231 S. W. 113.

Cited, *Gonzales v. State*, 30 Tex. App. 203, 16 S. W. 978; *Brumley v. State*, 21 Tex. App. 222, 17 S. W. 140, 57 Am. Rep. 612, *Smith v. State*, 31 Cr. R. 14, 19 S. W. 252.

## IN GENERAL

2. Theft at night.—Though deceased and his companions apprehended defendant and attempted to capture him while he was assisting in theft of watermelons at night, he was not justified in killing deceased. *Davis v. State*, 81 Cr. R. 450, 196 S. W. 520.

Statute justifies killing of thief while property is being stolen at night or thief is within gunshot of place where taken. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

In prosecution for murder growing out of defendant's discovery of deceased in his corncrib at night, defendant might show that deceased did not have sufficient corn to have fed his stock for the time shown, and keep it in condition shown, and have remaining the amount shown, as it would tend to show that deceased was stealing defendant's corn, when caught by defendant. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

If defendant shot plaintiff for the purpose of preventing theft, burglary, etc., on his premises at night, and it reasonably appeared by plaintiff's acts or words coupled with acts that it was plaintiff's purpose to commit one of such offenses, the shooting was justifiable. *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

2½. Charge.—In prosecution for murder and negligent homicide at night, court should have instructed jury that if defendant shot intentionally to kill or wound deceased when taking defendant's sugar cane, or within gunshot of where it was taken, the killing was justifiable under the statute, defendant's testimony raising the issue. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

Where evidence tended to show a homicide, justified as committed on a person taking the slayer's property at night while at place of taking, the qualification of an instruction thereon by stating that, if defendant killed deceased in pursuance of a previously formed design, and not to prevent theft of his corn, the killing would not be justified, was erroneous. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

Where facts tended to show a killing, justified as committed upon deceased while he was taking defendant's property at night while at place of taking, an instruction that former thefts by deceased would not justify the homicide was erroneous, where there was no contention that defendant's arrest and shooting of deceased was for past thefts, as his act would be attributed to the theft at time of the killing rather than to former thefts. *Id.*

## SUBD. 1

3. Threats by deceased.—Where evidence in murder case shows that language of deceased at time of killing may have given color to his acts, charge on self-defense should be so framed as to give accused benefit of language, as well as acts of deceased. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

4. Charge.—In homicide prosecution, wherein accused relied on self-defense, court's refusal to instruct jury to consider language as well as acts of deceased, in determining question of whether accused was justified in shooting deceased, held prejudicial error, where there was a conflict in evidence as to conduct of the parties immediately preceding homicide, and there was evidence that deceased, immediately before slaying accused with a knife said "D——n you, I will kill you." *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

5. Reasonableness of apprehension.—The law of self-defense requires that the jury should view the matter of apparent danger from the standpoint of the accused. *Standifer v. State*, 85 Cr. R. 394, 212 S. W. 954.

Homicide is permissible in repelling an assault where death or serious bodily injury is to be apprehended. *Petty v. State*, 86 Cr. R. 324, 216 S. W. 867.

In homicide prosecution defendant upon ground of self-defense, refusal to give requested instruction on apparent danger with reference to the words of deceased at time of the difficulty held reversible error. *Williams v. State*, 87 Cr. R. 280, 221 S. W. 287.

In a murder prosecution defended on ground of self-defense, instruction on apparent danger held objectionable, in that it did not permit jury to consider the words of deceased at the time of the difficulty, as well as his acts. *Id.*

## SUBD. 4

10. **Defense of another.**—In prosecution for murder, defendant setting up that he acted in defense of his son, deceased having insulted the son and put his hand to his hip, when defendant struck and killed him with a breast yoke, it was improper to instruct on the law of excessive force; charge relating to an issue not raised by evidence. *Mitchell v. State*, 85 Cr. R. 25, 209 S. W. 743.

Where there was evidence that deceased shot defendant's sister, and at once advanced toward her, and while so advancing was himself shot by defendant, it was a question for the jury as to whether the shooting was justifiable, and failure to instruct thereon was reversible error. *Thomas v. State*, 85 Cr. R. 42, 210 S. W. 201.

If a negro assaulted a posse member who, with others, was committing an unlawful assault upon the negro's wife to compel her to reveal the whereabouts of a criminal, the attack was provoked by the posse member's unlawful acts, and killing of the negro by him to avert injury to himself was unlawful, as the negro had a right to protect his home and family, and to resist unlawful detention of his own person also attempted. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

Where defendant's evidence showed that he shot deceased while the latter was holding a revolver against his brother and attempting to shoot and threatening to treat the brother like he had treated defendant's father, it was error to refuse to permit defendant to show that the deceased had assaulted and severely injured his father, in order to show what deceased meant by such threat. *White v. State* (Cr. App.) 225 S. W. 511.

## SUBD. 5

11. **Charge.**—Evidence in murder prosecution held to raise no issue as to whether deceased was robbing or attempting to rob defendant of his cotton at the time of the killing, upon which issue an instruction was requested. *Davis v. State*, 84 Cr. R. 282, 206 S. W. 690.

## SUBD. 6

12 $\frac{1}{2}$ . **Charge.**—In a prosecution for murder, an instruction as to the permissibility of homicide, when inflicted to prevent maiming or disfiguring, was error, where there was no evidence of any purpose of maiming or disfiguring. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

## SUBD. 8

16. **Theft by night.**—A killing is not justified, though theft be committed, or though the accused believe it to have been committed, if in killing the thief accused acted upon malice, and not to prevent the theft or the consequences thereof. *Surges v. State* (Cr. App.) 225 S. W. 1103.

Evidence held to raise the issue whether accused, in killing deceased, acted upon the reasonable belief that deceased had stolen his whisky, so as to require a charge as to justifiable homicide in case of theft by night. *Id.*

17. **Recovery of property.**—One giving chase to another who has stolen his money is justified in trying to recover his money, and may go even to the extent of shooting the person who has taken it. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

### Art. 1106. [676] Presumption from the use of weapons.

**Presumption as to Intent.**—Where defendant had discovered deceased in his corner at night, and had undertaken to arrest and hold him for the officers, if deceased was about to secure a gun from his wife, the presumption would be that he intended to kill defendant, or to inflict serious bodily injury. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

**Charge.**—Where there was testimony that accused, in attack by deceased and companions, had been knocked down with rocks and his left hand broken and his right hand cut, he was entitled to charge that, if the weapon used in the assault upon him was such as to produce a reasonable apprehension of death or serious bodily injury, jury should regard such attack as being for the purpose of killing him or inflicting upon him such serious bodily injury. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

In a murder case, where defendant claimed that deceased attacked him with an open knife, an instruction was not erroneous as failing to use the term "deadly weapon," where the length and size of the knife was described. *McDougal v. State*, 84 Cr. R. 424, 208 S. W. 173.

In prosecution for assault with intent to murder, facts held to raise issue of actual danger so as to require a charge on presumption of intent to kill from use of deadly weapon by injured party. *Castle v. State*, 84 Cr. R. 593, 209 S. W. 416.

Where defendant had discovered deceased in his corner at night, and had undertaken to arrest and hold him for the officers, the court should have charged that, if deceased was about to secure a gun from his wife, the presumption would be that he intended to kill defendant or to inflict serious bodily injury. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

Paragraph of charge to the effect that if, when deceased was shot by defendant, deceased's brother made or was about to make an attack upon defendant, or defendant's father, with a gun capable of producing death or serious bodily injury, the law presumes that the deceased's brother intended to kill or to inflict serious bodily injury upon defendant, defendant's father, or both of them, held not objectionable. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390.

In a prosecution for homicide, wherever the presumption from the use of a weapon by deceased against defendant becomes an issue, and request is made for a charge, thereon by defendant, such charge should be given in proper form. *Mason v. State* (Cr. App.) 228 S. W. 952.

In a homicide case, there being evidence that deceased threatened to kill accused and fired at him once and was in the act of firing again when he was shot, an appropriate instruction upon the presumption arising from the use of deadly weapons should have been given. *Medford v. State* (Cr. App.) 229 S. W. 504.

### Art. 1107. [677] In protecting person or property from attacks.

Cited, *Mays v. State* (App.) 19 S. W. 504.

1. **Defense of person or property.**—The law with reference to resort to other means, or no more force than necessary, does not apply to self-defense, actual or apparent. *Blacklock v. State*, 81 Cr. R. 511, 196 S. W. 822.

Where there was evidence that defendant pursued deceased for a peaceable settlement of a difficulty by calling to him that he wanted a peaceable settlement, the question of perfect self-defense is raised, and the proposition should have been given in the charge. *Hammonds v. State*, 82 Cr. R. 387, 198 S. W. 944; *Hokes v. Same*, 82 Cr. R. 271, 198 S. W. 945.

If deceased intended to kill defendant, or it reasonably appeared to defendant that such was deceased's purpose, killing was justifiable. *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873.

One does not forfeit his right of self-defense by reason of his intentions, unaffected by his acts, or words evincing his design to put his intentions into execution. *Raspberry v. State*, 84 Cr. R. 393, 208 S. W. 168.

Defendant, who discovered deceased in his corncrib stealing corn, and who attempted to arrest him as authorized by Code Cr. Proc. arts. 259-263, when deceased's wife, at his request, came with a shotgun, had right to prevent deceased from securing it and using it, and court should have so charged. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

Every one has the right to protect his property from unlawful violence. *Barklay v. State*, 85 Cr. R. 512, 213 S. W. 642.

In a homicide case, where accused was charged with shooting deceased while struggling with her husband, accused's right to rely on self-defense plea held independent of whether discharge of pistol was accidental. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941.

In a prosecution for murder, contentions of the state and defendant held to present the issues of murder, manslaughter, and self-defense. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

Where an assault is of such character that no serious injury is to be apprehended, one assaulted must resort to other reasonable means at hand of preventing injury before he can be justified in taking the life of his antagonist. *Petty v. State*, 86 Cr. R. 324, 216 S. W. 867.

Under the statute authorizing a school-teacher to punish his pupils moderately, if the punishment passes beyond that point, and is immoderate, or for the purpose of revenge, or maliciously done, the right does not exist, and the right of self-defense in the pupil obtains. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

If a school-teacher took his pupil beyond the schoolhouse and grounds not to chastise him as a student for a violation of rules, but out of revenge, or to inflict unnecessary and immoderate punishment in a cruel way, the pupil's right of self-defense inured, as viewed under the circumstances as he saw them at the time, and not as the jury saw them when he was tried for manslaughter. *Id.*

Where plaintiff's conduct on defendant's premises after 11 at night indicated that he was there for the purpose of committing theft, burglary, etc., and he was shot by defendant, the provision that all other means must be resorted to for the prevention of the injury, did not apply. *Ater v. Ellis* (Civ. App.) 227 S. W. 222.

2. **Defense of habitation.**—A negro had a right to procure arms if necessary, to protect his home and family against an illegal assault by posse members endeavoring to discover the whereabouts of a criminal. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

3. **Resisting arrest.**—Whether a de facto sheriff killed by accused had received information warranting arrest of accused without warrant, and whether accused knew of the fact that deceased was an officer, held for the jury. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

Unless accused who shot a de facto deputy sheriff knew the capacity in which deceased was acting and his ground for making the arrest, he was not bound to submit to arrest without warrant. *Id.*

If one arrested for offense was unaware of the officer's official character and the officer had no time to disclose it, flight would not deprive the accused of the right to defend against an effort to recapture him. *Id.*

A private citizen, while engaged in making an unlawful arrest and restraining the person arrested by threats with a pistol, loses the right of perfect self-defense, and cannot insist on instructions covering such right in a prosecution for killing the arrested person. *Rutland v. State* (Cr. App.) 224 S. W. 1088.

4. **Defense of another.**—If defendant negro fired upon officers under the defensive theory, to protect his friend from an assault made on him by either or both officers, defendant was not guilty of assault with intent to murder, though he may have fired too quickly, or have fired under circumstances showing no deliberation, which may constitute aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

Fact that negro stopped when posse member first ordered him to do so, and afterwards advanced threatening injury to posse member if he obstructed his progress to his home, where other members of posse were illegally assaulting his wife to compel her to reveal whereabouts of a criminal, did not confer upon posse member the right to

kill the negro, and, in restraining the negro by an assault with a shotgun, he was guilty of a continuous assault, which negro had right to resist. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

5. **Provoking contest, and impairment of self-defense.**—Although defendant provoked difficulty, he did not forfeit his right to defend against a deadly assault, unless he intended to kill or inflict serious bodily injury. *Aycock v. McQuerry* (Civ. App.) 200 S. W. 873; *Sheely v. State*, 83 Cr. R. 127, 201 S. W. 1012.

The right of self-defense is qualified under the law of provoking difficulty, where accused intended to provoke difficulty for purpose of causing deceased to attack, and thereupon to kill or do him serious bodily harm. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

To cut off self-defense on ground of provoking difficulty, accused must have intended to provoke the difficulty, for the purpose of causing deceased to attack, and thereupon to kill him or do serious bodily harm. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

A person may bring on a difficulty, which results in homicide, without forfeiting the right of self-defense, even if the act by which it was brought on was wrongful. *Id.*

If defendant obtained a knife and went to where deceased was with a view to engaging in a difficulty with him, and did some act that brought about the difficulty, he had no right to use knife in self-defense. *Torrez v. State*, 83 Cr. R. 475, 204 S. W. 228.

Calling a person a "son of a harlot" would be sufficient provocation to preclude self-defense if inducing cause of difficulty. *Trevino v. State*, 83 Cr. R. 562, 204 S. W. 996.

Where accused invited deceased to go out on the gallery after being struck by deceased, and where, after going out on the gallery, deceased pushed accused off the gallery, whereupon accused called deceased a son of a harlot, accused will not be deemed to have provoked the difficulty, the deceased having taken first step toward the trouble. *Id.*

Defendant, who discovered deceased in his corncrib stealing corn, and who attempted to arrest him, as authorized by Code Cr. Proc. arts. 259-263, when deceased's wife, at his request, came with a shotgun, had the right to prevent deceased from securing it and using it. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

Where defendant determined to kill deceased and armed himself with a shotgun for that purpose, and, on seeing deceased, presented the shotgun, and by words indicated a hostile intent reasonably calculated to cause deceased to make a counter demonstration, defendant had no right to make the demonstration so induced the cause for killing deceased, and the law of self-defense was not involved. *Beck v. State*, 85 Cr. R. 578, 213 S. W. 662.

Issue of provoking the difficulty, justifying instruction thereon, does not arise from evidence which is merely conflicting as to who made the first attack. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

Where one procured a gun to protect himself or himself and his son from unlawful violence, and such preparatory act caused an unlawful attack upon him, and in his own necessary self-defense he shot and killed the assaulting party, he was not guilty of any offense. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

An intent to provoke deceased to attack accused in order to produce occasion to kill deceased is an essential element in the law of provoking the difficulty, but the mere existence of such intent, in the absence of some word or action reasonably calculated to effect the end intended, is insufficient. *Richards v. State*, 86 Cr. R. 414, 216 S. W. 888.

Defendant did not forfeit his right of self-defense by the mere act of arming himself and seeking an interview with deceased to bring about a peaceful adjustment of their difficulties. *Id.*

Whether or not the persons involved in an affray had previously conspired to kill the other person fought with, the mere fact that they may have conspired to kill him if they were attacked on their part by him when acting inoffensively did not debar them from the right of self-defense. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

Evidence in homicide held to raise only the issues of murder and justifiable homicide, and not the issue of "provoking the difficulty," the law of which arises only where deceased was the attacking party, and his attack was brought about by the words or acts of accused, intended to bring on the attack, in order that advantage might be taken thereof by him to slay his adversary and escape the consequences; hence submission of such issue was improper. *Carter v. State*, 87 Cr. R. 200, 220 S. W. 335.

If a negro assaulted a posse member who, with others, was committing an unlawful assault upon the negro's wife to compel her to reveal the whereabouts of a criminal, the attack was provoked by the posse member's unlawful acts, and killing of the negro by him to avert injury to himself was unlawful, as the negro had a right to protect his home and family, and to resist unlawful detention of his own person also attempted. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

Where the acts and conduct of defendant are the cause of the attack on him, the question of provoking the difficulty is one of fact for the jury. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

In a prosecution for homicide, where defendant fired three shots as rapidly as they could be fired from a pistol, there was no question of abandonment of the difficulty by the deceased simply because deceased was in the act of turning, which placed his side to defendant, when the last shot was fired; hence it was error to limit defendant's right of self-defense by charging on the subject of abandonment of the difficulty. *Lovett v. State*, 87 Cr. R. 548, 223 S. W. 210.

A party may have a perfect right of self-defense, though he himself is not entirely free from blame or wrong in the transaction; if his blamable or wrongful act was not

intended to produce the occasion, and was not an act which was reasonably calculated to produce the occasion or provoke the difficulty, his right of self-defense was complete, though his act was not blameless. *Mason v. State* (Cr. App.) 228 S. W. 952.

One may seek a party with intent to provoke a difficulty, but he does not forfeit his right of self-defense unless after he has found his adversary he does provoke the difficulty by words or acts or both; the aggressor must not only have intended to provoke an attack to gain the vantage ground of apparent defensive, but he must do or say something to cause his adversary to make the attack, and his acts or words must be reasonably calculated to effect the object. *Id.*

Defendant could not claim the law of perfect self-defense, if his own wrongful act in first shooting at deceased produced or brought about the situation in which he subsequently shot and killed deceased. *Carlile v. State* (Cr. App.) 232 S. W. 822.

5½. **Right to arm oneself.**—The act of defendant in obtaining a knife to defend himself against the aggression of deceased, who had previously assaulted him, in case deceased should again attack him, did not defeat the right of self-defense, where defendant did nothing to bring on final difficulty resulting in killing. *Torrez v. State*, 83 Cr. R. 475, 204 S. W. 228.

7. **Threats by defendant.**—That defendant had made antecedent threats did not deprive him of the right to defend himself. *Legrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In prosecution for murder of sister's husband after the husband had assaulted and seriously injured his wife and had threatened to kill her entire family, and after the wife had taken refuge with defendant, in which defendant claimed to have shot from his house in defense of himself, sister, and others of the family while deceased was advancing toward the house, the court's failure to instruct on the law of homicide in defense of one's person in a case wherein the accused relies upon threats accompanied by a demonstration, where no special charge was asked correcting the omission, and where the fatal shot and the infliction of the injuries from which death appeared to result took place after deceased had fled from the premises pursued by defendant, held not reversible error. *Bean v. State* (Cr. App.) 231 S. W. 776.

9. **Evidence on issue of self-defense.**—Under plea of self-defense, evidence that deceased's daughter drank liquor and solicited men to purchase it for her and that she was an immoral person held admissible; defendant having testified that she was leading his daughter into such conduct. *Henley v. State*, 81 Cr. R. 221, 195 S. W. 197.

Defendant's statement that he struck because he was afraid, when deceased reached behind him, he was going to get a gun or something and do him injury, shoot or kill him, presents the question of apparent danger, with right of self-defense. *Blacklock v. State*, 81 Cr. R. 511, 196 S. W. 822.

That deceased's father met defendant after difficulty, and defendant drew knife, looked daggers at him, and appeared angry, held inadmissible. *Wallace v. State*, 82 Cr. R. 588, 200 S. W. 407.

In prosecution for murder, evidence held to sustain conviction, in that it showed defendant killed deceased to rob him, and not in self-defense. *Vestal v. State*, 83 Cr. R. 184, 202 S. W. 94.

In prosecution for murder, evidence held to raise issue of self-defense. *Torrez v. State*, 83 Cr. R. 475, 204 S. W. 228.

Evidence of the defendant as affected by that of other witnesses and surrounding circumstances held to present an issue of fact from which the jury was authorized to determine that defendant did not shoot deceased in self-defense. *Ward v. State*, 83 Cr. R. 518, 204 S. W. 322.

On the issue of self-defense, defendant should have been permitted to show that deceased had the reputation of being a quarrelsome, contentious, and overbearing man, and that defendant knew of such reputation. *Lacey v. State*, 83 Cr. R. 607, 204 S. W. 433.

In prosecution for murder, evidence held to authorize submission of question of defendant's provoking difficulty. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In prosecution for murder, evidence held sufficient to justify submission to jury of question of whether accused provoked the difficulty. *Trevino v. State*, 83 Cr. R. 562, 204 S. W. 996.

In a prosecution for manslaughter, claimed by defendant to have been committed in defense of his brother, evidence as to his brother's insanity was admissible on the question of defense of a relative. *Holland v. State*, 84 Cr. R. 154, 206 S. W. 89.

In homicide prosecution defended on ground of self-defense and involving questions whether the difficulty was initiated by the demonstration of the deceased or by defendant's assault, jury was entitled to consider previous difficulties and the relation of the parties and their mutual expressions of ill-will against one another. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In prosecution for homicide, defendant setting up self-defense, the state properly asked witnesses as to the location of bullet holes in the clothing worn by deceased at the time of the fatal difficulty. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

In prosecution for murder, defendant setting up self-defense, the state was properly permitted to ask a witness if he knew the general reputation of deceased in his community for being a quiet, peaceable man, over objection that alternative was not included in, and that something was omitted from, the question. *Id.*

Where defendant shot deceased immediately after deceased had shot defendant's sister, and while he was advancing toward her, evidence that deceased had a bottle of whisky in his pocket held immaterial, and its exclusion not error. *Thomas v. State*, 85 Cr. R. 42, 210 S. W. 201.

Where defendant prosecuted for murder pleaded self-defense and claimed that deceased had come to the place in question to carry out a threat to kill defendant be-

fore sundown, testimony of the wife of deceased, explaining her husband's presence by detailing his intention, undisclosed to defendant, to meet witness at that place for the purpose of accompanying her home, was inadmissible. *Standifer v. State*, 85 Cr. R. 394, 212 S. W. 954.

Evidence held insufficient to support conviction for manslaughter in that it showed that defendant fired the shot that killed deceased from a position on the floor to which he had fallen after having been shot by deceased. *Berrian v. State*, 87 Cr. R. 284, 221 S. W. 282.

To the issue of self-defense, depending on defendant's view of the incidents of the present event (trouble growing out of deceased's criticism of defendant's failure to buy Liberty Bonds), in the light of his knowledge of deceased's character, evidence of defendant's intense patriotism, existence of many disloyalists in the community, the stabbing of a friend of defendant by one of them, existence of feeling in the community against disloyalty, and defendant's opposition to disloyalty, known and resented by the disloyal was irrelevant. *Baker v. State*, 87 Cr. R. 305, 221 S. W. 607.

In prosecution of wife for killing her husband, defended on ground of self-defense, trial court properly allowed to come before the jury the various difficulties, quarrels, threats, and encounters constituting the course of conduct between husband and wife; such matters including a conversation wherein the husband asked his attorney for advice on killing his wife, being competent on the controverted question of self-defense. *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261.

It is permissible, though not necessary, for defendant in homicide, claiming reasonable belief that deceased was armed, and making a demonstration preparatory to attack, and relying in part on alleged statements of deceased to him that deceased had been the aggressor in difficulties with named persons, to support this by evidence of such attacks on such persons having been made. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

In a prosecution for murder resulting in conviction of manslaughter, evidence held to sustain the conviction, not being conclusive on the issue of killing in self-defense. *Ivens v. State* (Cr. App.) 225 S. W. 1095.

In homicide prosecution in which defendant claimed to have acted in self-defense, evidence held to sustain conviction. *Perea v. State* (Cr. App.) 227 S. W. 305.

In a homicide case, where plea was self-defense, deceased having fired a shotgun at accused, evidence that deceased had purchased the shotgun for one of his sons was improperly admitted, where the matter was unknown to the accused, as it tended to impair his rights of self-defense. *Medford v. State* (Cr. App.) 229 S. W. 504.

In a prosecution for murder, evidence held not to raise the issue of different phases of the law of self-defense based on the two shots fired by defendant. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In prosecution for manslaughter, evidence held to require a finding that defendant acted in self-defense from an assault with a deadly weapon in the hands of an intoxicated and dangerous man. *Spain v. State* (Cr. App.) 232 S. W. 325.

**12. Charge.**—See *Skaggs v. State*, 31 Cr. R. 563, 21 S. W. 257.

A charge that "homicide is justifiable, also, in the protection of the person against any other unlawful and violent attack besides those mentioned; \* \* \* and in such cases all other means must be resorted to for the prevention of the injury; and the killing must take place while the person killed is in the very act of making such unlawful and violent attack,"—is correct. *Miller v. State*, 27 Tex. App. 63, 10 S. W. 445.

Instructions on self-defense held to sufficiently present the idea that appearances of danger were to be considered from defendant's standpoint. *Bivens v. State*, 82 Cr. R. 278, 198 S. W. 962.

An instruction on self-defense held erroneous, as submitting the self-defense theory from the standpoint of the jury rather than from the standpoint of defendant. *Hays v. State*, 82 Cr. R. 427, 199 S. W. 621.

Instruction to view issue of self-defense from defendant's viewpoint, and that, if it reasonably appeared to defendant that deceased was drawing a weapon, the shooting was justified, and that, if there was reasonable doubt as to defendant's belief, he should be acquitted, sufficiently presented self-defense, in spite of previous instruction leaving appearances at time of shooting to jury's and not defendant's viewpoint. *Adler v. State*, 83 Cr. R. 72, 201 S. W. 177.

It was not error to refuse to specially charge that a man living with his wife in a house of ill fame was just as much entitled to defend himself from unlawful attack as any one else, although some of the jurors had stated that such fact would influence them. *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84.

There being testimony that accused was suddenly attacked, accused was entitled to instruction that if the jury believed that accused killed deceased, and not in self-defense, but that means used were not of a nature calculated to produce death, they should find accused not guilty of homicide, unless there was an intention on his part to kill and he was not acting in self-defense, but that accused could be found guilty of aggravated assault and battery, unless acting in self-defense, and in the latter case could not be convicted of any offense. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

In prosecution for murder, court's charge on self-defense held to amply submit defendant's claimed self-defense. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In prosecution of bank president for murder of state commissioner of banking, who had just closed his bank, instruction on self-defense held sufficiently to apply law to facts. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

Although defendant testified that he shot twice to protect his father, and that the third shot was accidental, held, in view of other evidence, that court should have

instructed on defendant's right to defend himself as well as upon his right to defend his father. *Knight v. State*, 84 Cr. R. 395, 207 S. W. 315.

Where in beginning of difficulty accused's father alone was in danger when defendant shot at prosecuting witness, and where later father was not present when defendant again shot at the prosecuting witness, it was reversible error not to limit charge as to self-defense to the second difficulty. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

In homicide prosecution involving self-defense issue, instruction on the law of self-defense held proper. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In murder trial, where issue of self-defense was made prominent by the facts, instruction on insulting words or conduct to female relative as justification held reversible error, as placing burden upon accused to prove justification to reduce the degree from murder to manslaughter, and then in substance instructing that, if this were not done, accused would be guilty of murder, thus excluding the issue of self-defense. *Wood v. State*, 85 Cr. R. 268, 211 S. W. 782.

In prosecution for homicide wherein defendant set up a defense of property in his rental possession, a charge that if he went to ask deceased why he was working thereon and to desist, and carried a gun, and that, if deceased rushed toward defendant and from deceased's acts, character, etc., defendant had a reasonable apprehension of serious bodily injury or fear of death, and acted thereon and shot deceased, held to fairly and fully cover self-defense as made by the evidence. *Barklay v. State*, 85 Cr. R. 512, 213 S. W. 642.

In trial for murder of street car conductor who had ejected accused from the street car, it was proper to refuse to charge anything with reference to the street car company's rules, which were unknown to accused and could not have influenced his conduct, as such instruction would confuse the issues. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

A charge on manslaughter was not unduly restrictive of accused's right of self-defense, where the reference in such charge to self-defense was not an attempt to define the law of self-defense, but to direct the jury's attention to the fact that they should keep the law and facts as to self-defense in mind for accused's benefit. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

The state's case being a killing from malice, and defendant's theory being that deceased came in a threatening attitude to where he was working, and he thought his life was in danger, and he defended from that standpoint, the necessity to resort to other means of defense are not to be charged. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

In a prosecution for murder there was no need for special charges telling the jury that they could consider the weakened condition of accused's mind in deciding whether to him the danger of death or serious bodily injury was real or apparent, the court having instructed that defendant be discharged if the conduct of the deceased produced in accused's mind a reasonable apprehension of fear of death or serious bodily injury, viewed from accused's standpoint alone. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In a homicide case, evidence held not to require the court to charge on self-defense. *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327.

A charge that homicide is justifiable in protection of the person against any unlawful and violent attack, but in such case all other means must be resorted to for the prevention of the injury, held erroneous; the evidence showing that from defendant's standpoint the attack upon him was one calculated to kill or seriously injure him, in which case defendant was not required to resort to any other means than force. *Petty v. State*, 86 Cr. R. 324, 216 S. W. 367.

Where self-defense is urged, it is incumbent on the trial court to instruct the jury that in determining the issue the matter should be viewed from the standpoint of the accused, and this is true, though the issue be raised by the testimony of the accused alone. *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474.

In a prosecution for manslaughter against a pupil who killed his teacher while being chastised, the issue being raised of the pupil's right of self-defense on account of improper chastisement, instruction on the pupil's right of self-defense held improper as not presenting the case from his standpoint, but from that of the jury. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

In a prosecution for manslaughter against a pupil who killed his school-teacher while being chastised, where the issue was raised whether the teacher's attempted punishment of the pupil passed beyond proper limits to bring into existence the pupil's right of self-defense, charges were required on such issue. *Id.*

In homicide prosecution defended upon ground of self-defense, refusal to give requested instruction on apparent danger with reference to the words of deceased at time of the difficulty held reversible error. *Williams v. State*, 87 Cr. R. 280, 221 S. W. 287.

Instructions on self-defense and communicated threats were properly refused, where it was stated therein that it made no difference and the jury would not consider whether deceased was an officer or not; his status as an officer being an element in the case, though not changing the nature of the offense. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

In a prosecution of a wife for killing her husband, charge on self-defense, which in applying the law to the facts directed the jury specifically to the theory of the case on which defendant predicated her right of self-defense, held not erroneous, though submitting the converse of defendant's theory that the mere belief she was in danger in the absence of reasonable grounds did not excuse her. *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261.

In a prosecution for homicide, charge on self-defense held not open to criticism. *Walker v. State* (Cr. App.) 227 S. W. 308.

In a homicide case, where defendant used rifle and deceased a shotgun, and there was evidence that during the encounter both the accused and deceased changed their positions, the state contending that between the first and second shots fired by the accused the movement by the deceased had the effect to increase the distance between the parties, court erred in failing to instruct the jury upon the phase of the law of self-defense which accords the accused the right to continue to shoot so long as the danger continues. *Medford v. State* (Cr. App.) 229 S. W. 504.

A charge that, if the jury believed from the evidence beyond a reasonable doubt that "defendant, acting with \* \* \* as principal, \* \* \* shoot with a gun, and thereby kill" deceased, but if the jury further believed that at the time of so doing deceased had made, or was about to make, an attack on defendant or his principal which caused defendant to have a reasonable expectation or fear of death or bodily harm, and that, acting under such reasonable expectation, he shot and killed, defendant should be acquitted, is not objectionable as confusing and erroneous. *Henderson v. State* (Cr. App.) 229 S. W. 535.

Considering the entire charge, where the court charged that if defendant, acting with another as a principal, killed deceased, nevertheless he should be acquitted if deceased had made, or was about to make, an attack on either, which, as viewed from his standpoint, caused defendant to have a reasonable expectation or fear of death or bodily injury to himself or his principal, defendant cannot complain of the charge on the theory that it unduly restricted the right of self-defense to such force as was reasonable or necessary. *Id.*

Where defendant, who was present when his son killed deceased, was accused of murder, and defendant testified that when the shooting occurred he was sitting in his automobile, the son having alighted and engaged in the fatal encounter, the facts were not sufficient to warrant a charge on the right of defendant to act in his own self-defense. *Id.*

In a prosecution for murder, presentation in the charge on behalf of defendant of separate legal phases pertaining to his right of self-defense at the time he fired his second or third shot held not necessary. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In prosecution for murder, failure to instruct at defendant's request that he had right to continue to shoot as long as the danger continued, as viewed from his standpoint, was not error, where such charge was rendered unnecessary by the circumstances, including an instruction that, if the first shot inflicted mortal wounds, and in firing it appellant was acting in self-defense, they would not consider as a circumstance against him that he fired additional shots, where the evidence showed that each of the wounds was fatal, there being no evidence to require the requested instruction. *Boaz v. State* (Cr. App.) 231 S. W. 790.

In a prosecution for homicide, where defendant claimed that deceased, who with others had beaten up one of defendant's friends, made a threatening motion, and that, becoming frightened, he shot and killed, a charge that if at the time defendant killed deceased the latter had made or was about to make an attack upon defendant, or that it reasonably appeared from defendant's standpoint that deceased had made or was about to make an attack upon him, defendant should be acquitted, etc., was a fair presentation of defendant's case. *Russell v. State* (Cr. App.) 232 S. W. 309.

See, also, *Vernon's Code Cr. Proc.* 1916, art. 735, notes 65-73.

13. — **Provoking contest.**—Whenever it becomes necessary in the opinion of the trial court to charge on the law of provoking the difficulty, it is necessary always that the converse of that proposition be also given to the jury. *Mason v. State* (Cr. App.) 228 S. W. 952; *Hammonds v. State*, 82 Cr. R. 387, 198 S. W. 944; *Hokes v. Same*, 82 Cr. R. 271, 198 S. W. 945.

In prosecution for murder, fact that defendant may have struck first blow will not justify charge on self-defense, qualified with charge on provoking difficulty in absence of evidence of intent to bring difficulty on to provoke attack in which defendant intended to kill or injure deceased. *Martinez v. State*, 81 Cr. R. 627, 197 S. W. 872.

That accused was alleged to have been criminally intimate with deceased's wife did not warrant submission of self-defense limited by provoking difficulty, on theory that such intimacy provoked the difficulty. *Sheely v. State*, 83 Cr. R. 127, 201 S. W. 1012.

In prosecution for murder of deputy sheriff who was attempting to prevent escape of accused after arrest for burglary, held error to qualify the charge on self-defense by the issue of provoking the difficulty in absence of evidence that accused fled with intent to provoke difficulty. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

Where the court properly defined and explained what acts establish provoking the difficulty, and further gave accused's requested charge submitting the converse thereof, according to his defensive theory, the original charge was not defective in failing to submit such theory. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

Evidence held to warrant charge on provoking the difficulty. *Id.*

If accused, after provoking the difficulty, abandon it, and it is renewed by deceased, the court must instruct on the law of such abandonment. *Id.*

In homicide prosecution, charge on provoking difficulty should inform jury that, if defendant provoked the difficulty with the intent to injure the deceased, but with no intent to kill him or do him serious bodily harm, and afterwards fired upon him for the protection of his own life against the threatened assault by deceased, conviction could not be for a higher grade of offense than aggravated assault. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 800.

In a homicide prosecution issue of provoking the difficulty held not in the case, so that a charge thereon was improperly given. *Redwine v. State*, 85 Cr. R. 437, 213 S. W. 636.



In prosecution for assault with intent to murder, where there was testimony for the state that defendant was armed with a pistol when he came to the injured party, and that he used insulting language and was in the act of drawing his pistol when the other party struck at him, it was not error to qualify defendant's right of self-defense by instructing on the law of provoking the difficulty. *Brown v. State*, 85 Cr. R. 493, 213 S. W. 658.

Charge on provoking the difficulty is proper, where first attack was made by deceased, but was induced by words and conduct of accused reasonably calculated and intended to provoke an attack, to be used by accused as an occasion for harm to deceased. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

Charge on provoking the difficulty held improper under the evidence, which was insufficient to raise the issue. *Id.*

In a prosecution for murder, evidence held sufficient to warrant an instruction given on the matter of accused's provoking the difficulty leading to the killing, and question as to whether defendant's acts and statements were for purpose of provoking attack was for the jury. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

The act of defendant, who with others was working on a public road, in lying down on a pallet which deceased claimed as his bed and refusing upon request to surrender it, was not unlawful, and where it did not appear to have been intended or reasonably calculated to provoke assault by deceased, an instruction on provoking the difficulty was not appropriate. *Petty v. State*, 86 Cr. R. 324, 216 S. W. 867.

In a prosecution resulting in conviction of manslaughter, instruction qualifying defendant's right of self-defense by a charge on provoking the difficulty held not justified by evidence. *Richards v. State*, 86 Cr. R. 414, 216 S. W. 888.

In prosecution for assault to murder, where trial court gave defendant his unlimited right of self-defense, and gave no charge on provoking the difficulty, a charge that no verbal provocation (defendant having called the assaulted person by an insulting term, and thereby provoked him to strike) would justify an assault was not called for. *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554.

In a prosecution for homicide, evidence tending to show that defendant provoked difficulty held sufficient to authorize the court to limit the right of self-defense by charging on the provoking of the difficulty. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

Where the presence and conduct of defendant caused the difficulty, whether intended or not, a charge on provoking the difficulty was proper. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

In prosecution for murder of husband of woman with whom defendant had been maintaining illicit relations, correct submission of case held to have required a charge, qualifying right of self-defense by one on law of provoking difficulty, accompanied by one advising jury when they might reduce grade of homicide to that of manslaughter if decedent was provoked to attack defendant by language used with reference to decedent's wife. *Barber v. State*, 87 Cr. R. 585, 223 S. W. 457.

If conductor's assault on passenger was provoked by the passenger's words and acts, the court, in prosecution of passenger for murder of conductor, should have qualified the charge on self-defense by a charge on the law of provoking the difficulty. *Mickie v. State* (Cr. App.) 227 S. W. 491.

In a prosecution for homicide committed on one whom defendant believed to have maligned his sister, the trial court having embodied in the charge no qualification of the right of perfect self-defense, his refusal to instruct on the law applicable to defendant's right to arm himself and seek deceased for an explanation was not error. *Moore v. State* (Cr. App.) 228 S. W. 218.

In a prosecution for homicide, a proper instruction on provoking the difficulty is to the effect that if defendant by his own willful and wrongful acts engaged deceased in a quarrel to provoke a difficulty with the intention to kill deceased, etc., and if defendant did some act, or used some language, or both, with the unlawful purpose to produce the occasion and bring on the difficulty, and such acts or language or both were reasonably calculated to provoke the difficulty, and deceased was caused to attack defendant, and defendant, in pursuance of his original intention, struck deceased and injured him, defendant could not avail himself of his plea of self-defense, but would be guilty either of manslaughter or aggravated assault. *Mason v. State* (Cr. App.) 228 S. W. 952.

In a prosecution for manslaughter, charge on provoking the difficulty held erroneous as giving the jury no measure or guide with reference to what wrongful acts or conduct on defendant's part would amount to provoking the difficulty and as leaving the jury to grope in the record and pick out any act which they might believe wrongful or blamable. *Id.*

See, also, *Vernon's Code Cr. Proc.* 1916, art. 735n66.

13½. — **Right to procure arms.**—An instruction that, if defendant armed himself and pursued deceased with the intention of taking his life, he could not justify on the ground of self-defense, is insufficient; as some act or word indicating that purpose or to provoke the deceased is necessary. *Hammonds v. State*, 82 Cr. R. 287, 198 S. W. 944; *Hokes v. Same*, 82 Cr. R. 271, 198 S. W. 945.

Having limited accused's right of self-defense by charge on provoking difficulty, court should have instructed as to possession of revolver, where accused was a traveler, whose possession was not unlawful, and the meeting with deceased was casual. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

In prosecution for murder, where court gives no charge at all on provoking difficulty, he should not give any charge on defendant's right to arm himself in preparation for any attack, or contemplated attack, by deceased upon him. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

In a prosecution for murder, the court having given the jury an instruction on the law of self-defense without in any way qualifying it, there was no error in refusing to instruct the jury that appellant had a right to arm himself and seek the deceased for an explanation or discussion of the previous difficulty. *Hollman v. State*, 85 Cr. R. 371, 212 S. W. 663.

In prosecution for assault with intent to murder, refusal to incorporate in instruction on self-defense charge that, in seeking assaulted party to peaceably adjust their difficulties, the fact that defendant first armed himself would not deprive him of his right to defend against an unlawful attack, was erroneous, in view of their previous encounter, the other party's communicated threats, and his hostile attitude, and the fact that he struck at defendant with a deadly weapon. *Brown v. State*, 85 Cr. R. 493, 213 S. W. 658.

In homicide prosecution, court, having given an unqualified charge upon the law of self-defense, was not required to instruct jury upon defendant's right to arm himself before seeking deceased for interview as to deceased's misconduct with his (defendant's) wife. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

Instructions that defendant had the right, together with his father, to seek deceased or his brother for the purpose of having an interview in regard to any difference of feed crop raised by deceased on farm of defendant's father, and the right to arm himself against any attack which might be made upon him or his father, held not subject to objection that it was too restrictive of defendant's right to arm himself and seek his assailant for an interview. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390.

In prosecution for assault to murder, held, that there were no facts to warrant a charge on the right to arm one's self in anticipation of danger when engaged in a lawful enterprise. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

Defendant's act in sharpening a borrowed pocketknife, opening it, and carrying it up his sleeve when going to meet the person ultimately assaulted was not "arming" himself as contemplated by Texas law, a pocketknife not being a "weapon," and a charge on right to arm himself was properly refused in his prosecution for assault to murder, as contemplating erroneous idea his acts were justifiable. *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554.

In murder prosecution involving self-defense issue, where the evidence showed that deceased had threatened to kill defendant when the opportunity was afforded, and that defendant was on his own premises when he procured his pistol, refusal of requested charge that defendant had the right to arm himself in anticipation of an attack from deceased held error. *Williams v. State*, 87 Cr. R. 280, 221 S. W. 287.

In a prosecution for murder, defendant's requested special charge that he had a right to arm himself on account of threats by decedent held properly refused as without evidence to support. *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

In a prosecution for homicide committed on one who defendant believed had maligned his sister, evidence held insufficient to present the issue of defendant's right to arm himself and ask an explanation of deceased to call for instruction thereon. *Moore v. State* (Cr. App.) 228 S. W. 218.

Where defendant and his son met deceased on the highway, and the son, who, in accordance with his usual custom, was traveling armed, shot deceased, who had insulted his wife, the fact that in the charge the court told the jury that the son had the right to approach deceased and demand an explanation of the insult did not warrant a charge that the son, before seeking the interview and explanation, had the right to arm himself. *Henderson v. State* (Cr. App.) 229 S. W. 535.

14. — **Mutual combat.**—Where deceased brought on the trouble and followed it to its conclusion, accused not being to blame at any point from any view of the evidence, the issue of abandonment of the difficulty was not in issue, although appellant attempted in good faith to leave the vicinity; hence failure to charge thereon was not error. *Campbell v. State*, 84 Cr. R. 89, 206 S. W. 348.

In a prosecution for murder, an instruction as to mutual combat held not supported by evidence. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

15. — **Threats by deceased.**—In a prosecution for murder, evidence showing previous threats of deceased, the court should have charged on subject of self-defense viewed in the light of threats. *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

Where one accused of murder proved that deceased's threats against his life had been communicated to him, it was error to refuse instruction on communicated threats. *Sheely v. State*, 83 Cr. R. 127, 201 S. W. 1012.

Where accused relies on self-defense on communicated threats accompanied by an overt act without actual attack, the charge on self-defense should be accompanied by and connected with a charge on the law of threats, but if actual attack is relied upon, the law of threats may be separately charged. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

See, also, *Vernon's Code Crim. Proc.* 1916, art. 735, n. 67.

16. — **Defense of another.**—In submitting question of defense by accused of his brother, it is proper to instruct that, if the jury believed that defendant killed deceased in defense of his brother, or if they had a reasonable doubt thereof, to acquit. *Holland v. State*, 84 Cr. R. 154, 206 S. W. 89.

In a homicide case, held error, in view of the evidence, to refuse to instruct as to the right of accused to arm himself and interpose in a difficulty to protect his son from unlawful violence. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

In a prosecution for assault with intent to murder, defendant claiming that he had acted in defense of his brothers, in view of the facts in evidence, despite defendant's testimony that he shot because the other party made a motion to shoot him, held,

that the trial court should have embodied in the charge on request defendant's right to act in defense of his brothers. *Medina v. State*, 87 Cr. R. 81, 219 S. W. 453.

See, also, *Vernon's Code Crim. Proc.* 1916, art. 735, n. 73.

17. — **Defense of property.**—It was not error to refuse a requested charge that, if defendant shot to stop or scare a man he had theretofore seen in his house, he could not be guilty, where there was no evidence of such intention. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

In a trial for homicide, evidence held not to call for a charge that defendant would be justified in committing homicide in defense of his property, if in defense thereof deceased made an unlawful attack upon defendant, from his standpoint, or was injuring or destroying defendant's property. *Barklay v. State*, 85 Cr. R. 512, 213 S. W. 642.

Charge on defense of property should not have been given, there being no fact showing defendant was defending against an attack on his property. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

#### Art. 1108. [678] Retreat not necessary.

Cited, *Gonzales v. State*, 30 Tex. App. 203, 16 S. W. 978.

**Retreat.**—The doctrine of retreat is not applicable to cases of imperfect self-defense, and hence its omission is not error in this case. *Carter v. State*, 30 Tex. App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

One acting in self-defense may pursue his adversary so long as he considers himself in danger. *Taylor v. State*, 85 Cr. R. 468, 213 S. W. 985.

**Charge.**—In prosecution for murder, evidence held not to entitle defendant to a charge that he had right to advance on deceased if it reasonably appeared to him that it was necessary for his self-protection. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In a homicide case, refusal of requested instruction that accused might pursue his adversary in self-defense so long as he considered himself in danger held reversible error, where evidence raised such issue. *Taylor v. State*, 85 Cr. R. 468, 213 S. W. 985.

Where accused killed deceased after he had unlawfully arrested him, and was restraining him by threats with his pistol, when he claimed deceased made a motion as if to attack him, it was not error for the court to omit to instruct the jury that accused was not bound to retreat. *Rutland v. State* (Cr. App.) 224 S. W. 1088.

It was error to refuse a request to charge on the law of retreat; for, although not applying to defendant's theory of defense that he shot deceased to save the life of defendant's brother when himself in no danger, yet the evidence showed that the brother was in combat, and the law of retreat was applicable to him. *White v. State* (Cr. App.) 225 S. W. 511.

#### Art. 1109. [679] Requisites of the attack.

See *Boyd v. State*, 28 Tex. App. 137, 12 S. W. 737; *Carter v. State*, 30 Tex. App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

Cited, *Gonzales v. State*, 30 Tex. App. 203, 16 S. W. 978.

**Attack and danger.**—Where a plea of self-defense is interposed in a prosecution for homicide, it is fundamental that the killing must be viewed from the standpoint of defendant, as understood by him at the time he acted. *Singleton v. State*, 86 Cr. R. 401, 216 S. W. 1094; *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161; *Williams v. State*, 87 Cr. R. 230, 221 S. W. 287; *White v. State* (Cr. App.) 225 S. W. 511.

Whether defendant, who had shot in self-defense, was justified in shooting the second time, depends upon whether he continued to shoot under apprehension of danger, and not upon whether sufficient time elapsed between first and second shots in which to determine that danger had ceased. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

Where nothing appears in evidence which could have caused defendant to think deceased was making an unlawful attack upon him, there was no error in refusing to charge on self-defense. *Thomas v. State* (Civ. App.) 210 S. W. 201.

If deceased had abandoned the conflict, accused was in no immediate danger, and was not justified in shooting deceased, but where deceased, after having stabbed defendant, ran apparently toward a building, making it appear to defendant that he intended to get pistol and renew conflict, the deceased had not, as a matter of law, abandoned the conflict. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 300.

Upon the question of whether deceased had abandoned conflict at the time accused fired shot, the intentions of deceased should be judged by their appearance from the accused's standpoint at the time he fired. *Id.*

Where defendant shot deceased while discussing deceased's insulting conduct toward defendant's wife, and after deceased had made demonstration as if to draw a pistol, the killing was in self-defense from the standpoint of apparent danger. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 853.

The theory of self-defense must be viewed from the defendant's viewpoint; and, where he shot deceased, who was holding and trying to shoot accused's brother, the fact, unknown to accused, that the pistol was so broken that it could not be discharged, did not destroy his plea of defense of the brother. *White v. State* (Cr. App.) 225 S. W. 511.

If it appeared to defendant charged with murder, viewing it from his standpoint, from the acts or words coupled with the acts of deceased and defendant's other assailants, that his (defendant's) life was in danger, he had a right to act on such appearances in his own defense. *Lewis v. State* (Cr. App.) 231 S. W. 113.

Where deceased verbally objected to defendants' aiding a companion who was being beaten by a third person, such verbal objections did not warrant defendants in using force against deceased. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

**Evidence.**—In prosecution for murder, where defendant claimed that he did not shoot until deceased moved his hand to his right side, the position of the arm of deceased was a material inquiry on issue of self-defense, and the coat worn by deceased at the time of the homicide was relevant on that issue. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In homicide prosecution, sheriff may generally testify as to whether he found a weapon on the body of deceased upon reaching the scene of the homicide, especially if apparent danger is the basis of self-defense; objections to such testimony, upon ground as to length of time that had elapsed since the killing and the opportunities for others to take weapons away affecting the weight, and not the admissibility of such testimony. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

On a trial for homicide, the fact that deceased was unarmed was admissible to support the state's theory that he was not the aggressor. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Evidence held not to raise any issue whether accused in shooting deceased, acted upon a reasonable apprehension of danger; it not appearing that deceased made any threat or demonstration of hostility, other than the fact that he started to walk in the door of the room where accused was. *Surges v. State* (Cr. App.) 225 S. W. 1103.

In a prosecution for murder committed by killing one who defendant thought had maligned his sister, the state's theory being that deceased made no demonstration at the time, and that there was no act from which defendant could reasonably draw the inference he was in danger of attack, under the circumstances it was competent for the state to show that deceased was not armed. *Moore v. State* (Cr. App.) 228 S. W. 218.

**Charge.**—In homicide prosecution defended on ground of self-defense and involving question of whether sufficient time elapsed between first and second shot for defendant to determine whether danger to his life had ceased, an instruction on the law, authorizing defendant to continue to shoot until the danger ceased as viewed from his standpoint, would have been proper. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In homicide prosecution, court properly refused instruction to acquit if first shot was fired in self-defense and insufficient time had elapsed between the first and second shot for defendant to determine that danger had ceased; defendant's right to continue shooting having been dependent upon whether he in fact shot second time under apprehension of danger which phase the requested instruction ignored. *Id.*

In prosecution for murder, charge that reasonable apprehension of death or serious bodily injury will excuse a person in using all necessary force to protect himself, whether or not there is actual danger, if he acts on a reasonable apprehension of danger from his standpoint at the time, held not erroneous. *Alsip v. State*, 85 Cr. R. 36, 210 S. W. 195.

In a prosecution for murder, charges held to fairly present to the jury the law of the case as to apparent danger, and the right of the accused to have the jury view the case from his standpoint in determining whether he acted in his own self-defense. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In homicide prosecution, where there was evidence that deceased had made demonstration to draw pistol before defendant had fired, instructions, merely referring to such demonstration in its effect upon reducing offense to manslaughter and limiting the right of self-defense to real attack without charging on self-defense from standpoint of apparent danger, held error. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 888.

A charge on self-defense should be applicable to the facts; and where the self-defense proposition is based on apparent and not real danger, a charge on real danger should not be given. *Id.*

In a prosecution for murder, an instruction as to self-defense held erroneous as not clearly stating that the act of defendant, alleged to have been in self-defense, must be viewed from defendant's standpoint at the time. *Singleton v. State*, 86 Cr. R. 401, 216 S. W. 1094.

Charge that if, when deceased was shot by defendant, deceased's brother made or was about to make an attack upon defendant or defendant's father with a gun, the law presumes that deceased's brother intended to kill or to inflict serious bodily injury on defendant, defendant's father, or both of them, when read in connection with preceding paragraph of charge, held not subject to objections that it did not give defendant right to act in self-defense, whether attack was lawful or unlawful, if it reasonably appeared to him that there was danger of loss of life or serious bodily injury to him or his father, or both. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390.

In a murder prosecution defended on ground of self-defense, instruction on apparent danger held objectionable, in that it did not permit jury to consider the words of deceased at the time of the difficulty, as well as his acts. *Williams v. State*, 87 Cr. R. 280, 221 S. W. 287.

On a trial for homicide, instructions withdrawing from the jury's consideration the fact that deceased was unarmed were properly refused, where such fact was admissible to support the state's theory that he was not the aggressor. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

The court's general charge on apparent danger, in view of those on the subject requested by defendant and given, held sufficient. *Baker v. State*, 87 Cr. R. 305, 221 S. W. 607.

In a prosecution of a wife for killing her husband, charge on self-defense, which in applying the law to the facts directed the jury specifically to the theory of the case on which defendant predicated her right of self-defense, held not erroneous, though submitting the converse of defendant's theory that the mere belief she was in danger in the absence of reasonable grounds did not excuse her. *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261.

In a case in which there is an absence of evidence of any fact upon which the jury could predicate a finding that, as viewed from the standpoint of the accused at the time,

there existed in his mind a reasonable apprehension or fear of death or serious bodily harm, the court is justified in refusing to charge the jury upon the law of apparent danger. *Surges v. State* (Cr. App.) 225 S. W. 1103.

In a case in which the evidence presents the theory of self-defense upon apparent danger only, a charge embodying the law of self-defense against actual attack will not suffice. *Id.*

In a prosecution for murder, charge of the trial court that, in determining if defendant acted in self-defense, the jury should view the transaction from his standpoint at the time, held a clear presentation of the law applicable to the facts in the case. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In a prosecution for murder, special charge requested by defendant on the matter of the appearance of danger as viewed from defendant's standpoint held improper, as tending to convey the idea that the whole transaction, the whole case, should be viewed from defendant's standpoint; it is only the question of the appearance of danger that must be viewed from defendant's standpoint. *Lewis v. State* (Cr. App.) 231 S. W. 113.

In a prosecution for murder, charge held erroneous as failing to submit the issue of self-defense based on apparent danger. *Carlile v. State* (Cr. App.) 232 S. W. 822.

In a prosecution for homicide, a requested instruction on self-defense against apparent danger need not be given, where the evidence showed that the danger, if any existed, was actual, and not merely apparent. *Jones v. State* (Cr. App.) 232 S. W. 847.

#### Art. 1110. [680] Circumstances justifying in defense of property.

**Defense of property.**—Even if deceased was trespassing when drilling in wheat on stubble land which defendant claimed he had not turned back to his landlord, that would not give defendant a right to kill deceased, and much less would he have such right, where deceased, as defendant came toward him with a gun, turned his team on other land, and was drilling 25 steps from edge of defendant's stubble. *Barklay v. State*, 85 Cr. R. 512, 213 S. W. 642.

If deceased was drilling in wheat on land in defendant's rental possession, and that that was such injury to property as to give a right to kill to prevent it, defendant, under the statute, must have used every effort in his power to repel the aggression before killing and have killed deceased while he was in very act of making the unlawful and violent attack, and, where deceased before killing had gone to other land, there was no right to kill in defense of property. *Id.*

A negro had a right to procure arms if necessary to protect his home against an illegal assault by posse members endeavoring to discover the whereabouts of a criminal. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

**Charge.**—In a prosecution for homicide on accused's premises, an instruction undertaking to set forth the rights of accused with reference to preventing deceased from entering his premises, qualified by the statement, "If you believe from the evidence that the said P. [deceased] was on said land without authority and not on a peaceful mission," was erroneous, as making it incumbent on accused to determine the undisclosed purpose of deceased in entering his premises, since the rights of accused must be determined from the things that took place, and not any undisclosed purpose that may have been in the mind of deceased. *Rasberry v. State* (Cr. App.) 224 S. W. 1093.

## CHAPTER THIRTEEN

### OF EXCUSABLE HOMICIDE

#### Article 1111. [681] Definition.

**Accident.**—If one killed his assailant in lawful self-defense, and in doing so accidentally killed his own wife, he is not guilty of the murder. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

In a homicide case, where accused was charged with shooting deceased while struggling with her husband, accused's right to rely on self-defense plea held independent of whether discharge of pistol was accidental. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941.

Where defendant fired a shot at one person with malice, intending to kill him, the fact that it wounded another, whom he did not intend to kill, would not excuse him from liability for assault with intent to murder. *Jones v. State* (Cr. App.) 231 S. W. 122.

**Evidence.**—Where two persons were killed in one transaction, the fact that more than one shot was fired does not, as a matter of law, render it insusceptible of proof that both were killed by one act, in one case intentional and in the other accidental, since a series of shots may be fired with one volition. *Spannell v. State*, 83 Cr., R. 418, 203 S. W. 357, 2 A. L. R. 593.

**Instructions.**—The refusal of a requested charge that, if defendant shot to stop or scare a stranger he had just seen at his house, he should be acquitted, was not error, where defendant did not claim he shot merely to scare, and the court, at defendant's request, authorized acquittal if the jury found defendant called on the intruder to stop, and that his pistol was accidentally discharged. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

Where accused was charged with killing deceased by discharging a pistol while struggling with her husband, an instruction on negligent homicide, making accused's guilt depend on whether he knew deceased was in danger of being killed, is erroneous where there is no evidence that accused knew deceased was in same room when struggle took place. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941.

## CHAPTER FOURTEEN

## HOMICIDE BY NEGLIGENCE

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| <p>1. IN THE PERFORMANCE OF A LAWFUL ACT</p> <p>Art.<br/>1114. In the performance of a lawful act.<br/>1115. "Lawful act" defined.<br/>1116. Must be an apparent danger of causing death.<br/>1117. How distinguished from excusable homicide.<br/>1119. Must be no apparent intention to kill.</p> | <p>Art.<br/>1120. Homicide must be consequence of the act.</p> <p>2. IN THE PERFORMANCE OF AN UNLAWFUL ACT</p> <p>1122. "Of second degree" defined, etc.<br/>1124. "Unlawful act" includes what.<br/>1125. Homicide in an attempt at felony, not negligent.<br/>1127. In a trespass, etc., how punished.</p> |
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## 1. IN THE PERFORMANCE OF A LAWFUL ACT

## Article 1114. [684] In the performance of a lawful act.

**Offense.**—One who overturned a boat with knowledge that a boy therein could not swim, causing the boy's death, was guilty of negligent homicide. *Gribble v. State* (Cr. App.) 210 S. W. 215, 3 A. L. R. 1096.

In view of art. 41, an intoxicated person is held to the same degree of caution in the handling of a pistol or other deadly instrument as is required of a sober person. *Haynes v. State* (Cr. App.) 224 S. W. 1100.

**Indictment or information.**—The offense is sufficiently charged by an indictment alleging that defendants, while engaged in running an engine, did back the engine negligently, without giving warning, and without looking to see if any one was likely to be injured, and by said negligence one M. was struck and killed, and that his dangerous position might have been known by defendants if they had used that care and caution which one of ordinary prudence would use under like circumstances, there being an apparent danger of causing the death. *Anderson v. State*, 27 Tex. App. 177, 11 S. W. 33, 3 L. R. A. 644, 11 Am. St. Rep. 189.

In a prosecution for negligent homicide by use of an automobile, an indictment omitting the element of apparent danger required by art. 1116, and being deficient in describing the act relied on, held insufficient. *Worley v. State* (Cr. App.) 231 S. W. 391.

**Evidence.**—In prosecution for negligent homicide, evidence held not to show a variance in that allegation was that defendant ran his automobile into and hit the person of deceased, while the proof showed that her person was struck by a part of the buggy, with which the automobile collided. *Hoffman v. State*, 85 Cr. R. 11, 209 S. W. 747.

Evidence regarding the circumstances under which accused, who had been drinking intoxicants and using narcotics to some extent, shot a negro who refused to secure gasoline for an automobile, etc., held not to present the issue of manslaughter or negligent homicide, but only murder and temporary insanity. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

**Charge.**—In prosecution for homicide, based upon defendant's negligent operation of an automobile, held, under the evidence, that court erred in failing to either give special requested charge accurately applying law of accidental homicide or embodying its substance in main charge. *Hoffman v. State*, 85 Cr. R. 11, 209 S. W. 747.

In charging negligent homicide, through the driving of an automobile, the particular act relied upon should be set up, and it should appear from the indictment that all the elements of the offense charged exist, among which is that declared in art. 1116, relating to apparent danger, and also that declared in article 1119, relating to apparent intention to kill. *Worley v. State* (Cr. App.) 231 S. W. 391.

## Art. 1115. [685] "Lawful act" defined.

A "lawful act" is an act not forbidden by the penal law, and which would give no just occasion for a civil action. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

One turning over a boat, thus drowning a child, if guilty of negligent homicide, is guilty of such crime in the first degree, the causative act not being a misdemeanor, nor, per se, cause for a civil action. *Gribble v. State* (Cr. App.) 210 S. W. 215, 3 A. L. R. 1096.

## Art. 1116. [686] Must be an apparent danger of causing death.

**Charge.**—See *Worley v. State* (Cr. App.) 231 S. W. 391.  
Instruction on negligent homicide requiring jury, in order to convict defendant of such crime, to believe that there was apparent danger of causing death held proper. *Haynes v. State* (Cr. App.) 224 S. W. 1100.

## Art. 1117. [687] How distinguished from excusable homicide.

**Charge.**—In homicide prosecution, involving the issue of negligent homicide, instruction defining negligence as the failure to exercise that degree of care and caution which a man of ordinary prudence would use under like circumstances held proper. *Haynes v. State* (Cr. App.) 224 S. W. 1100.

**Art. 1119. [689] Must be no apparent intention to kill.**

**Instructions.**—See *Worley v. State* (Cr. App.) 231 S. W. 391.

Where a husband, on trial for the murder of his wife, was shown to have been in a quarrel with a neighbor in the former's door-yard, and was waving a pistol, and threatening, without any apparent intention, to shoot, and his wife was shot upon coming to the door, and urging him to come in, and her dying declarations were that the shooting was accidental while trying to take the pistol from her husband's hand, it was error to refuse to instruct the jury on the law of negligent homicide. *Howard v. State*, 25 Tex. App. 686, 8 S. W. 929.

**Art. 1120. [690] Homicide must be consequence of the act.**

**Charge.**—Where a husband, on trial for the murder of his wife, was shown to have been in a quarrel with a neighbor in the former's door-yard, and was waving a pistol, and threatening, without any apparent intention, to shoot, and his wife was shot upon coming to the door, and urging him to come in, and her dying declarations were that the shooting was accidental while trying to take the pistol from her husband's hand, it was error to refuse to instruct the jury on the law of negligent homicide. *Howard v. State*, 25 Tex. App. 686, 8 S. W. 929.

**2. IN THE PERFORMANCE OF AN UNLAWFUL ACT****Art. 1122. [692] "Of second degree" defined, etc.**

**Charge.**—In homicide prosecution, involving the issue of negligent homicide, instruction defining negligence as the failure to exercise that degree of care and caution which a man of ordinary prudence would use under like circumstances held proper. *Haynes v. State* (Cr. App.) 224 S. W. 1100.

**Offense.**—In prosecution for negligent homicide, mental condition produced by intoxicants could not justify an illegal act in and of itself; but it might do so, combined with two blows on the head, both of which knocked defendant down. *Haynes v. State*, 84 Cr. R. 6, 204 S. W. 430.

**Art. 1124. [694] "Unlawful act" includes what.**

**Unlawful act.**—One turning over a boat, thus drowning a child, if guilty of negligent homicide, is guilty of such crime in the first degree, under art. 1124; the causative act not being a misdemeanor, nor, per se, cause for a civil action. *Gribble v. State* (Cr. App.) 210 S. W. 215, 3 A. L. R. 1096.

**Evidence.**—Evidence held insufficient to require submission of issue of negligent homicide in the second degree. *Merke v. State*, 82 Cr. R. 550, 199 S. W. 1123.

**Charge.**—In a homicide case, where the issue of negligent homicide in the second degree was submitted, court erred in failing to instruct the jury that it must appear that there was apparent danger resulting from the unlawful act of accused in firing the pistol. *Steen v. State* (Cr. App.) 225 S. W. 529.

**Art. 1125. [695] Homicide in an attempt at felony not negligent.**

**Offense.**—If defendant with malice shot at another and unintentionally killed his own wife, he would be guilty of her murder. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

**Art. 1127. [697] In a trespass, etc., how punished.**

Cited, *Spearman v. State*, 23 Tex. App. 224, 4 S. W. 586.

**CHAPTER FIFTEEN****OF MANSLAUGHTER**

<b>Art.</b>	<b>Art.</b>
1128. Definition of.	1134. General character of female in issue.
1129. "Under influence of sudden passion" explained.	1135. Discretion of jury in such cases.
1130. "Adequate cause" explained.	1137. "Adequate cause" must produce the passion.
1131. What are not adequate causes.	1138. Provoking contest with intent to kill, not manslaughter.
1132. What are.	
1133. For insult to female, killing must be immediate.	

**Article 1128. [698] Definition of.**

Cited, *Spearman v. State*, 23 Tex. App. 224, 4 S. W. 586.

**Elements of offense.**—To reduce homicide to manslaughter, it is essential that there be sudden passion arising from adequate cause. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123; *Walker v. State* (Cr. App.) 229 S. W. 527.

Where one shoots at another under a reasonable apprehension or fear of death, and disables him, and then in sudden passion, aroused by adequate cause, fires a second and fatal shot, before he has had reasonable cooling time, he is guilty of manslaughter. *Anderson v. State*, 87 Cr. R. 242, 221 S. W. 285.

Where accused shot a person approaching him, mistakenly believing it to be a man the killing of whom the circumstances would have been manslaughter, he can be convicted of manslaughter. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

The only difference between murder and manslaughter is the difference in the mental attitude of defendant at the time of the killing; murder, under the Penal Code of Texas, including every degree of homicide, and of assault, as murder, manslaughter, assault to murder, and aggravated assault. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Where a person from whom money has been stolen is chasing the person who took it, and, while agitated by reason of the theft, kills a third person who he believes is interfering to prevent his recovery of the money, he could not be guilty of any higher offense than manslaughter. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

If defendant charged with manslaughter had provoked the difficulty, and had done so with the intention to produce an occasion whereby he might assault deceased, and if the assault actually made by him was under the influence of sudden passion or excitement, and with an instrument not calculated or likely to produce death, he would not be guilty of a higher grade of offense than an aggravated assault, even though he did provoke the difficulty. *Mason v. State* (Cr. App.) 228 S. W. 952.

If the jury believe the killing was pursuant to a formed design which had remained in the mind of defendant from the time of his first shooting at deceased, and which actuated him in the later fatal encounter, they should find him guilty of murder; but if they believed he had in good faith abandoned the difficulty, though he was in the wrong, and that when he fired the fatal shot he was actuated by sudden passion, and not by malice, they could find him guilty of no more than manslaughter. *Carlile v. State* (Cr. App.) 232 S. W. 822.

**Evidence.**—Evidence held to show, at most, only manslaughter, and not murder. *Alanis v. State*, 82 Cr. R. 391, 200 S. W. 169.

Evidence held to sustain conviction of the crime of manslaughter. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

Evidence held sufficient to support verdict of manslaughter, by defendant, who killed deceased in a quarrel that arose during a game of craps. *Alexander v. State*, 84 Cr. R. 185, 206 S. W. 362.

Where accused, convicted of manslaughter was charged with killing deceased by discharge of a pistol with which he hit at her husband, evidence held not to sustain a conviction. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941.

Evidence that accused sought the meeting with deceased and was the aggressor in the encounter held to sustain a conviction for manslaughter though accused claimed threats and an attack with a knife by deceased. *Bocknight v. State*, 87 Cr. R. 428, 222 S. W. 259.

The state is not concluded by evidence that the whipping of the children of deceased by defendant did not cause ill will between the parties, but can offer evidence of that incident as the cause of the killing, notwithstanding that testimony. *Powers v. State* (Cr. App.) 227 S. W. 671.

In prosecution for manslaughter, where defendant introduced evidence to show that his reputation from his boyhood was good both for truth and veracity and for his being a peaceable and law-abiding citizen, held that the state could show his prosecution about 17 years before on a seduction charge, but that testimony that he had been arrested for seduction 17 years prior thereto was inadmissible, because not showing that such felony charge was legally made by way of indictment or complaint, or that the arrest was by virtue of *capias* or warrant. *Lasater v. State* (Cr. App.) 227 S. W. 949.

In a prosecution for manslaughter, testimony of decedent's wife as to the location of the wound on his head with reference to a torn place in his cap held admissible. *Mason v. State* (Cr. App.) 228 S. W. 952.

In a prosecution for manslaughter through killing of defendant's paramour, action of the trial court in declining to allow a witness to testify that deceased told her she was engaged to defendant held not erroneous; the testimony of the state's witnesses showing that defendant and deceased had been going together for a couple of years, and were practically living together at the time of the killing. *Mobley v. State* (Cr. App.) 232 S. W. 531.

**Instructions.**—In a prosecution for murder, evidence showing previous threats of deceased, the court should have charged on subject of manslaughter viewed in the light of threats. *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

In a murder trial, where there was evidence of self-defense, an instruction on adequate cause arising from assault and battery by deceased, causing defendant pain and bloodshed capable of creating sudden passion, and rendering him incapable of cool reflection, was erroneous where it failed to apply the law to the facts and instruct in connection therewith on the law of manslaughter. *Long v. State*, 84 Cr. R. 529, 208 S. W. 922.

In homicide prosecution, defended on ground of self-defense, and involving question of whether danger to defendant had been passed before he shot the second time, refusal of instruction as to law of manslaughter applicable in event that jury found first shot was justified, and second was not, was error; for, if second shot had been fired after danger had ceased but under the influence of a sudden passion, defendant's offense might not have been higher than manslaughter. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.



In homicide prosecution involving question of whether defendant was guilty of murder or manslaughter, court should so frame its charge as to leave no question that, if there is a doubt between murder and manslaughter, conviction should be for no higher grade of offense than manslaughter. *Id.*

In a homicide prosecution, where defendant, after having been severely beaten in a general fight, fled from the house, and in the face of a threat to shoot him fired a shot which killed a child in the house, it was error in an instruction on manslaughter to limit the provocation to the acts of the person defendant intended to kill. *Rodgers v. State*, 85 Cr. R. 338, 212 S. W. 166.

Instruction on manslaughter limiting provocation to the time of the killing held misleading, the trouble at the time being but a renewal of that of the evening before, and it being permissible to consider the two together, *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

In a prosecution for murder, defendant seeking to reduce the offense to manslaughter on the theory that he was attacked by decedent and another, one or both, general charge on manslaughter, construed as a whole, held to present the issue in such manner as not to injure defendant by limiting reduction of the offense to manslaughter only if defendant was attacked by both decedent and the other, not by one alone; the parts complained of not fairly presenting their relation to the general charge. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

A charge that when an act committed is the unlawful intentional homicide of a different person from the one intended, and is without malice aforethought, and is done while the mind is under the immediate influence of sudden passion arising out of an adequate cause, the charge, if a crime is of no higher grade than manslaughter, was not injurious to defendant; the word "intentional" not affecting the sense of the charge. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390.

In a homicide case where a third person was killed by accused while chasing one who had stolen his money for the purpose of recovering the same, accused believing such third person to be interfering to prevent his recovering his money, a charge that if accused killed in defense of his property he would not be guilty of any higher offense than manslaughter was too limited, as he was not trying to defend his property, but was chasing another to recover money after it had been stolen. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

In a prosecution for murder, where accused testified that he first shot at deceased when 20 steps away, because he thought he was reaching for a gun, and that deceased kept on advancing, and defendant fired the fatal shot when deceased was 4 steps away, and the state's witnesses testified that accused shot at deceased when he was 50 feet away, and, upon deceased falling to the ground, advanced and fired into the body, killing him, the court erred in its charge on manslaughter in failing to instruct on the law of cooling time as between the firing of the first and second shots. *Anderson v. State*, 87 Cr. R. 242, 221 S. W. 285.

In a prosecution for homicide, issue of manslaughter as raised by the evidence held sufficiently presented by the court's instruction, particularly in view of the absence of requested instructions. *Walker v. State* (Cr. App.) 227 S. W. 308.

In a prosecution for homicide, held, the jury should have been charged that if the conduct and language of deceased, or deceased and his son, either alone or in connection with any previous abuse or assault by deceased, on defendant, aroused in defendant's mind such a degree of anger, rage, resentment, or terror as rendered him incapable of cool reflection, and the facts and circumstances were sufficient to have produced such state of mind in a person of ordinary temper, there was adequate cause, and, if the killing occurred under such circumstances, defendant was guilty of manslaughter, unless he was acting in self-defense. *Lewis v. State* (Cr. App.) 231 S. W. 113.

In a prosecution for murder, it was not error to refuse charges that if a statement was made by defendant's accomplice, which aroused in defendant's mind such passion as to render it incapable of cool reflection, he would be guilty only of manslaughter; there being no evidence to support them, and they ignoring the theory of principals. *Barnes v. State* (Cr. App.) 232 S. W. 312.

Where, on a trial for homicide, acts and words of deceased prior to his assault on one of defendant's companions appeared, reference to which might aid a presumption of sudden passion, a general charge on manslaughter, including all the facts and circumstances, should have been given, and a charge limiting the jury's consideration of what might be deemed adequate cause to the one matter of assault and battery was too restrictive. *Monday v. State* (Cr. App.) 232 S. W. 831.

— **Necessity for submission of issue.**—In prosecution for murder, held that issue of manslaughter should have been submitted. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331; *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192; *Steen v. State* (Cr. App.) 225 S. W. 529; *Carlisle v. State* (Cr. App.) 232 S. W. 822.

Manslaughter should be charged, where the evidence raises a doubt as to whether same is in the case. *Steen v. State* (Cr. App.) 225 S. W. 529; *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671; *Pickens v. State*, 86 Cr. R. 657, 218 S. W. 755.

Evidence held insufficient to warrant submission of issue of manslaughter. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123; *Grissom v. State*, 87 Cr. R. 465, 222 S. W. 237.

If the case is either murder or perfect self-defense, it is not error to fail to charge on manslaughter. *Thomas v. State*, 84 Cr. R. 330, 206 S. W. 846; *Pickens v. State*, 86 Cr. R. 657, 218 S. W. 755.

Where deceased invited defendant to come outdoors with him, subsequent to a quarrel at a Christmas celebration, and made an attack upon him with a knife, the issue of manslaughter should have been submitted to the jury. *Hays v. State*, 82 Cr. R. 427, 199 S. W. 621.

Where instrument in homicide is not per se deadly weapon, manslaughter need not be submitted on proof of sudden passion without proof of adequate cause arousing such passion. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

In trial for murder arising out of difficulty at house at which deceased lived with his wife, where it appeared that defendant shot deceased, and where he claimed self-defense on the ground that deceased was trying to get a weapon from a drawer, there was no issue of manslaughter. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

In a prosecution for murder, it was not error to refuse to submit the question of manslaughter, where neither adequate cause nor passion was shown under the evidence. *Beaupre v. State* (Cr. App.) 206 S. W. 517.

Refusal to charge on manslaughter cannot be justified on the ground that the defendant said he shot in self-defense, since defensive issues arise from the whole case and are not controlled by the evidence of accused. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In a prosecution for murder, it was error to refuse an instruction with reference to the law of manslaughter, where it appeared that decedent was defendant's landlord and that the killing occurred after decedent had attempted to collect rent from defendant for a parcel of ground which he was entitled to hold rent free. *Jones v. State*, 86 Cr. R. 371, 216 S. W. 884.

Where the evidence in homicide prosecution raises the issues of self-defense and manslaughter, and a charge is demanded upon both issues, the omission of instruction as to manslaughter is error. *Pickens v. State*, 86 Cr. R. 657, 218 S. W. 755.

Evidence regarding the circumstances under which accused, who had been drinking intoxicants and using narcotics to some extent, shot a negro who refused to secure gasoline for an automobile, etc., held not to present the issue of manslaughter or negligent homicide, but only murder and temporary insanity. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

In prosecution for murder of husband of woman with whom defendant had been maintaining illicit relations correct submission of case held to have required a charge, qualifying right of self-defense by one on law of provoking difficulty, accompanied by one advising jury when they might reduce grade of homicide to that of manslaughter if decedent was provoked to attack defendant by language used with reference to decedent's wife. *Barber v. State*, 87 Cr. R. 535, 223 S. W. 457.

In a prosecution for murder, where the state's theory was that defendant and his brother had brought on the quarrel, and defense's theory was that deceased had done so, and was shot by defendant while trying to shoot defendant's brother, it was error to fail to instruct on and submit the issue of manslaughter. *White v. State* (Cr. App.) 225 S. W. 511.

Accused may assert that killing was attributable to another cause than passion, and still it becomes the duty of the trial court to submit manslaughter, and leave to the jury the ascertainment of whether or not the killing was the result of passion, and whether or not such cause was adequate, where the facts of the case in evidence fairly tend to indicate a homicide resulting from any such emotion of the mind as rendered it incapable of cool reflection, and this may be true in a prosecution of one shooting another in an automobile, but asserting that he was shooting at a tire. *Steen v. State* (Cr. App.) 225 S. W. 529.

Where defendant and deceased got into a dispute over turkeys, and in the course thereof deceased insulted the wife of defendant's son, and the son, in the presence of defendant, when the parties subsequently met on the highway, shot deceased, a charge on manslaughter was necessary, defendant being prosecuted for murder on the theory that he was a principal, notwithstanding defendant asserted that the son shot in defense of himself, for the state's evidence tended to show that defendant was in a passion over the loss of his turkeys, and that at the time of the killing deceased was taking turkeys to market, for under the state's own theory defendant might have been in such a passion as to be incapable of cool reflection. *Henderson v. State* (Cr. App.) 229 S. W. 535.

If the case is one either of murder or perfect self-defense, it is not error to fail to charge on manslaughter; but where the case becomes involved from the issues raised, and it is claimed the killing resulted from a fight, and the facts of its inception or progress become controverted issues raising the question of self-defense, the issue of manslaughter almost universally becomes pertinent. *Lewis v. State* (Cr. App.) 231 S. W. 113.

If there is evidence which, however weak or inconclusive it may seem to the court, tends to prove facts from which the jury may deduce a finding of manslaughter, it is error to fail to charge on it. *Id.*

Evidence of previous difficulties and of fear and excitement of defendant accompanying assaults and threats by deceased, though not sufficient to constitute adequate cause, held, on the evidence, to require the submission of the issue of manslaughter. *Theriot v. State* (Cr. App.) 231 S. W. 777.

### Art. 1129. [699] "Under the influence of sudden passion" explained.

See *Weathersby v. State*, 29 Tex. App. 278, 15 S. W. 823.

Cited, *Meuly v. State*, 26 Tex. App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Maxwell v. State*, 31 Tex. Cr. R. 119, 19 S. W. 914.

**Evidence.**—In a prosecution for homicide where accused claimed passion aroused by probable cause, declarations by him prior to the homicide expressing fear of trouble with deceased because he had whipped latter's children, and seeking permission to carry a pistol, were admissible on behalf of the state to illustrate the mental attitude of de-

defendant toward the deceased and as bearing on his motive. *Powers v. State* (Cr. App.) 227 S. W. 671.

**Charge.**—In prosecution for murder, refusal to defendant of charge that if his mind was enraged with reference to conduct of girl he killed, and killing occurred while his mind was so enraged, jury should consider it a ground for manslaughter, held not error. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

In a prosecution for murder, resulting in conviction of assault to murder, instruction on manslaughter held not too restrictive as requiring provocation to have arisen at the time of the killing, as a charge cannot be judged by isolated paragraphs. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

There can be no proper charge instructing the jury to find one guilty of manslaughter which omits to submit to them the issue as to whether or not the mind of the accused was in such condition as to render it incapable of cool reflection. *Barnes v. State* (Cr. App.) 232 S. W. 312.

### Art. 1130. [700] "Adequate cause" explained.

See *Lewis v. State* (Cr. App.) 231 S. W. 113.

**Adequate cause.**—In the absence of provocation occurring after defendant and deceased met and settled their differences, matters occurring prior thereto cannot constitute adequate cause to reduce the killing to manslaughter. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

Court did not err in defining adequate cause in its charge on manslaughter to be "such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection," although the accused was subject to epileptic fits and was nervous and irritable. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

**Evidence.**—In homicide prosecution, jury could consider, not only what occurred on day of homicide, but also what preceded that day upon question of whether there was sufficient and adequate cause to reduce the homicide to manslaughter. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

**Charge.**—An exception to the court's charge on manslaughter as allowing the jury to consider only the provocation arising at the time cannot be sustained, where the court further charged that, in determining the adequacy of the provocation, the jury should consider all the evidence in determining the condition of the defendant's mind. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

A charge on manslaughter in regard to adequate cause held not too restrictive. *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327.

In a prosecution for murder, an instruction as to facts reducing the offense to manslaughter, enumerating as adequate cause any act or words, or both, on the part of the deceased, which of themselves or together with any other facts and circumstances were from defendant's standpoint calculated to produce in his mind emotion rendering it incapable of cool reflection, held too restrictive and to unduly limit the facts which might be considered as reducing the offense to manslaughter. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

In a prosecution for homicide, where there was evidence that deceased abused and assaulted defendants and was larger and more powerful than they were, etc., a charge which confined the jury in deciding whether there was any adequate cause to whether an assault causing pain and bloodshed had been committed was too restricted. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

### Art. 1131. [701] What are not adequate causes.

See *Henderson v. State* (Cr. App.) 229 S. W. 535.

**Adequate cause.**—Insulting words or gestures are not adequate cause such as would render a killing manslaughter. *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327.

Taken separately, neither threats nor insulting words nor battery slight in its nature constitute an adequate cause within statute on manslaughter. *Pickens v. State*, 86 Cr. R. 657, 218 S. W. 755.

The enumeration of matters constituting adequate cause in arts. 1131 and 1132, is not, in view of arts. 1130 and 1138, exclusive of others. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

**Charge.**—In a homicide case; where accused took the stand himself and testified that he shot deceased "because I was trying to defend myself," and nowhere claimed that any language used by deceased affected him in any way or made him angry, he cannot complain that a charge on manslaughter was too restrictive in that it stated that insulting words are not adequate cause. *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327.

### Art. 1132. [702] What are.

See *Howard v. State*, 23 Tex. App. 265, 5 S. W. 231; *Pitts v. State*, 29 Tex. App. 374, 16 S. W. 189; *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135; *Lewis v. State* (Cr. App.) 231 S. W. 113.

Cited, *Gonzales v. State*, 30 Tex. App. 203, 16 S. W. 978.

**In general.**—Other causes may produce manslaughter passion, besides those named in the statute. *Steen v. State* (Cr. App.) 225 S. W. 529; *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

**Subdivision 1—Charge.**—In prosecution of passenger for murder of street car conductor, where there was evidence that the conductor, while the car was in motion

pushed passenger off from platform, causing him to fall on his back, instruction that, if the conductor ejected passenger, causing him bodily pain, "such as was reasonably calculated to produce passion," the passenger could not be convicted of a higher degree of homicide than manslaughter, held erroneous, since such ejection from car constituted an assault and battery and was sufficient to reduce the crime to manslaughter without specific proof of pain and without proof that it was calculated to produce passion. *Mickle v. State* (Cr. App.) 227 S. W. 491.

An instruction on manslaughter stating that an assault and battery which caused pain and bloodshed would be adequate cause, held, under the facts of the case, the failure to define assault and battery was not reversible error. *Monday v. State* (Cr. App.) 232 S. W. 831.

**Subdivision 2—Charge.**—Charge on manslaughter giving, as adequate cause, an attack by deceased on defendant threatening death, is erroneous; such matter constituting self-defense. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

In a prosecution for murder, wherein defendant testified that the killing was either manslaughter or in self-defense because he was attacked both by the person killed and another, an excerpt from a charge on manslaughter, that the killing was of such grade, if decedent and the other had combined, and the defendant believed they had, to do defendant some injury, and the conspirator with decedent had given the latter a knife to use against defendant, held not erroneous as unduly limiting reduction of the offense to manslaughter only by an attack on defendant from both decedent and the other. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

**Subdivision 3—Evidence.**—In a prosecution for homicide, evidence that defendant shot deceased under the mistaken belief that he was shooting a man who had been in the house with the wife of accused after midnight held sufficient to sustain a conviction for manslaughter. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

In a prosecution for murder, claimed to have been committed as the result of passion reducing the crime to manslaughter, evidence of deceased's criminal intimacy with defendant's wife was admissible to corroborate evidence that she communicated such fact to defendant before the killing. *Bereal v. State* (Cr. App.) 225 S. W. 252.

— **Charge.**—In prosecution for homicide, evidence that accused, when greatly excited, mistook deceased for a man who had been in the house with accused's wife after midnight, held to require an instruction on manslaughter. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

### Art. 1133. [703] For insult to female, killing must be immediate.

**Words constituting insult.**—Where the killing has taken place because of insulting conduct towards defendant's wife, the killing will be imputed to the last insulting conduct, rather than to prior acts or conduct, or previously occurring matters. (Per Davidson, P. J.) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

Where person shoots at one who tells his father in his presence that his mother and his father's wife was sustaining illicit relations with another person, he would only be guilty of manslaughter if he killed him. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

The question as to whether language used by deceased was insulting to defendant's female relatives, to reduce the killing to manslaughter committed under adequate provocation, seems to be one for the court and not the jury. *Walker v. State* (Cr. App.) 229 S. W. 527.

Where defendant, charged with murder, testified that deceased asked him why in h— he didn't get a divorce from that woman (meaning his wife), that she didn't care anything for him, etc., and that, when defendant asked him what he meant, deceased replied, "By G—, you know how you are living, don't you?" and that when defendant stated his family affairs had nothing to do with deceased, deceased replied, "I guess, by G—, it has," and that deceased then kicked him out of the automobile in which they were sitting and started after him, when he (defendant) secured deceased's gun and shot deceased, such testimony did not call for a charge on manslaughter as based on insulting words toward a female relative. *Id.*

Language used by deceased, claimed by defendant to have been insulting toward his wife, so that under the statute the killing was under provocation, and constituted manslaughter only, must be interpreted in the light of the surrounding circumstances and relation of the parties. *Id.*

Insulting language when used by deceased toward defendant's female relative is, as a matter of law, cause sufficient to excite passion reducing the offense to manslaughter. *Id.*

Insulting language, when used by deceased toward defendant's female relative, is, as a matter of law, cause sufficient to excite passion reducing the offense to manslaughter, but whether it does or does not excite passion is a question of fact for the jury. *Id.*

The language used by deceased in calling defendant a "son of a bitch" will not support a charge on manslaughter that insulting words as to a female relative was adequate cause. *Lewis v. State* (Cr. App.) 231 S. W. 113.

**Proximity to killing.**—Where accused and deceased met in the forenoon and had a difficulty about deceased's having sent accused's wife an insulting letter, mere fact that accused was not then prepared to kill deceased, but did kill him on the next meeting did not justify charge on manslaughter. *Adler v. State*, 83 Cr. R. 72, 201 S. W. 177.

Deceased's insulting conduct toward defendant's wife to reduce a crime to manslaughter must have occurred at the time of the killing, or defendant must have killed deceased as soon thereafter as informed thereof, and upon first meeting. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858.

Defendant eliminates manslaughter by testifying that, after he was told by his wife of an assault on her by deceased, and before the time of the killing, he met deceased, and they then were friendly, and that he would not have killed, but for deceased's hip-pocket play. *Gray v. State* (Cr. App.) 224 S. W. 513.

Where defendant, convicted of murder, after learning of the purported insulting conduct of deceased toward defendant's female relative talked with deceased on numerous occasions, even in defendant's own home, it was not error to refuse to instruct on manslaughter because of sudden anger due to such conduct. *Prestidge v. State* (Cr. App.) 228 S. W. 217.

Where at the time deceased insulted defendant's daughter-in-law defendant did not resent the insult, and his son thereafter in his presence killed deceased, the insults would not reduce the homicide to manslaughter. *Henderson v. State* (Cr. App.) 229 S. W. 535.

When it is sought to reduce a homicide to the grade of manslaughter by reason of insulting language or conduct to a female relative, it must appear that the killing took place immediately upon the insult, or so soon as the party killing met with the party killed after having been informed of such insults; hence the jury are not entitled to consider an insult to a female relative to determine whether the conditions surrounding a killing were sufficient to reduce the offense to manslaughter, where it did not occur at the first meeting after the person killing learned of the insult. *Id.*

**Truth of reports.**—Defendant who shot deceased after having been informed of deceased's insulting conduct toward his wife, believing information to be true, may have been under sufficient provocation, regardless of whether information was true. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858.

In a prosecution for homicide where defendant claimed killing in passion aroused by insults by deceased to defendant's wife, the jury in passing upon the issue of adequate cause for the passion are not to be governed by whether deceased was in fact guilty of the acts or words charged, but whether defendant had been informed that such was the case and believed it to be true, since the consequence of information received and believed upon the mind of defendant is the same whether the information is false or true. *Powers v. State* (Cr. App.) 227 S. W. 671.

**Evidence.**—In a homicide case, where the accused brought out on cross-examination of witnesses for the state *res gestæ* statement of accused immediately after the killing that trouble was caused by deceased, who had broken up the family of the accused, there was sufficient indication to the state that accused would rely upon insulting words to a female relative; and the state was privileged to prove the general character of accused's wife, for the purpose of ascertaining the extent of the provocation and to show specific occasions of misconduct on the part of the wife of which the husband had knowledge. *Bibb v. State*, 86 Cr. R. 112, 215 S. W. 312.

Where daughter of defendant in homicide case informed him that deceased had outraged her, and did not tell him any of the attendant circumstances, it was error to permit the state to go into all the incidental matters and environments that occurred between the daughter and the deceased, as matters unknown to defendant could not affect him or weigh upon his mind, viewed from the standpoint of adequate cause and sudden passion. *Lovett v. State*, 87 Cr. R. 548, 223 S. W. 210.

In a prosecution for homicide where the state had introduced declarations of accused showing fear of trouble with deceased because he had whipped the latter's children, it was error to exclude declarations of accused offered by him tending to corroborate his testimony that deceased had insulted his wife and that he killed deceased in heat of passion engendered thereby. *Powers v. State* (Cr. App.) 227 S. W. 671.

In a prosecution for homicide where defendant claimed passion aroused by insults to his wife, the state could introduce evidence that accused had whipped the children of deceased to show the cause of the difficulty. *Id.*

In a prosecution for homicide where accused claimed provocation arousing passion, evidence that deceased declared an intention to try to establish improper relations with the wife of accused, that the wife was friendly, and deceased did not fear accused, were admissible. *Id.*

In a prosecution for murder committed by killing one who defendant believed had maligned his sister, evidence held as a matter of law not insufficient to support conviction of murder as against contention that manslaughter only was shown. *Moore v. State* (Cr. App.) 228 S. W. 218.

**Charge.**—In murder trial, where issue of self-defense was made prominent by the facts, instruction on insulting words or conduct to female relative as justification held reversible error, as placing burden upon accused to prove justification to reduce the degree from murder to manslaughter, and then in substance, instructing that if this were not done, accused would be guilty of murder, thus excluding the issue of self-defense. *Wood v. State*, 85 Cr. R. 268, 211 S. W. 782.

In homicide prosecution, where there was no evidence of provocation at time of killing, and only evidence thereof was as to deceased's insulting conduct toward defendant's wife, some time prior to the killing, instruction on provocation at time of killing held improper. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858.

In a prosecution for homicide where the evidence showed that defendant's wife had told defendant deceased insulted her just before he left the city and that while away deceased had written to defendant's wife and that defendant killed deceased when he first met the latter on his return to the city, while the state sought to show that deceased had not been guilty of the conduct charged by defendant's wife, an omission to charge, as requested, that in determining the issue of probable cause the jury should not consider the truth of the charges against deceased, was error. *Powers v. State* (Cr. App.) 227 S. W. 671.

In a prosecution for homicide committed on one whom defendant believed to have maligned or made indecent proposals to his sister, instructions as to manslaughter referring to the effect of rage in defendant produced by the provocation of information of decedent's conduct held not erroneous as conveying the idea that the right of defendant growing out of alleged insulting conduct towards or words relating to his sister depended on the existence of such conduct or words in fact, but special charge requested by defendant on the effect of provocation, through information as to decedent's conduct, in reducing the offense to manslaughter, held erroneous as omitting the essential ingredient of a passion in defendant such as rendered the mind incapable of cool reflection. *Moore v. State* (Cr. App.) 228 S. W. 218.

In a case of homicide, where there is evidence that deceased used toward the female relative of defendant insulting language or conduct, in view of the statute, it is incumbent on the court to instruct the jury in unmistakable terms that such insulting language or conduct would be adequate cause to reduce the mind of defendant to a state rendering him incapable of cool reflection, thus reducing the offense to manslaughter. *Walker v. State* (Cr. App.) 229 S. W. 527.

In a prosecution for murder, special charge requested by defendant on manslaughter held incorrect; it embracing a clause telling the jury that insulting words of the person killed toward a female relative was "adequate cause," while there was no testimony justifying such a charge, etc. *Lewis v. State* (Cr. App.) 231 S. W. 113.

#### Art. 1134. [704] General character of female in issue.

See *Walker v. State* (Cr. App.) 229 S. W. 527.

Cited, *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

**Evidence.**—In a homicide case, where the accused brought out on cross-examination of witnesses for the state *res gestæ* statement of accused immediately after the killing that trouble was caused by deceased, who had broken up the family of the accused, there was sufficient indication to the state that accused would rely upon insulting words to a female relative; and the state was privileged to prove the general character of accused's wife, for the purpose of ascertaining the extent of the provocation and to show specific occasions of misconduct on the part of the wife of which the husband had knowledge. *Bibb v. State*, 86 Cr. R. 112, 215 S. W. 312.

In murder prosecution where defendant sought to mitigate offense on ground that deceased had insulted defendant's wife, evidence that defendant's wife had been guilty of specific acts of immoral conduct with another person of which defendant had knowledge prior to the killing was admissible. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

In a murder prosecution, where defendant sought to reduce the crime to manslaughter because of sudden passion on learning of deceased's criminal intimacy with defendant's wife, where her conduct had been good for seven years, except with deceased, evidence that she had, prior to marriage, been an inmate of a house of prostitution was not admissible. *Bereal v. State* (Cr. App.) 225 S. W. 252.

#### Art. 1135. [705] Discretion of jury in such cases.

See *Bailey v. Oliver* (Sup.) 9 S. W. 606; *Walker v. State* (Cr. App.) 229 S. W. 527.

Cited, *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

#### Art. 1137. [707] "Adequate cause" must produce the passion.

Cited, *Johnson v. State*, 26 Tex. App. 631, 10 S. W. 235.

**Adequate cause and passion.**—In ascertaining whether there was sufficient passion engendered to reduce homicide to manslaughter, because of deceased's insulting conduct toward defendant's wife, the jury's belief as to whether there was adequate cause for provocation is not the criterion; that question depending upon effect thereof upon defendant's mind. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858.

**Evidence.**—In a prosecution for homicide where accused claimed passion aroused by probable cause, declarations by him prior to the homicide expressing fear of trouble with deceased because he had whipped latter's children, and seeking permission to carry a pistol, were admissible on behalf of the state as bearing on his motive. *Powers v. State* (Cr. App.) 227 S. W. 671.

#### Art. 1138. [708] Provoking contest with intent to kill, not manslaughter.

See *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349; *Mason v. State* (Cr. App.) 224 S. W. 952; *Pinkerton v. State* (Cr. App.) 232 S. W. 327.

**Provoking contest.**—Where a contest was sought, brought about, and provoked by defendant for the apparent purpose of killing deceased, held, that it was not manslaughter. *Melton v. State*, 24 Tex. App. 47, 5 S. W. 652.

If accused heard that deceased had been circulating reports about him, he had the right to go to deceased to talk the matter over, and, if he believed this might bring on a difficulty, to arm himself for protection without forfeiting his right of self-defense. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

If a deceased is pursued with a less purpose than to kill or inflict serious bodily injury, the law of imperfect self-defense is not barred, and the culpability under such circumstances is less than murder. *Hammonds v. State*, 82 Cr. R. 337, 198 S. W. 944; *Hokes v. Same*, 82 Cr. R. 271, 945.

Deceased's assault on defendant would not be sufficient, even though it produced pain or bloodshed, to reduce the offense to manslaughter, if defendant provoked the assault

with the intention of killing or seriously injuring deceased by conduct reasonably calculated to provoke it. *Mickle v. State* (Cr. App.) 227 S. W. 491.

When defendant alone or with others uses abusive language to deceased, who thereupon makes an assault and is killed, it is proper to submit to the jury the issue of provoking the difficulty. *Monday v. State* (Cr. App.) 232 S. W. 831.

**Charge.**—In a prosecution for murder, resulting in conviction of manslaughter, where the court charged submitting the issue of provoking the difficulty from the standpoint of the state, in connection therewith the converse of the charge on defendant's request should have been fully submitted. *Garner v. State* (Cr. App.) 231 S. W. 339.

In a prosecution for murder, resulting in conviction of manslaughter, only the mitigating and justifying acts being in controversy, not the killing, the words and conduct of defendant immediately preceding the assault made by deceased which resulted in his death held to render appropriate a charge upon the law of provoking the difficulty. *Id.*

On a trial for homicide, an instruction on manslaughter which in part was in the identical language of this article, held not open to the objections that it was too restrictive, and stated that, if defendant's companions provoked the difficulty, defendant's offense would not be manslaughter. *Monday v. State* (Cr. App.) 232 S. W. 831.

## CHAPTER SIXTEEN OF MURDER

Art.  
1140. "Murder" defined.  
1141. Pun

Art.  
1143. Evidence of threats and deceased's  
character admissible, when.

### Article 1140. [710] "Murder" defined.

See *Washington v. State* (App.) 16 S. W. 653; *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

**2. Offense defined.**—Under Act Cong. Aug. 29, 1916, § 3, art. 92 (U. S. Comp. St. § 2308a [92]), a soldier of the United States who murders a citizen of the state offends against both the military and the state laws, and may be tried in the state courts. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

In a prosecution for murder, contentions of the state and defendant held to present the issue of murder. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

In determining whether or not a homicide case is bailable, the decisions of the courts before the change in the law eliminating degrees of murder, may be looked to. *Ex parte Cole* (Cr. App.) 230 S. W. 175.

If the jury believe the killing was pursuant to a formed design which had remained in the mind of defendant from the time of his first shooting at deceased, and which actuated him in the later fatal encounter, they should find him guilty of murder; but if they believed he had in good faith abandoned the difficulty, though he was in the wrong, and that when he fired the fatal shot he was actuated by sudden passion, and not by malice, they could find him guilty of no more than manslaughter. *Carlile v. State* (Cr. App.) 232 S. W. 822.

**4. — Malice as element.**—One who deliberately uses a deadly weapon in such reckless manner as to evince a heart regardless of social duty and fatally bent on mischief, as is shown by firing into a moving railroad train upon which human beings necessarily are, cannot shield himself from consequences by disclaiming malice. *Banks v. State*, 85 Cr. R. 165, 211 S. W. 217, 5 A. L. R. 600.

To constitute murder, it is not essential that any specific malice by the killer be directed toward the person killed, but it may be toward a group of persons as well as toward an individual, and may exist without former grudges or antecedent menaces. *Id.*

The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is "malice." *Id.*

If defendant was not actuated by malice aforethought, he was not guilty of assault with intent to murder; if he had the specific intent to kill under circumstances that would have constituted manslaughter, his assault, which failed to kill, did not constitute assault to murder, but was an aggravated assault. *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337.

One may by reckless shooting be guilty of murder of person killed thereby without specific intent. *Haynes v. State* (Cr. App.) 224 S. W. 1100.

Ten minutes is long enough for one to conceive malice, which would make him guilty of murder in killing another. *Steen v. State* (Cr. App.) 225 S. W. 529.

In order for a killing to amount to murder, it is unnecessary that defendants should have a design to kill at the time they went to deceased's place of business, and special charges declaring that such intention was necessary, etc., were properly refused. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

**5. — Degrees under former law.**—See *Zwicker v. State*, 27 Tex. App. 539, 11 S. W. 633; *Musick v. State*, 21 Tex. App. 69, 18 S. W. 95.

**10. Indictment.**—An indictment charging that accused "did then and there, with his malice aforethought, kill and murder B. F. Curtis, by shooting him with a gun,

against the peace and dignity of the state," is sufficient to charge the offense of murder. *Scott v. State*, 31 Cr. R. 363, 20 S. W. 755.

An indictment, alleging that defendant killed deceased "in some way or manner and by some means, instruments, and weapons to the grand jurors unknown," is sufficient as against an objection that it does not allege the means by which the murder was committed. (Per Prendergast, J.) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

13. — **Proof.**—In a trial for murder committed with a stick, which the indictment described with unnecessary particularity, the trial court correctly instructed the jury that it was sufficient if they believed the proof showed that the stick used was substantially the same as described in the indictment, in view of the rule that proof is sufficient, if it shows that the weapon charged in the indictment and the one proved to have been used are such that the nature and result of their use would be the same. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

22. **Evidence—Presumption and burden of proof.**—In a prosecution for murder, defendant is held responsible for what he does, his purpose in doing it, and intent and motive moving him to do the act. *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

24. — **Admissibility of evidence as to malice and intent.**—In a prosecution for murder, where state had showed a reconciliation between deceased and defendant and its cessation, as tending to show malice, defendant could show reasons therefor. *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

In a prosecution for homicide, testimony of a prior difficulty during which accused had a knife in his hand was admissible as tending to show the state of mind of accused. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

In prosecution of bank president for having murdered state commissioner of banking, evidence as to bank's insolvent condition, its management, etc., held admissible to show malice. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

The state, claiming killing of white landlord by negro renter, in the rented field, on the afternoon after trouble between the parties the night before when the negro was ordered to leave the place, was deliberate, and bringing out the fact of defendant's absence from the field in the forenoon, and his return thereto with his gun, he to meet this could show, not only that in the forenoon he went to town to consult with white friends as to what he should do, but that they advised him he had a right to remain with his crop. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

In prosecution for wife murder pursuant to alleged conspiracy between defendant and others, formed prior to defendant's marriage to deceased, whereby defendant, a young man, was to marry deceased, a wealthy old woman, and thereafter murder her to obtain her money, testimony that about two years prior to killing, and before defendant's marriage to deceased, defendant and another person tried to induce witness to marry a wealthy old woman, obtain her property, and thereafter dispose of her, and divide the property between witness, defendant, and the other person, held admissible on question of the conspiracy, not being too remote. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

In a prosecution for murder of mother-in-law, where the state in making out its case contented itself with proving the killing, and in no way adverted to relations between defendant and his wife, and defendant, after the state rested, introduced witnesses to show that relations between defendant and wife were more than ordinarily pleasant, and that deceased was attempting to cause a separation so that wife could become a moving picture actress, and state's theory was that any act on deceased's part advising or wishing to bring about a separation was on account of defendant's unwarranted cruelty, state was properly permitted to introduce any circumstances tending to show cruel treatment of the wife, not only on the question of motive, but on the direct issue joined as to defendant's conduct and treatment of wife, and state could also ask concerning such circumstances on cross-examination of defendant. *Smith v. State* (Cr. App.) 232 S. W. 497.

25. — **Commission of act.**—In a prosecution for murder, where there was some conflict in the testimony as to whether two shots were fired simultaneously, one by deceased and the other by accused, and as to who fired first, a witness may be allowed to testify that an automatic pistol of the caliber of that of deceased, in shooting smokeless powder, would make very little noise. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

26. — **Character of accused.**—In a prosecution for murder, it was immaterial whether deceased was the wife or mistress of accused. *Nelson v. State*, 84 Cr. R. 219, 206 S. W. 361.

Though defendant had put his reputation in evidence as a law-abiding citizen, objection to evidence of the state that 15 or 20 years before the homicide defendant was given to fighting and was regarded "as a holy terror," should have been sustained; the interregnum between defendant's fighting capacity as a youngster and the time of the killing being too remote. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

In murder prosecution, examination of defendant as to the number of times he had been separated from his wife before he had even seen deceased held error, having no bearing upon the killing. *Hurst v. State*, 86 Cr. R. 375, 217 S. W. 156.

In prosecution for murder of son-in-law, examination of defendant's son as to whether he had not been present at time his father had kicked his mother was irrelevant. *Id.*

In prosecution of a negro for murder, exclusion of testimony that defendant was extraordinarily obedient, kind, and humble to white people held not error. *Brown v. State* (Cr. App.) 224 S. W. 1105.



Where defendant admitted the killing and the appropriation of deceased's property, exclusion of testimony as to his reputation for honesty and fair dealing held not error. *Perea v. State* (Cr. App.) 227 S. W. 305.

In a murder prosecution, it was error to allow the state to introduce evidence relating to the marriages of defendant, and that he had been sued by each of his wives for divorce. *Lasater v. State* (Cr. App.) 227 S. W. 949.

In a prosecution for homicide, testimony that defendant had sons in the army and navy was immaterial and properly excluded. *Russell v. State* (Cr. App.) 232 S. W. 309.

In prosecution of a former police officer for murder, evidence that defendant had borne the reputation of being a loyal, efficient, faithful, and obedient officer held inadmissible. *Brent v. State* (Cr. App.) 232 S. W. 845.

**27. — Physical condition of the parties.**—In homicide case, evidence that deceased was nearly blind is inadmissible unless defendant knew of the blindness. *Clayton v. State*, 83 Cr. R. 57, 201 S. W. 172.

The age of deceased and the fact that he limped were legitimately before the jury in a homicide case, and instructions to disregard such matters were properly refused. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Where accused claimed self-defense against an attack by deceased, it was not error to show that deceased was 70 years of age, clumsy, and having defective eyesight, where accused had known deceased for 40 years and knew of his condition. *Briscoe v. State*, 87 Cr. R. 375, 222 S. W. 249.

In a prosecution for homicide, evidence that at the time of the killing defendant was intoxicated is admissible as affecting his memory, his temper, his power of observation, etc., and it should not be limited solely to the issue of credibility. *Russell v. State* (Cr. App.) 232 S. W. 309.

In a prosecution for murder, it was not error to refuse to allow witness to testify that defendant was a man of ordinary hearing, where deceased's threats, directed toward defendant, were proven to have been made within five feet of defendant, some half hour before shooting, and in the absence of contrary proof it is a legitimate assumption that threats were in defendant's hearing. *Fowler v. State* (Cr. App.) 232 S. W. 515.

**28. — Motive.**—Testimony that a few minutes before accused killed deceased he had trouble with him over deceased's having had a negro arrested, and that he went back to the vicinity of deceased's place of business with a gun, was admissible on the issue of motive. *Clay v. State*, 81 Cr. R. 293, 195 S. W. 600.

Evidence of a rumor as to improper relations with accused's wife, which might have caused accused to kill her, is inadmissible, unless accused's knowledge of it is proved. *Weige v. State*, 81 Cr. R. 476, 196 S. W. 524.

Where alleged circulation by deceased of report of accused's misconduct with a woman led to killing, testimony of the woman as to such misconduct and of another witness that accused had stated that he had an engagement with the woman for such purpose was admissible, but testimony by witness that he participated in such misconduct was inadmissible. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

State can introduce testimony tending to show motive on part of accused for shooting or killing. *Zarafonets v. State*, 82 Cr. R. 120, 198 S. W. 938.

For purpose of showing motive for accused's shooting prosecuting witness, held, on cross-examination of accused's brother-in-law state properly showed that he had been prosecuted by prosecuting witness and convicted of killing cousin of the latter. *Id.*

Evidence of indiscretion of defendant's wife with deceased, not known by defendant before the killing, is not admissible to show motive. *Black v. State*, 82 Cr. R. 358, 198 S. W. 959.

Evidence of a previous fight, in which accused took no active part, was improperly admitted to show accused's motive for the killing, there being no facts occurring at the time of either the first fight or the one culminating in the killing that would indicate accused had any reason to have animosity toward deceased on account of the first fight. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

In prosecution of bank president for having murdered state commissioner of banking, closing of bank for insolvency and improper management having brought about killing, evidence as to bank's insolvent condition, its management, etc., held admissible to show motive. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

Where the evidence justified conclusion that the abuse of defendant's friend at a hotel furnished motive for the homicide, and it appeared that deceased participated in the difficulty at the hotel, proof of details of the encounter at hotel, as well as a conversation had by defendant with his friend, in which the latter gave a detailed account of the occurrence, was relevant. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

Conversations between defendant and deceased's wife, detailed by her, disclosing his illicit relations with her, his desire that she abandon deceased, her unwillingness to do so, and his reference to his freedom since his wife's death, are admissible. *Haley v. State*, 84 Cr. R. 629, 209 S. W. 675, 3 A. L. R. 779.

Testimony as to letters seen in the possession of deceased, a woman, addressed to defendant since his marriage to another, and that similar letters went through the mails on that route, were admissible as circumstances showing the continuance of the illicit relations of the parties subsequent to said marriage, and leading up to the time of the alleged homicide; their prior illicit relations having been established by other evidence. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

In a prosecution for murder of defendant's mistress, testimony of defendant that he was supporting his wife and children, had a room at a hotel for \$60 a month, was drawing a salary of \$175 a month, and had given the deceased woman certain jewelry, worth \$1,000 or more, was admissible, in view of defendant's denial of the killing, with contention of accident or suicide, as possibly tending to prove a motive in his desire, arising

through financial inability, to get rid of the woman. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

Evidence tending to show enmity or former grudges on the part of accused against deceased is admissible. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

In prosecution for murder of husband of defendant's former sweetheart, evidence that defendant, after the marriage of both, had professed love for such sweetheart, etc., held admissible. *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202.

In prosecution for wife murder, on theory that defendant killed deceased to obtain her property, testimony of intimate friends of defendant and deceased as to acts and conversation showing lack of affection on the part of defendant for deceased, his attitude toward her both before and after marriage, his neglect of her, his attentions to other women, and his desire to get possession of her property, held admissible to show motive. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

In a prosecution for murder of a woman, the exclusion from evidence of a judgment of divorce between deceased and her first husband and of the certificate of death of the first wife of deceased's last husband with whom she was living until death, held not error, because relevancy was not shown. *Crow v. State* (Cr. App.) 230 S. W. 148.

Where a friend of deceased was beaten up a few days previous by a hotel proprietor and his employees, evidence that defendant's friend recited the details to defendant, who was indignant, and that after hunting for the participants he killed deceased, who was one of the parties, was admissible for such evidence bore on the question of the motive and provocation. *Russell v. State* (Cr. App.) 232 S. W. 309.

Evidence that the deceased and accused had been enemies for three years was admissible, previous quarrels and ill feeling being relevant on the issue of motive, and the nearness and remoteness of such evidence not affecting its relevancy. *Finch v. State* (Cr. App.) 232 S. W. 528.

The state was properly allowed to show that prior to the homicide defendant visited a certain woman in Arkansas; the evidence showing that the apparent beginning of ill feeling between the parties to the tragedy arose over an agreement by which deceased guaranteed payment by defendant of a board bill of such woman. *Carlile v. State* (Cr. App.) 232 S. W. 822.

29. — Threats by defendant.—Where objection was to remoteness of evidence of threats, and fact of reconciliation is not made clear by record, assignment that court erred in overruling objection will not be sustained. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

In prosecution for the murder of a daughter, evidence that on defendant's return home in an automobile and shortly before shooting he ran around the automobile and into house and said he was going to kill every member of family, held admissible. *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953.

In prosecution for murder of a daughter, testimony that some months previous to homicide, defendant told witness with whom he had lived on a farm that he was going to kill whole family, held admissible. *Id.*

In prosecution for murder of one who took part in altercation resulting in injury of defendant's friend, testimony of a witness quoting defendant as saying, "I would just as soon kill you as any one," was inadmissible; there being no suggestion in the evidence that the witness was connected with the injury. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

Where the state's theory was that defendant's purpose to punish those responsible for the abuse of his friend was accomplished in the killing of deceased, testimony that defendant had stated that any one beating his friend "is going to settle with me; \* \* \* I will stay with my friends to the limit"—disclosed animus toward those connected with the friend's injury, and defendant's intent to find them, and was admissible. *Id.*

In homicide prosecution, where, during the evening before the killing, accused's sister had threatened to shoot deceased, and accused in answer had said, "Never mind; that is my affair, and I will see to it," the statements by both the sister and accused are admissible. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

In a prosecution for murder, evidence that three months prior to the trial accused had stated to witness, "I killed two men, and twelve men will try me, and, if they convict me and don't watch me, I will get some of them," was inadmissible and should have been excluded; it constituting a threat against the jury. *Hardy v. State*, 86 Cr. R. 515, 217 S. W. 939, 8 A. L. R. 1357.

Evidence that five hours before the killing accused made a threat to kill a man which was not shown to have referred to deceased was inadmissible, the nearness of time not being sufficient to render such threat admissible without other evidence that deceased was the man threatened, and the burden was on the state to show that deceased was meant or included. *Briscoe v. State*, 87 Cr. R. 75, 222 S. W. 249.

30. — Circumstances preceding act.—That accused went armed to see deceased about alleged defamatory statements could be considered by the jury. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

A witness in a murder case could testify properly that deceased was a driver of his car and drove it on the night of the homicide, but testimony that he received a particular telephone call and sent the driver in response thereto was inadmissible. *Parker v. State*, 83 Cr. R. 77, 201 S. W. 173.

Where the state proved that on the night of the homicide defendant said that he was going to whip the driver of witness' car, who was the deceased, the state might prove by such witness that deceased was the only driver of any car he had at that time. *Id.*

Testimony of witnesses for state as to their movements, going from street to street seeking various parties prior to their reaching scene of a fight shortly before the killing, was not admissible; their movements not affecting accused. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

Where there was testimony that deceased's accusation of accused's companion of having participated in previous fight initiated the fatal trouble, only so much evidence of the previous fight was admissible as would serve to connect that matter with the later difficulty. *Id.*

Details of a fight preceding fight in which killing occurred were not admissible, where, if accused was present at the first fight, he was but an onlooker, and took no part in it. *Id.*

In prosecution for murder of a daughter, evidence that four or five years ago defendant had shot at deceased held admissible. *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953.

While the conclusion of deceased's wife that defendant's wife went upstairs for a specific purpose was not admissible without evidence of defendant's knowledge thereof, yet what then took place upstairs, being the basis of defendant's charge of misconduct of deceased toward his wife, and which led to the trouble and homicide, was admissible. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

In prosecution of convict guard for killing convict, evidence that shortly before homicide the defendant whipped deceased was admissible to show defendant's state of mind. *Hughes v. State*, 83 Cr. R. 550, 204 S. W. 640.

Although defendant claimed to have been sexually intimate with woman whom deceased was escorting at time defendant shot him, testimony that four or five months before killing defendant showed no concern when informed that such woman was intimate with another was immaterial and irrelevant. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In a prosecution for murder, evidence that, at the time defendant's wife and deceased left the hotel where they had stayed, two officers came to the hotel, and that defendant saw them from the opposite side of the street, was irrelevant. (Per *Davidson, P. J.*) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

In prosecution for murder at house of woman whom defendant was protecting, testimony that before killing, at time not fixed, witness was at house of woman, and defendant asked him to go home, and not be lying around there, defendant acting as if he was mad and having an ax with him, evidently introduced to show jealousy, was inadmissible as not connected with killing. *Walker v. State*, 84 Cr. R. 136, 206 S. W. 96.

Evidence in a homicide case that deceased and defendant's brother passed insulting remarks which led to the difficulty wherein the homicide took place held admissible against defendant on the doctrine of antecedent quarrels. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

In a prosecution for a murder, committed soon after deceased and defendant left a church, evidence that while in the church defendant said to the witness, "He is here, isn't he?" such statement, having reference to deceased, the witness having knowledge of a previous difficulty between them and having conversed subsequently with defendant upon that subject, was admissible as circumstantial evidence showing that defendant took notice of the presence of deceased. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

Testimony that defendant had sought to borrow a pistol from witness was admissible without laying a predicate to impeach defendant, being original testimony to show preparation for the homicide. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

Evidence showing that defendant prosecuted for homicide was out with a woman on the Sunday night preceding the killing and their conduct with each other was admissible as shedding light on the frame of mind of defendant at the time of the homicide, which came after a quarrel in which deceased stated he had been told that defendant was out with the woman. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

In prosecution for murder of son-in-law, who with his wife was living in same house as defendant at the time of killing, evidence that deceased and his wife had moved into such house because of the pregnant condition of the wife held inadmissible, having no relation to the killing. *Hurst v. State*, 86 Cr. R. 375, 217 S. W. 156.

In prosecution for murder of son-in-law, testimony that defendant had told witness that his wife was telling lies about him, and that she had left defendant and was living with daughter and son-in-law, held inadmissible, having reference to trouble between defendant and his wife, and not between defendant and deceased. *Id.*

It was not error to allow evidence by the wife of defendant's brother that she knew that her husband did not like the family of deceased, and that there was ill feeling between them. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

In a prosecution for murder of defendant's mistress, evidence for the state that he had paid \$550 for a ring and \$500 for a brooch for her was admissible, at least as against general objection. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

Where one is shot with a certain gun in the hands of accused, it is usually material to show that accused had the gun in his possession, the purpose for which he had it, and the kind of ammunition with which it was loaded. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

An insulting epithet by defendant's brother to deceased was relevant and admissible where the prosecution's evidence tended to show that defendant, after learning of the insult, armed himself to protect his brother, and killed deceased in an altercation arising out of deceased's demand for a retraction of the epithet. *English v. State*, 87 Cr. R. 507, 224 S. W. 511.

Where the participation of accused and deceased in a gambling game led to deceased giving to accused as security the horse over which the difficulty resulting in the homicide occurred, the fact that the parties were engaged in gambling was an incident

leading up to the homicide, and was properly admitted in evidence. *Kincaid v. State*, 87 Cr. R. 639, 224 S. W. 780.

Where defendant's son, while riding in an automobile driven by defendant, shot and killed deceased in an encounter in which shots were exchanged, the mere presence of defendant could not be used against him. *Anderson v. State*, 87 Cr. R. 641, 224 S. W. 782.

There being a well-defined and controverted issue concerning who was the aggressor in the beginning of the fight in which accused took the life of the deceased, it was proper for the state to introduce testimony of a difficulty between the parties two years prior to the homicide in which there were blows passed, threats made, and it was claimed accused was prevented from shooting by the efforts of his wife. *Medford v. State* (Cr. App.) 229 S. W. 504.

In a prosecution for murder, where the state alleged that deceased was killed by poison administered in brandy, and the defendant claimed deceased had telephoned him shortly before her death, making an engagement and requesting him to bring something to drink, defendant's offered testimony that deceased used intoxicating liquor to some extent should have been admitted. *Crow v. State* (Cr. App.) 230 S. W. 148.

Evidence that when the witness met defendant on the afternoon of the killing defendant had a pistol was admissible, and it was proper, as showing defendant's condition, to testify that on telling him that he looked like a soldier defendant attempted to draw his pistol, coupled with evidence that defendant had been drinking. *Russell v. State* (Cr. App.) 232 S. W. 309.

In a prosecution for murder, evidence of acts of defendant and his associates shortly prior to the homicide held to show the connection of defendant and his accomplices, the condition of their minds and hearts, the existence of malice, and a continuous transaction, in which defendant and his comrades were the aggressors. *Barnes v. State* (Cr. App.) 232 S. W. 312.

It was proper for the state to introduce evidence as to what occurred when defendant and deceased went to arrange for the board of a woman over whom their ill feeling began, and as to who was to pay for the board. *Carlile v. State* (Cr. App.) 232 S. W. 822.

30½. — **Circumstances accompanying act.**—It was not error to admit testimony of deceased's wife, showing that after receiving his fatal wound he went into his home and lay down on the floor and died in about five minutes, and that the only statement he made was, "I think he has killed me," or words to that effect. *Gillespie v. State*, 85 Cr. R. 4, 210 S. W. 967.

31. — **Identity of accused.**—In murder prosecution based on circumstantial evidence, testimony creating a reasonable doubt as to slayer's identity or presenting a theory consistent with accused's innocence should not be excluded because circumstances incriminating accused are more cogent. *Taylor v. State*, 81 Cr. R. 359, 195 S. W. 1147.

In a prosecution for murder it was not error to admit testimony that defendant was wearing a hat like the one the witness wore on the night of the homicide. *Parker v. State*, 83 Cr. R. 77, 201 S. W. 173.

31½. — **Tracks.**—Evidence of the tracks of an automobile near the scene of murder being those of defendant's machine, held admissible in a case depending on circumstantial evidence, it being shown that a machine passed there that night, and that he was driving that night; the possibility that they were made earlier or by another machine going only to its weight. *Haley v. State*, 84 Cr. R. 629, 209 S. W. 675, 3 A. L. R. 779.

Evidence of finding foot prints near the scene of the homicide corresponding to defendant's shoe is admissible. *Id.*

Testimony of county attorney that tracks near the scene of the killing had been made by a shoe about No. 8 or 9 in size, and that in his judgment defendant's boots made the tracks on the ground, held inadmissible in absence of something more definite in the witness' testimony showing proximity of tracks to body of victim. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

Where witness testified that he heard a party running through a field on the night of the murder, subsequent evidence showing there were tracks of a person running across the field and also describing tracks corresponding to those which would have been made by the witness claimed to have been in the field was admissible upon the question of the identity of the slayer. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a prosecution for murder, where deceased was killed by defendant after quarrel over a statement that defendant was out in a pasture at a certain time with a certain woman, evidence was properly admitted showing that witness saw tracks of men and women, cigar stubs, etc., in the pasture in question, which corroborated the state's claim that defendant was at such place at such time. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

32. — **Means or instruments used.**—In action for murder where defendant's accomplice testified to having killed deceased with hammer while repairing deceased's automobile, a hammer and hatchet found in deceased's automobile after her death held properly exhibited to jury. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1446.

Evidence of tracks at the scene of the homicide is admissible, notwithstanding the tracks were not found immediately after the homicide. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

A witness, who had measured accurately the footprints of person slaying another and the shoe of accused, could testify to such measurements. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

The state's testimony showing that tracks near the scene of the killing appeared to be boot tracks, etc., it was not error to ask defendant when a witness, relative to his ownership of a pair of boots prior to the homicide, and testimony of another wit-

ness, in which he stated that he saw defendant exchange a pair of boots with a third person some time prior to the homicide was admissible. *James v. State* (Cr. App.) 228 S. W. 941.

32½. — **Clothing and wounds of deceased.**—Exhibiting deceased's bloody clothing to witnesses who were examined concerning the clothing held error, though they were not directly introduced in evidence. *Dozier v. State*, 82 Cr. R. 321, 199 S. W. 287.

In a prosecution for murder, it was not error to allow witnesses to describe wounds on the bodies of deceased and another person also killed by accused, and to state that such wounds or some of them were on the backs of the bodies. *Hardy v. State*, 86 Cr. R. 515, 217 S. W. 939, 8 A. L. R. 1357.

In a prosecution for murder of defendant's mistress, evidence showing there were marks or spots on the woman's body held admissible as going to show the physical condition of the body. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

33. — **Subsequent incriminating or exculpatory circumstances.**—Testimony of deceased's wife that watch was just like her husband's, and that in her judgment it was his, was admissible. *Vestal v. State*, 83 Cr. R. 184, 202 S. W. 94.

Under the rule that circumstances are admissible which tend to prove the issue, and incidents are legitimate which would be irrelevant depending upon direct testimony, and that circumstances may be established where they tend to make the proposition more or less probable, where there was evidence that deceased was killed in an automobile in such manner that his hair and blood probably would have been upon it, and that the hair and blood found on a certain car at a garage two days after the killing were similar to that found upon the objects with the body of deceased, it was proper for the state to trace the car by evidence from the time it was found with blood on it back to the time it left the garage before the homicide in a different condition, without proof that an individual in whose possession it was shown to be during such time was a conspirator with accused. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

In a prosecution for murder of defendant's mistress, evidence that at defendant's request, probably while he was under arrest, the room where the killing took place was searched, and jewelry given by defendant to deceased found there, as he had suggested, held admissible as one of the physical facts accompanying the tragedy. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

Where there was testimony that defendant and deceased's wife had been guilty of illicit relations, and where the wife had died shortly after the husband had been killed, wife's will made subsequent to the commission of the crime, at a time when the defendant was in jail, devising a large portion of her estate to the defendant, held inadmissible. *Cates v. State* (Cr. App.) 227 S. W. 953.

In a prosecution for wife murder, the trial court properly permitted a witness to testify as to the finding and taking possession of a hammer in defendant's barn some 24 hours after the injury was inflicted on deceased, and in describing the condition of the hammer with reference to blood and hair upon it, etc., the proof as to the character of the wounds on deceased's head and as to finding the hammer in the barn being sufficient predicate for such testimony. *Pounds v. State* (Cr. App.) 230 S. W. 633.

Exhuming and examination of bodies in homicide cases ought not to be allowed in any case, unless it is imperatively demanded under the circumstances and is necessary for the due administration of justice, and where defendant's theory of the killing of her husband was that he was standing up and the state's theory was that he was lying in bed, held, that court did not err in denying a motion that the body of deceased be exhumed so as to ascertain for the purpose of the jury's knowledge the course of a wound. *Shields v. State* (Cr. App.) 231 S. W. 779.

Where it was the theory of the state that defendant became indignant because one of his friends was beaten up by the hotel proprietor and his employees, one of whom was deceased, testimony that defendant stated he pursued the hotel proprietor through 40 rooms to kill him was admissible. *Russell v. State* (Cr. App.) 232 S. W. 309.

Testimony of officers that after the shooting they found defendant in a large meat box was admissible as evidence of flight and concealment; defendant's contention that his action merely expressed his fear of a mob being a matter for the jury, and affecting only the weight of the evidence. *Carlile v. State* (Cr. App.) 232 S. W. 822.

34. — **Cause of death.**—Where the state's theory was that appellant killed deceased and threw her body in a river, and the defense urged suicide, evidence that deceased was cheerful, in a good humor, jolly, and apparently in good spirits continuously for several days prior to her disappearance was admissible, as tending to disprove defense of suicide. (Per *Prendergast, J.*) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

In a prosecution for murder, where the defendant claimed the deceased committed suicide, it was error to exclude the evidence of a witness that upon a pleasure trip deceased suddenly became despondent and withdrew from the circle of friends and told witness that she did not care to live, and evidence by a physician that he had told deceased that she had syphilis, and was incurable, but testimony that deceased and state's witness engaged in carnal intercourse with various men was inadmissible. *Crow v. State* (Cr. App.) 230 S. W. 148.

35. — **Incriminating others.**—In murder prosecution based upon circumstantial evidence, testimony that family of deceased's wife was hostile to him is admissible on theory that a member thereof may have committed crime, where such family lived near scene of murder and a man was seen walking toward their house soon after crime. *Taylor v. State*, 81 Cr. R. 359, 195 S. W. 1147.

In a prosecution for murder, evidence by defendant that his son had been sent to the penitentiary for killing deceased was improper. *Curry v. State*, 85 Cr. R. 443, 213 S. W. 268.

When the actual killing is done by another, the mere presence of accused does not deprive him of the privilege of having his criminal connection with the offense determined by the rule of circumstantial evidence. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

Although, where the evidence is wholly circumstantial, testimony showing the opportunity and motive of persons in such proximity to the murder as to render the fact of weight in determining the identity of the slayer, or in excluding the accused, should be received, yet, where a witness positively identified defendant as the party who struck the fatal blow, it was not error to reject defendant's offer to prove deceased's reputation for violence in an attempt to show that one other than accused had opportunity and motive to commit the offense. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

Where state relies upon circumstantial evidence to prove that defendant committed the crime, testimony tending to show that other persons who were near at hand at the time of the homicide had a motive to destroy the life of deceased is admissible, but must be legal evidence and not the hearsay declarations of the deceased or others, unless they amount to a confession of guilt. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

36. — 'Sufficiency of evidence.—Evidence held to sustain conviction of murder. *Tiger v. State*, 81 Cr. R. 614, 197 S. W. 716; *Williams v. State*, 81 Cr. R. 416, 195 S. W. 860; *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381; *Franklin v. State*, 82 Cr. R. 604, 200 S. W. 398; *Castoreno v. State*, 82 Cr. R. 592, 200 S. W. 401; *James v. State*, 84 Cr. R. 244, 206 S. W. 515; *Wallace v. State*, 84 Cr. R. 329, 206 S. W. 845; *Gilbert v. State*, 84 Cr. R. 616, 209 S. W. 658; *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390; *Jones v. State*, 86 Cr. R. 620, 218 S. W. 759; *Watson v. State*, 87 Cr. R. 189, 220 S. W. 329; *Grissom v. State*, 87 Cr. R. 465, 222 S. W. 237; *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202; *Walker v. State* (Cr. App.) 229 S. W. 527; *Thomas v. State*, 82 Cr. R. 609, 200 S. W. 402; *Finch v. State* (Cr. App.) 232 S. W. 528.

Circumstantial evidence held not sufficient to support conviction of murder. *Wilkie v. State*, 83 Cr. R. 490, 203 S. W. 1091; *Sloan v. State*, 83 Cr. R. 464, 204 S. W. 332.

In prosecution for murder committed by one engaged in theft at night, evidence held to sustain verdict of guilty. *Davis v. State*, 81 Cr. R. 450, 196 S. W. 520.

Evidence held insufficient to show express malice on the part of accused in killing deceased. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

Evidence held to show that when accused struck deceased on the head with an ax handle, it was his intent to kill him. *Id.*

Evidence in a homicide case held insufficient for submission of the issue of murder. *Miles v. State*, 82 Cr. R. 489, 200 S. W. 158.

Evidence held to show, at most, only manslaughter, and not murder. *Alanis v. State*, 82 Cr. R. 391, 200 S. W. 169.

Evidence, in a homicide case in which the sole defense was self-defense, held sufficient to support a conviction, depending on the credit given witnesses. *Pollard v. State*, 83 Cr. R. 647, 200 S. W. 838.

Although motive is not always necessary to be shown in a murder trial, yet if existent it is a circumstance to be considered by the jury with other facts. *Wilkie v. State*, 83 Cr. R. 490, 203 S. W. 1091.

Evidence held sufficient to sustain finding that defendant put poison in whisky and killed deceased. *Fults v. State*, 83 Cr. R. 602, 204 S. W. 108.

In a prosecution for the murder of an 18 year old Mexican boy by a soldier, who was a passenger in his automobile, circumstantial evidence held sufficient to sustain a verdict of guilty. *Parish v. State*, 85 Cr. R. 75, 209 S. W. 678.

Evidence held insufficient to show that defendant shot, or participated in shooting, resulting in death of deceased. *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749.

The mere presence of accused at the time and place of the homicide does not justify his conviction. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

Where the evidence showed that death necessarily resulted either from suicide or the criminal agency of another, the only motive for either being to avoid the disgrace of pregnancy by defendant, and that when last seen alive deceased was in good health and appearance and going away on a trip for which she made careful preparation, and when next seen her dead body was floating in deep water in a river, with baling wire so wrapped about her legs as to make walking impossible, with a loop suggesting use of a weight, the body showing results of strangulation, and her laundry bag, also wired, was near the body, the corpus delicti was established. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

Evidence held sufficient to establish that deceased was pregnant by defendant, and that he had arranged to meet her and take her away on the night of her disappearance, that he was the only person who had motive and opportunity to kill her, and that she did not commit suicide. (Per *Prendergast, J.*) *Id.*

In murder prosecution where actual killing had been done by person other than accused, evidence held sufficient to prove accused was connected with the killing, either as accomplice or as a principal. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

In a prosecution for murder of defendant's mistress, evidence held sufficient to authorize verdict of guilty despite defendant's claim that the shooting with an automatic pistol belonging to the woman was accidental or suicidal. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

A verdict of guilty of murder held sustained by evidence and, the weight thereof being primarily for the jury, the appellate court will not disturb the verdict. *Watson v. State*, 87 Cr. R. 189, 220 S. W. 329.

Where it appeared that defendant killed decedent with a shotgun from ambush, and that ill feeling had existed between the parties preceding the homicide, and a fresh provo-

cation had taken place on the day of the killing, evidence held to support a verdict of guilty. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a prosecution for murder by causing deceased to drink whisky containing strychnine poison, evidence, including defendant's statements in nature of confession, held insufficient to prove beyond a reasonable doubt a conspiracy between defendant and his two brothers to murder deceased; no motive being shown. *Baugus v. State*, 87 Cr. R. 551, 223 S. W. 224.

In a prosecution for murder involving the issue of defendant's identity as the slayer, incriminating circumstances disclosed by evidence held to sustain a conviction. *Wilson v. State* (Cr. App.) 226 S. W. 687.

Evidence held to raise the issue of murder, so as to justify the giving of an instruction therein. *Wade v. State* (Cr. App.) 227 S. W. 489.

In a prosecution for wife murder, evidence that defendant killed the woman with a hammer held sufficient to sustain conviction. *Pounds v. State* (Cr. App.) 230 S. W. 683.

Evidence held to show that defendant's presence was accounted for in a manner consistent with her innocence. *Giles v. State* (Cr. App.) 231 S. W. 765.

Evidence on prosecution for murder held to authorize submission of the issue of defendant's participation as a principal. *Flores v. State* (Cr. App.) 231 S. W. 786.

Evidence that deceased was cut dangerously a number of times, once in the lungs and once near the heart, that defendant was one of his assailants, and that shortly afterward he was seen washing blood from his knife, was sufficient to justify submission of the issue of death by cutting at the hands of defendant. *Barnes v. State* (Cr. App.) 232 S. W. 312.

Evidence held sufficient to support a conviction of murder of one participating in threats directed towards deceased and acting with others in bringing on a fight and participating with them in the fight, though he was not the man who fired the actual shot. *Monday v. State* (Cr. App.) 232 S. W. 831.

**37. Charge.**—Where there is no evidence that defendant shot deceased, the shooting having been done by one with whom defendant was in company, it was error to instruct to find defendant guilty if, with malice aforethought, he killed deceased by shooting him with a pistol. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241.

In a prosecution for murder, resulting in conviction of assault to murder, deceased not having died until 30 days after he was cut by defendant, a requested charge that the jury should find defendant not guilty of murder or assault to murder, but should consider simply whether or not he was guilty of manslaughter or aggravated assault, or not guilty, held properly refused, in view of the record. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Where the evidence showed that defendant acted a leading part, and there was no evidence other than his own suggesting a different motive than that of his accomplices, it was not error to refuse to charge that defendant was not bound by their motive, intent, or acts unless he knew of and agreed thereto. *Barnes v. State* (Cr. App.) 232 S. W. 312.

Where there was evidence that defendant and two others a week before a homicide agreed to "get" deceased, and that defendant participated with others after they reached the restaurant where the crime was committed and after the difficulty began, a requested instruction that he would not be guilty of murder, though present and participating in the offense, unless he knew when he went to the restaurant that his companions intended to take deceased's life or inflict upon him serious injury, was inapplicable, since, if defendant acts with others knowing their unlawful design, he becomes equally guilty with them, no matter at what stage of the conspiracy he entered it. *Monday v. State* (Cr. App.) 232 S. W. 831.

**39. — Malice.**—Instruction that "malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse" was correct, and criticism that word "legal" should have been used instead of "just" is hypercritical. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

An instruction as to malice aforethought was not erroneous in failing to define the terms "will in law justify, excuse or extenuate the homicide" and "without just cause or excuse." *McDougal v. State*, 84 Cr. R. 424, 208 S. W. 173.

**40. — Degrees under former law.**—Since Acts 33d Leg. c. 116, § 1, amending the statutes, so as to do away with the degrees of murder, it is improper for the court to charge on the different degrees. *Nelson v. State*, 84 Cr. R. 219, 206 S. W. 361.

## Art. 1141. Punishment.

See *Ex parte Walker*, 28 Tex. App. 246, 13 S. W. 861.

**Punishment and assessment thereof.**—Facts in a trial for murder occurring in a sudden quarrel between defendant and his coworkers, held not to justify death penalty. *Liggon v. State*, 82 Cr. R. 514, 200 S. W. 530.

Punishment by death was justified where the murder was committed by unprovoked shooting into a moving train. *Banks v. State*, 85 Cr. R. 165, 211 S. W. 217, 5 A. L. R. 600.

A ten-year sentence upon conviction for murder in a case involving the issue of temporary insanity from use of morphine and whisky held warranted by the evidence. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

**Art. 1143. [713] Evidence of threats and deceased's character admissible, when.**

See *Eason v. State* (Cr. App.) 232 S. W. 300.

**Threats by deceased.**—Defendant, in a trial for murder, asked for a continuance on account of absent witnesses, by whom he proposed to show threats, made by deceased the day before the killing against defendant's life, and that these threats were communicated to defendant before the killing. No testimony was offered to show that deceased manifested any intention to execute his threats at the time of the homicide. Held, that the court did not err in disallowing a continuance. *Ellis v. State*, 30 Tex. App. 601, 18 S. W. 139.

It is always permissible to prove uncommunicated threats, where question as to who began difficulty is an issue. *Bolin v. State*, 83 Cr. R. 590, 204 S. W. 335.

In prosecution for homicide, facts raising issue as to who began difficulty, defendant in such connection had right to prove uncommunicated threats by deceased. *Marshall v. State*, 84 Cr. R. 201, 206 S. W. 356.

In a prosecution for murder, evidence of a witness that shortly before the homicide he saw and heard deceased point through the door and say, "There goes a man I am going to shoot a hole through, I will put his lights out," was admissible, and the fact that no name was used by deceased could only affect the weight of the testimony, where the witness said that when the statement was made he looked through the door and saw no one except defendant. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

Deceased's statement to be admissible need not amount to a direct threat against defendant, if it shows the state of mind or animus of deceased toward defendant. *Collins v. State* (Cr. App.) 227 S. W. 189.

Proof that threats made by deceased were communicated to the defendant may be made by any person who heard the communication. *Id.*

**Character of deceased or person assaulted.**—In prosecution for murder, defendant's testimony as to deceased's conduct at chicken garden held admissible. *Henley v. State*, 81 Cr. R. 221, 195 S. W. 197.

Testimony of defendant's daughter of communication of deceased to defendant that defendant could not take his own daughter from deceased's house held admissible. *Id.*

Inquiries concerning reputation of deceased for 12 years prior to the birth of accused, his son, are too remote and inadmissible. *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595.

In homicide prosecution, testimony as to the reputation of the deceased is generally not introducible as original testimony, but, if there have been previous threats by deceased, communicated to defendant, and there is an issue of apparent danger in connection with the threats, the reputation of deceased could be shown by the state, except where the threats are part and parcel of the immediate difficulty. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

— **Specific acts.**—Specific acts of violence committed by deceased on others, when known to the person accused of having killed deceased, are admissible on the issue of self-defense. *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595.

In prosecution for murder, where accused alleged deceased had insulted accused's wife, conceding specific acts of unchastity or bad conduct on deceased's part could have been shown, offer to show that accused had been informed that deceased had caused a man and wife to separate was too indefinite. *Adler v. State*, 83 Cr. R. 72, 201 S. W. 177.

Accused's attempt to prove the character of deceased, for whose murder he was being tried, by evidence of certain vile remarks by deceased concerning women, was improper; evidence of particular acts being inadmissible for that purpose. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

In homicide prosecution where deceased had been guilty of misconduct toward defendant's wife, evidence that deceased had separated from his wife on account of his "running around after other women" held admissible. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

Evidence sought to be introduced by defendant that before the time deceased was killed there were a number of other people living in the neighborhood who were on bad terms with him, and who had had trouble with him was properly excluded, where such persons were not named, nor their whereabouts on the day of the homicide given. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In homicide prosecution, where the defendant did not claim to have any knowledge regarding any illicit relations between deceased and man killed by defendant immediately prior to deceased's death, and did not claim to have been influenced in killing deceased by any such illicit relationship, testimony as to such illicit relations held inadmissible as against contention that it would shed light on how defendant viewed threats made by deceased immediately before defendant killed her. *Perea v. State* (Cr. App.) 227 S. W. 305.

— **Rebuttal by state.**—A witness who has testified to good reputation of deceased may be asked on cross-examination as to having heard or known of incidents inconsistent with such reputation. *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

In homicide prosecution, statement by defendant on cross-examination that deceased was a bad negro and had a gun, being state's testimony, was not sufficient basis for introduction by state of testimony as to reputation of deceased for peace and quietude. *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858.

In homicide prosecution, testimony that deceased had told witness that he was in trouble with another man's wife, or with other men's wives, and was going to have to leave the neighborhood, or would either get killed or have to kill somebody, without particularizing as to whose wife was referred to, was not sufficient ground for intro-



duction by state of evidence as to deceased's reputation for peace and quietude in the community. *Id.*

In homicide prosecution, the state would be entitled to show good reputation of the deceased, where such reputation has been put in issue by defendant. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

Where defendant introduced testimony to establish deceased's reputation as a violent and dangerous man and justified the homicide by claiming that the conduct of deceased previously and at the time of the killing created a reasonable apprehension of death, the admission of evidence that deceased was about 61 years old was not error. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

**Charge.**—In homicide prosecution involving question of whether defendant was led to shoot by deceased's demonstration in view of previous threats, it was not incumbent upon court to qualify or limit the purpose for which evidence of threats was before the jury. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In homicide prosecution involving self-defense issue, where there was evidence that deceased had made threats against defendant's life, court's refusal to give requested instruction on law of communicated threats was error. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 800.

In a homicide case, court properly refused to instruct that, if one has made threats and at the time of the homicide did something showing the intention of executing such threats, his slayer should be held not guilty; such an instruction not being full and correct statement of the law. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

In a prosecution for homicide, where self-defense was claimed and there was evidence that accused had been informed of threats against him by deceased, an instruction on threats should include his right to act on such information, though the threats were not in fact made by deceased. *Rutland v. State* (Cr. App.) 224 S. W. 1088.

In a prosecution for manslaughter, where the question is in issue who began the difficulty, and the issue of self-defense is involved on such question, the trial court's failure to charge on uncommunicated threats is erroneous, unless the matter is of no importance in the case. *Aycock v. State* (Cr. App.) 225 S. W. 1099.

In homicide prosecution where there was testimony that deceased had threatened defendant and had twice made attacks on him within the hour preceding the homicide, court's refusal to charge on the law of threats in connection with self-defense held error. *Collins v. State* (Cr. App.) 227 S. W. 189.

If there is evidence of communicated threats and of an overt act by deceased at the time of the homicide not amounting to an actual attack, the court should charge the jury affirmatively on the law of threats in connection with self-defense. *Id.*

Defendant in homicide case could not criticize a charge relative to threats, where the jury was pointedly told that if deceased had made threats against defendant and it appeared to her from her standpoint at the time that by acts, or words coupled with acts, he manifested an intention to execute such threats, she would be justified in killing him and should be acquitted. *Shields v. State* (Cr. App.) 231 S. W. 779.

A charge in a prosecution for homicide, where evidence of threats by deceased had been admitted, which, after using the language of the statute, explained that it meant some act or word which reasonably indicated to defendant that the threatened attack had then commenced to be executed, was erroneous, as imposing on defendant a greater burden than the law required. *Jones v. State* (Cr. App.) 232 S. W. 847.

## CHAPTER EIGHTEEN

### GENERAL PROVISIONS RELATING TO HOMICIDE

Art.	Art.
1147. Means or instruments used must be considered.	1150. If evil or cruel disposition be exhibited.
1149. If in sudden passion not with deadly weapon.	

#### Article 1147. [717] Means or instruments used must be considered.

See *Garrett v. State*, 82 Cr. R. 64, 198 S. W. 308; *Hoover v. State*, 87 Cr. R. 372, 222 S. W. 244.

**Deadly weapon.**—A stick, described as a black jack limb about two or three feet long and about as big as witness' wrist, with which defendant struck and killed deceased, was not per se a deadly weapon, and its character as such was a question of fact. *Hollman v. State*, 85 Cr. R. 371, 212 S. W. 663.

A pocketknife, with which homicide was committed, was not per se a deadly weapon, and its character as such and defendant's intent were questions of fact. *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616; *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

A shotgun usually can be considered a "deadly weapon," but not necessarily so. *Teague v. State*, 84 Cr. R. 169, 206 S. W. 193.

A stick, described as a black jack limb about two or three feet long and about as big as witness' wrist, with which defendant struck and killed deceased, was not per se a deadly weapon, and its character as such was a question of fact, notwithstanding death resulted from the blow struck with it; and it was error for the court, after having its attention called thereto, not to charge the substance of Pen. Code 1911, art. 1147,

providing that "if the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." *Hollman v. State*, 85 Cr. R. 371, 212 S. W. 663.

A pistol used as a club is not per se a deadly weapon. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941.

A shotgun at such long range as to make it apparent that death or serious bodily injury could not result from its use would not be legally a deadly weapon. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

In a prosecution for murder, resulting in conviction of assault to murder, requested instructions eliminating the issue of murder and assault to murder held properly refused, in view of evidence showing that defendant assaulted deceased with a knife having a blade 2½ inches long. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Merely because death results from an instrument or weapon used to strike, there is no necessary conclusion that the weapon used was a deadly weapon. *Hilliard v. State*, 87 Cr. R. 15, 218 S. W. 1052, 8 A. L. R. 1316.

Whether a weapon can be deemed a "deadly weapon" is usually for the jury, to be determined according to its size and means whereby it has been used, the relative sizes and strength of the parties, and all the surrounding circumstances. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

A weapon may become deadly when from the manner of its use it is calculated to inflict death or serious bodily injury, but it is unnecessary that an injury be inflicted which is likely to produce death or give rise to apprehension before the weapon be deadly. *Id.*

In a prosecution for murder, where the weapon used was a wooden stick about three feet long, three inches in diameter at one end, and tapering to two inches at the other end, such club was not per se a "deadly weapon." *Hoover v. State*, 87 Cr. R. 372, 222 S. W. 244.

An empty quart bottle is not per se a dangerous weapon. *Tolston v. State* (Cr. App.) 225 S. W. 1098.

**Weapon or means used as evidence of Intent.**—Where defendant in murder case set up self-defense, the knife with which the killing was done was admissible to show intent, where not shown to be a deadly weapon per se. *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84; *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

In murder prosecution, involving self-defense issue, presumption of intent from character of weapon used, was inapplicable, since, the killing by defendant being admitted, defendant's intent was not in issue; the only question being whether homicide was lawful or unlawful. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

The use of a weapon calculated to produce death does not always carry with it the presumption of an intent to kill or inflict serious bodily injury, as the manner of use of the weapon must always be taken into consideration. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

Where one strikes another with a weapon calculated to produce death or serious bodily injury there is an absolute presumption that former intended to kill or seriously injure the latter. *Ware v. State*, 86 Cr. R. 505, 217 S. W. 946.

Where the means used to kill deceased were not in their nature ordinarily calculated to produce death, being a pocketknife, the law presumes that defendant was not guilty of homicide, unless there is showing of an intention to kill. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

In a prosecution for murder, where one is shot with a certain gun in the hands of accused, it is usually material to show that accused had the gun in his possession, the purpose for which he had it, and the kind of ammunition with which it was loaded. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

In prosecution of husband for murder of wife, who died from peritonitis, claimed to have been caused by internal injuries sustained on being beaten and kicked by husband, death would not be imputed to husband, unless a specific intent to kill manifestly appeared at the time he beat wife, or unless it was the necessary consequence of the weapon used or means employed. *Hill v. State* (Cr. App.) 225 S. W. 521.

**Charge.**—Where accused struck deceased with ax handle, held, that charge on aggravated assault should have been given. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

In prosecution for homicide alleged to have been committed with a hoe and a stick of wood, since the weapon was not per se a deadly weapon, a charge that the intent to kill was not to be presumed except from the manner in which the weapon was used should have been given. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

There being testimony that accused committed the killing with a knife in repelling a severe assault by deceased and companions, he was entitled to a charge on aggravated assault, based on the statute that the instrument or means with which a homicide is committed are to be taken into consideration in judging of the intent, etc. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

If defendant's weapon was used so as to show evident intention to kill deceased, and there is no evidence that such was not defendant's intention, it is not error to fail to charge on this article. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

Where there was evidence that deceased had his knife in his hand, but no evidence describing the knife upon which the jury could predicate a finding that it was a deadly weapon, the failure of the court to instruct the jury on the presumption of intent to kill by the deceased, arising from his use of deadly weapon, was not error. *Hollman v. State*, 85 Cr. R. 371, 212 S. W. 663.

This article is not to be made the basis of a charge against accused in any case of homicide, since it conflicts with charge on presumption of innocence, necessary in every case. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

In a prosecution of a pupil for killing his teacher by the use of a pocketknife when chastised, instruction that in connection with other facts in evidence the means by which the homicide was committed were to be taken into consideration in judging defendant's intent, and, if the instrument was not likely to produce death it is not to be presumed death was designed, unless from the manner used the intention evidently appeared, held erroneous. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

In a prosecution of a pupil for killing his teacher with a pocketknife while being chastised, defendant pupil's contention being merely that he did not intend to take a serious thrashing, and used his pocketknife, not to kill, but in self-defense, the provision that the instrument whereby a homicide is committed is to be considered in judging of the intent of the offending party, etc., should have been given in the charge to the jury. *Id.*

In prosecution for murder, where deceased was killed with one blow of a wooden club, which was not per se a deadly weapon, it was error to refuse to instruct affirmatively that unless the jury found that in the manner used the stick was a deadly weapon, conviction should not be returned unless the jury believed beyond a reasonable doubt that at the time the blow was struck defendant had the specific intent to kill deceased, in view of evidence that only one blow was struck, and that defendant did not intend to kill. *Hoover v. State*, 87 Cr. R. 372, 222 S. W. 244.

#### Art. 1149. [719] If in sudden passion not with deadly weapon.

See *Garrett v. State*, 82 Cr. R. 64, 198 S. W. 308; *Miles v. State*, 82 Cr. R. 489, 200 S. W. 158; *Hoover v. State* (Cr. App.) 230 S. W. 982.

**Charge.**—Where there was evidence that the killing was committed in repelling by use of a knife a sudden and exciting attack by deceased and companions, accused was entitled to charge based on statute providing that, where a homicide occurs under the influence of sudden passion, but by means not in their nature calculated to produce death, the slayer is not deemed guilty unless it appears that there was an intention to kill, but may be prosecuted for any grade of assault and battery. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

Where defendant had given testimony raising issue of whether he had acted under immediate influence of sudden passion, court's instruction as to reduction of offense to aggravated assault held fatally defective because of omission to charge that where deadly weapon was not used and blow resulted from uncontrolled passion or excitement, defendant was not guilty of higher offense than aggravated assault. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

In homicide prosecution, where there was evidence raising the question of provoking the difficulty, court, in charging on aggravated assault, properly instructed jury that, if the killing was under sudden passion, without intent to kill, with weapon not reasonably calculated to inflict death or serious bodily injury, and defendant had not provoked difficulty, and was not justified, he would be guilty of no higher offense than aggravated assault. *Id.*

Where accused was charged with killing deceased by discharge of a pistol during a struggle with deceased's husband, the substance of this article should have been charged. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941.

In a prosecution of a pupil for killing his teacher by the use of a pocketknife when chastised, instruction that in connection with other facts in evidence the means by which the homicide was committed were to be taken into consideration in judging defendant's intent, and, if the instrument was not likely to produce death, it is not to be presumed death was designed, unless from the manner used the intention evidently appeared, held erroneous. *Dill v. State*, 87 Cr. R. 49, 219 S. W. 481.

#### Art. 1150. [720] If evil or cruel disposition be exhibited.

See *Lewis v. State* (Cr. App.) 231 S. W. 113.  
Cited, *Thompson v. State*, 24 Tex. App. 383, 6 S. W. 296.

## TITLE 16

### OF OFFENSES AGAINST REPUTATION

Chap. 1. Of libel. 2. Of slander. 3. Sending anonymous letters.	Chap. 4. Of false accusation and threats of prosecution.
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#### CHAPTER ONE

#### OF LIBEL

Art. 1151. "Libel" defined. 1170. Corporations cannot be libeled.	Art. 1179. This title relates only to penal action.
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#### Article 1151. [721] "Libel" defined.

3. **Publication.**—Generally, a newspaper publisher may, when done in good faith and without intent to injure, print and circulate any item, whether true or false, without pecuniary or criminal liability other than that arising from loss of confidence and esteem in the minds of the public, but he is responsible for an abuse of that privilege and may be punished for the publication of a libel. *Wortham-Carter Pub. Co. v. Littlepage* (Civ. App.) 223 S. W. 1043.

5. **Indictment, information and complaint.**—Where an alleged libel was printed in a foreign tongue, the information charging the offense of libel should, after setting out the alleged libelous article, contain an English translation thereof according to the tenor of the article, which should not be interspersed with innuendoes or explanatory statements. *Drozda v. State*, 86 Cr. R. 614, 218 S. W. 765.

An information setting out an alleged libelous article published by defendant in a foreign tongue which related to the Bohemian National Alliance held insufficient to state an offense, not showing to what particular persons the libelous statements were directed. *Id.*

6. — **Innuendo.**—An indictment, which set out a newspaper article that charged fire was of an incendiary origin, held insufficient to charge offense of criminally libeling the person named in the indictment as the one against whom it was directed, notwithstanding Code Cr. Proc. 1916, art. 472; there being no innuendo showing the applicability of the article to the one claimed to be libeled or that the diatribe in the article against Jews was directed against him. *Potter v. State*, 86 Cr. R. 380, 216 S. W. 886.

An innuendo in an information charging libel is to explain, not to extend, what has gone before, and it cannot extend the meaning of words, although in a particular case it may more precisely fix the meaning either of preceding or subsequent words. *Drozda v. State*, 86 Cr. R. 614, 218 S. W. 765.

#### Art. 1170. [740] Corporations cannot be libeled.

In general.—A corporation as such cannot be criminally libeled. *Potter v. State*, 86 Cr. R. 380, 216 S. W. 886.

#### Art. 1179. [749] This title relates only to penal action.

See *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428.

#### CHAPTER TWO

#### OF SLANDER

Art. 1180. Definition and punishment.	Art. 1181. Procedure in prosecution for.
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#### Article 1180. [750] Definition and punishment.

1. **Nature and elements of offense.**—Excitement at time of making a slanderous remark as to chastity of female is admissible as bearing upon issue of intent, but not as a defense, unless it amounted to temporary insanity. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

Evidence that defendant, who was too far away to distinguish whether something "white" on the track "was a bunch of women, horses, or cows," remarked that it was just a bunch of whores following the soldiers, is insufficient to convict defendant of wanton or malicious slander of two women in the group. *Lutker v. State*, 83 Cr. R. 347, 203 S. W. 53.

3. **Privileged statement.**—In a prosecution for slander, the fact that the person to whom the slanderous statement was made was a friend of defendant held not to make it privileged, under the rule applicable where a relative of the injured female making inquiry of accused as to reported utterances is told what had been said. *Jones v. State* (Cr. App.) 232 S. W. 304.

6. **Indictment and information and proof thereunder—Innuendo.**—In a prosecution for slander, a statement that “Mr. F. and Mrs. R. are sleeping together, and they will not marry as long as they are sleeping together without marrying,” held sufficient in itself to impute a want of chastity to Mrs. R., so that innuendo averments were unnecessary. *Jones v. State* (Cr. App.) 232 S. W. 304.

7. — **Proof and variance.**—In a prosecution for slander, defendant having said that a third person had “knocked up” the female in question, where it was necessary to allege the meaning of such words, it was necessary for the state to prove meaning, and what the witness who heard the statement understood by the same. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

8. **Evidence.**—In prosecution for slander by imputing want of chastity to Mrs. W—— T—— by use of words: “Will Tingle burned our barn, and his damned whore helped him plan it. Will’s wife is no account”—evidence tending to connect W. T. with burning defendant’s barn was not relevant. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

In prosecution for slander of female, it was incompetent to show that, subsequent to offense charged, female’s reputation became bad. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

In prosecution for female slander, evidence to effect that accused told a witness that female in question had slighted him is admissible as showing motive or malice of accused in making statement for which prosecuted, but should be restricted by court to that purpose. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

9. **Charge of court.**—In a prosecution for slander of a female, special charge, requesting court to define “wantonly” and “willfully,” should have been given. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

#### Art. 1181. [751] Procedure in prosecution for.

*Lasky v. State* (App.) 18 S. W. 465.

**Charge.**—On a prosecution for slander by imputing want of chastity to a female, where there is evidence that the general reputation for chastity of the female alleged to have been slandered is bad, it is error to refuse an instruction that if the jury believed this evidence they should acquit. *Shaw v. State*, 28 Tex. App. 236, 12 S. W. 741.

In prosecution for slander of a female, it was proper to instruct that if defendant relies on unchastity in female as a defense he has the burden of proving it by a preponderance of the evidence. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

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## CHAPTER THREE

### SENDING ANONYMOUS LETTERS

#### Article 1182. Prohibited, penalty for so doing.

**Indictment, information or complaint.**—An indictment charging the offense of sending an anonymous letter the words and tenor of which reflected upon the chastity, good character, and reputation of the recipient, without setting out the letter, but merely alleging that the words and tenor violated the statute, is insufficient. *Rudy v. State*, 81 Cr. R. 272, 195 S. W. 187.

**Evidence.**—In prosecution for sending anonymous letter reflecting on chastity and good reputation of recipient, another anonymous letter alleged to have been written by defendant and received by the same person, was admissible in evidence. *Rudy v. State*, 81 Cr. R. 272, 195 S. W. 187.

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## CHAPTER FOUR

### OF FALSE ACCUSATION AND THREATS OF PROSECUTION

#### Article 1187. [754] Threats of prosecution to extort money.

See *Houston Ice & Brewing Co. v. Harlan* (Com. App.) 228 S. W. 1090.

## TITLE 17

## OF OFFENSES AGAINST PROPERTY

Chap.	Chap.
1. Of arson.	13. Illegal marking and branding and other offenses relating to stock.
3. Of malicious mischief [cruelty to animals, trespass, etc.].	15. Offenses against labels, trade-marks, etc.
4. Of infectious diseases among animals and bees.	16. Offenses relating to the protection of stock raisers in certain localities.
5. Of cutting and destroying timber.	17. Embezzlement.
6. Of burglary.	18. Of swindling and the fraudulent disposition of mortgaged property.
7. Of offenses on board of vessels, steam-boats and railroad cars.	1. Swindling.
8. Of robbery.	2. Fraudulent disposition of property mortgaged or subject to lien.
9. Of theft in general.	19. Of offenses committed in another country or state.
10. Of theft from the person.	
11. Theft of animals.	
12. Miscellaneous provisions relating to the recovery of stolen animals and the detection and punishment of thieves.	

## CHAPTER ONE

## OF ARSON

Art.	Art.
1208. Exceptions.	1210. Punishment.
1209. Part owner cannot burn.	

**Article 1208. [764] Exceptions.**

**Offense.**—If the owner of a house in a town or city employs another to burn it for him, the agent is guilty of arson. *Johnson v. State*, 82 Cr. R. 82, 197 S. W. 995.

**Art. 1209. [765] Part owner can not burn.**

**Tenant in possession.**—A tenant in possession of a house under a lease is a part owner; and an indictment against him for arson in burning the building must allege such tenancy, and the particular facts making the burning arson, under art. 1208, as that there was property of another in the house, or that the life of some person was endangered by the burning. *Mulligan v. State*, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

**Art. 1210. [766] Punishment.**

**Effect of amendment.**—Where the conviction was had, and the appeal taken, prior to an amendment of the statute by Acts 35th Leg. c. 145, so as to reduce the minimum penalty for arson from five to two years, the fact that the appeal was heard after the statute became effective did not entitle accused to a reversal. *Johnson v. State*, 82 Cr. R. 82, 197 S. W. 995.

## CHAPTER THREE

## MALICIOUS MISCHIEF, [CRUELTY TO ANIMALS, TRESPASS, ETC.]

Art.	Art.
1229. Obstructing railway track, etc.	1254. Cut, destroy or injure levee.
1230. Killing animal to injure owner.	1254a. Destroying or defacing corner, line, mark, etc., in connection with levee.
1231. Cruelty to animals.	1255. Entering upon inclosed land of another to hunt or take fish.
1232a. Using boat without consent of owner.	1255a. Hunting on enclosed and posted lands containing 2000 acres or more.
1232b. Same; punishment.	1255b. Same; punishment; proviso.
1234. Robbing orchards, gardens, etc.	1255c. Same; necessity of posting.
1235. Destroying fruit, corn, etc.	1259a. Taking or driving motor vehicle belonging to another.
1240. Injuring fence, leaving open gates, etc.	1259aa. Operation of motor vehicle of another without his consent.
1241. Where stock law adopted, what constitutes offense.	
1242. Wantonly and wilfully, etc., cutting, etc., fence.	
1243. Unlawful to remove party fence.	
1246. Dogging stock when fence insufficient.	

**Article 1229. [785] Obstructing railroad tracks, etc.**

**Evidence.**—Evidence held sufficient to corroborate defendant's confession as to his guilty connection with the commission of the crime. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

**Art. 1230. [786] Killing animal to injure owner.**

See *Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; *McCleskey v. State* (App.) 13 S. W. 997.

Cited, *Owens v. State*, 25 Tex. App. 552, 8 S. W. 658; *Hurley v. State*, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916; *Lynn v. State*, 33 Cr. R. 153, 25 S. W. 779.

**Offense.**—The provisions of arts. 1230, 1231, and 1246, relating to killing of animals, define separate offenses, each containing elements distinct from the other. *Choate v. State*, 87 Cr. R. 328, 221 S. W. 980.

If one who willfully kills an animal with intent to injure its owner may be convicted, although at the time the animal was killed it was on defendant's premises, inclosed with an insufficient fence, such conviction can be sustained only upon proof of intent to injure the owner, and such intent cannot be inferred from the mere fact of injury; the inference being that the animal was killed in defense of the property upon which it was trespassing. *Choate v. State*, 87 Cr. R. 328, 221 S. W. 980.

In a prosecution for killing a hog, where one count, under this article, 1230, charged killing with intent to injure the owner, and the other, under art. 1231, charged willful and needless killing, defendant may justify on the ground that the hog was trespassing in his field, regardless of the fact that the field was insufficiently fenced, the information not charging the offense of killing an animal trespassing on land inclosed by an insufficient fence denounced by art. 1246, and the court's failure to present the defense raised by requested charges and objections to evidence is error. *Id.*

**Indictment, information or complaint.**—A complaint charging that defendant did "unlawfully and willfully wound a horse" belonging to another, without alleging the intent, did not charge the offense under this article. *Ex parte Phillips*, 33 Cr. App. 126, 25 S. W. 629.

**Evidence.**—Evidence held to warrant a finding that defendant put the dogs on the swine, with intent to injure the owner. *Shirley v. State* (Cr. App.) 22 S. W. 42.

**Art. 1231. [787] Cruelty to animals.**—Every person who overdrives, willfully overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates or kills, or carries in or upon any vehicle, or otherwise in a cruel or inhumane manner, or causes or procures to be done, or who having the charge or custody of any animal unnecessarily fails to provide it with proper food, drink or cruelly abandons it, shall, upon conviction be punished by fine of not more than two hundred (\$200.00) dollars. [O. C. 714; amended Acts 1901, p. 289; Acts 1913, p. 168, ch. 88, § 1; Acts 1919, 36th Leg., ch. 59, § 1.]

Took effect March 13, 1919.

See *Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

Cited, *Lynn v. State*, 33 Cr. R. 153, 25 S. W. 779.

**Offense.**—The provisions of arts. 1230, 1231, and 1246, relating to killing of animals, define separate offenses, each containing elements distinct from the other. *Choate v. State*, 87 Cr. R. 328, 221 S. W. 980.

In a prosecution for killing a hog, where one count, under art. 1230, charged killing with intent to injure the owner, and the other, under this article, charged willful and needless killing, defendant may justify on the ground that the hog was trespassing in his field, regardless of the fact that the field was insufficiently fenced, the information not charging the offense of killing an animal trespassing on land inclosed by an insufficient fence denounced by art. 1246, and the court's failure to present the defense raised by requested charges and objections to evidence is error. *Id.*

**Art. 1232a. Using boat without consent of owner.**—It shall be unlawful for any person to use in this State, without the consent of the owner thereof, any boat of any size, character or kind, or to remove therefrom any motor or part thereof, oar or oars, row-locks, oar locks, anchor, anchor chain or anchor rope, paddles, seats, planks, polls, or any rigging whatsoever belonging to such boat, and which boat is capable of being used or operated on any bay, lake, river, or body of water or any part thereof in this State. [Acts 1921, 37th Leg., ch. 72, § 1.]

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

**Art. 1232b. Same; punishment.**—Any person violating the provisions of this Act shall upon conviction be fined in any sum not less than

Five -\$5.00- dollars, and not more than One Hundred -\$100.00- dollars. [Id., § 2.]

**Art. 1234. [790] Robbing orchards, gardens, etc.**

**Indictment or information.**—Where the information charged defendant with the theft of 10 bushels of pears, and the facts and testimony showed that he gathered them from the orchard of the prosecuting witness, the prosecution should be had under this article, in terms making such act punishable. *Busey v. State*, 87 Cr. R. 23, 218 S. W. 1048.

**Art. 1235. [791] Destroying fruit, corn, etc.**

**Offense.**—A malicious destruction of property must be willful, and if defendant was rendered unconscious or so deranged in mind from being struck on the head as to be incapable of forming the evil intent or acting with legal malice required to make the act criminal, he should not be punished. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

**Art. 1240. [794] Injuring fence, leaving open gates.**

See *Martin v. State* (App.) 16 S. W. 749.

Cited, *Bybee v. State* (Cr. App.) 20 S. W. 824.

**Offense.**—Court will not adjudicate question of title or rightful ownership of fence; the pivotal question being the actual possession thereof, and not title or ownership. *Bray v. State*, 87 Cr. R. 146, 219 S. W. 1102.

One who cuts fence while in actual possession thereof is not liable for malicious mischief, though another party, not in actual possession, is the owner and entitled to possession. *Id.*

**Evidence.**—In prosecution for unlawfully breaking, pulling down, and injuring fence of another without his consent, evidence held insufficient to prove possession of fence by person in whom ownership was alleged. *McCullers v. State*, 86 Cr. R. 247, 216 S. W. 182.

Where it was charged that defendant had torn down and removed a fence by cutting, evidence of title or ownership of the fence was inadmissible; the question being one of possession, and the evidence in such cases being confined to possession, rather than to ownership. *Bray v. State*, 87 Cr. R. 146, 219 S. W. 1102.

Evidence showing that defendant, and not prosecuting witness, was in actual possession of fence at time of alleged commission of crime, held fatal to conviction. *Id.*

**Art. 1241. Where stock law adopted, what constitutes offense.**

See *Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

**Indictment or information.**—A complaint and information are insufficient, where they do not allege a legal petition for an election by the commissioners' court for the election, the order by the county judge declaring the result of the election as provided by law, and a proclamation by publication or otherwise for 30 days of the result of the election. *Alsobrook v. State*, 86 Cr. R. 271, 216 S. W. 167.

Information charging that defendant caused cattle to go within inclosed lands of T. without T.'s consent should have alleged want of consent of the other renters or possessors of the land in the inclosure including the owner, he having rented to T. and others for shares of the crops. *Jones v. State*, 86 Cr. R. 468, 217 S. W. 945.

**Evidence.**—Conviction of causing cattle to go within inclosed lands without consent is unsupported by evidence, defendant having authority from the owner of the land who rented to others for shares of the crops. *Jones v. State*, 86 Cr. R. 468, 217 S. W. 945.

In a prosecution for permitting stock to run at large in county in which the stock law had been adopted, failure to prove the adoption of the law within the territory where in the offense is charged to have been committed is fatal to conviction. *Cline v. State* (Cr. App.) 227 S. W. 668.

**Art. 1242. [795] Wantonly and wilfully, etc., cutting, etc., fence.**

**Evidence.**—In a prosecution for wantonly and wilfully cutting fences not defendant's own, evidence held insufficient to sustain a verdict of guilty. *Williams v. State*, 84 Cr. R. 35, 204 S. W. 640.

**Art. 1243. [796] Unlawful for owner of party fence to remove.**

**Evidence.**—Evidence held insufficient to support conviction for removing the fence belonging to another. *Williams v. State*, 84 Cr. R. 496, 208 S. W. 515.

**Art. 1246. [799] Dogging stock when fence insufficient.**

See *Smith v. State*, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773.

**Offense.**—The provisions of arts. 1230, 1231, and 1246, relating to killing of animals, define separate offenses, each containing elements distinct from the other. *Choate v. State*, 87 Cr. R. 328, 221 S. W. 980.

In a prosecution for killing a hog, where one count, under art. 1230, charged killing with intent to injure the owner, and the other, under art. 1231, charged willful and needless killing, defendant may justify on the ground that the hog was trespassing in his field, regardless of the fact that the field was insufficiently fenced, the information not charging the offense of killing an animal trespassing on land inclosed by an insufficient fence denounced by art. 1246, and the court's failure to present the defense raised by requested charges and objections to evidence is error. *Id.*

**Art. 1254. Cut, destroy or injure levee.**—Any person or persons who shall wrongfully or purposely cut, injure, destroy, or in any manner im-



pair the usefulness of any levee or other reclamation improvement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period not exceeding one year; or by both such fine and imprisonment. [Acts 1909, p. 152; Acts 1915, 34th Leg., ch. 146, § 40; Acts 1918, 35th Leg. 4th C. S., ch. 44, § 58.]

**Art. 1254a. Destroying or defacing corner, line, mark, etc., in connection with levee.**—Any person or persons who shall wilfully destroy or deface any corner, line, mark, bench mark or other object fixed or established in connection with the work herein authorized, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than thirty days, or by both such fine and imprisonment. [Acts 1915, 34th Leg., ch. 146, § 41; Acts 1918, 36th Leg. 4th C. S., ch. 44, § 59.]

**Art. 1255. [804] Entering upon inclosed land of another to hunt or take fish.**

**Indictment or Information.**—An information alleging that a certain named person was the lessee of the pasture on which defendant hunted, and negating consent by the owner, lessee, proprietor, and agent in charge, cannot be sustained on the theory that the named lessee was intended by all those terms. *Boubel v. State*, 87 Cr. R. 360, 221 S. W. 290.

An information for hunting in a pasture without consent should inform the accused whether the prosecution is brought under art. 1255a, prohibiting hunting in pastures of more than 2,000 acres or under this article, applying to pastures of 2,000 acres or less. Id.

**Evidence.**—An information, alleging that the pasture on which accused was hunting had been leased to a named individual, who did not consent to the hunting, is not supported by proof that the pasture was under the charge or management of one of two agents of the lessee who were not named in the information. *Boubel v. State*, 87 Cr. R. 360, 221 S. W. 290.

**Art. 1255a. Hunting on inclosed and posted lands containing 2000 acres or more.**

See *Boubel v. State*, 87 Cr. R. 360, 221 S. W. 290.

**Evidence.**—In prosecution for hunting upon inclosed lands of another without his consent, where defendant was informed against and tried under the statute relating to the larger class of inclosures (arts. 1255a, 1255b, and 1255c), but the evidence shows that if he violated the law it was by hunting on the smaller class of inclosures (art. 1255), the judgment will be reversed. *Spencer v. State*, 86 Cr. R. 197, 215 S. W. 966.

**Art. 1255b. Same; punishment; proviso.**

See *Spencer v. State*, 86 Cr. R. 197, 215 S. W. 966.

**Art. 1255c. Same; necessity of posting.**

See *Spencer v. State*, 86 Cr. R. 197, 215 S. W. 966.

**Art. 1259a. Taking or driving motor vehicle belonging to another.**

**Validity.**—Acts 34th Leg. c. 105, amending Acts 33d Leg. c. 100, § 1, so as to omit words "shall steal or" with reference to taking of motor vehicles and which was republished with said words omitted, held valid under Const. art. 3, § 36. *Ex parte Jackson*, 83 Cr. R. 55, 200 S. W. 1092.

**Offense.**—Under this article, which originally made it a misdemeanor to steal, take, drive, or operate any vehicle, but which after it was construed by the court as making larceny of an automobile misdemeanor regardless of its value, in view of art. 1344, was amended in 1915 so as to omit the word "steal" therefrom, the word "take" in the amended act is not, in view of the evident purpose of the Legislature in making the amendment to be given the same meaning as "steal," notwithstanding art. 1331, defining taking under the definition of theft. *Hunt v. State (Civ. App.)* 229 S. W. 869.

**Indictment or Information.**—An information and complaint for using another's automobile without his consent was not duplicitous because it charged in one count that accused had driven and operated, and caused to be driven and operated, said car. *Pelz v. State (Civ. App.)* 230 S. W. 154.

**Evidence.**—Defendant cannot complain of owner of buggy taken being allowed to testify to its value, where punishment inflicted was that provided for a minimum value. *Fitzgerald v. State*, 82 Cr. R. 130, 198 S. W. 316.

**Art. 1259aa. Operation of motor vehicle of another without his consent.**

See *Williams v. State*, 84 Cr. R. 255, 206 S. W. 684.

## CHAPTER FOUR

## OF INFECTIOUS DISEASES AMONG ANIMALS AND BEES

Art.	Art.
1262. Driving sheep affected with scab or other contagious disease.	1284i. Burying or burning carcasses of animals dying of disease.
1265. Permitting sheep with scab to run at large.	1284k. Failure or refusal to dip or treat animals quarantined.
1284c. Special quarantine districts for particular diseases, etc.	1284l. Removal of animals after notice of quarantine.
1284f. Penalty for violation of act.	1284m. Failure to dip animals in mode required by law.
1284g. Failure to dip animals.	
1284h. Tick eradication; election.	

**Article 1262. Driving sheep affected with scab or other contagious diseases.**

See *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808.

**Art. 1265. [812] Permitting sheep with scab to run at large.**

See *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808.

**Art. 1284c. Special quarantine districts for particular diseases, etc.**

**Indictment or Information.**—Under arts. 1284c, 1284f, 1284g, indictment for failing to vaccinate hogs for cholera held insufficient, where not alleging the making or promulgation of any rule by the live stock sanitary commission. *Rayburn v. State*, 81 Cr. R. 610, 197 S. W. 714.

**Art. 1284f. Penalty for violation of act.**

**Indictment or Information.**—Under arts. 1284c, 1284f, 1284g, indictment for failing to vaccinate hogs for cholera held insufficient, where not alleging the making or promulgation of any rule by the live stock sanitary commission. *Rayburn v. State*, 81 Cr. R. 610, 197 S. W. 714.

**Art. 1284g. Failure to dip animals.**

**Indictment and Information.**—Under arts. 1284c, 1284f, 1284g, indictment for failing to vaccinate hogs for cholera held insufficient, where not alleging the making or promulgation of any rule by the live stock sanitary commission. *Rayburn v. State*, 81 Cr. R. 610, 197 S. W. 714.

**Art. 1284h. Tick eradication, election.**

**Validity.**—The provision authorizing the Live Stock Sanitary Commission to require the dipping of cattle exposed to fever-carrying tick within nine months prior to the passage of the act, and making violation of such direction a misdemeanor, is not an ex post facto law. *Walker v. State* (Civ. App.) 229 S. W. 513.

**Art. 1284i. Burying or burning carcasses of animals dying of disease.**

Cited, *Rayburn v. State*, 81 Cr. R. 610, 197 S. W. 714.

**Art. 1284k. Failure or refusal to dip or treat animals quarantined.**

—Any person, company or corporation owning, controlling or caring for any cattle, horses, mules, or asses which have the fever-carrying tick (*margaropus annulatus*, Say,) upon them or upon any one of them, or that are exposed to the said fever-carrying tick, or that are on any premises or other place on which the fever-carrying tick is known to exist, or that have, some time within nine months next preceding the issuance of the written direction to dip hereinafter provided, been exposed to the said fever-carrying tick or been on said premises or other place on which the fever-carrying tick is known to exist, who shall fail or refuse to dip any of said cattle, horses, mules or asses at such time and in such manner as directed in writing by the Livestock Sanitary Commission, or its chairman, as provided for in this Act [Arts. 7314k—1 to 7314k—5, 7314l, Civil Statutes, ante], shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars, nor more than one hundred dollars, and each day of such failure or refusal shall be a separate offense. [Acts 1917, 35th Leg., ch. 60, § 15; Acts 1920, 36th Leg. 3d C. S., ch. 38, § 1 (§ 15).]

Took effect June 17, 1920.

See *Ex parte Matthews*, 87 Cr. R. 511, 223 S. W. 230.

**Validity.**—The Tick Eradication Law is not invalid on the ground that it prescribes two penalties for the same offense; the offense punished by this section being refusal to

dip cattle after proper notification, while that set out in section 22 (post, art. 1284m) is for failure to use dip of the strength and kind officially prescribed. *Gandy v. State*, 87 Cr. R. 197, 220 S. W. 339.

This article held invalid, as denial of due process, for lack of definite provision for notice to cattle owner. *Ex parte Leslie*, 87 Cr. R. 476, 223 S. W. 227.

Where defendant's cattle had ticks on them, and had been exposed to the tick subsequent to the date the law became effective, the prosecution might be maintained though the nine-month clause were *ex post facto*, as it was separable from the other provisions and did not destroy them. *Walker v. State* (Cr. App.) 229 S. W. 513; *Lee v. Same* (Cr. App.) 229 S. W. 515.

**Regulations.**—Where official inspection disclosed that there were ticks in the locality and the county, it was proper to require the dipping of cattle without an inspection of all the animals therein. *Page v. Tucker* (Civ. App.) 218 S. W. 534.

Proclamation of live stock commission, conferring power on agents to discriminate in enforcing this act, held not authorized by the statute. *Ex parte Leslie*, 87 Cr. R. 476, 223 S. W. 227.

**Offenses.**—Where defendant was not, in writing, notified to dip his cattle, horses, and mules to eradicate fever ticks until after the filing of the complaint and information, he cannot be convicted on account of failure. *McGee v. State*, 82 Cr. R. 129, 198 S. W. 302.

Sickness and physical inability to take cattle to the dipping vat on the date directed is a defense to a prosecution under Tick Eradication Law, such law not being immune from the application of rules of reasonableness. *Gandy v. State*, 87 Cr. R. 197, 220 S. W. 339.

The date of an alleged offense under the Tick Eradication Law, consisting in failure to dip cattle, should correspond with the date in the written notice served. *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340.

**Indictment, information, or complaint.**—An information and complaint which fails to allege notification in writing of the time and manner such dipping was required to be done by the commission is fatally defective. *Smith v. State*, 85 Cr. R. 281, 211 S. W. 944.

It is sufficient to substantially charge that the election was legal and held in a certain county to determine whether said county should prosecute the work of tick eradication, at which election the majority of legal votes were cast in favor thereof, and thereafter said law was put in effect as prescribed by statute, and thereafter on named date in said county and state a named person was the owner and caretaker of certain animals specified, and refused to dip such animals after being directed to do so by the live stock sanitary commission at the time and manner set out. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

Tick Eradication Law does not require allegation and proof that cattle of accused were infected with ticks, or that they have been inspected, in order to sustain a prosecution thereunder. *Walker v. State*, 87 Cr. R. 186, 222 S. W. 569.

A complaint for violation of the Tick Eradication Law, which alleged that the failure and refusal of defendant occurred within the county, that he was ordered to dip the cattle in the county, and that he then and there owned and controlled the cattle, but did not directly allege that the cattle at the time were situated within the county, is insufficient. *Cornelius v. State* (Cr. App.) 228 S. W. 564.

In a prosecution for violation of the Tick Eradication Law, which can be made effective within a particular county either by a local option election or by proclamation of the Governor, the complaint must allege that the law was in effect in the county by one or the other of those means. *Id.*

**Charge.**—In a prosecution for refusing to dip cattle as directed by the Live Stock Sanitary Commission, an instruction that the execution of such an order might be delayed by filing a written protest, but that when such step was not taken, the jury would determine if defendant was ordered to dip his cattle in conformity to law, and, if he unlawfully and willfully failed and refused to comply, did not make his right to defend dependent on the filing of a protest, but was favorable to defendant as tending to guard rather than to impinge his rights. *Walker v. State* (Cr. App.) 229 S. W. 513; *Lee v. Same* (Cr. App.) 229 S. W. 515.

Charge instructing the jury that territory where it was alleged that defendant refused or failed to dip his cattle was in the zone quarantined by order of the Live Stock Sanitary Commission as promulgated in Proclamation No. 17 by the Governor, held not erroneous; it being a question of law for the court to determine the effect of the Governor's proclamation not set out in the statement of facts, while, if there was no issue as to the territory covered, he was within his province in directing that the territory where the cattle were situated was within the quarantine zone. *Williams v. State* (Cr. App.) 229 S. W. 545.

Where the information charged that defendant's stock had been inspected and found infected with ticks, but did not allege the stock had been exposed to the fever tick within 9 months, special charge, given at the prosecuting attorney's request, authorizing the jury to find defendant guilty if the stock were found to be infected with tick or had been exposed to other cattle infested with ticks, was erroneous, as authorizing conviction for an offense not charged. *Id.*

### Art. 1284l. Removal of animals after notice of quarantine.

**Verdict.**—The verdict and judgment in a prosecution must be specific and definite, and if it be desired to state in the verdict that the fine fixed as punishment is so many dollars per animal, such verdict must further find affirmatively that accused is guilty of moving a specific number of such animals. *Smith v. State* (Cr. App.) 232 S. W. 522.

**Art. 1284m. Failure to dip animals in mode required by law.**

**Validity.**—This article is not invalid as prescribing unreasonable and excessive penalties. *Page v. Tucker* (Civ. App.) 218 S. W. 584.

The Tick Eradication Law is not invalid on the ground that it prescribes two penalties for the same offense; the offense punished by section 15 (ante, art. 1284k) being refusal to dip cattle after proper notification, while that set out in this article is for failure to use dip of the strength and kind officially prescribed. *Gandy v. State*, 87 Cr. R. 197, 220 S. W. 339.

## CHAPTER FIVE

## OF CUTTING AND DESTROYING TIMBER

**Article 1289. [825] Punishment for.**

See *Cooper v. Langway*, 76 Tex. 121, 13 S. W. 179.

## CHAPTER SIX

## OF BURGLARY

<b>Art.</b>	<b>Art.</b>
1303. "Burglary" defined.	1313. Burglary of private residence at night, distinct offense.
1304. Same.	1314. "Private residence" defined.
1305. "Burglary of private residence" defined.	1315. Burglary with explosives.
1306. "Entry" defined.	1316. Punishment for same.
1307. Further defined.	1317. Other offenses committed after entry punishable.
1308. "Breaking" defined.	1319. Actual breaking necessary in case of domestic.
1309. "House" defined.	1320. Attempt at burglary, how punished.
1312. Punishment for burglary of private residence.	

**Article 1303. [838] "Burglary" defined.**

See *Hammons v. State*, 29 Tex. App. 445, 16 S. W. 99; *Bigham v. State*, 31 Cr. R. 244, 20 S. W. 577; *Shackelford v. State*, 83 Cr. R. 371, 203 S. W. 600.

**Art. 1304. [839] Same.**

See *Shackelford v. State*, 83 Cr. R. 371, 203 S. W. 600; *Fitzgerald v. State* (Cr. App.) 219 S. W. 1119.

**1. Nature and elements of offense in general.**—Act of receiving stolen property some hours after it was taken from house with knowledge that it was stolen would not make recipient principal in burglary, although he could be prosecuted for receiving fruits of crime. *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853.

One who by force in the nighttime breaks and enters the house of another with intent to commit a theft therein is guilty of burglary. *Sodors v. State*, 81 Cr. R. 506, 195 S. W. 1146.

Defendant was not guilty of burglary unless he was one of the parties connected with the entry of the burglarized house either by actual entry or as a principal within the terms of the statute. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

**3. Intent.**—Defendant was guilty of burglary in unlawfully breaking and entering store or house with intent to steal, though state does not prove he stole anything. *Love v. State*, 82 Cr. R. 411, 199 S. W. 623.

One accused of burglary was not guilty, if he in good faith believed he had the consent of the owner to enter for the purpose for which he did enter, notwithstanding the owner testified that accused did not have his consent. *Parsons v. State*, 84 Cr. R. 177, 206 S. W. 196.

Entry into a woman's sleeping apartment by cutting a screen door was burglarious if made for the purpose of rape upon her. *Hays v. State*, 86 Cr. R. 469, 217 S. W. 938.

Where police officers, believing gambling to be going on behind a closed door attempted to enter, and the hand of one was caught in the door, and was struck at by one inside the door, and he thereupon fired a shot through the door angling towards the floor, there was no burglary; for to constitute "entry" one shooting through a door must intend to commit a felony or theft. *Nalls v. State*, 87 Cr. R. 83, 219 S. W. 473.

**5. Breaking and entry.**—The fact that defendant was a domestic servant of the owner of the house burglarized was immaterial, where his service was that of a delivery boy and he had no authority in the house at night. *Connor v. State*, 85 Cr. R. 98, 210 S. W. 207.

**6. Nonconsent.**—Where a building and property therein was in the control of G. L., the building belonging to an estate in which G. L. and several others were equally interested, and the property in the building belonging to a corporation, state, in a prosecution for burglary, need not allege or prove that the property was taken without the consent of such other interested persons; indictment having alleged that G. L. was the owner and in possession of both the premises and property, and testimony showing that no

one else had anything to do with the management of the property. *Brown v. State*, 85 Cr. R. 618, 215 S. W. 97.

Evidence that owner of residence, who died previous to trial of indictment charging attempt to enter private residence with intent to commit theft, was notified by his sister that a man was on the porch trying to pry off a screen from window opposite her room, and that he called the police, is sufficient to show his want of consent. *Freeman v. State*, 86 Cr. R. 331, 216 S. W. 878.

10. **Indictment in general.**—The defendant was indicted for "that he did \* \* \* break and enter a house \* \* \* with the intent to commit theft, and did then and there fraudulently take from the house" certain property, from the possession of, and without the consent of, one W., etc., and was found guilty of burglary. Held, that while the indictment does not charge all the elements of the theft he intended to commit, it does charge all the elements of the theft he did commit, and is sufficient to sustain a conviction for burglary. *Williams v. State*, 24 Tex. App. 69, 5 S. W. 838.

Indictment for burglary of building not a private residence, which alleged that defendant broke and entered, but did not allege whether it was a daytime or nighttime burglary, charged a nighttime burglary, and court correctly tried case on such theory. *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

11. — **Allegations as to ownership and occupancy.**—When one leaves the state and asks another to look after his house and property, an indictment may allege ownership in the one left to care for the house. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

Where the property of D. and S. was taken from their room, if a burglarious entry was made of said room, it might support a conviction under a count alleging that the burglarized premises belonged to D., and that the property intended to be taken was his. *Russell v. State*, 86 Cr. R. 580, 218 S. W. 1051.

In prosecution for burglary of a mule barn, averment that the building was under the control of specified person held sufficient as against objection that it should have been alleged to be owned, occupied, and controlled or put under the care, control, and management of such person; "control" and "management" being synonymous, and control meaning to manage, govern, to have authority over, etc. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

Where the proof showed that the owner of a store at the time of a burglary was in the hospital and an employee had full control carrying on the business of buying and selling during the owner's absence, possession was in the employee, and possession should have been laid in him. *Ratcliff v. State* (Cr. App.) 229 S. W. 857.

Allegation and proof of ownership of partnership property by either partner is sufficient. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

Though the real ownership of the stolen property is in a corporation, if possession is in an individual, it is sufficient to name him as the owner. *Id.*

12. — **Joinder of counts and election.**—Indictment held not duplicitous, as charging both burglary of residence at night and another breaking and entering of house. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

In indictment for burglary, alleging that defendant did "break and enter," "in the daytime and at night," was not duplicitous. *Young v. State*, 84 Cr. R. 232, 206 S. W. 529.

13. — **Proof and variance.**—The ordinary burglary indictment will not support a conviction for breaking a private residence, nor will an indictment for breaking a private residence sustain a conviction for any other burglary. *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

Allegation of indictment for burglary that offense was committed April 30th would not preclude state from proving it was on some other date within period of limitation from time indictment was found. *Stegall v. State*, 82 Cr. R. 117, 198 S. W. 311.

Where defendant was indicted for burglarizing a house with the intent to take the property of H., proof that he took the property of D. and S. therefrom is insufficient. *Russell v. State*, 86 Cr. R. 580, 218 S. W. 1051.

Where a burglary indictment alleged that defendant entered the building without the owner's consent, and the owner was not a witness, and it was not shown by circumstances that he had not consented to the entry, such error was fatal. *Id.*

Possession of a house by a discharged soldier occupying it for a few days and sleeping in it at night during absence of his uncle and aunt, the owners, was sufficient to justify allegation of possession in him in a prosecution for burglary of the house. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

Where the proof showed that the owner of a store at the time of a burglary was in the hospital, and an employee had full control, carrying on the business of buying and selling during the owner's absence, possession was in the employee, and both ownership and possession were alleged to be in the owner, there was a variance, for possession should have been laid in the agent. *Ratcliff v. State* (Cr. App.) 229 S. W. 857.

In a prosecution for burglary, evidence held not inconsistent with averment of ownership of stolen property. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

15. **Admissibility of evidence—In general.**—In prosecution for burglarizing a saloon, testimony that whisky was found outside of the saloon after it was broken open was admissible, when the whisky was found while defendant was present. *Soders v. State*, 81 Cr. R. 506, 195 S. W. 1146.

Evidence that the doors of house were in such condition that they might be open at any time was admissible. *McInish v. State*, 82 Cr. R. 141, 198 S. W. 780.

Tracks corresponding to those of defendant on trial for burglary may be shown. *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735.

Evidence that defendant had in his possession two new tires was admissible as a circumstance against him, although identity of such tires with those obtained in exchange for casings which were the fruits of burglary was not definitely established. *Williams v. State*, 84 Cr. R. 524, 208 S. W. 924.

In a prosecution for burglary, there was no error in permitting proof that accused

was in possession of a rope stolen from an outhouse at the same time the property described in the indictment was taken from the house. *Carneal v. State*, 86 Cr. R. 274, 216 S. W. 626.

In a prosecution for burglary of a county poor farm, defendant being charged with having stolen hams and sausage meat, testimony of the superintendent of the farm, after examining in the presence of the jury the sausage meat found in defendant's house, that it was his and had every appearance of the sausage meat taken from his meat house, etc., was admissible. *Rippey v. State*, 86 Cr. R. 539, 219 S. W. 463.

In prosecution for burglary of mule barn, involving issue of whether person named in indictment had control, evidence of such person as to who employed and discharged the men who worked on the place held admissible on question of ownership and control of the property taken and the building burglarized. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

In a prosecution for burglary committed by defendant and another, testimony of the officers who made the arrest as to finding some of the stolen property in a room where defendant and his companion were found sleeping together on the same cot, some of the stolen property having been found under the cot and some lying on the clothes of defendant and his companion on the floor, was admissible. *Garcia v. State* (Cr. App.) 228 S. W. 938.

**30. Sufficiency of evidence.**—Evidence held sufficient to support a conviction of burglary. *Coprew v. State*, 83 Cr. R. 151, 202 S. W. 81; *Cooper v. State*, 81 Cr. R. 639, 197 S. W. 1106; *Simpson v. State*, 82 Cr. R. 614, 200 S. W. 385; *Williams v. State*, 84 Cr. R. 39, 204 S. W. 638; *Connor v. State*, 85 Cr. R. 98, 210 S. W. 207; *Lillard v. State*, 87 Cr. R. 75, 219 S. W. 454.

In prosecution for burglary, evidence held insufficient to support a conviction. *Davidson v. State*, 84 Cr. R. 433, 208 S. W. 664; *McGarry v. State*, 82 Cr. R. 597, 200 S. W. 527; *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735; *Manuel v. State*, 83 Cr. R. 223, 202 S. W. 736; *Williams v. State* (Cr. App.) 230 S. W. 156.

Evidence that a house was burglarized and property taken, and that a short time thereafter accused was found in possession of the stolen goods and pawned them, is sufficient to connect the accused with the burglary. *Richardson v. State*, 84 Cr. R. 38, 204 S. W. 638; *Jefferson v. State*, 85 Cr. R. 386, 212 S. W. 505; *Smith v. State*, 85 Cr. R. 355, 212 S. W. 660; *Wayland v. State*, 86 Cr. R. 522, 218 S. W. 1065.

Evidence that a burglary had been committed and property stolen February 25, and that some of the stolen goods was found April 4 in a house occupied by defendant and his wife and by a man with opportunity equal to that of defendant, and not showing defendant's personal possession or conscious assertion of property, is insufficient to sustain a conviction. *Russell v. State*, 86 Cr. R. 609, 218 S. W. 1049; *Russell v. State*, 86 Cr. R. 580, 218 S. W. 1051.

Defendant's statement that he entered another's house at night, showing an entry through an open door, raised the question that the house may have been open. *McInish v. State*, 82 Cr. R. 141, 198 S. W. 780.

Evidence held to show defendant was person who broke glass out of store door and entered. *Love v. State*, 82 Cr. R. 411, 199 S. W. 623.

In prosecution for burglary by breaking and entering store with intent to steal, evidence held to justify finding defendant's intention was to steal. *Id.*

Where evidence tended to show that defendant stole parts of a Pittsburg water heater, it was not necessary for conviction of burglary to show its size and number. *Sherman v. State*, 83 Cr. R. 205, 202 S. W. 93.

While tracks corresponding to those of defendant, in connection with other evidence, may be shown, they are not alone sufficient to convict of the offense of burglary. *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735.

In prosecution for burglary of crib to steal cotton seed, when guilt depended on identification of such seed, evidence held insufficient to sustain conviction. *Williams v. State*, 84 Cr. R. 461, 208 S. W. 522.

That a house is shown to have been broken in a burglarious manner, and defendant recently thereafter is found in possession of property identified as coming from the house, is evidence of guilt, though not conclusive, but before conviction can be predicated on such theory, the fact of the burglary must be demonstrated. *Davidson v. State*, 84 Cr. R. 433, 208 S. W. 664.

In a prosecution for burglary of a store, circumstantial evidence that defendant did not have the owner's consent to enter and take the property held sufficient to support conviction. *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

In a prosecution for burglary, where the one who broke and entered the premises was not identified, and the only evidence to connect defendant with the offense was his possession of a knife which the owner of the premises identified as having been taken, such evidence will not support a conviction where defendant explained his possession, and the evidence tended to show that the knife was taken from him a few days before the burglary, when he was arrested for fighting. *Jefferson v. State*, 85 Cr. R. 386, 212 S. W. 505.

Evidence that defendant was found in a neighboring town in possession of an overcoat exactly similar to one taken from the burglarized store, that he had on no overcoat the afternoon of the burglary, and carried tools and keys in his cap with which entrance to the burglarized store could be effected, that he tried to secretly dispose of articles corresponding with those taken when the overcoat disappeared, held, in the absence of explanation or attempted explanation, sufficient evidence to sustain a verdict of guilty. *Smith v. State*, 85 Cr. R. 355, 212 S. W. 660.

Evidence held insufficient to sustain conviction of burglary with intent to commit rape, defendant having merely cut his way into the woman's sleeping apartment through a screen door, and, when she awakened, having used no force, despite opportunity. *Hays v. State*, 86 Cr. R. 469, 217 S. W. 938.

The discovery of pistols and flashlights on premises occupied by defendant and others, and upon which the stolen goods were found, is evidence tending to connect the defendant with the burglary. *Russell v. State*, 86 Cr. R. 609, 218 S. W. 1049.

In prosecution for entering a garage at night and stealing automobile casings, evidence held insufficient to identify tires found in defendant's possession as those stolen from the garage. *Wayland v. State*, 86 Cr. R. 522, 218 S. W. 1065.

Where the state relies for a conviction upon the circumstance that accused is found in possession of property recently stolen from burglarized premises, the identity of the property in his possession must be established. *Id.*

In a prosecution for burglary of a county poor farm, defendant being charged with having stolen certain hams and sausage meat, evidence held sufficient to sustain conviction. *Ripsey v. State*, 86 Cr. R. 539, 219 S. W. 463.

To convict of burglary it is not necessary to show that defendant took all of the property missing from the broken premises. *Id.*

The unexplained possession of recently stolen property which will authorize a conviction must be exclusive possession by the accused or by an accomplice or coconspirator. *Russell v. State*, 86 Cr. R. 587, 219 S. W. 835.

Evidence that the burglar was tracked to defendant's house, and that property stolen in previous burglaries was found therein, held insufficient to sustain a conviction of burglary where it appeared that a relative of defendant's wife also lived in the same house. *Id.*

In a prosecution for burglary, in which defendant claimed to have purchased from a third person the stolen property found in his possession, evidence held insufficient to sustain such defense. *Revels v. State* (Cr. App.) 224 S. W. 689.

Evidence that accused in the nighttime fired into a private residence containing an occupant and accused's declarations at time the shots were fired held to sustain a conviction for burglary by discharging firearms into a dwelling with intent to kill, although accused denied such intent. *Felder v. State* (Cr. App.) 225 S. W. 374.

In a prosecution for burglary, evidence consisting of comparison between defendant's tracks made after he was arrested and those found near the burglarized store held sufficient to sustain conviction. *Osby v. State* (Cr. App.) 227 S. W. 322.

Evidence that money taken from house at time of burglary was found on defendant's premises, in an envelope which had been addressed to him, the morning after the crime had been committed, that defendant had been in the vicinity of the premises about the time that the crime was committed, and that he had known that the money was in the house, held sufficient to sustain conviction of burglary. *Criswell v. State* (Cr. App.) 227 S. W. 948.

Evidence that, the morning after a burglary was committed, accused pawned a suit of clothes stolen by the burglars in a town in another state to which he could have gone after the burglary, held sufficient to sustain a conviction of burglary. *Jones v. State* (Cr. App.) 229 S. W. 865.

In a prosecution of one as principal in a burglary, evidence held sufficient to identify the property stolen. *Smith v. State* (Cr. App.) 230 S. W. 410.

In a prosecution for burglary, a witness' testimony that he was vice president of the concern from which the property was stolen did not show that it was owned by a corporation. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

**31. Questions for jury.**—Where defendant's intention was to steal when he broke and entered is for jury. *Love v. State*, 82 Cr. R. 411, 199 S. W. 623.

The sufficiency of the evidence to identify an overcoat found on defendant as having been taken from the burglarized store was one for the jury. *Smith v. State*, 85 Cr. R. 355, 212 S. W. 660.

**32. Instructions in general.**—In prosecution for burglary of barn in nighttime, indictment merely charging entry by breaking, trial court did not err in simply telling jury that, if defendant entered by force, he was guilty, omitting to define "breaking." *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

In a prosecution for burglary, where the house was burglarized at night, if at all by defendant, and not in the daytime, the trial court should not submit a count of the indictment charging daylight breaking of a private residence. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

In prosecution for burglary of mule barn, alleged to have been under the control of manager of the plantation, refusal to instruct to acquit defendant if the barn was under the care, control, and management of specified person held proper under evidence that such person was a mere employé under the manager. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

Instructions that, if defendant's companion burglarized a residence, and if there was a reasonable doubt whether defendant was not present and did not participate, he should be acquitted, though he afterwards came into possession of some of the stolen property, held to sufficiently present defendant's theory that he did not participate. *Hendrix v. State*, 87 Cr. R. 482, 222 S. W. 980.

**34. — Possession of stolen property and explanation.**—In a prosecution for burglary, the trial court should have charged on defendant's theory that he purchased certain of the stolen goods from a witness offered in explanation of his possession. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

Where defendant, when arrested on charge of burglary, was silent as to his possession of the goods, his testimony that later, while in jail, he was asked for money taken, and returned it, and offered to return the clothes, saying they were given to him by his companion, who was there in jail, it was not error to refuse an instruction on reasonable explanation of his possession at first opportunity. *Hendrix v. State*, 87 Cr. R. 482, 222 S. W. 980.

In prosecution for burglary, in which defendant claimed to have purchased the stolen property which had been found in his possession, instruction as to his explanation

of the possession of such property held, not only sufficient, but in favor of defendant, in view of additional charge directly submitting the issue of his account of his possession of the stolen goods. *Revels v. State* (Cr. App.) 224 S. W. 689.

In a prosecution for burglary, court did not err in charging, "if you believe from the evidence in this case beyond a reasonable doubt that stolen property that had been recently taken from said building, if any was found in the defendant's possession, and if you believe that the defendant got the same from M., and if you fail to believe beyond a reasonable doubt the defendant was a principal to the said burglary, if any, as principal is defined in this charge you must find the defendant not guilty." *Smith v. State* (Cr. App.) 230 S. W. 410.

### Art. 1305. [839a] "Burglary of private residence" defined.

**Offense.**—Art. 1307, defining "entry" as used in burglary, is not to be read into arts. 1305, 1312, and 1313, as to burglary of a private residence. *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

— **Intent.**—Breaking a house for the purpose of engaging in a fist fight or committing a misdemeanor except the crime of theft is not the definition of burglary of a private residence at night. *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

**Indictment.**—Nighttime burglary of a private residence being a separate offense from other burglaries, an indictment must conform to the definition and charge a private residence burglary at night with a purpose or intent of committing a felony or theft, and shooting into a house to injure it does not charge a felony. *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

The ordinary burglary indictment will not support a conviction for breaking a private residence, nor will an indictment for breaking a private residence sustain a conviction for any other burglary. *Id.*

Indictment for burglary of residence at night held not defective for using the word "steal," in place of the statutory word "theft," for failing sufficiently to allege intent to steal property of value, for failing to allege that the residence was a building or room, for failing to charge previously formed felonious intent, or for failing to charge that the property accused intended to steal was in the possession of the owner of the residence. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

**Proof and variance.**—Where indictment alleged burglary of private residence at night, proof was admissible to show that such private residence was a building or a room, in view of art. 1309, defining a house as any building of whatever material. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Where indictment for burglary of residence at night could in no case have sustained a conviction for any other burglary whatever, and the evidence showed only a burglary of a private residence at night, there was no variance. *Id.*

**Sufficiency of evidence.**—Evidence held to sustain conviction of burglary of a private residence at night. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

In prosecution for burglary of residence in nighttime, evidence held insufficient to sustain conviction. *Solomon v. State*, 83 Cr. R. 319, 203 S. W. 50.

Evidence that accused climbed the porch of a private residence, and while attempting to pry off the screen on a window the occupant of the room opposite screamed and accused ran away, is not sufficient to convict of an attempt to enter a private residence with intent to commit theft. *Freeman v. State*, 86 Cr. R. 331, 216 S. W. 878.

### Art. 1306. [840] "Entry" defined.

**Nonconsent.**—Evidence that owner of residence, who died previous to trial of indictment charging attempt to enter private residence with intent to commit theft, was notified by his sister that a man was on the porch trying to pry off a screen from window opposite her room, and that he called the police, is sufficient to show his want of consent. *Freeman v. State*, 86 Cr. R. 331, 216 S. W. 878.

### Art. 1307. [841] Further defined.

**Construction and operation in general.**—This article is not to be read into arts. 1305, 1312, and 1313, as to burglary of a private residence. *Miller v. State*, 195 S. W. 192.

This article does not create a new offense or change the definition of the offense of burglary, but simply extends the enumeration of the manner of "entry." *Nalls v. State*, 87 Cr. R. 83, 219 S. W. 473.

**Shooting into house.**—Shooting at one on the porch of a house in continuance of a fight and wounding him and his wife, who is in the house does not constitute burglary. *Hunt v. State*, 82 Cr. R. 471, 200 S. W. 151.

To constitute burglary by discharging firearm into a house, there must be a breaking accompanied by an intent to commit a felony. *Shackelford v. State*, 83 Cr. R. 371, 203 S. W. 600.

Where police officers, believing gambling to be going on behind a closed door, attempted to enter, and the hand of one was caught in the door, and was struck at by one inside the door, and he thereupon fired a shot through the door angling toward the floor, there was no burglary; for to constitute "entry" one shooting through a door must intend to commit a felony or theft. *Nalls v. State*, 87 Cr. R. 83, 219 S. W. 473.

**Proof and variance.**—To constitute offense under indictment charging burglary by discharging a firearm into a house with intent to injure S., "then and there being in said house," it must be shown that S. was in house when shot was fired. *Shackelford v. State*, 83 Cr. R. 371, 203 S. W. 600.

**Sufficiency of evidence.**—Evidence held sufficient to establish burglarious entry. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.



**Art. 1308. [842] "Breaking" defined.**

**Burglarious breaking.**—If defendant entered a barn to steal maize in the nighttime by force applied to the building, as by pushing open a door held shut only by friction, in law this act amounted to a "breaking." *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

Burglary may be committed by entering a room which is closed, although the outer doors of the house are open. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

The use of keys to enter a building is the use of sufficient force as applied to it to constitute burglary. *Ripsey v. State*, 86 Cr. R. 539, 219 S. W. 463.

Where the closed door of the building was forcibly opened to gain entry, force was applied to the building, so that a charge authorizing conviction if defendant entered by force was proper. *Russell v. State*, 86 Cr. R. 587, 219 S. W. 835.

**Sufficiency of evidence.**—In a prosecution for burglary, testimony of the owner of the burglarized house that his storehouse was broken into about the 23d of March held sufficient to support the action of the trial court in submitting to the jury the statutory definition of breaking. *Osby v. State* (Cr. App.) 227 S. W. 322.

**Charge.**—On the trial of a person indicted for burglary, committed by breaking and entry "by force," threats, and fraud at night, it appeared that the doors of the building, and of a room from which an article was stolen, were open, through which defendant entered. Held, that it was error to charge that an entry into a house in the nighttime through an open door, without the consent of the owner and with intent to steal, was a forcible entry, and was burglary. *Costello v. State* (Cr. App.) 21 S. W. 360.

In a burglary case, court properly refused to give a special charge with reference to whether the doors were open or not, instruction only mentioning "doors of the house," omitting entirely the submission of the question as to whether the "doors of the room, in which the property was stored, were open." *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

**Art. 1309. [843] "House" defined.**

**What constitutes "house."**—A sheriff's office is a "house," and hence an indictment which charges defendant with breaking into the sheriff's office, and also into a vault therein, is sufficient, though it does not use the precise language of the statute, and allege the sheriff's office to be a house. *Bigham v. State*, 31 Cr. R. 244, 20 S. W. 577.

Where indictment alleged burglary of private residence at night, proof was admissible to show that such private residence was a building or a room. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

A stockroom situated on the sixth floor of a building, used and occupied by a dry goods company, walls of which were made of wire and beaver board, was a "house" within the meaning of the burglary statute. *Douglas v. State* (Cr. App.) 225 S. W. 536.

**Charge.**—Where, in a burglary case, the undisputed evidence shows that the structure burglarized came within the term "house," as defined, it is not error to charge that it was a house. *Willis v. State*, 33 Cr. R. 168, 25 S. W. 1119.

**Art. 1312. [845a] Punishment for burglary of a private residence.**

See *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

**Art. 1313. [845b] Burglary of private residence at night distinct offense.**

See *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

**In general.**—Under arts. 1303, 1304, 1305, 1312, and 1313, held, that the ordinary burglary indictment will not support a conviction for breaking a private residence, nor will an indictment for breaking a private residence sustain a conviction for any other burglary. *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

**Art. 1314. [845c] "Private residence" defined.**

Cited, *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

**Residence.**—A kitchen about 16 feet from bedrooms which were used by the family and connected therewith by plank walk, used both as a kitchen and dining room, must be deemed a part of a private residence. *Hornbuckle v. State*, 86 Cr. R. 352, 216 S. W. 880.

**Occupancy.**—Where owner left his dwelling closed up and went to a distant state, leaving his household goods stored in one room of his house, his stock in the pasture, feed in the crib, etc., the house was "occupied" within the meaning of the burglary statute; the actual corporeal presence of the alleged occupant not being necessary. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

It is not necessary that there should be some one actually living in the house in order to constitute "occupancy." *Carneal v. State*, 86 Cr. R. 274, 216 S. W. 626.

**Indictment.**—Indictment for burglary of residence at night, held not defective for failure to allege that the residence was a building or room. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

**Art. 1315. Burglary with explosives.**

**Indictment and variance.**—Where an indictment charged the use of nitroglycerine, dynamite, or gunpowder, the averment of means was descriptive, and it was essential that the state prove the use of one of the named explosives. *Jolly v. State*, 87 Cr. R. 288, 221 S. W. 279.

**Sufficiency of evidence.**—Circumstantial evidence raising suspicions against accused, but establishing no facts which could not be explained in a manner consistent with his innocence, held insufficient to sustain a conviction of burglary with the use of explosives. *Jolly v. State*, 87 Cr. R. 288, 221 S. W. 279.

In a prosecution for burglary with the use of nitroglycerine, dynamite, or gunpowder, evidence that the sound was such as might have been made by dynamite, and that a fuse with which dynamite could be exploded was found near the scene, held insufficient to show the means by which the offense was committed. *Id.*

**Art. 1316. Punishment for same.**

Cited, *Crawford v. State*, 31 Cr. R. 51, 19 S. W. 766.

**Art. 1317. [846] Other offenses committed after entry punishable.**

Cited, *Crawford v. State*, 31 Cr. R. 51, 19 S. W. 766.

**Separate offenses and former jeopardy.**—Burglary and theft committed by one person in the same transaction can be punished as separate offenses. *Rust v. State*, 31 Cr. R. 75, 19 S. W. 763.

A conviction of a theft alleged to have been committed at the time of a burglary is not a bar to a subsequent prosecution for the burglary. *Loakman v. State*, 32 Cr. R. 563, 25 S. W. 22.

**Art. 1319. [848] Actual breaking necessary in case of domestic.**

**Domestic servant or inhabitant.**—One whose duties do not entitle or require of him free access to the house, or room which he burglarized is not a domestic servant or inhabitant of such house or room. *Douglas v. State* (Cr. App.) 225 S. W. 536.

A house porter whose work lies within a building or part of a building is a domestic servant of the building or part thereof. *Id.*

**Charge.**—In a prosecution of a janitor for burglary of a stockroom, evidence held insufficient to raise the issue of domestic servant, upon which a special charge was requested by defendant. *Douglas v. State* (Cr. App.) 225 S. W. 536.

**Art. 1320. [849] Attempt at burglary; how punished.**

**Offense.**—Under an indictment charging an attempt to enter a private residence with intent to commit the crime of theft, both allegation and proof of intent as to theft are necessary. *Freeman v. State*, 86 Cr. R. 331, 216 S. W. 878.

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## CHAPTER SEVEN

### OF OFFENSES ON BOARD OF VESSELS, STEAMBOATS, AND RAILROAD CARS

**Article 1322. [851] Burglarious entry on board of vessel.**

Cited, *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

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## CHAPTER EIGHT

### OF ROBBERY

<b>Art.</b> 1327. "Robbery" defined and punished.	<b>Art.</b> 1328. Fraudulent acquisition of property by threats.
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**Article 1327. [856] "Robbery" defined and punished.**

1. **Nature and elements of offense.**—"Putting in fear," to support a conviction of robbery, must be sustained by evidence of acts or conduct or words or circumstances reasonably calculated to effect that result. *Easley v. State*, 82 Cr. R. 238, 199 S. W. 476.

Though one who plays at a gambling game, and loses money under the rules of the game, and surrenders it to his adversary, may be guilty of robbery, when he regains the money by force, yet if he was induced to part with his money through deceit and fraud, he would not be guilty, as one obtaining personal property by false pretenses is guilty of theft under article 1332. *Temple v. State*, 86 Cr. R. 219, 215 S. W. 965.

Where the demonstrator of an automobile was induced by trick to leave it and enter a house, where he was threatened with a pistol and bound, and the prospective purchasers then took the car, the demonstrator retained "possession," until the others took actual possession of it so that they obtained possession by force, and not by trick. *Clark v. State*, 87 Cr. R. 107, 220 S. W. 100.

The acquisition of the property without force by a trick is not robbery. *Id.*

Where indictment contains both robbery by assault and use of deadly weapons, that part, charging the use of deadly weapons, which merely enhances the punishment, is not essential; and it is within the power of the state to abandon that phase, and prosecute on the other. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

The crime of robbery by assault is a felony, but not capital, but becomes capital when deadly weapons are used. *Id.*

Where defendant, who was armed with a pistol, by threats forced the custodian of bank funds to open the vault, the fact of the custodian's consent does not change the offense from robbery. *Guyon v. State* (Cr. App.) 230 S. W. 408.

An acting together in the robbery of several persons makes all the participants guilty, without proof of any particular agreement directed at one of the injured parties. *Searcy v. State* (Cr. App.) 232 S. W. 799.

**2. Distinguished from theft.**—The *animus furandi* is an element of robbery as it is of theft, and both in theft and robbery the taking of goods upon a bona fide claim of right may negative any intent to steal. *Barton v. State* (Cr. App.) 227 S. W. 317.

**7. Indictment.**—Indictment held not duplicitous because charging that property was taken by assault, violence, and putting in fear, and also by using and exhibiting a pistol. *Lay v. State*, 82 Cr. R. 202, 198 S. W. 291.

An indictment for robbery alleging defendant assaulted another by exhibiting a firearm, etc., is not objectionable as duplicitous, for the robbery statute does not denounce two offenses, and an indictment may properly refer to the exhibition of a firearm as aggravation. *Crouch v. State*, 87 Cr. R. 115, 219 S. W. 1099.

An indictment charging that defendants "did then and there unlawfully in and upon A. make an assault, and then and there by said ———, fraudulently and against the will of the said A., take from the person," etc., was insufficient to charge robbery, since it omitted the allegation that defendants took the property by means of an assault. *Shoemaker v. State* (Cr. App.) 232 S. W. 518.

**8. — Proof and variance.**—The rules with reference to the allegation and proof of ownership in the offense of robbery are not more restrictive than those pertaining to the offense of theft. *Guyon v. State* (Cr. App.) 230 S. W. 408.

**10. Admissibility of evidence in general.**—In a robbery prosecution, if there was any fact relevant to the question of how the stolen watch came to be in defendant's house where it was found, which had defensive weight, defendant could offer it in evidence. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

In a robbery prosecution it was proper to receive evidence that the watch stolen was found in a house occupied by defendant, the weight of such testimony being for the jury, and it was immaterial from what source the officers learned the whereabouts of the watch. *Id.*

**12. Sufficiency of evidence.**—On a trial for robbery, evidence to identify defendants as the robbers held sufficient to sustain a conviction. *Lay v. State*, 82 Cr. R. 202, 198 S. W. 291; *Searcy v. State* (Cr. App.) 232 S. W. 799.

In prosecution for robbery, evidence held insufficient to show assault or violence. *Easley v. State*, 82 Cr. R. 238, 199 S. W. 476.

In a prosecution for robbery by use of firearms, evidence held sufficient to sustain a conviction. *Beard v. State*, 87 Cr. R. 205, 220 S. W. 342.

In prosecution for robbery where defendant claimed an alibi, the testimony of prosecuting witness and evidence as to similarity of tracks with defendant's footprints held sufficient proof of identification to sustain conviction. *Moore v. State* (Cr. App.) 226 S. W. 415.

The exactness with which footprints made by defendant's shoes correspond to peculiar foot prints leading from place of robbery is high character of evidence of identification. *Id.*

In a prosecution for bank robbery, where a bank employee was named as owner, evidence held to establish that he had a special property, being custodian of the funds. *Guyon v. State* (Cr. App.) 230 S. W. 408.

Evidence held to warrant a conviction of robbery by putting in fear of life or bodily injury, notwithstanding defendant, who with his confederate was masked, did not display firearms, or in any wise injure the party robbed. *Horn v. State* (Cr. App.) 230 S. W. 693.

**15. Charge of court.**—Failure to instruct as to defense, if defendant was induced to part with his money and place it under the control of his adversary in a gambling game through deceit and fraud, he would not be guilty of robbery in regaining possession, was error. *Temple v. State*, 86 Cr. R. 219, 215 S. W. 965.

In a prosecution for robbery, where the indictment laid ownership in one having custody of the property, the failure to submit the question of ownership held not error; the undisputed evidence establishing the same. *Guyon v. State* (Cr. App.) 230 S. W. 408.

Where defendant, who was armed with a pistol, by threats forced the custodian of bank funds to open the vault, the fact of the custodian's consent does not change the offense from robbery, and a charge on lesser degrees is unnecessary. *Id.*

In a prosecution for robbery, where the court told the jury that they must find that defendant, who admitted taking property from prosecuting witness, put him in fear of life or bodily injury, and if they had a reasonable doubt they should acquit, the refusal of requested charge that, if defendant took the property, but did not put the witness in fear of life or bodily injury, they should acquit, held proper; the issue not being raised by the evidence. *Horn v. State* (Cr. App.) 230 S. W. 693.

## Art. 1328. [857] Fraudulent acquisition of property by threats.

See *Griffin v. State* (Cr. App.) 20 S. W. 552.

## CHAPTER NINE

### OF THEFT IN GENERAL

Art.	Art.
1329. "Theft" defined.	1340. Theft of fifty dollars and over.
1330. Property must have some value.	1341. Petty theft, how punished.
1331. Asportation not necessary.	1342. General penalties not applicable, when.
1332. The "taking" must be wrongful.	1343. Voluntary return of stolen property.
1333. Possession and ownership need not be in same person.	1344. "Steal" or "stolen" includes what.
1334. Possession, how constituted.	1345. Stealing of agricultural products.
1335. Theft of one's own property, when.	1348. Conversion by a bailee is theft.
1338. Animals of domestic breed included.	1349. Receiving stolen property.
1339. Particular penalties exclude general punishment.	

#### Article 1329. [858] "Theft" defined.

See *Smith v. State* (Cr. App.) 219 S. W. 1119; *Federal Ins. Co. v. Munden* (Civ. App.) 203 S. W. 917.

Cited, *Ex parte Jackson*, 33 Cr. R. 55, 200 S. W. 1092.

1. **Nature and elements of offense in general.**—Neither asportation nor actual manual possession is necessary to constitute the crime of theft. *Harris v. State*, 29 Tex. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717.

If defendant received stolen horse, but was not present when it was stolen, and did not participate in original taking, he was not guilty of larceny merely because a receiver. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

If defendant only assisted one who killed hogs of another in taking hogs home after they were dead, he was not guilty of theft of hog. *Grace v. State*, 83 Cr. R. 442, 203 S. W. 896.

Mere receipt of property, knowing it to have been stolen, does not constitute larceny. *Rosalez v. State*, 84 Cr. R. 134, 206 S. W. 95.

There may be two separate and distinct unlawful takings of property, so as to make two separate offenses. *Gardner v. State*, 84 Cr. R. 586, 208 S. W. 920.

Where accused instructed by telephone an innocent agent to sell for him prosecutor's wagon, the offense was theft, though accused was not bodily present when it was sold. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

5. **Possession and ownership and want of consent.**—Defendant was not guilty of larceny of cattle from father and son unless taking was without consent of father as well as of son. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

Where cotton was stolen by defendant from the owner's premises in his temporary absence, such absence did not change the ownership and control of the stolen property, so as to justify a directed verdict on the ground that the property was not taken from the owner's possession. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

If defendant, at the time of the commission of his claimed offense of stealing timber, taken from a barn leased to him, had the care, control, and management of the barn from which the timbers were charged to have been taken, conviction could not result. *Fleischman v. State* (Cr. App.) 231 S. W. 397.

7. **Intent.**—In a prosecution for cattle theft, it was error to refuse to charge that, if defendant believed himself or a member of his family the owner, they should acquit. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

The only intentions of the taker of property as to the property which are material are those in his mind when the property came into his possession. *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.

9. **Compared with and distinguished from other offenses.**—Where an employé of one having custody of property belonging to a railroad took and removed freight, possession of which he had by reason of his employment, held that the offense was theft, and not embezzlement. *Bonatz v. State*, 85 Cr. R. 292, 212 S. W. 494.

The taking of goods by errand boy from employer's store at a time when he was not delivering such goods to customers was theft, and not embezzlement, the boy having no care, control, or custody of the goods at such time. *Hoyt v. State* (Cr. App.) 228 S. W. 936.

14. **Indictment, complaint and information—In general.**—Under an indictment in ordinary form for theft of horses a conviction will lie for "fraudulently driving from its accustomed range live-stock not his own." *Foster v. State*, 21 Tex. App. 80, 17 S. W. 548.

In prosecution for automobile theft in which defendant was charged as a principal only, he could not be convicted of the offense of receiving and concealing stolen property. *Seebold v. State* (Cr. App.) 232 S. W. 328.

18. **Intent.**—Taking with intent to appropriate to use or benefit of taker being an essential element of theft, and such intent therefore being required by Code Cr. Proc. art. 454, to be stated in the indictment, it not doing so, but stating that taking was with intent to appropriate to use and benefit of the owner, was bad. *Arocha v. State*, 86 Cr. R. 656, 218 S. W. 759.

19. **Asportation and fraudulent taking.**—Information for misdemeanor theft alleging that defendant "did unlawfully take, steal, and carry away," etc., did not use language supplying the omission of the word "fraudulently." *Phillips v. State* (Cr. App.) 231 S. W. 400.

**Complaint and information charging misdemeanor theft without alleging that the property charged to have been stolen was "fraudulently" taken was defective in substance, and such defect may be raised by motion in arrest of judgment or in the Court of Criminal Appeals for the first time. Id.**

**20. — Ownership and possession and want of consent.—**Brother of owner of property who obtained it for purpose of sending it to the owner held at least a special owner, so that indictment for theft properly alleged his ownership. *Ward v. State*, 32 Cr. R. 133, 197 S. W. 1102.

Where indictment for larceny alleged ownership in railroad station agent, no conviction could be had without proof either that he owned it or had possession and control as agent of the railroad. *Butler v. State*, 83 Cr. R. 354, 203 S. W. 597.

Where an indictment for the theft of one head of cattle alleged ownership in a certain person, it was necessary to prove such allegation. *Gomez v. State*, 83 Cr. R. 599, 204 S. W. 638.

In prosecution for theft of cattle from two owners, defendant was not entitled to acquittal because proof showed owners owned property as a partnership and not as individuals only. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

Where the property stolen is community property and the spouses are living together, the ownership is properly laid in the husband. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Where the owner of an automobile sold it and received a check in payment but was to keep the car until the purchaser could call and get it and it was stolen while in the possession of the original owner, the ownership, so far as the prosecution for larceny was concerned was properly alleged to be in the original owner; he having the control, care and management of the property. *Torrence v. State*, 85 Cr. R. 310, 212 S. W. 957.

In larceny prosecutions, while ownership may be generally alleged to be in the general or special owner, under the statute ownership must be alleged to be in the party who has the actual control, care, and management of the property, and it is not sufficient to allege ownership only in the real owner, although an allegation that possession is in the real owner does not detract from the indictment. *Id.*

In prosecution for theft, complaint failing to allege from whose possession the alleged stolen property was taken held fatally defective. *Taylor v. State*, 86 Cr. R. 463, 217 S. W. 937.

Where a mother sent a watch to her son by parcels post, and the package reached the son's office in bad condition, with wrapper broken, so that the mail carrier who brought it was told claim would be made if anything was missing, and thereafter the watch in a small box was found by the janitor of the building in front of the elevator on the floor on which the son had his office, at the time of the finding of the watch by the janitor, its care was in the mail carrier, with whom it would remain until delivery, and in prosecution of the janitor for larceny of the watch, ownership thereof should have been alleged in such carrier in the alternative with the son. *Holland v. State*, 87 Cr. R. 89, 219 S. W. 458.

If the name of true owner of a hog stolen while on the range or commons be not known to the grand jury and cannot be ascertained by them, it is proper to allege ownership and possession in an unknown owner. *Griffin v. State*, 87 Cr. R. 194, 220 S. W. 330.

**20½. — Proof and variance.—**In prosecution for theft of junk brass from railroad, proof of identity of property, found in possession of junk dealer and claimed to have been received from defendant, was necessary. *Kellum v. State*, 82 Cr. R. 635, 200 S. W. 343.

That name of owner of stolen calf was J. L. P. and not J. R. P., as alleged, was not material variance. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

Where the property stolen is community property and the spouses are living together, the ownership is properly laid in the husband, and evidence establishing it as community property makes no fatal variance. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Where, according to the evidence, S., the owner of cattle stolen, placed them in the pasture of H., controlled by one T., who looked after the place, and to both of whom, under Rev. St. art. 5664, rent was due from S. under their pasturer's lien, and ownership was alleged to be in S., there was a variance, and the indictment should have alleged ownership in T., or real ownership in S. and special ownership in T. *Rabe v. State*, 85 Cr. R. 373, 212 S. W. 502.

There is fatal variance between a larceny indictment alleging that stolen cotton was in possession of a landlord and proof that tenant had possession and control of cotton under agreement that one-half net proceeds from its sale belonged to landlord as rental. *Bergfeld v. State*, 85 Cr. R. 489, 213 S. W. 986.

There is fatal variance between a larceny indictment alleging that stolen cotton was owned and in possession of a landlord and proof that tenant had possession and control of cotton under agreement that one-half net proceeds from its sale belonged to landlord as rental. *Id.*

No matter what amount of other property accused may be shown to have stolen at the time and place alleged, such proof will not support a conviction for theft, unless it also appears that the property described in the indictment was stolen. *Garratt v. State*, 87 Cr. R. 12, 218 S. W. 1064.

In prosecution for theft of property from ranch, where allegation of ownership was laid in person in whose care, control, and management the property had been left by the real owner, it was unnecessary, in order to sustain case, to show want of consent and knowledge of the real owner. *Narango v. State*, 87 Cr. R. 493, 222 S. W. 564.

There is no variance between allegations that defendant stole diamonds and proof that the diamonds taken by him were set in rings. *Mathason v. State* (Cr. App.) 229 S. W. 548.

Defendant charged with theft of automobile as a principal could not be convicted unless he himself took the automobile from the owner or acted together with others in the original taking. *Seebold v. State* (Cr. App.) 232 S. W. 328.

**24. Evidence—In general.**—In prosecution for larceny of automobile, other indictments and verdict of jury in another case were not inadmissible on question of defendant's identity. *Moore v. State*, 83 Cr. R. 319, 203 S. W. 767.

In a prosecution for the larceny of an automobile, evidence that defendant, while in custody under a charge in the county court for taking the car broke jail and fled, was admissible in the district court; the cases not being separate or distinct, but involving the same act and the same facts. *Torrence v. State*, 85 Cr. R. 310, 212 S. W. 957.

In a trial on a charge of the theft of casing from an abandoned oil well alleged to have been taken and sold by defendant, wherein he denied any guilty connection with the matter and offered evidence of an alibi, checks given for the payment of the casing in the profits of which defendant shared were admissible. *Davis v. State*, 87 Cr. R. 425, 222 S. W. 236.

Testimony as to the ease with which the parts of a certain make of automobile could be detached and that witness was positive that a part in defendant's possession was on witness' car when stolen, was admissible. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

In a prosecution for larceny of an automobile, evidence that when the car was found in possession of accused stencils adapted to change the number of the car were also found in it was admissible, whether the stencils were left in the car by the original owner or were placed therein by accused. *Godby v. State* (Cr. App.) 225 S. W. 516.

In a prosecution for theft of an automobile parked on a street, testimony of the owner that it was his custom to park his car at the place from which it was stolen was relevant, as a circumstance bearing on the merits of the case. *Smith v. State* (Cr. App.) 230 S. W. 160.

In a prosecution for larceny of wheat, the owner of the wheat can show quantity which he sent to an elevator, where he did not remember the number of bushels, by stating the amount of money he received for the wheat and the price per bushel, since the jury could determine the quantity of wheat from such evidence by a mathematical computation. *Davis v. State* (Cr. App.) 231 S. W. 784.

In a prosecution for the theft of a hog, evidence as to how long defendant had lived at the place in question, and how many hogs he had brought into the country, and how many hoggens he had built, held not inadmissible, since hoggens are not contraband or suspicious property ordinarily. *Stone v. State* (Cr. App.) 232 S. W. 818.

**25. — Burden of proof.**—Where stolen goods are found in possession of accused, who explains that he has gotten them from another, state has burden of disproving truth of his explanation. *Solomon v. State*, 83 Cr. R. 319, 203 S. W. 50.

Where defendant's explanation of possession of stolen automobile contained no contradiction or weaknesses which of themselves would destroy it, the state had the burden of proving that the explanation was unreasonable or untrue. *Knott v. State*, 87 Cr. R. 117, 219 S. W. 825.

In prosecution for theft of automobile, the state was required to prove that the car which had been proved to have been in defendant's possession was the one claimed to have been stolen. *Hunt v. State* (Cr. App.) 231 S. W. 775.

**26. — Intent.**—Where servant was directed to kill one head of cattle belonging to his master, evidence that he made a mistake, and killed an animal belonging to another, would not show fraudulent intent; the color of animal directed to be killed and that killed being about the same. *Reimer v. State*, 84 Cr. R. 142, 206 S. W. 91.

**29. — Identity of property.**—Testimony as to the number of an automobile bought by the witness the morning following the theft, and which was the number of the stolen machine, was admissible to show the identity of the car. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

Testimony as to finding papers along road where stolen automobile was driven which were identified, claimed, and delivered to the owner held admissible to identify car. *Id.*

Testimony that witness was positive that a part in defendant's possession was on witness' car when stolen was admissible. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

Testimony that the numbers on the engines of certain automobiles ran serially, and that a book of such numbers for several years was authentic, and evidence of certain numbers of certain years' make, corroborating the testimony, was admissible. *Id.*

Testimony to the number on the engine of an alleged stolen automobile, that it had been tampered with and bore a number much higher than any put out by the maker of that kind of automobiles, was admissible. *Id.*

**32. — Want of owner's consent.**—In prosecution for theft of cattle from father and son, father being dead at time of trial, his want of consent to taking could be proved by circumstantial evidence. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 36.

Where the owner of alleged stolen property is present and testified before the jury, and fails to give direct and positive testimony as to want of consent to the taking of the property, such want of consent will not be inferred from other circumstances in evidence. *Hunt v. State* (Cr. App.) 231 S. W. 775.

**33. — Possession of stolen property.**—Proof that accused was in possession of property at any time after it was stolen may be considered by jury on question of his guilt. *Pritchard v. State*, 82 Cr. R. 219, 199 S. W. 292.

Possession of recently stolen property is but a circumstance, and involves a charge on the law of circumstantial evidence. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

Where the stolen automobile was dismantled after being taken, a jack and bolt shears and automobile parts found in defendant's possession were properly introduced to show fraud in taking and in dismantling the car, and to identify it, though the jack and shears and some of the parts were not identified by the owner as his property. *Clay v. State*, 85 Cr. R. 128, 210 S. W. 968.

In a prosecution for theft from a millinery store burglarized by defendant, testimony of the owner of the store that she saw a stolen dress on defendant's wife, or mistress, held admissible. *Brown v. State*, 86 Cr. R. 8, 215 S. W. 323.

To constitute legal possession of stolen property, so as to give rise to an inference of guilt, the property need not be in the hands, house, or premises of the alleged possessor, who may have the same secreted on another person's premises, or out on the commons, and nevertheless be in actual care, control, and management, in which case he is legal possessor. *Marable v. State*, 87 Cr. R. 28, 219 S. W. 455.

Where stolen groceries were taken from a crib two or three miles from defendant's house, by a person who bought from defendant, after being shown the way and the place by a negro boy, the facts were sufficient to charge defendant with possession of the property after it was stolen, to give rise to an inference of guilt against him. *Id.*

From the recent possession of a part of the stolen property, theft of the whole may be inferred and a conviction sustained. *Perry v. State*, 87 Cr. R. 559, 223 S. W. 212.

Where H., guest in a hotel, missed some money from his room after defendant, a bell boy, and a woman had left it, the delivery of the money to H. by the woman, on defendant conducting him to her room, is admissible on prosecution for the theft. *Tillman v. State* (Cr. App.) 225 S. W. 165.

In a prosecution for theft, possession of the stolen property to give rise to an inference of guilt must not only be shown to have been recent and unexplained, but also personal and exclusive in the party or parties sought to be charged; discovery of the property in the presence of a group of people one of whom is defendant, unaccompanied by evidence of an acting together, thus of guilt, as a principal or accomplice on the one hand, or of evidence satisfactorily fixing possession in defendant, does not support a conviction for theft as to any one of such persons. *Frazier v. State* (Cr. App.) 227 S. W. 324.

Proof that stolen tools were on premises belonging to and under control of the father of one accused of theft and receiving stolen goods, in an outhouse with other tools, would not justify an inference of guilt on the part of the accused, in the absence of any assertion of ownership by the accused. *Lemon v. State* (Cr. App.) 231 S. W. 388.

Evidence that the stolen calves had been pastured in the county in which the prosecution was instituted and had disappeared therefrom and had been traced to defendant's possession in another county is sufficient to sustain a conviction for theft in the county in which the prosecution was begun, though there was no direct evidence of a taking in that county. *Stiles v. State* (Cr. App.) 232 S. W. 805.

In a prosecution for the theft of a pig, where the pig in question and another were brought to defendant's premises at the same time, on the claim of right and good faith, and he let two different parties have the pigs, because they claimed them, although still claiming them as his own, testimony that he voluntarily gave up the pigs to these parties held not erroneously admitted. *Stone v. State* (Cr. App.) 232 S. W. 818.

34. — **Explanation of possession.**—Granting that the fact that, in anticipation of an inspection, defendant caused goats, not belonging to him, to be taken out of his herd and placed in another pasture, constituted proof of possession of recently stolen property, which unexplained might, with other evidence, justify inference of theft, such inference was met by proof that goats came into defendant's possession through instrumentality of others who stole them. *Gardner v. State*, 84 Cr. R. 586, 208 S. W. 920.

Where defendant's possession of stolen goats was fully explained by the state in a manner which showed that he was not present at their taking and took no part in the actual theft, his theft could not be inferred from possession. *Id.*

In a prosecution for theft of an automobile, where the state proved sale by defendant of a car alleged to have been the one stolen, but offered in evidence a licensee of the car sold which showed a sale of that car to defendant by the licensee, such licensee raised the issue of explanation of the possession of stolen property and entitled defendant to a charge thereon. *Hunt v. State* (Cr. App.) 229 S. W. 869.

35. — **Sufficiency to convict.**—Circumstances held to justify finding that the killing of a cow had the requisite elements of the crime of theft as defined by this article and art. 1331. *Gold v. State*, 81 Cr. R. 611, 197 S. W. 1110.

Evidence held sufficient to support a finding that the carcass of a cow found was the one alleged to have been stolen by defendant. *Id.*

On a trial for the theft of an automobile, evidence held sufficient to establish defendant's guilt. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

Evidence held to sustain conviction of horse theft. *Thomas v. State*, 82 Cr. R. 656, 200 S. W. 522.

Evidence held sufficient to show that defendant and his accomplice actually stole car, and that defendant was a principal with his accomplice, even if latter himself personally did the stealing. *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771.

Evidence held to show that ownership of stolen automobile was as alleged, and was not in the keeper of wagon yard where the automobile was temporarily stored, so as to warrant conviction of larceny. *Thomas v. State*, 83 Cr. R. 282, 203 S. W. 773.

Circumstantial evidence held sufficient to sustain conviction of theft of one claiming to have been given the articles by another to sell. *Jones v. State*, 83 Cr. R. 444, 203 S. W. 1101.

In a prosecution for theft of 20 goats, evidence held to sustain conviction. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

In prosecution for theft of 200 pounds of cotton by the owner's employé, evidence held sufficient to show that defendant stole the cotton with intent to deprive the owner of its value and to appropriate it to his own use and benefit. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

In a prosecution for the theft of a sack of wheat, evidence held sufficient to sustain a conviction. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

Evidence held to sustain conviction of felony theft of a barrel of whisky. *Wilson v. State*, 85 Cr. R. 148, 210 S. W. 802.

In a prosecution for theft, evidence as to ownership, loss of property, and defendant's connection therewith held sufficient to show a taking thereof by defendant. *Charles v. State*, 85 Cr. R. 534, 213 S. W. 266.

Evidence held to support verdict of guilty in cattle theft prosecution. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

Evidence held sufficient to support defendant's conviction of theft of lard and sugar from a wholesale grocery store. *Marable v. State*, 87 Cr. R. 28, 219 S. W. 455.

Evidence that prosecutor's wagon was left in an alley behind defendant's hotel, that defendant instructed another to sell it for him and knew that the proceeds of the sale had been applied to his benefit, and that three days thereafter prosecutor discovered his wagon was gone and defendant admitted that he had sold it, is sufficient to prove a taking of the wagon. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

In a prosecution for theft of property over the value of \$50, evidence held to warrant the jury in concluding that defendant was the person who took the property, notwithstanding defendant's explanation of his possession of the stolen goods. *Alarcan v. State*, 87 Cr. R. 458, 222 S. W. 982.

**36. — Insufficiency to convict.**—Evidence held not to sustain conviction for hog theft. *Dowdell v. State*, 85 Cr. R. 472, 213 S. W. 649; *Strickland v. State*, 81 Cr. R. 643, 197 S. W. 1104; *Rosalez v. State*, 84 Cr. R. 134, 206 S. W. 95.

On a trial for hog theft, evidence indicating that defendant took possession of the hog to protect his crop held insufficient to show a fraudulent taking, even if sufficient to show that he subsequently killed the hog. *Brooks v. State*, 82 Cr. R. 242, 199 S. W. 472.

In prosecution for theft of brass from railroad, evidence held insufficient to sustain conviction as failing to identify property as coming from possession of storekeeper, or to show that he had lost it or similar property. *Kellum v. State*, 82 Cr. R. 635, 200 S. W. 843.

Evidence held insufficient to sustain conviction of larceny of lard and sugar. *Butler v. State*, 83 Cr. R. 354, 203 S. W. 597.

Evidence held insufficient to sustain conviction for theft of lawn mower. *White v. State*, 83 Cr. R. 530, 204 S. W. 230.

Under an indictment for the theft of one head of cattle from a certain named person, evidence held insufficient to show ownership or possession in that person. *Gomez v. State*, 83 Cr. R. 599, 204 S. W. 638.

In prosecution for hog stealing, evidence held insufficient to establish accused's possession of ham alleged to have been from the stolen hog. *Rosalez v. State*, 84 Cr. R. 134, 206 S. W. 95.

Evidence, in a prosecution for the theft of a hat alleged to have been in possession of a milliner and sold to a third party who left it in the store, held not to show ownership in the milliner either general or specific so as to support a conviction. *Isaac v. State*, 84 Cr. R. 192, 206 S. W. 346.

Evidence, in a prosecution for the theft of a hat, held not sufficient to sustain a conviction. *Id.*

Evidence held not to warrant conviction of defendant for theft of automobile in view of explanation of how automobile came to be in his garage. *Knott v. State*, 87 Cr. R. 117, 219 S. W. 825.

Circumstantial evidence held insufficient to sustain conviction of the offense of theft of cotton seed under the value of \$50. *Campbell v. State* (Cr. App.) 224 S. W. 899.

In a prosecution for theft of 15 quarts of whisky, evidence held insufficient to establish the corpus delicti or to show that accused committed the theft. *Thomas v. State* (Cr. App.) 225 S. W. 167.

Evidence held insufficient to sustain conviction for theft of a hog, the showing of defendant's possession of the stolen animal being not such as to justify inference of guilty. *Frazier v. State* (Cr. App.) 227 S. W. 324.

In a prosecution for stealing a hog which had been placed in possession of a third person for breeding purposes, circumstantial evidence, tending to show that a hog of similar description to that stolen had been seen in defendant's possession, held insufficient to sustain a conviction. *McGowan v. State* (Cr. App.) 229 S. W. 323.

Evidence that defendant was one of several drivers hauling wheat for prosecuting witness, and that he disposed of a load of wheat for his own account under suspicious circumstances, but which did not show clearly that the owner's wheat was short or that any shortage could have been caused only by theft, held insufficient to sustain a conviction for theft of the wheat. *Davis v. State* (Cr. App.) 231 S. W. 784.

**37. Questions for jury.**—Question of intent, being raised by the evidence in larceny, should be submitted, notwithstanding defendant's drunkenness. *Riddick v. State*, 83 Cr. R. 291, 202 S. W. 947.

In prosecution for stealing one head of cattle belonging to unknown owner, defense being that defendant killed the animal under the authority and for the benefit of his master, evidence held insufficient to warrant submission of question of defendant's guilt. *Reimer v. State*, 84 Cr. R. 142, 206 S. W. 91.

In a prosecution for larceny, ordinarily the question of identity of stolen property is for the jury. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

**38. Charge of court.**—Requested instructions on trial for theft held to turn upon ownership of property and sufficiency of evidence to show ownership, and properly refused where the facts showed a special ownership. *Ward v. State*, 82 Cr. R. 133, 197 S. W. 1102.

In prosecution for theft of automobile, an instruction held insufficient in that it failed to present issues; the questions of defendant's presence at the original taking, alibi, and his good faith as a driver, being involved. *Collins v. State*, 82 Cr. R. 24, 198 S. W. 143.

Possession of recently stolen property is but a circumstance, and calls for a charge with reference to explanation of possession. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.



In a prosecution for larceny from the owner, evidence that defendant, when stolen cotton was found in his possession, stated that he had bought it, and later that he took it thinking it would be all right with the owner, and that he intended to pay for it, justified an instruction on explanation of possession of property recently stolen. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

In prosecution for theft of cow claimed by defendant as his own, where only issue was ownership, defendant was entitled to charge submitting that issue unincumbered with a charge on explanation of possession of property recently stolen. *Cannon v. State*, 84 Cr. R. 504, 208 S. W. 339.

To authorize charge on possession of recently stolen property and consequent explanation, it must appear that property was stolen and recently found in possession of defendant, who gave explanation sufficient, if believed, to disconnect him with the crime; but the question does not arise when the issue is one of title claimed by defendant. *Id.*

In a prosecution for misdemeanor theft, an instruction on the law relating to the possession of property recently stolen held proper and not prejudicial to defendant. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

In a prosecution for cattle theft, it was error to refuse to charge that if jury believed the animal stolen to be the property of defendant, or one of his family, or there was reasonable doubt of it, or if defendant believed himself or a member of his family the owner, they should acquit. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

Charge held sufficient presentation of issues in a prosecution for theft of an automobile. *Clay v. State*, 85 Cr. R. 128, 210 S. W. 968.

Where there was no evidence that defendant made any explanation of his possession of recently stolen property, but he testified on the trial that part of it belonged to himself, a charge on the theory of explanation of possession of recently stolen property was not called for, but the defense appearing from the testimony should have been pertinently submitted. *Garrett v. State*, 87 Cr. R. 12, 218 S. W. 1064.

Care, control, and management are not necessarily exclusive in one person, but may be joined in several, within the comprehension of the law of theft; and, unless the evidence raises the issue of exclusive care, control, and management in some person other than the one named as the owner in the indictment, it is not necessary to present such issue to the jury. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

In a prosecution for theft of an automobile, evidence held not to render it incumbent upon the court to charge the jury in an affirmative way that an absence of intent on the part of the accused at the time he took the car to appropriate it to his own use would require an acquittal. *Escobedo v. State* (Cr. App.) 225 S. W. 377.

In a prosecution for stealing a hog which had been left in the care of a third person, it was error to refuse to instruct that, unless the hog taken by defendant belonged to the alleged owner, an acquittal must result, although the jury might believe that the owner had lost a hog of the same description. *McGowan v. State* (Cr. App.) 229 S. W. 323.

In a prosecution for theft of an automobile, where the state proved the theft of a car and the sale a few days later by defendant of a car of the same make, but the prosecuting witness had not seen the car sold so that he could not identify it as his own, it was error to refuse a requested instruction to acquit unless the jury believed that the automobile sold by defendant was the one which had belonged to prosecuting witness. *Hunt v. State* (Cr. App.) 229 S. W. 869.

In prosecution for automobile theft, instruction on the law relating to explanation of possession of recently stolen property held sufficient. *Seebold v. State* (Cr. App.) 232 S. W. 328.

In a prosecution for theft of cattle, where the evidence showed the stolen cattle had been in defendant's possession, but he denied the taking and claimed to have purchased them from another, he was entitled to a charge requested by him that the offense of receiving stolen goods was a distinct offense from the theft of the goods, and that he could not be convicted of receiving where the indictment charged only the theft. *Stiles v. State* (Cr. App.) 232 S. W. 805.

### Art. 1330. [859] Property must have some value.

Cited, *Shaw v. State*, 23 Tex. App. 493, 5 S. W. 317.

**Value of property.**—Defendant, if going with others to an abandoned oil well and taking therefrom certain casing of the value of over \$50 and selling it, would be guilty of theft. *Davis v. State*, 87 Cr. R. 425, 222 S. W. 236.

**Evidence.**—In a prosecution for misdemeanor theft, evidence held sufficient to show that the quilt top stolen had a value. *Thomas v. State*, 85 Cr. R. 246, 211 S. W. 453.

### Art. 1331. [860] Asportation not necessary.

**Construction and operation in general.**—Under art. 1259a, which originally made it a misdemeanor to steal, take, drive, or operate any vehicle, but which after it was construed by the court as making larceny of an automobile misdemeanor regardless of its value in view of article 1344 was amended in 1915 so as to omit the word "steal" therefrom, the word "take" in the amended act is not, in view of the evident purpose of the Legislature in making the amendment, to be given the same meaning as "steal," notwithstanding this article. *Hunt v. State* (Cr. App.) 229 S. W. 869.

**Taking and asportation.**—Any taking of property without the owner's consent and with the present intent to deprive the owner of its value and to appropriate the same by the taker is "theft"; and asportation is not necessary to make out the offense. *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.

Where an automobile was temporarily left in the garage while the owner was about his business in the vicinity, a claim of ownership and possession thereof by

another person was a taking of the automobile rendering such person guilty of theft. *Smith v. State* (Cr. App.) 227 S. W. 1105.

**Evidence.**—Circumstances held to justify finding that the killing of a cow had the requisite elements of the crime of theft as defined by P. C. art. 1329, and this article. *Gold v. State*, 81 Cr. R. 611, 197 S. W. 1110.

### Art. 1332. [861] The "taking" must be wrongful.

See *Taylor v. State*, 32 Cr. R. 110, 22 S. W. 148; *Temple v. State*, 86 Cr. R. 219, 215 S. W. 965.

1. **Offense under this article in general.**—If defendant obtained possession of horse, he is charged with having stolen, with consent of owner, there was no theft. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

In a prosecution for cattle theft, that defendant's wife took the animal stolen and put it in their inclosure in defendant's absence, and without his consent, does not constitute him an original taker, notwithstanding he subsequently sold the animal, believing himself or a member of his family to be the owner. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

In prosecution for theft of an automobile casing from a garage, in which defendant claimed that he took the casing in absence of the owner, but in the presence and with the consent of a watchman in charge, and with intent to pay for the same, and did thereafter so offer to pay, it was error to refuse to charge that, if defendant entered the garage and took the casing with the consent of one in charge, and without fraudulent intent, he was not guilty. *Beach v. State*, 85 Cr. R. 64, 210 S. W. 540.

If accused took the alleged stolen horse for his temporary use only, intending to return it, he would not be guilty of theft. *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.

Proof of an appropriation and that possession of the alleged stolen property was obtained with the owner's consent either by false pretext or with a present intent to appropriate it will authorize a conviction. *Gibson v. State*, 85 Cr. R. 462, 214 S. W. 341.

In prosecution for felony theft, by false pretext, in that defendant had found a pocketbook and wanted money to make change so that contents could be equally divided between himself and another and prosecuting witness, thereby inducing his surrender of money, the fact that he was to share in contents was no defense. *Id.*

The acquisition of the possession of property by false pretext is "theft," if done with the intention to appropriate, followed by an appropriation. *Gordon v. State*, 85 Cr. R. 641, 214 S. W. 980.

Where a person got a pistol from his sister, she delivering it to him with the request that he dispose of it, giving as a reason that she did not want it about the place, he was not guilty of theft; the sister not telling him that it belonged to her husband. *Adams v. State*, 85 Cr. R. 648, 215 S. W. 301.

In a prosecution for theft of cotton claimed by defendant to have been purchased by him, though he did not pay the price, the question in the case was what was defendant's intent when he appropriated the cotton. *Mills v. State*, 87 Cr. R. 655, 224 S. W. 780.

3. **Offense distinguished from swindling or embezzlement.**—The rule in swindling cases that the false representation must be as to something present or past has no application in a case where the charge is theft by false pretext. *Gibson v. State*, 85 Cr. R. 462, 214 S. W. 341.

The distinction between swindling and theft by false pretext under this article depends upon whether injured party was induced to part or intended to part with both title and possession, in which case the offense is swindling; or whether he intended to part only with possession, in which case it is theft by false pretext. *Id.*

Where defendant's accomplice called complainant's attention to the fact that defendant was in the act of picking up a pocketbook, and it was agreed that the contents of the pocketbook be divided equally between the three, and defendant represented that the pocketbook contained a \$500 bill and a \$100 bill, and that it was necessary to have additional money to make change, so that the division might be effected, and complainant delivered \$200 to defendant, defendant remarking, "You will get your money back and the \$200," the \$200 being appropriated by the defendant and his accomplice, the offense was theft, and not swindling. *Gordon v. State*, 85 Cr. R. 641, 214 S. W. 980.

The taking of goods by errand boy from employer's store at a time when he was not delivering such goods to customers was theft, and not embezzlement; the boy having no care, control, or custody of the goods at such time. *Hoyt v. State* (Cr. App.) 228 S. W. 936.

6. **Appropriation of estray.**—If defendant took possession of a hog for the purpose of protecting his crop and the original taking was not fraudulent, his subsequent appropriation or killing of the hog was not larceny. *Brooks v. State*, 82 Cr. R. 242, 199 S. W. 472.

8. **Money paid by mistake.**—Where accused was sent to a store to deliver 90 cents worth of oil, and by mistake was paid \$9, and kept \$8.10 of it, if, when receiving such money from storekeeper, he formed the criminal design to appropriate it to his own use, and did so appropriate it, the appropriation would be theft, but if he subsequently formed such fraudulent purpose, he could not be convicted under the general charge of theft. *Campos v. State*, 84 Cr. R. 216, 207 S. W. 931.

Where debtor by mistake gave creditor a check for an amount in excess of that actually due, and the creditor took the excess amount without the debtor's consent, with the intent to deprive debtor of the value thereof and to appropriate it to his own use and benefit, the creditor was guilty of theft of the excess amount, notwithstanding that the creditor was entitled to a portion of the amount of the check, the theft consisting of the appropriation of the excess amount, and not in the taking of the check itself, and it was immaterial that the creditor did not know the exact amount of the excess. *Hedge v. State* (Cr. App.) 229 S. W. 862.

A defendant, who by mistake of his debtor received a check for an amount in excess of that actually due, and who appropriated the entire amount to his own use, to be guilty of theft must have intended to appropriate the money at the time of receiving it, and must have appropriated the money without the intention to return it. *Id.*

A defendant, who by mistake of his debtor received a check for an amount in excess of that actually due, and who with knowledge thereof appropriated the entire amount, was guilty of theft regardless of whether debtor had consented to the possession or taking. *Id.*

10. **Evidence.**—In prosecution on indictment form for felony theft, evidence held to sustain finding that pretext of having found pocketbook and of wanting money so as to make change to divide contents equally between defendant and another and prosecuting witness, an aged, ignorant man, in fact induced his surrender of money which he expected to get back. *Gibson v. State*, 85 Cr. R. 462, 214 S. W. 341.

11. **Charge of court.**—In a prosecution for the theft of a hog, evidence held such as to render it error not to instruct jury that, if defendant in good faith believed that the hog belonged to him, he would not be guilty. *Griffin v. State*, 87 Cr. R. 194, 220 S. W. 330.

In a prosecution for theft of cotton, claimed by defendant to have been purchased by him, though he did not pay the price, the question in the case was, what was defendant's intent when he appropriated the cotton? and the jury should have been instructed that, if he believed he had a right to take it, he should be acquitted of theft, regardless of whether the minds of the parties completely agreed on the price of the cotton and the terms of sale or not. *Mills v. State*, 87 Cr. R. 655, 224 S. W. 780.

In prosecution for theft alleged to have been committed by the defendant, appropriating to his own use the excess amount of a check given to defendant in an amount in excess of that actually due by mistake of maker, instructions held sufficient to charge jury that defendant must have known that he was not entitled to the entire amount, and must have intended to take and appropriate the excess amount. *Hedge v. State* (Cr. App.) 229 S. W. 862.

Where the defendant claimed to have bought the property alleged to have been recently stolen and which was found in his possession, the jury should be charged that, if they believed he bought the car in question or had a reasonable doubt upon that issue, they should acquit. *Hunt v. State* (Cr. App.) 229 S. W. 869.

In prosecution for theft of a hog, in which both defendant and prosecuting witness claimed ownership of the hog, refusal of requested instruction that, "if you have a reasonable doubt as to the ownership of the hog described in the indictment, you will find defendant not guilty," held proper. *Hill v. State* (Cr. App.) 230 S. W. 1005.

### Art. 1333. [862] Possession and ownership need not be in same person.

Cited, *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963.

### Art. 1334. [863] Possession; how constituted.

**Possession or ownership in general.**—That the owner is out of state when property is stolen will not change the possession from him, if he did not leave it in the care, control, and management of another, or if the actual control, care, and management of another has not supervened. *Griffin v. State*, 87 Cr. R. 194, 220 S. W. 330.

The fact that a hotel guest who had left his wagon in a public alley back of the hotel placed the doubletree and some of the irons on the hotel premises, and asked accused if the wagon was in his way, does not establish that the wagon was no longer in the possession of the guest. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

A wagon left by its owner in a public alley back of a hotel remains in the custody and possession of the owner, even while he was temporarily out of the county, so far as the law of theft is concerned. *Id.*

In prosecution for theft of property taken from certain ranch, the allegation of ownership was properly laid in the manager of the ranch, in whose care, control, and management the property had been left by real owner. *Narango v. State*, 87 Cr. R. 493, 222 S. W. 564.

Care, control, and management are not necessarily exclusive in one person, but may be joined in several within the comprehension of the law of theft. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

In a prosecution for theft of cattle from a pasture, ownership should be alleged to be in the person who had the care, control, and management of the pasture, and not in the owner of the pasture. *Rabe v. State*, 87 Cr. R. 497, 222 S. W. 1106.

When owner of whisky in bottles in cellar leased the property to another, turned over the key of the cellar to the lessee, and went on a trip, the lessee became the possessor, and at least in a qualified way, under his lease, the owner of the property, as against everybody, except the superior title in the lessor; and, in a prosecution for theft of the whisky from the cellar, ownership should have been alleged in the lessee. *Thomas v. State* (Cr. App.) 225 S. W. 167.

In a prosecution for theft of property jointly owned, the property must be alleged in one of the owners who has control and possession of it, and, if all are in possession, it can be alleged in either owner, but if one of the owners is in exclusive possession of it to the exclusion of the others, then it must be alleged in the party having the control, care, and management of it. *Id.*

Where one person had general supervision of all oil leases of a petroleum company, but no personal connection with a particular lease, an employé of the company in charge of the boring of a well on the farm covered by such lease should be named as owner, in an indictment for theft of a casing of the oil company on that farm. *Miller v. State* (Cr. App.) 225 S. W. 262.

In a prosecution for theft of an automobile belonging to the United States government which was put in possession of a construction company and was ordinarily under the

control and management of a major supervising military work, the indictment properly named as the owner a captain, subordinate to the major, who was using the car for his own purpose and while so engaged parked it on the street from which the theft occurred. *Escobedo v. State* (Cr. App.) 225 S. W. 377.

When an express company received and receipted for goods, which were subsequently stolen, the company, under the law of theft, became the owner. *Trinkle v. State* (Cr. App.) 225 S. W. 754.

A car left temporarily in a garage while the owner is about his business in the vicinity is legally in the care, control, and general management of the owner, as well as the special owner for all purposes of prosecution for theft. *Smith v. State* (Cr. App.) 227 S. W. 1105.

Where an owner of a hog placed it with a third person for a week for breeding purposes, and it was stolen during such time, but it appeared that the animal escaped or was taken from such third person by another than the defendant, the special owner had lost control of the animal, and an averment that the ownership was in the actual owner was proper. *McGowan v. State* (Cr. App.) 229 S. W. 323.

**Animals on range.**—A hog on the range or commons is in the possession of the owner, if such owner be the last person exercising care, control and management of it before the same is stolen. *Griffin v. State*, 87 Cr. R. 194, 220 S. W. 330.

Animals on their accustomed range are in the possession of their owner within the terms of the theft statute, and such possession need not be manual. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

**Proof and variance.**—In prosecution for theft, variance between allegation placing ownership and possession of stolen goods in proprietor of store from which goods were stolen, and proof that at time of theft proprietor was in the hospital and that goods were under the care, control, and management of an employe, held fatal. *Ratcliff v. State* (Cr. App.) 225 S. W. 53.

There was no variance between allegation and proof as to ownership and possession in a prosecution for cattle theft from W., where G., who was W.'s foreman, testified he had only charge of the ranch under W.'s instructions, and could neither sell nor dispose of anything or move it from place to place, and that W. gave matters on the ranch his personal supervision most of the time, and W. testified that he had the actual care, control, and management of the cattle stolen. *McClain v. State* (Cr. App.) 229 S. W. 550.

**Evidence.**—Evidence held insufficient to show that the alleged stolen property was that of the alleged owner. *Mattison v. State* (Cr. App.) 228 S. W. 951.

**Charge.**—Where on a trial for theft of hogs the state contended they belonged to a certain man, and when taken by defendant were on a certain range and bore a certain mark, while defendant claimed they were his hogs and were on a different range and bore a different mark at the time he took them and sold them, an instruction that the mere assertion of ownership of hogs on the range did not constitute possession was properly refused. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

In a prosecution of a switchman for theft of goods, which he claimed he was taking from a car unloaded by consignee to proper railroad office when arrested, an instruction that if the jury believed the property was taken from the possession of the railroad agent they should convict, and another that if they believed from the evidence beyond a reasonable doubt that the defendant took the property from an empty box car, that the property belonged to the agent, they should convict, was error, since, if the consignee had finished unloading, and inadvertently left the property in the car it would be subject to the theft as lost property belonging to consignee, but not belonging to the freight agent. *Monroe v. State* (Cr. App.) 230 S. W. 995.

#### Art. 1335. [864] Theft of one's own property, when.

See *Rabe v. State*, 87 Cr. R. 497, 222 S. W. 1106.

**Offense.**—If defendant, at the time of the commission of his claimed offense of stealing timber, taken from a barn leased to him, had the care, control, and management of the barn from which the timbers were charged to have been taken, conviction could not result. *Fleischman v. State* (Cr. App.) 231 S. W. 397.

#### Art. 1338. [867] Animals of domestic breed included.

Cited, *Lynn v. State*, 33 Cr. R. 153, 25 S. W. 779.

**Dog.**—A dog may become the subject of theft, and that, where he is shown to be worth at least \$20, such theft is a felony. *Hurley v. State*, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

#### Art. 1339. [868] Particular penalties exclude general punishment.

Cited, *Shaw v. State*, 23 Tex. App. 493, 5 S. W. 317.

#### Art. 1340. [869] Theft of fifty dollars and over.

Cited, *Shaw v. State*, 23 Tex. App. 493, 5 S. W. 317; *Ex parte Jackson*, 83 Cr. R. 55, 200 S. W. 1092.

**Decisions under former law making theft of \$20 a felony.**—On a trial for theft of jewelry, where several articles of jewelry, of the value of more than \$20, are traced to defendant's possession, but two of them only are identified as the property of the person named in the indictment, and their value is shown to be \$16, and there is no evidence of the value of the other articles, there can be no conviction for felony. *Clark v. State*, 26 Tex. App. 486, 9 S. W. 767.

A dog may become the subject of theft, and that, where he is shown to be worth at least \$20, such theft is a felony. *Hurley v. State*, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

**Evidence.**—Evidence held sufficient to sustain conviction of theft of more than \$50 worth of seed cotton. *Crisp v. State* (Cr. App.) 231 S. W. 392.

### Art. 1341. [870] Petty theft; how punished.

Cited, *Shaw v. State*, 23 Tex. App. 493, 5 S. W. 317.

**Punishment.**—A judgment in a prosecution for misdemeanor theft, imposing on defendant a fine merely, is erroneous, since the statute makes misdemeanor theft punishable by imprisonment with fine, or else imprisonment without fine, but does not permit a fine alone. *Thomas v. State*, 85 Cr. R. 246, 211 S. W. 453; *Busey v. State*, 87 Cr. R. 23, 218 S. W. 1048.

**Charge.**—On an indictment it is error for the court to charge that, if the jury found defendant guilty, they would assess his punishment at not more than one year's imprisonment in the county jail, and a fine of not more than \$500, since it omitted to charge as to the imprisonment without the fine. *Irvin v. State*, 25 Tex. App. 588, 8 S. W. 681.

### Art. 1342. [871] General penalties not applicable when.

5. **Value as determining degree of offense in general.**—Where a part of the property described in an indictment for theft was not shown by the evidence to have been stolen, and the rest was not of the value of \$50, a conviction for felony theft could not be sustained, though the evidence showed the theft of property not described in the indictment of a value larger than \$50. *Garrett v. State*, 87 Cr. R. 12, 218 S. W. 1064.

7. **Alleging and proving value.**—Indictment alleging taking of a bale of seed cotton, "of the value of \$100," sufficiently alleges its worth. *Bell v. State*, 84 Cr. R. 160, 205 S. W. 986.

In a prosecution for receiving and concealing stolen property, evidence held not sufficient to show that the property concealed was of the value of \$50 or over, so as to make the offense a felony. *Rutherford v. State*, 85 Cr. R. 7, 209 S. W. 745.

If defendant was guilty of taking the prosecuting witness' automobile from one town to another, and the evidence showed that he took part of the alleged stolen property from the car, this would justify the conclusion that he took all of the property and took it at the same time, making him guilty of felony theft where the aggregate value exceeded \$50, and it is immaterial that there was no direct proof of taking of the remainder of such articles. *Bride v. State*, 86 Cr. R. 535, 218 S. W. 762.

The loss of any considerable property at or about the same time, the taking of which may be attributed to accused, will support a verdict finding him guilty of felony theft of all such property. *Garrett v. State*, 87 Cr. R. 12, 218 S. W. 1064.

13. **Charge of court.**—Where there is a doubt from the evidence whether a sufficient amount of property described was taken at one time to constitute a felony, the trial court should submit the law of misdemeanor theft, and leave the question of fact to the jury. *Garrett v. State*, 87 Cr. R. 12, 218 S. W. 1064.

### Art. 1343. [872] Voluntary return of stolen property.

**Voluntary return in general.**—A subsequent abandonment of, or a subsequent intention to abandon or return, the horse taken, is no defense to charge of theft of the horse. *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.

The fact that the owner recovered a part of the property subsequent to the theft thereof would not reduce the grade of the offense below that of felony theft. *Bride v. State*, 86 Cr. R. 535, 218 S. W. 762.

**Return after accused is found in possession or taken in the act.**—Where \$40 in money are stolen, a return by defendant, when arrested, of \$28.75, some of which is in different denomination and kind from that stolen, is not a voluntary return. *Powell v. State* (Cr. App.) 24 S. W. 515.

The return of stolen property by the thief after arrest or after charge made of the theft is not a "voluntary return" within the statute. *Hartman v. State*, 85 Cr. R. 582, 213 S. W. 936.

In a prosecution for theft, where the evidence showed that defendant went behind the showcase in a store and took therefrom a tray containing diamond rings which he concealed beneath his coat, and that he was apprehended when he was on his knees trying to make his escape and the diamonds then taken from him, does not call for a charge on the voluntary return of stolen property. *Mathason v. State* (Cr. App.) 229 S. W. 548.

A party caught in the possession of stolen property cannot claim the benefit of this article. *Hill v. State* (Cr. App.) 230 S. W. 1005.

**Evidence.**—In prosecution for the theft based upon theory that defendant took an automobile with intent to steal it, but made a voluntary return, evidence held insufficient to sustain conviction. *Aeby v. State*, 84 Cr. R. 231, 206 S. W. 685.

**Charge.**—In prosecution for theft of hog, where the evidence showed that defendant was caught in the possession of the hog, that he claimed ownership thereof, and that he refused to give it up until his brother had agreed to give him one in lieu thereof, failure to submit the issue of voluntary return of stolen property held not error; the facts being insufficient to present such issue. *Hill v. State* (Cr. App.) 230 S. W. 1005.

### Art. 1344. [873] "Steal" or "stolen" include what.

See *Hunt v. State* (Cr. App.) 229 S. W. 869.

### Art. 1345. [874] Stealing agricultural products.

**Elements of offense.**—If defendants took growing, standing corn of another without intent to steal it, or defraud owner, but merely to use in catching horses, they were

not guilty of a fraudulent intent and conversion. *Sampson v. State*, 83 Cr. R. 594, 204 S. W. 324.

**Products included.**—Statute, prohibiting unlawful taking from owner of growing, standing, and ungathered corn, applies to growing standing corn, even if immature. *Sampson v. State*, 83 Cr. R. 594, 204 S. W. 324.

**Indictment or information.**—Information, charging that defendant unlawfully and fraudulently took from growing, standing, and ungathered corn, sufficiently charged statutory offense; since statutory offenses which may be committed in divers ways may be charged conjunctively, or a single phase may be charged. *Sampson v. State*, 83 Cr. R. 594, 204 S. W. 324.

**Charge.**—In prosecution for taking from owner standing corn, where there was evidence defendants took corn without fraudulent intent, court should have given instructions requested, submitting issue of lack of fraudulent intent. *Sampson v. State*, 83 Cr. R. 594, 204 S. W. 324.

#### Art. 1348. [877] Conversion by a bailee is theft.

See *Parkinson v. State*, 87 Cr. R. 176, 220 S. W. 774; *Fleischman v. State* (Cr. App.) 231 S. W. 397.

Cited, *Willys-Overland Co. of California v. Chapman* (Civ. App.) 206 S. W. 978.

**1. Nature and elements of offense in general.**—Where defendant in prosecution for theft was sent by his employer to deliver oil, with a bill for 90 cents, and through the storekeeper's mistake, in thinking that the bill was for \$9, was given that amount, and kept \$8.10, there was no theft by bailee; the money not coming into defendant's possession by virtue of a contract. *Campos v. State*, 84 Cr. R. 216, 207 S. W. 931.

Where there was no trust relationship, there could be no offense of theft by bailee. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

**4. Compared with and distinguished from other offenses.**—The fraudulent taking of cotton by an employé engaged merely in weighing the cotton and paying other employés, where the owner and employer was absent for the day, constituted theft, and not embezzlement. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

Where an employé of one having custody of property belonging to a railroad took and removed freight, possession of which he had by reason of his employment, held that the offense was theft and not embezzlement. *Bonatz v. State*, 85 Cr. R. 292, 212 S. W. 494.

That case in question may have constituted theft of property acquired by bailee would afford no reason why it would not also constitute embezzlement, under art. 1416. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

If defendant converted goods, appropriating them to his own use, the offense would come under this article, but if he had sold the goods belonging to another at the other's direction, and converted the money, the embezzlement statute (art. 1416) would apply. *Moore v. State* (Cr. App.) 225 S. W. 261.

**6. Indictment and information.**—If husband has left home, leaving wife in the exclusive control, care, and management of a hog, an indictment charging theft by conversion of the hog by a bailee should allege ownership in the wife and that the contract of bailment was made by her, instead of alleging ownership in husband and that the contract was made by her as his agent. *Nugent v. State* (Cr. App.) 229 S. W. 855.

Indictment charging theft by conversion by a bailee, alleging that the defendant had possession of a hog owned by a certain person by virtue of a contract of bailment with such person's wife, and had unlawfully converted it to his own use, without alleging that the wife was authorized by the owner to make the contract of bailment, held fatally defective. *Id.*

**8. Evidence.**—In a prosecution for embezzlement of money given by the prosecuting witness to defendant to purchase an automobile, evidence held to show that such money was used for the purchase of the machine and not appropriated to defendant's own use. *Allen v. State*, 83 Cr. R. 613, 204 S. W. 764.

Evidence held to show a typical case of embezzlement by the local manager of a company under art. 1416, and not bailee theft, under this article. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

**11. Charge of court.**—In prosecution for theft of automobile as bailee, special charge that if defendant had permission of the owner to sell the car or thought he had, he would not be guilty, though he retained the proceeds of sale, supplementing main charge written by court, fully protected defendant's rights. *Parkinson v. State*, 87 Cr. R. 176, 220 S. W. 774.

#### Art. 1349. [878] Receiving stolen property.

Cited, *Boyd v. State*, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908.

**1. Nature and elements of offense in general.**—One who receives property without knowing at the time that it was stolen, but who thereafter comes into possession of such knowledge, and conceals or destroys the property with intent to aid the thief to escape punishment, or with intent to deprive the owners of the property, is guilty of receiving and concealing stolen property. *Rutherford v. State*, 85 Cr. R. 7, 209 S. W. 745; *Kahanek v. State*, 83 Cr. R. 19, 201 S. W. 994; *Falcone v. State*, 84 Cr. R. 279, 206 S. W. 845.

Act of receiving stolen property some hours after it was taken from house, with knowledge that it was stolen, would not make recipient principal in burglary, although he could be prosecuted for receiving fruits of crime. *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853.

If the accused purchases goods in good faith, he is not guilty of receiving stolen goods, but, if he knew of the theft, the purchase would be no defense. (Per *Davidson*, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

Knowledge of fact that goods were stolen is an essential element of the offense of receiving stolen goods. *Wool v. State*, 83 Cr. R. 121, 201 S. W. 1006.

Defendant was guilty of receiving dead hogs that had been stolen by another only if he knew hogs were stolen when he assisted other in taking them home after they had been shot. *Grace v. State*, 83 Cr. R. 442, 203 S. W. 896.

In order to make receiving stolen goods a felony, it must be shown not only that the property lost was of the value required by statute, but that which actually came into the possession of accused was of sufficient value to make it a felony. *Rutherford v. State*, 85 Cr. R. 7, 209 S. W. 745.

The grade of the offense of concealing stolen property by one who, having received it innocently, sold part of it before learning of the theft is determined by the value of that only which he had in his possession when he learned it was stolen. *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653.

If property was stolen, and defendant received or concealed it, knowing at the time it was stolen, he was guilty of an offense under the statute denouncing the reception or concealing of stolen goods. *Kyle v. State*, 86 Cr. R. 471, 217 S. W. 943.

Where two persons jointly steal the goods, one cannot be guilty of fraudulently receiving stolen property from the other. *Harper v. State* (Cr. App.) 227 S. W. 190.

If one accused of receiving stolen property bought the property without knowledge of the theft, he should be acquitted. *Donegan v. State* (Cr. App.) 229 S. W. 857.

In a prosecution for receiving goods stolen from a railway freight warehouse, where the evidence showed that the goods were actually stolen by the person named in the indictment, the fact that two employees of the railroad working at the freight house connived at or aided the theft so as to be guilty of embezzlement does not prevent conviction under the indictment. *Kluting v. State* (Cr. App.) 232 S. W. 305.

**2. Distinguished from theft or embezzlement.**—Where an indictment charges theft of an automobile in one count, and receiving the automobile as stolen property in another count, a verdict, finding defendant guilty on both counts is improper; it being impossible for defendant, guilty of receiving a stolen automobile, to have stolen it himself. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

**7. Indictment or information.**—In indictment charging reception of stolen property, it is necessary to name parties from whom stolen property was received by defendant, if names are known, and, if not, grand jury is justified in alleging names are unknown to it. *Kahanek v. State*, 83 Cr. R. 19, 201 S. W. 994; *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

An information describing stolen goods as the property of G., "which had been theretofore acquired" by some one unknown to affiant, and in such manner that such acquisition was brought within the term "theft," was insufficient, in that it did not charge that defendant received goods from any one. *Shipp v. State*, 84 Cr. R. 623, 209 S. W. 656.

An information for receiving stolen property, alleging that person from whom goods were received was unknown, was insufficient, where officers knew from whom goods had been received, or had reasonable grounds for so believing, under Pen. Code, art. 1349. *Id.*

Allegations that the accused received stolen property "from some person to the grand jurors unknown," and that said property had been theretofore acquired by another in such manner as to make the acquisition theft, held sufficient to charge receiving and concealing stolen property. *Fallon v. State* (Cr. App.) 230 S. W. 170.

**9. — Proof and variance.**—Where indictment for receiving stolen goods alleged defendant received property from two named persons, to convict it was necessary for state to meet allegations with appropriate evidence. *Kahanek v. State*, 83 Cr. R. 19, 201 S. W. 994.

The variance between the quantity of stolen property which the indictment charged had been received by defendant and that shown by the proof is not fatal to conviction, where a sufficient quantity of the property shown to have been stolen was found in defendant's possession to make the offense a felony. *Kluting v. State* (Cr. App.) 232 S. W. 305.

**10. Evidence.**—Evidence held to warrant conviction. *Batts v. State*, 83 Cr. R. 103, 201 S. W. 408; *Fallon v. State* (Cr. App.) 230 S. W. 170.

Where one accused of receiving stolen goods set up that he bought the goods without knowledge or notice of the theft, the state had the burden of showing that the theory of purchase was false. (Per Davidson, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

In a prosecution for receiving stolen sheep, evidence held sufficient to support finding that defendant, while the sheep were on his premises, learned of theft of them. *Wilson v. State*, 85 Cr. R. 94, 210 S. W. 542.

In prosecution for receiving stolen sheep, in determining whether facts excluded every reasonable hypothesis except defendant's guilty knowledge of theft, defendant was entitled to have jury afforded privilege of considering evidence of his advanced age and infirmities due to sickness. *Id.*

In a prosecution for receiving stolen property, the bare fact that defendant received the property is not sufficient to show that it was stolen, but the possession of such property with other facts, was a circumstance from which the inference of guilty knowledge on defendant's part might be drawn. *Grant v. State*, 87 Cr. R. 19, 218 S. W. 1062.

Evidence of the circumstances under which accused received automobile tire casings which had been stolen, with his statements and admissions tending to show guilty knowledge, held sufficient to sustain a conviction for knowingly receiving and concealing stolen goods. *Gunter v. State*, 87 Cr. R. 74, 219 S. W. 452.

Proof that stolen tools were on premises belonging to and under control of the father of one accused of theft and receiving stolen goods, in an outhouse with other tools,

would not justify an inference of guilt on the part of the accused, in the absence of any assertion of ownership by the accused. *Lemon v. State* (Cr. App.) 231 S. W. 388.

Court did not err in refusing a peremptory instruction, where the proof showed that for \$11 accused bought a new silk dress worth \$42.50, which had never been worn or used and was brought to her house by a negro in a handbag, he having been to her house before with other articles, and when the dress was found by the officers in her home it was taken from an ice chest. *Joiner v. State* (Cr. App.) 232 S. W. 333.

14. **Charge of court.**—In a prosecution for receiving stolen property, defended on ground that the property was purchased in good faith and without knowledge that it had been stolen, refusal to present such defense by affirmative charge on defendant's request therefor held error. *Hoyt v. State* (Cr. App.) 228 S. W. 936; *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

Where accused's ex-partner testified that accused told him he bought the goods, a defensive theory was raised which should have been submitted to the jury. *Wool v. State*, 83 Cr. R. 121, 201 S. W. 1006.

The better practice is to instruct the jury that such property must have been fraudulently received or concealed, as the case may be; but in absence of evidence that defendant's acquisition of property was for innocent purpose or under such circumstances as to raise doubt of his guilty intent, failure to insert "fraudulently" in portion of charge applying law to facts was not reversible error. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

Under indictment charging their reception from a particular individual after theft by another individual, an instruction authorizing conviction in case of defendant's reception of the property from anybody after theft by anybody was erroneous. *Kyle v. State*, 86 Cr. R. 471, 217 S. W. 943.

In a prosecution under indictment charging automobile theft in one count and the fraudulent receiving of stolen property in another count, where the state's testimony, if believed, proved that defendant helped to steal the automobile, and defendant's testimony, if believed, proved that he had purchased automobile in good faith, the submission of whether defendant had fraudulently received stolen property held error, since, under the evidence, he was either guilty of stealing the car or was a good faith purchaser thereof. *Harper v. State* (Cr. App.) 227 S. W. 190.

Where defendant was charged with receiving a certain car stolen from a certain person, it was error to permit a conviction if defendant "received and concealed one automobile of the value of \$550 and \* \* \* knew that said automobile was acquired by theft," since, under such instruction, defendant could be convicted if he received any stolen car; there being evidence of his having received other cars. *Kolb v. State* (Cr. App.) 228 S. W. 210.

Evidence tending to show automobile casings were taken from the possession of the alleged owner by some third person, and that defendant's connection therewith was subsequent thereto, held to justify the submission to the jury of the count charging the receiving and concealing of stolen property. *Fallon v. State* (Cr. App.) 230 S. W. 170.

In a prosecution for receiving goods stolen from a railroad freight agent, evidence that railroad employees who connived at the theft had checked the goods into the warehouse, or had trucked them in, does not authorize an instruction requested by defendant that, if those two employees had the care of the property at the time it was taken, and they consented to its taking, the defendant should be acquitted. *Kluting v. State* (Cr. App.) 232 S. W. 305.

17. **Punishment.**—Where defendant at different times received stolen articles from thieves, on no occasion of the value of \$50, but in the aggregate exceeding that amount, his requested charges, presenting his theory, having support in the evidence, that each delivery constituted a separate sale and transaction, and stating that, if this was so, his offense, if guilty, would be misdemeanor, should have been given. *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653.

## CHAPTER TEN

### OF THEFT FROM THE PERSON

Art.  
1350. Punishment for.

Art.  
1351. Ingredients of the offense.

#### Article 1350. [879] Punishment for.

See *Shaw v. State*, 23 Tex. App. 493, 5 S. W. 317; *Nichols v. State*, 28 Tex. App. 105, 12 S. W. 500; *Green v. State*, 23 Tex. App. 493, 13 S. W. 734; *Brown v. State* (Cr. App.) 22 S. W. 24.

Cited, *White v. State*, 83 Cr. R. 31, 201 S. W. 186; *Johnson v. State*, 83 Cr. R. 33, 201 S. W. 187.

#### Art. 1351. [880] Ingredients of the offense.

Cited, *Johnson v. State*, 83 Cr. R. 33, 201 S. W. 187.

1. **Nature and elements of offense.**—In a prosecution for theft from the person by snatching the property so suddenly as not to allow time for resistance, evidence that the prosecuting witness resisted and that the money was taken in the struggle or a scuffle, if true, would entitle accused to an acquittal. *Mayzone v. State* (Cr. App.) 225 S. W. 55.

5. **Indictment.**—Indictment must allege that property was taken from person of another, and it is not sufficient to allege that it was taken "from the possession of the person" of another. *White v. State*, 83 Cr. R. 31, 201 S. W. 186.



7. — **Proof and variance.**—Indictment charging money was fraudulently taken by defendant from person of another would not be supported by proof that such other lost his money in saloon and that defendant picked it up from floor. *Bassett v. State*, 83 Cr. R. 479, 204 S. W. 112.

8. **Evidence.**—In prosecution for theft from person, evidence held insufficient to sustain conviction. *Faudoa v. State*, 81 Cr. R. 653, 197 S. W. 1109.

Evidence that, shortly after alleged taking of watch from D. by defendant, he came into a café with it, stated it belonged to D., and that he wanted to find him to return it, is admissible on intent. *Riddick v. State*, 83 Cr. R. 291, 202 S. W. 947.

9. **Charge of court.**—A charge that the property must have been taken so suddenly as not to allow time for the person from whom the property is stolen to resist, and prevent the taking of such property from his person, is not objectionable because the word "prevent," in the latter clause of the charge, is not in the statute, and such charge was, as to the last clause thereof, beneficial to defendant. *Brown v. State* (Cr. App.) 22 S. W. 24.

## CHAPTER ELEVEN

### THEFT OF ANIMALS

<p>Art. 1353. Theft of horse, etc. 1354. Theft of cattle. 1355. Theft of sheep, goat, etc., how punished.</p>	<p>Art. 1356. Wilfully driving stock from range, theft.</p>
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#### Article 1353. [881] Theft of horse, etc.

**Evidence.**—Evidence held sufficient to sustain conviction of horse theft. *Ingram v. State*, 83 Cr. R. 215, 202 S. W. 741.

#### Art. 1354. [882] Theft of cattle.

**Evidence.**—In prosecution for hog theft, circumstantial evidence held insufficient to connect defendant with original taking by another, or to show that he committed the theft. *Grace v. State*, 83 Cr. R. 442, 203 S. W. 896.

In prosecution for theft of a hog, evidence held sufficient to sustain conviction. *Jackson v. State*, 86 Cr. R. 329, 216 S. W. 866.

Evidence held sufficient to sustain conviction of hog theft. *Bradford v. State* (Cr. App.) 224 S. W. 901.

In a prosecution for cattle theft, court properly permitted state to show that calf tracks and two horse tracks led from the pasture of prosecuting witness to that of defendant, being a circumstance tending to show human agency in the moving of the cattle. *McClain v. State* (Cr. App.) 229 S. W. 550.

In a prosecution for theft of one head of cattle, held that the court did not err in refusing a requested peremptory instruction of acquittal, based on insufficiency of testimony. *Id.*

**Charge.**—Court's charge, unobjected to on trial, authorizing imprisonment for not more than five years, held not reversible error. *Grider v. State*, 82 Cr. R. 124, 198 S. W. 579.

In prosecution for cattle theft, where only defendant's connection with cattle after they were taken was proved by direct evidence, and his possession was explained, court should have charged on circumstantial evidence. *Rollins v. State*, 83 Cr. R. 345, 203 S. W. 355.

#### Art. 1355. [883] Theft of sheep, goat, etc.; how punished.

**Evidence.**—Evidence held sufficient to sustain a conviction of sheep theft. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

**Charge.**—The penalty for stealing sheep being different from that prescribed for theft generally of property of the value of \$20 or more, a charge on a trial for the former crime giving the penalty prescribed for the latter crime is fatally erroneous, notwithstanding, the penalty being greater in the former case, the charge inures to the benefit of the accused. (*Work v. State*, 3 Tex. App. 233, overruled.) *Spradling v. State*, 30 Tex. App. 595, 17 S. W. 1117.

#### Art. 1356. [884] Wilfully driving stock from the range, theft.

**Nature and elements of offense.**—One taking a hog from the range or commons believing in good faith that it belonged to him would not be guilty of theft. *Griffin v. State*, 87 Cr. R. 194, 220 S. W. 330.

## CHAPTER TWELVE

### MISCELLANEOUS PROVISIONS RELATING TO THE RECOVERY OF STOLEN ANIMALS AND THE DETECTION AND PUNISHMENT OF THIEVES

#### Article 1361. [889] Butchering unmarked or unbranded animals.

See *Aston v. State*, 27 Tex. App. 574, 11 S. W. 637.

## CHAPTER THIRTEEN

## ILLEGAL MARKING AND BRANDING AND OTHER OFFENSES RELATING TO LIVE STOCK

## Article 1386. [913] Driving live stock from range.

**Elements of offense.**—One who is in charge of a large pasture owned by another, and who, under instructions from his employer, drives out of such pasture, at a point several miles from the place where they were turned in, cattle owned by a third person, and turned into such pasture without permission, is not guilty of "willfully driving cattle not his own from their accustomed range," though the owner of the cattle owns a few acres inclosed in the pasture, where he consented to the inclosure thereof, without reserving any right of pasturage, as defendant's act is not "willful," and the cattle are not on "their accustomed range." *Wells v. State* (App.) 13 S. W. 889.

## CHAPTER FIFTEEN

## OFFENSES AGAINST LABELS, TRADE-MARKS, ETC.

Art.	Art.
1396a. Names or trade marks in milk cans, etc.; unlawful use of or refusal to return to owner.	1396d. Same; punishment.
1396b. Same; removal or defacing.	1396e. Sale of marked milk bottles.
1396c. Same; who is owner.	1396f. Use of marked milk bottles by person other than owner of trade mark.

**Article 1396a. Names or trade marks in milk cans, etc.; unlawful use of or refusal to return to owner.**—It shall hereafter be unlawful for any person, other than the lawful owner or owners, for the purpose whatever, to fill with milk, cream, butter or ice-cream any milk can, milk bottle, milk jar, butter box, ice cream can or ice cream tub or to mutilate or destroy without the consent of the owner of same, or to wilfully refuse to return or deliver to such owner, upon demand, any such milk can, milk bottle, milk jar, butter box, ice cream can, or ice cream tub branded or stamped with the name or trademark of such owner, or bearing any private mark in common use by such owner, or from which such brand or stamp or private mark or marks have been removed, cut off or defaced. [Acts 1918, 35th Leg. 4th C. S., ch. 78, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

**Art. 1396b. Same; removal or defacing.**—It shall hereafter be unlawful for any person within this State to remove, cut off, deface or obliterate the stamp or brand or private mark of any owner of any milk bottle, milk jar, butter box, milk can, ice cream can or ice cream tub, or to stamp or place other than brands or stamps or private mark on any such milk bottle, milk jar, milk can, butter box, ice cream can or ice cream tub, without the written permission of such owner. [Id., § 2.]

**Art. 1396c. Same; who is owner.**—Any person or persons, firm or corporation, or joint stock association owning or using milk cans, milk bottles, milk jars, butter boxes, ice-cream cans or ice-cream tubs in his, her or their name or names, or private mark or marks in common use branded or stamped or placed on the same shall be considered the owner or owners thereof. [Id., § 3.]

**Art. 1396d. Same; punishment.**—Any person violating Sections 1 and 2 of this Act [Arts. 1396a, 1396b] shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than ten nor more than one hundred dollars. [Id., § 4.]

**Art. 1396e. Sale of marked milk bottles.**—Any person, firm or corporation who shall hereafter sell or offer for sale a bottle or bottle upon which such name [Arts. 706a–706f, Civil Statutes, ante], or names, trade name, mark or design appears shall be guilty of a misdemeanor, and

upon conviction, be fined in any sum not less than \$10.00 nor more than \$50.00, provided if such person shall be the owner of such name or names, trade name, mark or design, as shown by the record of the County Clerk of the county in which said bottle or bottles are offered for sale, he shall not be deemed guilty of a misdemeanor hereunder. [Acts 1921, 37th Leg., ch. 81, § 5.]

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

**Art. 1396f. Use of marked milk bottles by person other than owner of trade-mark.**—Any dairyman, milk distributor or milk dealer who shall deliver or sell milk in a bottle bearing a name, or names, trade name, mark or design recorded as herein provided [Arts. 706a–706f, Civil Statutes, ante] without the consent of the owner of said name or names, trade name, mark or design, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$1.00 nor more than \$50.00. [Id., § 6.]

## CHAPTER SIXTEEN

### OFFENSES RELATING TO THE PROTECTION OF STOCK RAISERS IN CERTAIN LOCALITIES

Art. 1412. Clerk improperly recording brand.	Art. 1413. Agent of railroad, etc., receiving for shipment uninspected animals.
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**Article 1412. [934] Clerk improperly recording brand.**

Cited, *Massey v. State*, 31 Cr. R. 91, 19 S. W. 908.

**Art. 1413. [935] Agent of railroad, etc., receiving for shipment uninspected animals.**

**Construction and operation in general.**—Where a carrier, after it has contracted to furnish cars at a certain time for the shipment of cattle, and after the shipper has prepared to deliver them, having them inspected as fast as they can be loaded, stops the loading, and gives the cars to another shipper, who has already had his cattle inspected, it is liable to the first shipper for the damages caused by the delay, and is not relieved from liability by this article. *Receivers of International & G. N. R. Co. v. Wright*, 2 Civ. App. 198, 21 S. W. 56.

## CHAPTER SEVENTEEN

### EMBEZZLEMENT

**Article 1416. [938] Defined and punished.**

See *Grice v. State* (Cr. App.) 225 S. W. 172.

**Offense.**—Where agent to collect note, after doing so, receiving from maker a check, deposited it in bank to his account, and failed to account therefor to his principal, he was guilty of embezzlement, whether or not he checked out more than \$50 of the money for his own purposes at any one time. *Powell v. State*, 82 Cr. R. 163, 198 S. W. 317.

Where there was no trust relationship there could be no offense of embezzlement. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

If defendant received by virtue of his agency, and embezzled, more than \$50 at a time, he was guilty of a felony, but, if the amount which he embezzled was less than \$50, his offense was a misdemeanor. *Grice v. State* (Cr. App.) 225 S. W. 172.

Where a Grand Order of Odd Fellows suspended its local lodge, so that the agency of the secretary of the local lodge for the Grand Order ceased, his embezzlement of moneys received by him after such suspension of his lodge was not in his capacity as agent of the Grand Order, and he cannot be convicted thereof. *Id.*

**Compared with and distinguished from other offenses.**—The fraudulent taking of cotton by an employé engaged merely in weighing the cotton and paying other employés, where the owner and employer was absent for the day, constituted theft, and not embezzlement. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

Where an employé of one having custody of property belonging to a railroad took and removed freight, possession of which he had by reason of his employment, held that the offense was theft and not embezzlement. *Bonatz v. State*, 85 Cr. R. 292, 212 S. W. 494.

That case in question may have constituted theft of property acquired by bailee under art. 1348, would afford no reason why it would not also constitute embezzlement, under article 1416. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

If defendant converted goods, appropriating them to his own use, the offense would come under art. 1348, defining theft by bailee; but if he had sold the goods belonging to another, at the other's direction, and converted the money, this article would apply. *Moore v. State*, 225 S. W. 261.

The taking of goods by errand boy from employer's store at a time when he was not delivering such goods to customers was theft, and not embezzlement, the boy having no care, control, or custody of the goods at such time. *Hoyt v. State* (Cr. App.) 228 S. W. 936.

**Indictment.**—An indictment charging that accused was a clerk or employee of a corporation is sufficient; the term employee being treated as surplusage. *Miller v. State* (Cr. App.) 225 S. W. 379.

Allegation that the property embezzled came into defendant's possession by virtue of his employment as clerk sufficiently charged a fiduciary relation and defendant's duty to receive and care for the money. *Id.*

**Proof and variance.**—In prosecution for embezzlement of agent to collect note, proof that defendant received check from maker, which he deposited to his own account and checked out for his own purposes, held not fatal variance from allegation of indictment that he embezzled lawful money of United States. *Powell v. State*, 82 Cr. R. 163, 198 S. W. 317.

It is essential in a prosecution for embezzlement that the proof show that the relation charged in the indictment existed, and that the property came into defendant's hands by virtue of the relationship, so that in a prosecution for the embezzlement of the funds of the Grand Order of Odd Fellows it was essential to show that the money was owned by the Grand Order, that defendant was its agent, and that he appropriated it to his own use. *Grice v. State* (Cr. App.) 225 S. W. 172.

Where an indictment charged that defendant converted money, it was essential that the proof sustain the allegation. *Moore v. State* (Cr. App.) 225 S. W. 261.

A "cashier," defined as a custodian of money of a bank, mercantile house, and the like, is not a "clerk," who is defined as one to keep accounts or records, a higher assistant in an office, so that there is a variance between an indictment charging accused with embezzlement of money, while clerk of a corporation, which charge must be construed under art. 10, by giving the ordinary meaning to the words, and proof that he was the cashier of the corporation, especially where the manager of the corporation expressly testified that he was not a clerk. *Miller v. State* (Cr. App.) 225 S. W. 379.

In a prosecution for embezzlement, there is a variance between the allegation in the indictment that accused was a clerk of a corporation and proof that he was cashier and bookkeeper for the corporation. *Miller v. State* (Cr. App.) 225 S. W. 382.

**Evidence.**—In prosecution of agent for embezzling principal's funds, evidence held sufficient to justify finding defendant was agent or employé of principal in collecting and receiving money on note. *Powell v. State*, 82 Cr. R. 163, 198 S. W. 317.

In prosecution for embezzlement of agent to collect note, evidence held to justify conclusion that between certain dates defendant drew out of his bank on small checks all money received by him from maker of note. *Id.*

In a prosecution for embezzlement of money given by the prosecuting witness to defendant to purchase an automobile, evidence held to show that such money was used for the purchase of the machine and not appropriated to defendant's own use. *Allen v. State*, 83 Cr. R. 613, 204 S. W. 764.

In prosecution for embezzlement by local manager of company's property on or about May 30, 1916, there was no error in admitting in evidence the sales slips for several days from the 22d to the 27th, inclusive, of said month. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

In prosecution for embezzlement by local manager of property of company, there was no error in admitting testimony of banker showing deposits which defendant had made to his individual account, the sole objection being that it was immaterial. *Id.*

Evidence held to show a typical case of embezzlement by the local manager of a company and not bailee theft, under art. 1348. *Id.*

In a prosecution for embezzlement, where it appeared that defendant was a constable, that he collected a fine from a third person for gambling, such third person giving him a check to pay the fine and costs to the justice of the peace, which he failed to do, claiming that the justice owed him a larger amount, a verdict finding defendant guilty of fraudulent appropriation of the money is without support in the evidence, where it does not appear that the check had been converted into money. *Morrow v. State*, 87 Cr. R. 287, 220 S. W. 1098.

In the prosecution of a constable for embezzlement of funds given him by a third person to pay a fine to the justice of the peace for gambling, evidence that both the justice and defendant made collection of fines and costs, and that each had a claim against the other, held to create an issue of fact as to whether defendant had a right to retain any of the funds collected as an offset to funds in the hands of the justice belonging to the defendant. *Id.*

In a prosecution for embezzlement, evidence that defendant was employed by an oil company as foreman to supervise the drilling of wells, that there was placed in his possession a quantity of casings, which he was directed to sell and deliver the money to his employer, that he sold the same, but deposited the money to his credit in the bank, and drew it out for his own use, held to show that the relation of principal and agent existed. *Wray v. State* (Cr. App.) 232 S. W. 808.

**Charge.**—In prosecution of agent for embezzlement of proceeds collected by him for principal, where there was evidence that it was contemplated that a separate remittance was not to be made by agent upon each sale or collection, but that the aggregate

amount of the day's business was to be embraced in a single cashier's check, refusal to charge that the deposit by the agent of check received in payment of the account to his credit in the bank, unless done with fraudulent intent, would not be a conversion. held error. *Herberg v. State*, 87 Cr. R. 439, 222 S. W. 559.

In prosecution of agent for embezzlement by failing to remit amount of \$70.10 collected for principal, where the memorandum accompanying the cashier's check sent to the principal by agent contained an item of \$60.50 described as "cash sales collections," the meaning of which was not otherwise expressed, refusal to submit issue of whether the cashier's check remitted a portion of the \$70.10, and to charge that conviction could not be for more than a misdemeanor offense if the amount appropriated was less than the sum of \$50, held error. *Id.*

In a prosecution for embezzlement of money derived from the sale of goods, the defense of purchase should be submitted, upon defendant's request, in a specific and affirmative manner. *Moore v. State* (Cr. App.) 225 S. W. 261.

## CHAPTER EIGHTEEN

### OF SWINDLING AND THE FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY

#### 1. SWINDLING

Art.

1421. "Swindling" defined.

1422. Certain wrongful acts included.

1427. Punishment.

1429. [Repealed.]

#### 2. FRAUDULENT DISPOSITION OF PROPERTY, MORTGAGED OR SUBJECT TO LIEN

Art.

1430. Fraudulent disposition of mortgaged property.

1430b. Mortgagor of motor vehicle to inform mortgagee of location thereof.

1430c. Same; punishment for refusal.

#### 1. SWINDLING

##### Article 1421. [943] "Swindling" defined.

1. **Nature and elements of offense in general.**—Where defendant had another person pick up a pocketbook in street in view of prosecuting witness, which, upon being opened, showed a \$1,000 bill, and prosecuting witness in consideration of a promise of defendant to change bill and give him one-third, gave defendant and his aide a certain sum of money, which was put in the pocketbook, and defendant and his aide went out to change the same and never returned, defendant was not guilty of swindling; mere false promises not being the basis of the crime of swindling. *Williams v. State*, 84 Cr. R. 626, 209 S. W. 655.

A charge of obtaining land by false pretenses was properly withdrawn from the jury. *Luce v. State* (Cr. App.) 224 S. W. 1095.

If the owner of drafts of the value of \$2,500 was induced to part with them on his faith in the false and fraudulent representations made by defendant, defendant was guilty of swindling. *Escue v. State* (Cr. App.) 227 S. W. 483.

3. **False pretense or promise and reliance thereon.**—It is not essential to conviction for swindling that swindled party should have relied exclusively upon false pretenses. *Whitehead v. State*, 81 Cr. R. 278, 196 S. W. 851.

An indictment for swindling, alleging that defendant, who conducted a business college, had fraudulently represented himself to complaining witness to represent another business college wherein complaining witness had purchased a scholarship, held insufficient, where it failed to aver that complaining witness desired a certificate of scholarship in such other business college, and that the false representations had induced her to pay defendant for such certificate, thus showing the connection between the false pretenses alleged and the delivery of the money to defendant. *Farmer v. State*, 85 Cr. R. 440, 213 S. W. 669.

The rule in swindling cases that the false representation must be as to something present or past has no application in a case where the charge is theft by false pretext. *Gibson v. State*, 85 Cr. R. 462, 214 S. W. 341.

It is not necessary for a written instrument to be such as would stand the scrutiny of the courts to make it sufficient as a pretense on which one has been induced to part with his property in a swindling case; it being enough if the injured party relied on the instrument, and was thereby induced to part with his property. *Escue v. State* (Cr. App.) 227 S. W. 483.

Defendant, charged with swindling by selling an 85-cent time check for \$84.15, was not guilty if the prosecuting witness knew, when he parted with his money, that the check given him was for only 85 cents. *Scott v. State* (Cr. App.) 228 S. W. 1099.

In a prosecution for accomplice to theft by false pretenses, property having been taken from prosecuting witness through a conspiracy, it could not be said that false representations made by the coconspirators had no influence and were of no effect in inducing complaining witness to part with his money, because of the fact that at some stage in the transaction, complaining witness became suspicious and demanded of one of the coconspirators the return of the money which he had delivered to such coconspirator, and that, by apparent frankness and acquiescence at said time, the suspicions of complaining witness were allayed, and the confederate permitted to keep and appropriate the money. *Gerber v. State* (Cr. App.) 232 S. W. 334.

Where a swindler falsely represented to a railroad agent that he had loaded a car

with pipe, and thereby procured a bill of lading, which he exchanged for another, showing a second shipment by himself to a consignee at another point, attaching to the latter a draft on such consignee, which he deposited with his bank for collection, and thereafter procured advancements against the draft by means of a forged telegram from the bank's correspondent, that the draft had been paid there was a sufficient compliance with the demand of the law that the injured party must have been induced to part with his property by false and fraudulent representations. *Taylor v. State* (Cr. App.) 232 S. W. 525.

Where one charged with swindling by falsely representing to a railroad agent that he had loaded a car with pipe, thereby obtained a bill of lading, thereon, every step thereafter based on such bill was fraudulent, so that when he presented it to the agent at the point of destination the issuance by the latter, believing the bill was genuine, of another bill for reshipment to a consignee at a third point was but a substitution of one fraudulent bill for another. *Id.*

**4. Acquiring or impairing property or right.**—In swindling, the purpose and effect of the false pretenses is to acquire the title. *Gordon v. State*, 85 Cr. R. 641, 214 S. W. 980.

In a prosecution for obtaining money by fraudulent representations, it is no defense that the injured party was not deprived of his property because he recovered from defendant and his kindred the money so obtained. *Taylor v. State* (Cr. App.) 232 S. W. 525.

**6. Compared with and distinguished from other offenses.**—The distinction between swindling and theft by false pretext under art. 1332, depends upon whether injured party was induced to part or intended to part with both title and possession, in which case the offense is swindling, or whether he intended to part only with possession, in which case it is theft by false pretext. *Gibson v. State*, 85 Cr. R. 462, 214 S. W. 341.

Where defendant's accomplice called complainant's attention to the fact that defendant was in the act of picking up a pocketbook, and it was agreed that the contents of the pocketbook be divided equally between the three, and defendant represented that the pocketbook contained a \$500 bill and a \$100 bill, and that it was necessary to have additional money to make change, so that the division might be effected, and complainant delivered \$200 to defendant, defendant remarking, "You will get your money back and the \$200," the \$200 being appropriated by the defendant and his accomplice, the offense was theft, under art. 1332, and not swindling. *Gordon v. State*, 85 Cr. R. 641, 214 S. W. 980.

In a prosecution for forgery by writing into a check a larger amount than authorized by its maker, the action of an employé of another bank in ascertaining from the payee bank, at the defendant's request, whether or not the payee bank would pay any amount filled in, did not change the crime from forgery to swindling; there being nothing to show that the maker of the check authorized the payee of bank to make such statement to the officer of the other bank. *Duncan v. State*, 86 Cr. R. 191, 215 S. W. 853.

In a prosecution for forgery committed by the insertion in a check of a larger amount than defendant was authorized by maker to insert, the contentions of the defendant, appellant, that such acts would make a case of swindling and not of forgery, cannot be sustained, since if he so exceeded his authority it would constitute forgery and not swindling and if the case be one of swindling or forgery it must be prosecuted as forgery. *Id.*

**8. Indictment and information.**—An indictment must aver the acquisition of the property by defendant, and an averment that the property was delivered to defendant by the alleged swindled person is not sufficient. *Cannon v. State* (App.) 15 S. W. 117.

Indictment for swindling by selling personal property on false representation that it was unincumbered should definitely allege the connection between the false pretense and the acquisition of the money. *Moore v. State*, 81 Cr. R. 606, 197 S. W. 728.

In indictment for swindling by selling personal property on false representation that it was unincumbered, a mortgage held required to be set out with sufficient particularity to accurately describe it, but not necessarily in full. *Id.*

In indictment for swindling by selling property on representation that it was unincumbered, held, that it was necessary to directly aver existence and validity of mortgage and the existence of the debt. *Id.*

An indictment for swindling a corporation by drawing a check, should state the name of the particular person to whom the false representation was made. *Fruitt v. State*, 83 Cr. R. 148, 202 S. W. 81.

In prosecution for swindling by obtaining stock of goods by execution of note and mortgage on property not owned by defendant, indictment failing to allege that injured party was induced to part and did part with goods, that he relied on mortgage, that note and mortgage were delivered to him and accepted in exchange for goods, or that he delivered to defendant title or possession of goods, was fatally defective. *Albertson v. State*, 84 Cr. R. 574, 208 S. W. 923.

A complaint for swindling by giving a check on a bank without reasonable expectation it would be honored, which set out the check in part, but entirely omitted the signature thereto, is insufficient and should be quashed. *Lord v. State*, 87 Cr. R. 226, 220 S. W. 548.

An indictment for swindling, which charged accused with obtaining hotel furniture and equipment, insufficiently describes the property, since it cannot be determined therefrom whether the property referred to was fixtures or personalty. *Luce v. State* (Cr. App.) 224 S. W. 1095.

An indictment which charged the obtaining of a deed to land without alleging the value of the deed was insufficient, though it alleged the value of the land in connection with an invalid charge of obtaining the land by false pretenses. *Id.*

An indictment for swindling, which alleged that the property was obtained by representations that the notes given therefor were a first and only lien upon certain

land, is insufficient, where such representation was traversed in general terms, but no prior or additional lien was described. *Id.*

Indictment charging swindling alleging that "S. [defendant] did falsely pretend and fraudulently represent to the said J. [prosecuting witness] that he had in his possession a certain valid writing obligatory. \* \* \* and did then and there, by means of said false pretense and fraudulent representation, fraudulently induce the said J. \* \* \* to exchange his said \$84.15 for the said pretended writing obligatory," held sufficient against objection that it was indefinite and uncertain as to whom the pronouns "he" and "his" related. *Scott v. State* (Cr. App.) 228 S. W. 1099.

**9. Proof and variance.**—In a prosecution for swindling based upon defendant's false representations that he was connected with a business college in which complaining witness desired a scholarship, thereby inducing complaining witness to pay money for tuition in a different business college owned by defendant, evidence showing that the deceit was accomplished by defendant's course of conduct, and not by direct statements, held inadmissible under the allegations of the indictment. *Farmer v. State*, 85 Cr. R. 440, 213 S. W. 669.

In prosecution for swindling, the state must prove that defendant in fact collected the money which the information alleges that he collected from swindled person. *Kraft v. State*, 86 Cr. R. 484, 217 S. W. 1038.

In prosecution for swindling, allegations that defendant procured swindled person's check, and procured money thereon, did not support proof of swindled person's mother's check made payable to certain newspaper and drawn against mother's funds; there being a distinct variance between such proof and allegations. *Id.*

In a prosecution for swindling, where information charged defendant with having acquired and cashed swindled person's check, the check of swindled person's mother, drawn against the mother's money and signed in mother's name by the swindled person, held inadmissible, not being the check described in the information. *Id.*

In a prosecution for swindling by obtaining drafts by false pretenses, if it became necessary, in order to sustain the allegation of value of the drafts, to prove their execution by a bank or some person having authority from it, such proof was admissible under the general allegation of value of the instruments in the indictments. *Escue v. State* (Cr. App.) 227 S. W. 483.

In a prosecution for swindling, it was not essential to prove that the quantity of money received was that named in the indictment; any amount over \$50 being sufficient to classify the offense as a felony. *Taylor v. State* (Cr. App.) 232 S. W. 525.

**10. Evidence.**—Evidence held insufficient to sustain conviction of swindling. *Whitehead v. State*, 81 Cr. R. 278, 196 S. W. 851.

In prosecution for swindling thereby securing mule and horse, evidence that some time after transaction accused bought farm and incurred large indebtedness thereon, giving a mortgage on stock which may have included horse and mule, is inadmissible. *Id.*

In a prosecution for swindling by false representations that defendant was connected with a certain business college, wherein complaining witness desired to purchase a scholarship, evidence held insufficient to support a conviction. *Farmer v. State*, 85 Cr. R. 440, 213 S. W. 669.

In a prosecution for swindling, where it was charged that defendant had acquired and cashed swindled person's check, and had thereby obtained money belonging to swindled person, evidence showing that the check received had in fact been the check of such person's mother and had been drawn against the mother's funds, and failing to show that defendant had collected money thereon, held not to sustain a conviction; there being no proof that defendant had received the money which the pleading charged him with receiving. *Kraft v. State*, 86 Cr. R. 484, 217 S. W. 1038.

In a prosecution for swindling by obtaining drafts through false pretenses, the trial court did not err in admitting such drafts in evidence, they having been described in the indictment, and the material question being whether or not they were of value and acquired by defendant by the means alleged. *Escue v. State* (Cr. App.) 227 S. W. 483.

In a prosecution for swindling by obtaining drafts by false representations, the mortgage given by defendant on certain animals was admissible, though the description of the property in the mortgage was not such as to make out a flawless contract; the mortgage in fact having been relied upon and accepted by the injured party in handing over his property. *Id.*

In a prosecution for swindling by selling an 85-cent time check for \$84.15, where there was no testimony that any time checks had been lost, and there was testimony that the check was for services rendered during two weeks in January, that defendant had been sick for two weeks in January and had received his wages for other two weeks thereof, and that defendant in sale of check to prosecuting witness had made no statement as to the amount that was due him, exclusion of employer's testimony as to whether time checks were often lost or misplaced, and as to whether it sometimes took employer months to straighten out the record, and as to whether it was probable that defendant could have had more coming than was shown by the record, held proper. *Scott v. State* (Cr. App.) 228 S. W. 1099.

In a prosecution for accomplice theft by false pretenses, where accused was charged with having held himself out to the prosecuting witness as secretary of the "Fort Worth Exchange," and thereby, with other conspirators, had obtained his money, trial court properly permitted a witness to testify that he was secretary of the "Fort Worth Grain and Cotton Exchange" at the time in question, and that the accused was not an employee of such exchange, it being the claim of the state that there was no such institution as the "Fort Worth Exchange," but that it was the purpose of accused to mislead the injured party into believing the former to be a bona fide officer of an exchange in the city of Fort Worth. *Gerber v. State* (Cr. App.) 232 S. W. 334.

Where a swindler obtained a bill of lading from a railroad company's agent by falsely representing that he had loaded a car with pipe and subsequently exchanged it for another

the state was not estopped from setting up their false and fraudulent character on the ground they were in fact issued by agents of the company, and were to that extent genuine, the company being bound only to transport property in fact delivered to them; bills of lading carelessly issued by its agents upon false representations not being binding upon it. *Taylor v. State* (Cr. App.) 232 S. W. 525.

Where defendant, accused of swindling, procured a bill of lading for a carload of pipe by representing to the agent of a railroad company that a car set aside for his use was so loaded, exchanged the bill for another, and attached the latter to a draft, which he deposited with a bank for collection, and thereafter forged a telegram from the bank's correspondent, advising that the draft had been paid, thereby procuring advancements, testimony of a fright conductor that he failed to pick up the car because it was empty was relevant; the burden being on the state to show fraudulent intent. *Id.*

In a prosecution for swindling, evidence held to show defendant's guilt; and, where there was direct evidence that defendant obtained a bill of lading by falsely representing to a railroad company's agent that he had loaded a car with pipe, that he made false representations to his bank as to a bill of lading and a draft attached thereto presented by him and as to a telegram received by him from his bank's correspondent certifying that the draft had been paid, there was no occasion to resort to circumstantial evidence.

**12. Charge of court.**—Evidence in a prosecution for swindling held to require requested instruction that if prosecuting witness relied on advice of others than accused, there could be no conviction. *Whitehead v. State*, 81 Cr. R. 278, 196 S. W. 851.

### Art. 1422. [944] Certain wrongful acts included.

See *Luce v. State* (Cr. App.) 224 S. W. 1095.

**Subdivision 4—Validity.**—This subdivision does not deprive accused of liberty without due process of law, and is not void for uncertainty nor because it makes condition subsequent to act of drawing check, etc., necessary element for conviction or subjects liberties of accused to caprice of different juries. *Krueger v. State*, 82 Cr. R. 404, 199 S. W. 629.

— **Offense.**—It is essential to prove that one drawing a check on a bank, not only had no funds in the bank, but also that he had no good reason to believe that the check would be paid. *Pruitt v. State*, 83 Cr. R. 148, 202 S. W. 81.

To be guilty of the offense of swindling denounced by subd. 4, it is not necessary that the check or order given by defendant be signed by him, and where defendant gives a check or order signed by another knowing that it is valueless, etc., he is guilty of the offense. *Moore v. State*, 87 Cr. R. 77, 219 S. W. 1097.

— **Indictment.**—An indictment for swindling a corporation by drawing a check, should state the name of the particular person to whom the false representation was made. *Pruitt v. State*, 83 Cr. R. 148, 202 S. W. 81.

If the party injured by the giving of a worthless check is an individual, it is only necessary to allege his name; but if the injured party is a corporation, that fact must be alleged, and the indictment is bad if it fails to allege whether it is an individual, partnership, corporation, or joint-stock company. *Whitaker v. State*, 85 Cr. R. 272, 211 S. W. 787.

An affidavit and information for swindling, by giving a check on a bank in which defendant had not funds, or any reasonable prospects of having funds, need not allege that the bank, which was not the injured party, was an incorporated bank or a copartnership. *Id.*

An indictment alleging that defendant obtained automobile tires giving a check signed by J. I. B., which he falsely represented to be good, though he knew that neither he nor J. I. B. had funds in the bank on which the check was drawn, etc., sufficiently charges the offense denounced by statute. *Moore v. State*, 87 Cr. R. 77, 219 S. W. 1097.

— **Variance.**—If the name only of a party injured by the giving of a worthless check is alleged, it is proper and sufficient to prove that the injured party was an individual; but if the proof under such allegations should show that the injured party was a corporation, there would be a variance. *Whitaker v. State*, 85 Cr. R. 272, 211 S. W. 787.

An information charging the swindling of one C. out of \$10 by giving a worthless check, and alleging C. to be owner of property obtained, was not sustained by evidence that C., as an employer of a company, cashed the check with the company's money, where it was not shown that he was a special owner, having exclusive possession and management of such money. *Id.*

Where information for swindling by giving a worthless check alleged that one C. was the injured party from whom property was obtained, and was owner of property, it was necessary to prove that he was the owner and that it was obtained from him as his property, and proof that some other party was swindled by transaction would be a variance, defeating state's case. *Id.*

— **Evidence.**—Although indictment did not allege that defendant and another were partners, testimony that amount of draft drawn by defendant was deposited to credit of defendant and another, held admissible. *Krueger v. State*, 82 Cr. R. 404, 199 S. W. 629.

Evidence held sufficient to warrant conviction of swindling by drawing check with "no good reason to believe that such check will be paid" under Pen. Code 1911, arts. 1421, 1422. *Pruitt v. State*, 83 Cr. R. 148, 202 S. W. 81.

Evidence held sufficient to sustain a conviction against defendant, who gave in payment of property a worthless check, signed by a third person. *Moore v. State*, 87 Cr. R. 77, 219 S. W. 1097.



**Art. 1427. [949] Punishment.**

See *Luce v. State* (Cr. App.) 224 S. W. 1095.

**Art. 1429. [Repealed by Acts 1919, 36th Leg., ch. 49, § 1.]****2. FRAUDULENT DISPOSITION OF PROPERTY MORTGAGED OR SUBJECT TO LIEN****Art. 1430. [950] Fraudulent disposition of mortgaged property.**

**Offense.**—The gist of the offense of fraudulently disposing of mortgaged property is the fraudulent sale of the property, and any pleading of the mortgage is by way of inducement. *Hardin v. State* (Cr. App.) 227 S. W. 676.

**Indictment.**—An indictment for fraudulent disposal of mortgaged property need not set out the mortgage. *Hardin v. State* (Cr. App.) 227 S. W. 676.

An allegation in an indictment for fraudulently disposing of mortgaged property, that the mortgage was a valid, subsisting, and unsatisfied mortgage, sufficiently alleged that the same was for a consideration, and given to secure a debt. *Id.*

**Variance.**—It is not variance for an indictment for fraudulently disposing of mortgaged property to name less property than is named in the mortgage. *Hardin v. State* (Cr. App.) 227 S. W. 676.

**Evidence.**—In a prosecution for fraudulently disposing of mortgaged property, whether accused sold the property before or after the execution of the mortgage held for the jury, although accused testified without contradiction that he sold it in the morning of the day that he executed the mortgage, which was given in the afternoon. *Hardin v. State* (Cr. App.) 227 S. W. 676.

**Art. 1430b. Mortgagor of motor vehicle to inform mortgagee of location thereof.**—Every person, firm or corporation who shall hereafter purchase any motor vehicle or accessories therefor, giving a mortgage thereon to secure the purchase price thereof or any portion of same, shall, upon demand, notify the mortgagee or holder of such mortgage of the location of such motor vehicle or accessories therefor. [Acts 1919, 36th Leg., ch. 128, § 1.]

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

**Art. 1430c. Same; punishment for refusal.**—Any person, firm or corporation who shall, upon demand, hereafter fail or refuse to notify the mortgagee or holder of a mortgage given upon any motor vehicle or accessories therefor purchased by him to secure the purchase price thereof or any portion of same, of the location of such motor vehicle, shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by confinement in the county jail for a period of not more than sixty days, or by both such fine and imprisonment [Id., § 2.]

**CHAPTER NINETEEN****OF OFFENSES COMMITTED IN ANOTHER COUNTRY OR STATE**

Art. 1431. Bringing stolen property into this state.	Art. 1432. Requisites of guilt under preceding article.
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**Article 1431. [951] Bringing stolen property into this state.**

See *Fernandez v. State*, 25 Tex. App. 538, 8 S. W. 667; *Edwards v. State*, 29 Tex. App. 452, 16 S. W. 98.

**In general.**—One who steals property in another state, and brings it into Texas, may be tried and punished in Texas. *McKenzie v. State*, 32 Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

**Art. 1432. [952] Requisites of guilt under preceding article.**

**Nature and elements of offense.**—One who steals property in another state, and brings it into Texas, may be tried and punished in Texas. *McKenzie v. State*, 32 Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

## TITLE 18

### OF MISCELLANEOUS OFFENSES

Chap.	Chap.
1. Of conspiracy.	13. Schools.
2. Of threats.	15. Offenses by railway officials or against railways.
3. Seduction.	16. Railroads, etc.—Prohibiting the issuance of free passes, etc.
3c. Employment of females.	16a. Receiving preference from carrier of goods.
3d. Protection of employes in factories, mills, etc.	28. Penitentiaries—Control and treatment of prisoners.
3e. Wages and labor conditions.	29a. Land surveyors.
3f. Protection of workmen on buildings.	30. Registration of automobiles repaired.
6. Trusts—Conspiracies against trade.	31. Sale of motor vehicles.
7. Theaters, etc.—Prohibiting discrimination between persons desiring to lease same.	
12. Prize fighting, roping contests, etc.	

### CHAPTER ONE

#### OF CONSPIRACY

Art.	Art.
1433. Definition.	1436. Mere threat not sufficient.
1434. When offense complete.	1439. To kill, same as murder.
1435. Agreement must be positive.	

#### Article 1433. [953] Definition.

See *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

#### Art. 1434. [954] When offense complete.

**Separate offense.**—The offense of conspiracy to commit murder having been complete at the time of entering into the conspiracy, it was an independent offense for which the parties could be prosecuted and punished though the offense contemplated was not consummated. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

#### Art. 1435. [955] Agreement must be positive.

**Evidence.**—In a prosecution for conspiracy to commit murder, evidence held not to show a positive agreement to commit the offense of murder upon the husband of a woman infatuated with defendant. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

#### Art. 1436. [956] Mere threat not sufficient.

See *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

#### Art. 1439. [959] To kill, same as murder.

**In general.**—If a conspiracy was to kill another, it was included within conspiracy to commit murder. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

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### CHAPTER TWO

#### OF THREATS

Art.	Art.
1442. Threats to take life, etc.	1446. Sending threatening letter.

#### Article 1442. [962] Threats to take life, etc.

**Evidence.**—Evidence that accused stated he would get his gun and kill an officer before allowing him to seize property under writ of sequestration, which was denied by defendant, held not to sustain a conviction for making threats to kill. *Janks v. State*, 81 Cr. R. 493, 196 S. W. 182.

#### Art. 1446. [966] Sending threatening letter.

**Indictment.**—An indictment charging that the accused sent and delivered a letter to one W., threatening to accuse him of a crime, and that he did so send the letter with intent to extort money, but not alleging that he delivered the letter with such intent, does not charge the offense of delivering a letter with such purpose. *Landa v. State*, 26 Tex. App. 580, 10 S. W. 218.

## CHAPTER THREE

## SEDUCTION

Art.	Art.
1447. Punishment.	1450. Abandonment after seduction and marriage, offense defined.
1448. "Seduction" how used.	
1449. Marriage obliterates offense.	

**Article 1447. [967] Punishment.**

See *Daniels v. State* (App.) 14 S. W. 395; *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

**Art. 1448. [968] "Seduction," how used.**

1. **Nature and elements of offense in general.**—To constitute seduction a man must, in addition to the promise of marriage, use some other means than a mere appeal to the lust or passion of the woman. *Putman v. State*, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738.

Contention that a woman who had been once seduced can never be seduced again so as to be entitled to damages therefor is without support. *Freeman v. Bennett* (Civ. App.) 195 S. W. 238.

The fact that accused told the prosecutrix that he would marry her as soon as he got \$300 was only a promise conditioned as to time, and did not prevent it being sufficient to render him guilty of seduction. *Hunt v. State*, 85 Cr. R. 622, 214 S. W. 983.

That defendant was a minor, under age and incapable of contracting marriage, did not render him immune from the law for seduction under promise of marriage. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

If defendant seduced prosecutrix through a promise of marriage, it is immaterial that no definite time was fixed upon for the marriage. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

3. **Justification or defense.**—If prosecutrix was unchaste, defendant was not guilty of seduction. *Gainer v. State* (Cr. App.) 232 S. W. 830.

7. **Evidence.**—In a prosecution for seduction, testimony by the father of the prosecuting witness that he had received information that defendant was a married man was admissible as a circumstance showing defendant's intent and motive in visiting prosecuting witness. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

In a seduction case in which prosecutrix' chastity was challenged by evidence of acts of intercourse with parties other than defendant, the state could submit evidence of her general reputation. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

In a prosecution for seduction, evidence that prosecutrix's sister was the mother of a bastard and had murdered her husband was not improperly excluded, where it was shown that prosecutrix had not associated with such sister since prosecutrix was five years old. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

In a prosecution for seduction, the child of defendant and prosecutrix cannot properly be introduced in evidence. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

8. — **Sufficiency.**—Evidence held to sustain verdict of guilty of seduction. *Barlow v. State*, 84 Cr. R. 173, 206 S. W. 198.

In a criminal prosecution for seduction, evidence of the previous character of the prosecuting witness and of the acts and promises of defendant held sufficient to sustain a conviction. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

12. **Charge of court.**—In view of Code Cr. Proc. art. 789, in prosecution for seduction, court should have given defendant's requested special charge in appropriate language, informing jury that acts and declarations of accomplice subsequent to seduction could not be used for corroboration. *Haney v. State*, 81 Cr. R. 651, 197 S. W. 1102.

In a seduction prosecution, a refusal to charge on the theory that there was evidence that prosecutrix submitted to intercourse for reasons other than that alleged in the indictment was not error, where there was no evidence raising that issue. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

Where, in prosecution for seduction, prosecutrix testified to a state of facts which, if true, would justify a verdict of guilty, an instruction tantamount to a peremptory instruction for defendant was properly refused. *Scoggins v. State*, 84 Cr. R. 519, 208 S. W. 930.

In prosecution for seduction, in view of the evidence, defendant's requested special charge that, if prosecutrix did not rely solely on defendant's absolute promise to marry her, etc., it was the jury's duty to acquit, though a promise of marriage was made held properly refused. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

In a prosecution for seduction, instruction that before the jury could convict they must believe that defendant seduced prosecutrix by his promise to marry her, and not through her passion, held not erroneous. *Id.*

**Art. 1449. [969] Marriage obliterates offense.**

In general.—Where one who is under arrest for seduction marries the female alleged to have been seduced, he cannot afterwards, in a prosecution for bigamy, claim that such marriage was under duress, as marriage under such circumstances is provided for by this article. *Medrano v. State*, 32 Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

**Art. 1450. Abandonment after seduction and marriage, offense defined.**

**Indictment.**—Indictment for abandonment after seduction and marriage, must allege the particular court where the complaint for seduction was filed. *Seely v. State*, 83 Cr. R. 363, 203 S. W. 596.

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## CHAPTER THREE C

### EMPLOYMENT OF FEMALES

Art.

1451h. More than nine hours labor per day in certain employments prohibited, proviso.

Art.

1451k. Seats for females.

**Article 1451h. More than nine hours labor per day in certain employments prohibited, proviso.**

See *Parish v. State*, 87 Cr. R. 397, 221 S. W. 1085.

**Computation of time.**—The employer of a café waitress did not violate this article, where the time within formal working hours which the employee in fact spent outside the café and under her own direction brought her hours of actual work within the statutory limits. *Haddad v. State*, 86 Cr. R. 592, 218 S. W. 506.

The time a café waitress was eating her meals in the café, she being subject to call to discharge her duties, is not to be eliminated from her hours of employment. *Id.*

**Indictment or information.**—An information, alleging that defendant was foreman or manager of a department of a certain store whose ownership or management was not alleged, held insufficient to charge that defendant was the agent of any employer. *Parish v. State*, 87 Cr. R. 397, 221 S. W. 1085.

**Art. 1451k. Seats for females.**

**Validity.**—This article held a lawful exercise of legislative authority since the Legislature in the exercise of police power has the right to pass laws to safeguard the health of women employes. *Glanges v. State*, 87 Cr. R. 158, 220 S. W. 95.

**Indictment or information.**—Information charging a restaurant keeper with failure to furnish female employes with suitable seats when not engaged in active duties, was not defective, though it also charged a failure to give notice required by such statute; the statute providing no penalty for violation of the provision requiring such notice. *Glanges v. State*, 87 Cr. R. 158, 220 S. W. 95.

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## CHAPTER THREE D

### PROTECTION OF EMPLOYÉS IN FACTORIES, MILLS, ETC.

**Article 1451n. Punishment for violations of act.**—Any person, firm, or corporation, or any owner, manager, superintendent or other person in control or management of any factory, mill, workshop, mercantile establishment, laundry or other establishment, who shall violate any of the provisions of this Act [Arts. 5243<sup>7</sup>/<sub>8</sub>–5243<sup>7</sup>/<sub>8</sub>g, Civil Statutes] or who shall fail or refuse to comply with any order of correction provided for in Section 7 of this Act [Art. 5243<sup>7</sup>/<sub>8</sub>f, Civil Statutes], unless such order shall have been attacked and set aside as provided for in Section 8 of this Act, shall be deemed guilty of a misdemeanor and upon conviction in any court of competent jurisdiction shall be punished by a fine of not less than twenty-five (\$25.00) Dollars, nor more than two hundred (\$200.00) Dollars, or by not to exceed sixty (60) days in the county jail or by both such fine and imprisonment; and each day the law is so violated shall constitute a separate offense. [Acts 1918, 35th Leg. 4th C. S., ch. 58, § 9.]

The act took effect 90 days after March 27, 1918, date of adjournment. See note under art. 5243<sup>7</sup>/<sub>8</sub>, Civil Statutes, as to peculiarities of title of the act.

## CHAPTER THREE E

## WAGES AND LABOR CONDITIONS

**Articles 1451s, 1451t.** [Repealed].

**Explanatory.**—Acts 1919, 36th Leg., ch. 160, is repealed by Acts 1921, 37th Leg., ch. 118, § 1.

**Validity.**—This section is valid; the Legislature having the power to enact such laws for the welfare and betterment of the conditions of working men, women, and children. *Poye v. State* (Cr. App.) 230 S. W. 161.

This section did not impair the obligation of contract in violation of Const. U. S. art. 1, § 10; such statute having become a part of the contract of employment, nor violate the due process of law clauses of Const. U. S. Amends. 5, 14, and state Const. art. 1, §

## CHAPTER THREE F

## PROTECTION OF WORKMEN ON BUILDINGS

<b>Art.</b>	<b>Art.</b>
1451u. Temporary floorings on certain buildings in course of construction.	1451x. Duty of general contractor as to floorings.
1451v. Same; removal.	1451y. Duty of owners of buildings.
1451w. Elevator shafts or openings on certain buildings in course of construction.	1451z. Same.
	1451zz. Punishment for violations of act.

**Article 1451u. Temporary floorings on certain buildings in course of construction.**—Hereafter any building three or more stories in height, in the course of construction or repairs, shall have the joists, beams or girders of each and every floor below the floor level where any work is being done, or about to be done, covered with planking laid close together, said planking to be of not less than one and one-half inches in thickness, in buildings that have steel framework, and what is commonly known as one-inch plank in all others where joists are set on two feet centers or less, to protect the workmen engaged in the erections or construction of such buildings from falling through joists, girders, and from falling planks, bricks, rivets, tools or other substances, whereby life and limb are endangered. Where any scaffolding is placed on the outside of any of said buildings over any public street or alley where persons are in the habit of passing, then said scaffolding shall be so constructed as to prevent any material, tools or other things from falling off and endangering the life of passersby. [Acts 1919, 36th Leg., ch. 152, § 1.]

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

**Art. 1451v. Same; removal.**—Such flooring shall not be removed until the same is replaced by a permanent flooring in such building. [Id., § 2.]

**Art. 1451w. Elevator shafts or openings on certain buildings in course of construction.**—If elevators, elevating machines or hod hoisting apparatus are used within a building in the course of construction, for the purpose of lifting materials to be used in such construction the contractor or owners or the agents of the owners, shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides, two sides of which must be at least six feet, and two sides where material is to be taken off or on, shall be protected by automatic safety gates. [Id., § 3.]

**Art. 1451x. Duty of general contractor as to floorings.**—It shall be the duty of the general contractor having charge of the erection and construction of such building to provide for the flooring as herein required, and to make such arrangements as may be necessary with the

subcontractor in order that the provisions of this Act may be carried out. [Id., § 4.]

**Art. 1451y. Duty of owners of buildings.**—It shall be the duty of the owner, or the agent of the owner, of such building, to see that the general contractor or sub-contractors carry out the provisions of this Act. [Id., § 5.]

**Art. 1451z. Same.**—Should the general contractor or sub-contractors of such building fail to provide for the flooring of such buildings as herein provided, then it shall be the duty of the owner or the agent of the owner of such buildings to see that the provisions of this Act are carried out. [Id., § 6.]

**Art. 1451zz. Punishment for violations of act.**—Failure upon the part of the owner, agent of the owner, general contractor or sub-contractors to comply with the provisions of this Act shall be deemed a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars nor more than two hundred dollars, and each day of such violation shall constitute a separate offence. [Id., § 7.]

## CHAPTER SIX

### TRUSTS—CONSPIRACIES AGAINST TRADE

Art.	Art.
1461a. Revival of permit to do business; procedure.	1461c. Same; costs.
1461b. Same; corporations excepted.	1463. [Superseded.]
	1478. Trade unions, etc., exempt. when.

**Article 1461a. Revival of permit to do business; procedure.**—Any foreign corporation not engaged in the manufacture or sale of spirituous, vinous or malt liquors, which has heretofore, more than ten years prior to the passage of this Act, been convicted of a violation of any of the provisions of Title 130 of the Revised Statutes of Texas of 1911, and its right to do business has been forfeited thereunder, and which, under the judgment of any court in this State, was not assessed a penalty in excess of \$3000.00, shall be permitted to revive its permit to do business in Texas under the following provisions and in the following manner;

(a) It shall file suit in the court where the original judgment was entered, making the Attorney General of Texas a party defendant thereto, and serve notice upon him ten days prior to the time said suit is called for trial of the filing thereof, furnishing him a copy of the petition filed.

(b) It shall establish to the satisfaction of the court that the judgment of conviction against it was had more than ten years prior to the passage of this Act, and that the penalty assessed against it, either in the suit which forfeited its right to do business in this State or in any other suit against it for violation of the provisions of said chapter, was not in excess of \$3000.00.

(c) It shall establish to the satisfaction of the court that it has not violated in any respect the judgment of the court forfeiting its right to do business in this State, and that it has paid in full the penalty assessed against it.

(d) It shall establish to the satisfaction of the court that it has no connection at the time of the trial, and has had no connection since said judgment of conviction, with any person, firm or corporation engaged in violating the provisions of said chapter.

(e) And the court must find as a fact that the company doing business is not at the time engaged in any business in violation of the anti-trust laws of the State of Texas.

Upon the establishment of the things hereinbefore set out it shall be the duty of the court to set aside the previous judgment of conviction, and a certified copy of said judgment setting aside such previous judgment shall be filed in the office of the Secretary of State, who shall, upon receipt of same, issue a permit to said foreign corporation to do business in Texas upon the payment by it of such fees as the law may require for issuing permits to foreign corporations; provided, however, that no corporation shall be permitted to do business in this State which has been convicted a second time of any violation of the anti-trust laws of this State. [Acts 1919, 36th Leg., ch. 4, § 1.]

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

**Art. 1461b. Same; corporations excepted.**—The provisions of this Act shall not apply to any foreign corporation who is at the time of said trial, or was at the time of said judgment of conviction, or has been at any time during said dates been engaged in the manufacture or sale of spirituous, vinous or malt liquors. [Id., § 2.]

**Art. 1461c. Same; costs.**—The costs of said court proceedings shall be paid by said foreign corporation. [Id., § 3.]

**Art. 1463.** [Superseded.]

**Explanatory.**—Superseded by Acts 1919, 36th Leg., ch. 30, amending art. 7805, Revised Civil Statutes 1911.

**Art. 1478. Trade unions, etc., exempt when.**

**In general.**—Ordinance prohibiting walking back and forth or loitering in front of business places, to persuade persons by sign or otherwise from entering to transact business, does not conflict with Rev. St. arts. 5244, 5245, or this article. *Ex parte Stout*, 82 Cr. R. 183, 198 S. W. 967, L. R. A. 1918C, 277.

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## CHAPTER SEVEN

### THEATERS, ETC.—PROHIBITING DISCRIMINATION BETWEEN PERSONS DESIRING TO LEASE SAME

**Article 1480. "Public house of amusement" defined and subject to regulations.**

See *Hegman v. State* (Cr. App.) 227 S. W. 954.

**In general.**—Art. 302, prohibiting certain amusements on Sunday, is not affected by this article. *Zucarro v. State*, 82 Cr. R. 1, 197 S. W. 982, L. R. A. 1918B, 354.

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## CHAPTER TWELVE

### PRIZE FIGHTING, ROPING CONTESTS, ETC.

**Article 1507. [1005] Pugilistic encounters prohibited; penalty.**

**In general.**—Act 1889 imposed an occupation tax of \$500 on prize fights. Held, that this act repealed so much of the act of 1889 as permitted an occupation tax to be charged on prize fights, and that a conviction under the act of 1889 for engaging in a prize fight without obtaining a license could not be sustained. *Sullivan v. State*, 32 Cr. R. 50, 22 S. W. 44.

Prize fighting is unlawful under the laws of both Texas and New York. *Willard v. Knoblauch* (Civ. App.) 206 S. W. 734.

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## CHAPTER THIRTEEN

### SCHOOLS

**Art.**  
1513. Unauthorized sale or use of questions for examinations.  
1513dd. Violations of free text books act.

**Art.**  
1513h. Failure of school officers to make reports.

**Article 1513. Unauthorized sale or use of questions for examinations.**—Any person or persons who shall sell, barter, or give away, prior

to any forthcoming examination to applicants for teachers' certificates, or to any person, the questions prepared by the State Superintendent of Public Instruction, to be used by the county, summer normal, or any board of examiners in the examination of teachers at said forthcoming examination; or any person who shall accept or otherwise obtain possession of such questions, or the answers thereto, prior to any such examination; or any person or persons who shall use the same fraudulently at the time of said examination, or thereafter; or any person who shall permit or aid in the substitution of examination papers fraudulently prepared to be substituted for examination papers prepared during the examination; or any person who accepts remuneration for the granting of certificate or for aiding others to obtain certificates, except as provided for by law, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred and not more than five hundred dollars, and, in addition thereto, shall be imprisoned in the county jail for any number of days not less than twenty and not more than sixty. [Acts 1901, p. 272; Acts 1905, ch. 124, § 124a; Acts 1920, 36th Leg. 3d C. S., ch. 61, § 2 (§ 124a).]

**Explanatory.**—The act amends section 124a, ch. 124, Acts 29th Leg., so as to read as above. The act took effect 90 days after June 18, 1920, date of adjournment. Sec. 3 of the act repeals all laws in conflict.

**Art. 1513dd. Violations of free text books act.**—A wilful violation of any provision of this Act [Arts. 2904 $\frac{1}{4}$ –2904 $\frac{1}{4}$ v, Civil Statutes, ante] by any person other than text book contractor shall be a misdemeanor punishable by fine of not less than \$5.00 nor more than \$100.00. [Acts 1919, 36th Leg., ch. 29, § 21.]

Took effect Feb. 25, 1919.

**Art. 1513h. Failure of school officers to make reports.**—The State Superintendent of Public Instruction shall require of Judges acting as ex-officio county superintendents of public schools, of county, city and town superintendents, of county and city treasurers and depositories, and of treasurers and depositories of school boards, and of other school officers and teachers such school reports relating to the school fund and to other school affairs as he may deem proper for collecting information and advancing the interests of the public schools, and shall furnish the county, city and town superintendents, treasurers, and depositories, and other school affairs as he may deem proper for collecting information and advancing the interests of the public schools, and shall furnish the county, city and town superintendents, treasurers, and depositories, and other school officers and teachers for the use of such teachers and officers the necessary blanks and forms for making such reports and carrying out such instructions as may be required by them. All teachers librarians, school presidents, superintendents, principals, or other school officers employed by all schools supported wholly or partly by the State, shall fill out and send to the State Department of education, before the expiration of the first school month of each annual session, a registration card, supplied by the State Department of Education, which card shall furnish blanks for useful statistical information, and said teachers, librarians, school presidents, superintendents, and principals shall not be paid the salary for the first month's service, except on the presentation of a receipt certifying that the said registration card has been received by the State Department of Education; provided also that any teacher, librarian, school president, superintendent, principal or other school officer employed in any school supported wholly or partly by the State of Texas, on changing his position from one school to another at any time during the school session, shall not be entitled to receive the first month's salary in any new position ex-



cept on presenting a receipt from the State Department of Education certifying that he has filed with the State Department of Education another registration card giving information as to the said change of position. The monthly salary of any county judge acting as ex-officio county superintendent of public schools, of any county, district city or town superintendent, or principal, of any teacher, or librarian in any school supported wholly or partly by the State of Texas, or any assessor, county treasurer, treasurer in county school depository or treasurer of any school district depository, shall be withheld by the officials or authorities paying the said salary, on notification by the State Superintendent of Public Instruction that said county judge, acting as ex-officio county superintendent of public schools, county, district, city or town superintendent or principal, teacher, librarian, assessor, county treasurer, treasurer of county school depository or treasurer of school district depository has refused or failed to make the reports required of him: provided that this notification shall not be sent by the State Superintendent until at least two written requests have been made for the desired information and until thirty days have elapsed from the time of the first request without the receipt of the information required; in such case the aforesaid monthly salary shall be withheld until a notice is received from the State Superintendent, certifying that the information requested has been furnished by the delinquent person.

An employé of the state or of any district, county, city, town, or school, who may be responsible for the payment of the salary of any county judge acting as ex-officio county superintendent of public schools, of any county, district, or town superintendent of principal, or other school officer, or any teacher, librarian, assessor, county treasurer, treasurer of county school depository, or treasurer of school district depository, after notice by the State Superintendent that the said person has failed to comply with the provisions of this Act, shall be deemed guilty of a misdemeanor and shall on conviction be fined in any sum not less than \$50.00 nor more than \$500.00, and the State Superintendent of Public Instruction may withhold warrants for further payment of state apportionments until the aforesaid officials have made satisfactory reports as herein provided. [Acts 1917, 35th Leg., ch. 104, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 71, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Indictment or information.**—An information, charging defendant, a cashier of a bank which was a depository, with failure to make a report, not alleging that defendant occupied any position mentioned in the statute, stated no offense. Ex parte Ballard, 87 Cr. R. 460, 223 S. W. 222.

## CHAPTER FIFTEEN

### OFFENSES BY RAILWAY OFFICIALS OR AGAINST RAILWAYS

<p>Art. 1523—1. Separate coaches for whites and negroes.</p> <p>1531e. Obstruction of highway crossings.</p>	<p>Art. 1531i. Improper purchase or use of transportation at reduced rates; production of certificate on purchase of tickets.</p>
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**Article 1523. [1010] 1. Railroad to provide separate coaches for white and negro passengers.**

**Indictment, information or complaint.**—Complaint which failed to charge that interurban car upon which accused was riding was owned by a common carrier of passengers for hire, and which failed to state conductor's name or that name was not known, was defective. Chester v. State, 84 Cr. R. 269, 206 S. W. 685.

**Art. 1531e. Obstruction of highway crossings.**—It shall hereafter be unlawful for any railway company or any officer, agent, servant, re-

ceiver or receivers of any railway corporation to wilfully obstruct for more than five minutes at any one time any street, railway crossing or public highway in this State by permitting their trains to stand on or across such crossing or crossings. Provided that the City Council of any incorporated city may by ordinances, grant a franchise to a railway company to obstruct a street crossing, not a part of a "Designated State Highway," by railway passenger trains for the purpose of receiving and discharging passengers, mail, express or freight, for a longer time than specified herein, and shall be authorized to enact and enforce reasonable ordinances in the premises; and when any such franchise has been granted under the provisions of this Act, the street crossing named therein shall be excepted from the general law of obstructing any street, railway crossing, or public highway by railway companies. Provided the provisions hereof shall not apply to a city having a special charter unless the charter of such city shall first be amended so as to adopt the provisions hereof. [Acts 1915, 34th Leg., ch. 60, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 21, § 1.]

Took effect Nov. 15, 1921.

**Art. 1531i. Improper purchase or use of transportation at reduced rate; production of certificate on purchase of tickets.**—Any peace officer named in Section 1 of this Act [Art. 6618a, Civil Statutes, ante], who shall procure transportation over any steam railroad or electric interurban railroad between points in this State under the provisions of this Act, and shall use the same for any other than official business connected with the duties of his office or any person not entitled to the benefits of this Act who shall falsely represent himself as entitled to such privileges and shall purchase or offer to purchase transportation over any steam railroad or electric interurban railway company in this State at the rate provided for herein, shall be guilty of a misdemeanor, and shall upon conviction be fined in any sum not less than One Hundred (\$100.00) Dollars and not more than Five Hundred (\$500.00) Dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Provided, that the officers entitled to the benefits of this Act shall, when presenting themselves to the agent of any such railway or interurban railway company for the purchase of a ticket or to pay his fare, exhibit to such agent in case of the Adjutant General and State Rangers a certificate of the Secretary of State under seal, in case of sheriffs and constables and their deputies a certificate under seal of the County Judge of the county where they hold office and in case of officers of a city or town a certificate under seal of the Mayor of such city or town stating that such person is entitled to the reduced fare herein provided for and provided further, that it shall be the duty of sheriffs and constables to designate in writing the two deputies entitled to the reduced rates herein provided for and provided further that if the sheriff or constable has designated two deputies who are entitled to such reduced rates that then and in that event no deputy of such sheriff or constable shall be entitled to free transportation under the provisions of the pass laws of this State. [Acts 1921, 37th Leg., ch. 88, § 2.]

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

## CHAPTER SIXTEEN

RAILROADS, ETC.—PROHIBITING ISSUANCE OF FREE  
PASSES, ETC.

Art.

1532. Free pass, frank, privilege or free haul or carrying of person or property free of charge, penalty for.

1533. Provisions of preceding article not to prohibit what.

Art.

1533b. Free passes to persons receiving pensions.

1534. Person offering to use permit, pass, frank, etc.

**Article 1532. Free pass, frank, privilege or free haul or carrying of persons or property free of charge, penalty for.**

Cited, Missouri, K. & T. Ry. Co. of Texas v. Haven (Civ. App.) 200 S. W. 1152.

**Art. 1533. Provisions of preceding article not to prohibit what.—**

That the provisions of Section 1 of this Act (Art. 1532), shall not be held to prohibit any steam or electric interurban railway, telegraph company, or chartered transportation company, or sleeping car company, or the receivers or lessees thereof, or persons operating the same, or the officers, agents or employees thereof, from granting free or exchanging free passes, franks, privileges, substitute for pay or other thing herein prohibited to the following persons: The actual bona fide employees of any such companies and the members of their families. The term "employees" shall be construed to embrace the following persons only: All persons actually employed and engaged in the service of any such companies, including its officers, bona fide ticket, passenger and freight agents, physicians, surgeons and general attorneys, and attorneys who appear in courts to try cases and who receive a reasonable annual salary; furloughed, pensioned and superannuated employees, persons who have been disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier, and ex-employees traveling for the purpose of entering the service of any such common carrier. And the term "families" as used in this paragraph shall include the families of the persons named in this provision, also the families of persons killed while in the service of any such common carrier; also the families of the persons who for a period of ten years or more were employees of such common carrier, and who died while in the service of any such common carrier; also persons actually employed on sleeping cars, express cars; also officers and employees of telegraph and telephone companies, newsboys employed in trains, railway mail service employees and their families; post office inspectors; chairman and bona fide members of grievance committees of employees; bona fide custom and immigration inspectors employed by the Government; the State Health Officer and one assistant; Federal Health Officers; county health officers; the State Railroad Commissioners; the Secretary of the Railroad Commission; the Engineer of the Railroad Commission; the Inspector of the Railroad Commission, and the Auditor of the Railroad Commission; State Superintendent of Public Buildings and Grounds; the State Game, Fish and Oyster Commissioner and his two chief deputies; also government representatives accompanying from the Texas fish hatcheries shipments of fish for free distribution in the waters of this State; the Dairy and Food Commissioner and two chief deputies; also when live stock, poultry, fruit, melons or other perishable produce is shipped, the necessary caretakers while en route and return; also trip passes to the indigent poor when application therefor is made by any religious or charitable organizations, Sisters of Charity, or members of any religious society of like character; delegates to the different farmers institutes and farmers congresses and farmers unions; also all delegates to the State and district firemen's conventions

from volunteer fire companies, and Confederate Veterans who are or have been or who hereafter may be admitted to the Confederate Home; managers of Young Men's Christian Associations or other eleemosynary institutions while engaged in charitable work; also the officers or employees of industrial fairs during the continuance of any said fair and six months prior thereto; provided, that no more than four officers or employees of any one fair or fair association shall receive passage in any one year; also persons injured in wrecks upon the road of any such company immediately after such injury, and the physicians and nurses attending such persons at the time thereof, also persons and property carried in cases of general epidemic, pestilence or other calamitous visitations at the time thereof or immediately thereafter; also the United States marshals and not more than two deputies of each such marshal; State rangers; constables; the Adjutant General and assistant Adjutant General of the State of Texas; the members of the State militia in uniform and when called into service for the State; sheriffs and not more than two deputies to each constable or sheriff; chiefs of police or city marshals, whether elective or appointive. Any bona fide policeman or fireman in the service of any city or town in Texas may have the right to ride upon free transportation furnished by any steam railway company, any street railway company, any interurban railway company, or other lines of public transportation, when such policeman or fireman is in the discharge of his public duty; but this provision shall not be construed so as to apply to men holding commissions as special policemen or firemen. Any other bona fide peace officer shall enjoy the same privilege, when their duties are to execute criminal processes; provided, that if any such railroad or transportation company shall grant to any sheriff a free pass over its lines of railroad, then it shall issue like free transportation to each and every sheriff in this State who may make to it written application therefor; and provided further, that said sheriffs and other peace officers above mentioned using such free passes, or transportation shall deduct the money value of the same, at the legal rate per mile, from any mileage accounts against the State and litigants earned by them in executing process when such pass was used or could have been used; also members of the Live Stock Sanitary Commission or their inspectors, of Texas, not exceeding twenty-five (25) in number for any one year; any person who has by many years of actual labor aided, assisted and been instrumental in securing the passage of Statutes by the Congress of the United States requiring the equipment of railroad trains with adequate safety appliances for the protection of the persons and lives of the employees and passengers; provided, that such person was not at such time a public officer, National, State, or local, nor employed directly or indirectly by any railroad company; provided, that nothing in this Act shall prevent any such companies, the receiver or lessees thereof and their families or the officers, agents or employees from granting to ministers of religion reduced rates of one-half the regular fare, nor shall anything in this Act prevent any such companies, their receivers or lessees from transporting free of charge any article being sent to any orphan home or other charitable institution; provided, further, that nothing in this Act shall be construed to prohibit any such companies, their receivers, lessees or officers, agents or servants from making special rates for the special occasions or under special conditions, but no such rate shall ever be made without first obtaining authority from the Railroad Commission of Texas; and provided further that no persons who hold any public office in this State shall at any time during their term of office be entitled to any such pass or transportation, privilege or franks, or substitute for fare or charges

over any railway or other company mentioned in Section 1 of this Act, except employees operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted; provided, further, that nothing in this Act shall prohibit any street railway company from transporting, free of charge, police officers and firemen in any city where said company is authorized so to do by an ordinance or authority from the city council of any such city; provided, however, that no person or persons, beneficiaries of free transportation herein permitted, shall ride on a free pass or enjoy free transportation to or from any political convention or any political errand; that nothing in this Act shall prohibit any express company from hauling or carrying free of charge the packages and property of its actual and bona fide officers, attorneys, agents and employees who are actually in the employment of any such company, its receivers or lessees, at the time such free transportation of the right thereto was given; and provided, further, that nothing in this Act shall be construed to prohibit any telegraph or telegraph company from carrying and transmitting free of charge the messages of its bona fide officers, attorneys, agents and employees and their families who are actually in the employment of such company, its receivers or lessees at the time when such free transportation or the right thereto was given; provided, the actual bona fide officers and employees upon annual salaries of railway and telephone companies, and telegraph companies are hereby permitted to exchange franks, privileges and free transportation over their respective lines of railway and telegraph or telephone; and provided, further, that nothing in this Act shall be construed to prevent the right of contract between railway companies and publishers, editors or proprietors of newspapers or magazines from making an exchange of mileage for advertising space in such newspapers or magazines; and provided, further, that the contract between the railway companies and publishers, editors or proprietors of such newspapers shall be upon the same basis of charge as is charged the public generally for a like service, and that the said exchange shall be on a basis of value received in all cases, and providing that such contract shall be in writing and shall not be operative until approved by the Railroad Commission of this State and filed in the office of the Commission as a part of the records thereof, subject at all reasonable times to public inspection; and that nothing herein contained shall be construed to prevent railway, express, railway news and other companies, persons and corporations performing service for or in connection with the operation of railways, from issuing to or exchanging with each other, franks, passage and free transportation of persons and property to each other and to their respective company's officers and employees for the use of the respective facilities; provided, that nothing herein contained shall be construed to prohibit actual bona fide employees from riding on a pass if he at the same time holds the position of school trustee or notary public. [Acts 1907, p. 94, § 2; Acts 1911, p. 151, § 1; Acts 1921, 37th Leg., ch. 99, § 1.]

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

Cited, *Missouri, K. & T. Ry. Co. of Texas v. Haven* (Civ. App.) 200 S. W. 1152.

**Validity.**—Under Const. art. 10, § 2, prohibiting unjust discriminations, whether granting of passes by railroads to classes of persons accepted in the Anti-Pass Law is unjust discrimination is a judicial question, and not one of fact to be determined by the Legislature conclusively. *State v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 197 S. W. 1006.

Under Const. art. 10, § 2, prohibiting unjust discrimination, and Civ. St. art. 6670, defining unjust discrimination, exemptions from the operation of the Anti-Pass Law contained in section 2, are void except as to employes and their families, etc.; necessary caretakers; indigent poor; Confederate veterans; persons injured in wrecks and physicians and nurses attending them; persons and property carried in general epidemic articles sent to orphan homes, etc.; special rates authorized by the railroad commission; exchange privileges to bona fide officers and employes, and exchange of mileage for advertising space. *Id.*

**In general.**—Attorney General was authorized to sue to enjoin railroads of the state from granting passes to persons under unconstitutional exception in the Anti-Pass Law (Acts 30th Leg. c. 42, as amended by Acts 32d Leg. c. 83). *State v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 197 S. W. 1006.

**Art. 1533b. Free passes to persons receiving pensions.**—From and after the passage of this Act it shall be lawful for any steam or electric interurban railway or chartered transportation company, or sleeping car company or the receivers or lessees thereof, or persons operating the same, or the officers, agents, or employees thereof, to grant free passes to any person who is now receiving, or may hereafter receive, a pension from the State of Texas under the provisions of Section 51 of Article 3 of the Constitution of the State of Texas, and providing that said pensioner in making application for a pass shall accompany the same by a certificate of the County Judge of the county in which the applicant lives to the fact that said applicant is receiving a pension from the State of Texas under the provisions of Section 51 of Article 3 of the Constitution of the State of Texas. [Acts 1921, 37th Leg., ch. 110, § 1.]

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

**Art. 1534. Persons offering to use permit, pass, franks, etc.**

Cited, *Missouri, K. & T. Ry. Co. of Texas v. Haven* (Civ. App.) 200 S. W. 1152.

## CHAPTER SIXTEEN A

### RECEIVING PREFERENCE FROM CARRIER OF GOODS

Art. 1539½.	Receiving unlawful preference from carrier.	Art. 1539½a.	"Preference" defined.
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**Article 1539½. Receiving unlawful preference from carrier.**—Any person who shall ask, solicit, demand, or receive, directly or indirectly, from any person, corporate or otherwise, any money, reward, favor, benefit, or other thing of value, or the promise of either, as a consideration or inducement for procuring or effecting, or with the view, purpose or intent of the person asking, soliciting, demanding, charging or receiving the same, or the promise thereof, that such person may, can or will, or may, can or will seek or undertake to, procure or effect, any preference in the receipt, carriage, transportation, storing, movement, placing, handling, caring for, or delivery of any freight, commodity or article, or any railroad car or cars, by any common carrier in this State, or by any agent or employe of such common carrier, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail not less than thirty days nor more than six months. [Acts 1921, 37th Leg., ch. 17, § 1.]

Took effect Feb. 28, 1921.

**Art. 1539½a. "Preference" defined.**—By the word "preference" as used in Section 1 of this Act is meant any advantage, privilege, right, opportunity, precedence, choice, favor, priority, or gain that is or may be, or is sought or purposed to be, accorded, afforded, granted, given, allowed, permitted, or extended to any person or persons, place or places, or thing or things, as against any other person or persons, place or places, or thing or things, in the receipt, carriage, transportation, movement, placing, storing, handling, caring for or delivery of any freight, commodity or article, or any railroad car or cars, by any common carrier in this State, or by any agent or employe of such common carrier. [Id., § 2.]

## CHAPTER TWENTY-EIGHT

## PENITENTIARIES—CONTROL AND TREATMENT OF PRISONERS

Art. 1611. Penalty for misapplication of money of prisoners by officers, etc., of prison.	Art. 1617. Officer, etc., inflicting unauthorized punishment on any prisoner.
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**Article 1611. Penalty for misapplication of money of prisoners by officers, etc., of prison.**

See *Goree v. Ramey*, 78 Tex. 176, 14 S. W. 553.

**Art. 1617. Officer, etc., inflicting unauthorized punishment on any prisoner.**

**Validity.**—This article is valid. *Hughes v. State*, 83 Cr. R. 550, 204 S. W. 640.

## CHAPTER TWENTY-NINE A

## LAND SURVEYORS

**Article 1617b. Violations of act relating to land surveyors.**—One who violates any provision of this Act [Arts. 5491½–5491½k, Civil Statutes, ante] shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not to exceed one thousand dollars. [Acts 1919, 36th Leg. 2d C. S., ch. 67, § 12.]

Took effect 90 days after July 22, 1919, date of adjournment.

## CHAPTER THIRTY

## REGISTRATION OF AUTOMOBILES REPAIRED

**Article 1617½c. Penalty for violation.**

**Offense.**—Owner of garage is not guilty of violating this act, providing that any "garage" or "repair shop" not keeping register of repairs to automobiles shall be guilty of a misdemeanor; arts. 9, 10, requiring words to be given their clear meaning. *Fowler v. State*, 81 Cr. R. 574, 196 S. W. 951.

## CHAPTER THIRTY-ONE

## SALE OF MOTOR VEHICLES

Art. 1617¾. Sale of motor vehicle with engine number removed or obliterated.	Art. 1617¾e. Buying motor vehicle without demanding license fee receipt.
1617¾a. Record of engine numbers.	1617¾f. Sale of motor vehicle without bill of sale.
1617¾b. Registration of motor vehicle with engine number removed or obliterated.	1617¾g. Record of work done on motor vehicles in garage, etc.
1617¾c. Sale of motor vehicle without possession of receipt showing registration of engine number.	1617¾h. Same; contents.
1617¾d. Sale of motor vehicle without transferring license fee receipt.	1617¾i. Engine number to be stamped on new cylinder block.
	1617¾j. Inspection of records.
	1617¾k. Punishment for violations of act.

**Article 1617¾. Sale of motor vehicle with engine number removed or obliterated.**—From and after the taking effect of this Act it shall be unlawful for any person, or persons in this State to have or retain in his or their possession, or sell or offer to sell any motor vehicle from which the engine number has been removed or obliterated. Every such

owner of a motor vehicle from which the engine number has been removed, erased, or destroyed in any manner, before using the same upon the public highways of this State, or selling or offering for sale any such motor vehicle, shall make application to the Highway Commission for an engine number, and the number assigned by the Highway Commission shall be stamped with a steel die on the engine of such motor vehicle. [Acts 1919, 36th Leg., ch. 138, § 1.]

**Construction and operation in general.**—The purpose of this act was not to enforce payment of the license fee, but was to prevent theft. *Overland Sales Co. v. Pierce* (Civ. App.) 225 S. W. 284.

**Art. 1617<sup>3</sup>/<sub>4</sub>a. Record of engine numbers.**—The State Highway Commission shall cause to be kept in the State Highway Department a separate register in which shall be recorded the engine number assigned to owners of motor vehicles, from which the original engine number has been removed, erased or destroyed in any manner, and before assigning any such number the Commission shall require the filing of an application for same, attested by oath of the applicant, that he is the owner of such motor vehicle, and such record shall disclose the name and address of the owner; the trade name and model of the motor vehicle; the year manufactured, and the engine number assigned, and shall be authorized to collect a registration fee of \$2.00 for such services. [Id., § 2.]

**Art. 1617<sup>3</sup>/<sub>4</sub>b. Registration of motor vehicle with engine number removed or obliterated.**—Any person who shall make an application to the county tax collector for the registration of any motor vehicle from which the original engine number has been removed, erased, or destroyed in any manner until it bears the new engine number designated by the State Highway Department under the provisions of Section 2 of this Act [Art. 1617<sup>3</sup>/<sub>4</sub>a], shall be guilty of a misdemeanor and upon conviction shall be subject to fine of not less than \$50.00, and not more than \$100.00; and it shall be the duty of any person who has applied to and received from the State Highway Department a new engine number as herein provided, to present the receipt received for the registration of such new engine number from the Department to the County Tax Collector when applying for the registration of such motor vehicle under the provisions of the law and failure to so present such receipt to the county tax collector shall subject the owner of said motor vehicle to a fine of not less than \$10.00, nor more than \$50.00. Any tax collector who shall knowingly accept an application for the registration of a motor vehicle from which the original engine number has been removed, erased or destroyed in any manner, and which does not have on it the number designated by the Highway Department, shall be subject to a fine in a sum not less than \$10.00, and not more than \$50.00. [Id., § 3.]

**Art. 1617<sup>3</sup>/<sub>4</sub>c. Sale of motor vehicle without possession of receipt showing registration of engine number.**—It shall be unlawful for any person acting for himself or any one else, to offer for sale or trade any second-hand motor vehicle in this State, without then and there, having in his actual physical possession the Tax Collector's receipt for the license fee issued for the year that said motor vehicle is offered for sale or trade. [Id., § 3a.]

**Art. 1617<sup>3</sup>/<sub>4</sub>d. Sale of motor vehicle without transferring license fee receipt.**—It shall be unlawful to sell or trade any second-hand motor vehicle in this State without transferring by indorsement of the name of the person to whom said license fee receipt was issued by the Tax Collector and by physical delivery of the Tax Collector's receipt for license fee for the year that the said sale or trade is made. [Id., § 3b.]

See *Overland Sales Co. v. Pierce* (Civ. App.) 225 S. W. 284.



**Art. 1617<sup>3</sup>/<sub>4</sub>e. Buying motor vehicle without demanding license fee receipt.**—It shall be unlawful for any person acting for himself or another to buy or trade for, any second-handed motor vehicle in this State without demanding and receiving the Tax Collector's receipt for the license fee issued for said motor vehicle for the year that said motor vehicle is bought or traded for.

Any person violating the provisions of Sections 3a, 3b, [Arts. 1617<sup>3</sup>/<sub>4</sub>c, 1617<sup>3</sup>/<sub>4</sub>d] or 3c shall be guilty of a misdemeanor and upon conviction shall be fined in any sum, not less than Ten Dollars (\$10) or more than Two Thousand Dollars (\$2,000.00), or by confinement in the County Jail for any term less than one year, or both such fine and imprisonment, and all moneys collected for such fines shall be placed in the Road and Bridge Fund of the County in which the violation occurs and the penalty is recovered. [Id., § 3c.]

**Art. 1617<sup>3</sup>/<sub>4</sub>f. Sale of motor vehicle without bill of sale.**—It shall be unlawful for any person, whether acting for himself or as an employé or agent to sell, trade, or otherwise transfer any second-hand motor vehicle without delivering to the purchaser a bill of sale in duplicate, the form of which is prescribed in this Act, one copy of which shall be retained by the transferee as evidence of title to ownership, and the other copy of which shall be filed by the transferee with the county tax collector as an application for transfer of license together with the lawful transfer fee of \$1.00.

The following form of transfer shall be subscribed before a Notary Public:

Bill of Sale and Application for Transfer.

State of Texas, }  
County of \_\_\_\_\_ }

Know all men by these presents that the ownership of the following described motor vehicle is hereby transferred by the undersigned to \_\_\_\_\_ for and in consideration of \_\_\_\_\_ and other valuable consideration.

Seal No. \_\_\_\_\_ State License No. \_\_\_\_\_ Name and Model and Year made \_\_\_\_\_ Engine No. \_\_\_\_\_ Horse Power (A. L. A. M.) \_\_\_\_\_ Transferee's name in full \_\_\_\_\_ Transferee's correct address in full \_\_\_\_\_

Before me, the undersigned authority personally appeared the vender of the vehicle described above, and, being duly sworn, deposes and upon oath states that the vehicle described is hereby transferred to the transferee named above.

\_\_\_\_\_ Vender.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 191-  
[Id., § 4.]

**Art. 1617<sup>3</sup>/<sub>4</sub>g. Record of work done on motor vehicles in garages, etc.**—It shall be the duty of every person, firm or corporation engaged in the business of operating a repair shop or garage of every kind, within this State, where the repairing, rebuilding or repainting of automobiles is carried on, or electrical work in connection with the repair of automobiles is done and performed, and also it shall be the duty of every person, firm or corporation engaged in the business of the purchase and sale of second hand or used automobiles within this State, to keep a well bound book in the office or place of business where said work is carried on, or said business conducted, in which shall be kept, in a clear and intelligent manner, a register of each and every repair or change in any automobile of every description so repaired or dealt in, by any of the parties mentioned

in this Act. Provided that repairs of a value not exceeding One (\$1.00) Dollar are hereby excepted. [Id., § 5.]

**Art. 1617<sup>3</sup>/<sub>4</sub>h. Same; contents.**—Said register shall contain a substantially complete and accurate description of each and every car upon which there is performed said repairs, or upon which there is installed any new parts or accessories of any character, and where the said car is bought or sold as a used car, the said register shall particularly show in each of the cases mentioned, the make of the automobile, the number of cylinders, motor number, passenger capacity, model, and also the name, apparent age and sex and any special identifying physical characteristics of the party or parties claiming to be the owner or owners of the automobile, his or their usual place of address, and the State register number of such automobile. In case of the sale of a used or second-hand car by any dealer, or the owner or proprietor of any garage, a like register shall be made as to the name and address and description of said purchaser, the character and description of said car and the state register thereof. Said registers provided for herein shall be kept in a secure place and be subject at all times to the inspection of any peace officer desiring to examine the same or any party or parties interested in tracing or locating stolen automobiles. [Id., § 6.]

**Art. 1617<sup>3</sup>/<sub>4</sub>i. Engine number to be stamped on new cylinder block.**—Any owner of a motor vehicle registered in the State Highway Department, as provided by law, and of which motor vehicle the cylinder block has been so damaged as to make necessary the installation of a new cylinder block, shall cause the original engine number of the motor vehicle to be stamped with a steel die on the new cylinder block, and the garage or repair shop so installing the new cylinder block and impressing the number thereon, as herein provided, shall enter a record in a substantially bound book showing the name of the owner of such motor vehicle and his address, the engine number, and the registration number of the motor vehicle. [Id., § 7.]

**Art. 1617<sup>3</sup>/<sub>4</sub>j. Inspection of records.**—All records required to be kept by the provisions of this Act shall be reserved for a period of one year after the date recorded, and shall be open for the inspection of the public at all reasonable hours. [Id., § 8.]

**Art. 1617<sup>3</sup>/<sub>4</sub>k. Punishment for violations of act.**—Anyone who shall fail to comply with any of the requirements of this Act as prescribed in Sections 1, 2, 3, 4, 7, and 8 [Arts. 1617<sup>3</sup>/<sub>4</sub>–1617<sup>3</sup>/<sub>4</sub>b, 1617<sup>3</sup>/<sub>4</sub>f, 1617<sup>3</sup>/<sub>4</sub>i, 1617<sup>3</sup>/<sub>4</sub>j] shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten (\$10.00) dollars nor more than One Hundred (\$100.00) Dollars, and all such fines when recovered, shall be placed in the road and bridge fund of the county in which the violation occurs and the penalty is recovered. [Id., § 9.]

## TITLE 19

## REPETITION OF OFFENSES

Art.  
1619. Subsequent conviction for felony.

Art.  
1620. Third conviction for felony, how punished.

**Article 1619. [1015] Subsequent conviction for felony.**

**Indictment.**—Where an indictment charges defendant with forging a check described therein and proceeds to charge that theretofore defendant was convicted of a similar offense, it will be presumed on appeal that the purpose of the pleader in drawing the indictment was to secure an increased punishment. *Stevenson v. State* (Cr. App.) 230 S. W. 174.

**Art. 1620. [1016] Third conviction for felony, how punished.**

**Indictment.**—It is not sufficient in an indictment merely to allege that the prior offense or offenses is or are the same offenses, since there must not only be prior offenses but prior convictions, not of the same offense, but of offenses of like character as that for which accused is being tried. *Brittian v. State*, 85 Cr. R. 491, 214 S. W. 351.

An indictment attempting to set up former convictions for similar offenses, charging defendant with "unlawfully selling intoxicating liquors," held insufficient to charge a violation of the law so as to form a basis for enhanced punishment, as in charging an offense the indictment must follow the statute. *Id.*

**Former convictions.**—To secure enhanced punishment because of a repetition of offenses and previous convictions, there must not only be prior offenses but prior convictions, not of the same offense, but of offenses of like character as that for which accused is being tried. *Brittian v. State*, 85 Cr. R. 491, 214 S. W. 351.

Convictions justifying enhanced punishment under Pen. Code, art. 1620, must constitute a final disposition of the case, and, if the judgment for any reason be set aside and another trial awarded, there is no conviction. *Id.*

Where a suspended sentence is awarded by the jury in a criminal case, there is no final conviction. *Id.*

# SUPPLEMENT

TO THE

# CODE OF CRIMINAL PROCEDURE

## TITLE 1

### INTRODUCTORY

Chap.

1. Containing general provisions.
2. The general duties of officers charged with the enforcement of criminal laws.

Chap.

2. The general duties of officers charged with the enforcement of criminal laws—Continued.
2. District and county attorneys.
4. Peace officers.
5. Sheriffs.

### CHAPTER ONE

#### CONTAINING GENERAL PROVISIONS

Art.

1. Objects of this Code.
3. Trial by due course of law secured.
4. Rights of accused persons.
5. Protection against searches and seizures.
6. Prisoners entitled to bail, except in certain cases.
8. Excessive bail, fines, etc., forbidden.
9. No person shall be twice put in jeopardy for same offense.
10. Trial by jury shall remain inviolate.

Art.

19. Conservators of the peace; style of process.
20. In what cases accused may be tried, etc., after conviction.
21. No conviction of felony, except by verdict of jury.
22. Defendant may waive any right, except, etc.
25. Construction of this Code.
26. When rules of common law shall govern.

#### Article 1. [1] Objects of this Code.

Cited, *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

#### Art. 3. [3] Trial by due course of law.

Cited, *Cooper v. State*, 25 Tex. App. 530, 8 S. W. 654.

#### Art. 4. [4] Rights of accused persons.

**Explanatory.**—Sec. 10, art. 1, of the constitution, from which this provision was constructed, has been recently amended. See p. — preceding the Civil Statutes, ante.

1. **In general.**—Defendant, a negro, tried for murder of a white man, against whom mob influence was manifested in and about the courtroom and in the presence of the jury and toward the sheriff, held not to have had a fair and impartial trial as guaranteed by Bill of Rights, §§ 10, 15. *Liggon v. State*, 82 Cr. R. 514, 200 S. W. 530.

5. **Indictment.**—Under Bill of Rights, § 10, in view of section 29, an indictment, leaving out the words “by the” in the formal clause “by the authority of the state,” held fatally defective, so that court erred in not allowing amended motion for new trial for alleged discovery that indictment had been amended by inserting such omitted words. *Alvarado v. State*, 83 Cr. R. 181, 202 S. W. 322.

While Const. art. 1, § 10, declaring that defendant shall have the right to demand the nature and cause of the accusation against him, and a copy thereof, cannot be abridged by the Legislature, those articles of the Code of Criminal Procedure providing for the service of indictments on defendants are not invalid, being an extension of the constitutional provision and recognizing the right of a defendant in all cases to have a copy of the indictment. *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

Where purported indictment was preferred by an illegal grand jury, that had been impaneled and was acting without authority of law, the prosecution will be dismissed for want of a legal indictment; the act of such illegal grand jury being void. *Brannan v. State*, 87 Cr. R. 169, 219 S. W. 1096.

The court to which the venue of a case is changed acquires no jurisdiction, where the indictment was not transmitted to it, because it had been lost in the other court,

and not substituted, since under Bill of Rights, § 10, no citizen can be tried for felony except upon an indictment, and the court to which the venue was changed, therefore, cannot grant an order for substitution of the indictment. *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 978.

Under Const. art. 1, § 10, guaranteeing accused the right to demand the nature and cause of the accusation, in charging an assault with intent to commit another offense, it is necessary only to allege such matters as bring the offense within the definition of an assault coupled with an intention to commit such other offense, naming it, without giving the constituent elements of the offense intended to be committed. *Jones v. State* (Cr. App.) 231 S. W. 122.

**7. Evidence against self.**—Permitting state to prove that defendant made finger prints on paper which corresponded with prints on glass of window pane in burglarized premises was not violative of Bill of Rights, § 10, providing accused must not be required to give evidence. *McGarry v. State*, 82 Cr. R. 597, 200 S. W. 527.

Documents found in defendant's wallet comprising certificates that J. J. Wilson (not defendant's name, but name under which he registered at hotel in vicinity of burglary charged) was a deaf-mute, and worthy of assistance, and data connected therewith, were improperly received. *Id.*

Under Bill of Rights, Const. art. 1, § 10, providing that no man shall be compelled to give evidence against himself, when a witness makes known his objection in any language, the trial court should either desist or further inquire into cause of his hesitation and inform him of his privilege. *Mathis v. State*, 84 Cr. R. 514, 209 S. W. 150.

One arrested without warrant cannot be compelled to testify before the grand jury as to matters involving those for which he was arrested as against a claim of privilege. *Ex parte Sanchez*, 85 Cr. R. 380, 213 S. W. 271.

The introduction of a notebook, taken by the sheriff from the person of accused on his arrest, which notebook contained certain memorandum claimed to be incriminating, was not a violation of the constitutional guaranty against requiring accused to give evidence against himself. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

In a prosecution for burglary, defendant being charged with having stolen hams and sausage meat, testimony as to the finding of the meat at defendant's house in her absence when search was made after her arrest without her consent was admissible despite Bill of Rights, §§ 9, 10, guaranteeing citizens against unreasonable searches and seizures, and against being compelled to give evidence against themselves, also despite federal Const. Amendments 4 and 5, controversy as to identity of property going only to weight of evidence. *Riphey v. State*, 86 Cr. R. 539, 219 S. W. 463.

Statements of defendant while under arrest which are found to be true and which aid in establishing his guilt are admissible against him, and while under arrest defendant may be compelled to place his feet in certain tracks, or his shoe may be removed from his foot and placed in certain tracks, for identification. *Id.*

**9. Immunity.**—In prosecution for adultery, the paramour is an accomplice, and a promise of immunity, to secure her testimony, to be binding, must be sanctioned by the court. *Messenger v. State*, 81 Cr. R. 465, 198 S. W. 330.

**10. Persons entitled to claim privilege.**—The paramour in adultery, being an accomplice, cannot be forced to testify or used against her consent. *Messenger v. State*, 81 Cr. R. 465, 198 S. W. 330.

**11. Hearing.**—In a prosecution for misdemeanor, the time allowed by statute to prepare for trial, the right to appear by attorney, as well as the right to have illegal evidence excluded, may be waived. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

Where defendant's attorney resided in a county other than that in which the case was called for trial, and was engaged in the trial of cases in such other county at the time that the case was called for trial, court's refusal to postpone trial because of the absence of defendant's attorney, where such postponement would not have operated as a continuance, and where such failure left defendant without any attorney, held reversible error. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

Accused's right, under the Constitution, to have the benefit of counsel, is a valuable right which the courts will strictly enforce. *Id.*

**13. Confrontation of witnesses.**—One convicted of burglary could not for the first time on motion for rehearing contend that the agreed evidence of two state's witnesses who were absent was inadmissible on the ground that he was deprived of being confronted by the witnesses. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Evidence coming to the jury otherwise than that introduced under supervision of presiding judge, as by the statement of a juror after a retirement, violates the constitutional provision declaring that one accused of crime shall be confronted with the evidence against him, as such conduct denies cross-examination. *Weaver v. State*, 85 Cr. R. 111, 210 S. W. 698.

**17. — Testimony at former trial or in other proceeding.**—Admissibility in general, see art. 783, notes 149-151.

Where witness testifying in former trial is out of state and cannot be reached, his former testimony may be proved and introduced without violating constitutional right to be confronted by witnesses. *Robbins v. State*, 82 Cr. R. 650, 200 S. W. 525.

## Art. 5. [5] Protection against searches and seizures.

**Right to search.**—It is permissible to enter a house to search for and seize stolen property, such action not being an unreasonable search or seizure, though, when such entry is over objection, it can be allowed only when in accordance with prescribed forms, such as search warrants, etc. *Riphey v. State*, 86 Cr. R. 539, 219 S. W. 463.

**Use of results of search in evidence.**—In a prosecution for burglary, defendant being charged with having stolen hams and sausage meat, testimony as to the finding of the meat at defendant's house in her absence when search was made after her arrest with-

out her consent was admissible despite Bill of Rights, §§ 9, 10, guaranteeing citizens against unreasonable searches and seizures, and against being compelled to give evidence against themselves, also despite federal Const. Amends. 4 and 5, controversy as to identity of property going only to weight of evidence. *Rippey v. State*, 86 Cr. R. 539, 219 S. W. 463.

One arrested and searched may not complain that what was found on his person was used in evidence against him. *Id.*

That defendant was arrested and held in custody without a warrant did not render testimony as to a comparison of footprints at place of crime with those voluntarily made by defendant while in custody inadmissible under the search and seizure clause of the Bill of Rights. *Moore v. State* (Cr. App.) 226 S. W. 415.

#### Art. 6. [6] Prisoners entitled to bail, except in certain cases.

**Right to, and allowance of, bail.**—A trial court's denial of bail in a murder case is accorded great deference on appeal. *Ex parte Sparks*, 81 Cr. R. 618, 197 S. W. 873.

Under Const. art. 1, § 11, providing that all prisoners shall be bailable unless for capital offenses when the proof is evident, the word "evident" means that unless it is clear not only that accused is guilty, but that the jury would probably assess capital punishment. *Ex parte Hill*, 83 Cr. R. 146, 201 S. W. 996.

Where one was charged by complaint with murder, and the statement of facts of the testimony at the examining trial, which was used by consent, indicated that other pertinent testimony might have been introduced, and it does not appear that the proof was so evident as to justify holding the prisoner without bail, bail will be granted. *Ex parte Haley*, 83 Cr. R. 538, 204 S. W. 330.

To justify denial of bail, the evidence must be clear and strong, leading dispassionate judgment to the conclusion that the offense was committed by accused, and that he would probably be punished capitally if the law was administered. *Ex parte Townsley*, 87 Cr. R. 252, 220 S. W. 1092.

Upon application for bail in a capital case, the same will not be denied unless the evidence is such that the court must conclude that upon a proper decision based thereon the applicant would receive capital punishment. *Rogers v. State* (Cr. App.) 228 S. W. 945.

Where defendant, who had separated from his wife, who was at the home of her parents, came there to pay her money due her in the division of their property, and, apparently without provocation, shot her father, killing him, defendant can be refused bail without violence to his rights under the Constitution, having acted with "express malice," involving a deliberate mind and formed design unlawfully to kill, evidenced by external circumstances. *Littleton v. State* (Cr. App.) 228 S. W. 946.

— **Proof.**—Evidence held not such as to warrant denial of bail. *Ex parte Hill*, 83 Cr. R. 146, 201 S. W. 996; *Ex parte Johnson*, 84 Cr. R. 535, 208 S. W. 518; *Ex parte Stevens*, 85 Cr. R. 449, 213 S. W. 656; *Ex parte Young*, 87 Cr. R. 412, 222 S. W. 242; *Ex parte Wade*, 87 Cr. R. 500, 222 S. W. 979.

Under Const. art. 1, § 11, making all persons bailable unless for a capital offense when the proof is evident, burden is on the state to show that the proof was evident against one held without bail to answer a capital charge. *Ex parte Townsley*, 87 Cr. R. 252, 220 S. W. 1092; *Ex parte Jones*, 81 Cr. R. 646, 197 S. W. 997; *Ex parte Ray*, 86 Cr. R. 582, 218 S. W. 504.

The mere conflict of testimony will not necessarily entitle an accused to bail because conflicting testimony may be evidently not true by reason of mistakes or perjury. *Ex parte Lewellen* (Cr. App.) 229 S. W. 326; *Ex parte Young*, 87 Cr. R. 412, 222 S. W. 242.

Where eyewitness testified that deceased was walking along a street, and accused approached him from behind, and, without a word of warning, struck him on the head with a metal pipe, inflicting a fatal blow, and, when deceased collapsed, walked calmly away until he reached a street corner, then fled at full speed, and medical expert testified that skull of deceased was crushed and that such a wound would kill any man, the court was justified in concluding that there was a killing upon express malice and that a capital offense had been committed, and bail was properly refused. *Ex parte Ray*, 86 Cr. R. 582, 218 S. W. 504.

Evidence, showing bad feeling and previous fight, in which deceased vanquished accused, and that accused shot deceased three times on meeting him, held insufficient to show that jury would probably inflict the death penalty so that accused was entitled to bail. *Ex parte Townsley*, 87 Cr. R. 252, 220 S. W. 1092.

Trial court held not in error in refusing to grant bail to defendant charged with killing his uncle. *Ex parte Lebo* (Cr. App.) 227 S. W. 187.

Evidence in a habeas corpus proceeding held to raise the issue of self-defense, to entitle defendant charged with murder to bail. *Ex parte Lewellen* (Cr. App.) 229 S. W. 326.

Where accused's theory of an accidental shooting would entitle him to bail and if his theory was rejected there would be an unexplained killing, held, that accused was entitled to bail. *Ex parte Cole* (Cr. App.) 230 S. W. 175.

Where the verdict of the jury upon the former trial fixed the applicant's punishment at less than capital and testimony tending to show a conspiracy between the applicant and deceased's wife to kill deceased was erroneously admitted, the court cannot say that the jury upon another trial would be likely to inflict the death penalty, and the applicant should be admitted to bail. *Ex parte Cates* (Cr. App.) 231 S. W. 396.

#### Art. 8. [8] Excessive bail, fines, etc., forbidden.

**Construction and operation in general.**—Under Const. Bill of Rights, § 13, and this article, forbidding cruel or unusual punishment, the appellate court can review the question whether the punishment is excessive. *Calhoun v. State*, 85 Cr. R. 496, 214 S. W. 335.

**Art. 9. [9] No person shall be twice put in jeopardy for the same offense.**

1. **In general.**—Defendant, though convicted of assault and fined, is liable to exemplary damages in a civil suit; this not being a double punishment for the same offense, in view of Const. art. 16, § 26. *Hartman v. Logan* (Civ. App.) 203 S. W. 61.

The Legislature may single out, of acts made penal by general laws, those having certain characteristics and make all acts having those characteristics more heavily penal than the others. *Ex parte Roy*, 85 Cr. R. 626, 215 S. W. 322.

In an indictment for statutory rape, an allegation that prosecutrix was under 15 years of age was favorable to accused, the statutory age of consent being 18 years, as thereby the pleader placed a greater burden on the state than required by law; and was not objectionable on the ground that an acquittal thereunder on proof that prosecutrix was over 15 would not bar a subsequent prosecution by indictment charging her to be under 18. *Young v. State* (Cr. App.) 230 S. W. 414.

5. **Quashing or dismissing proceedings.**—Where one count of the information charged wife desertion and the other desertion of his minor child, the fact that after introduction of evidence the prosecutor elected to ask for conviction upon the second count did not raise any presumption in favor of the defendant which would relieve him from prosecution under that count or cast doubt on his guilt. *Williams v. State* (Cr. App.) 232 S. W. 507.

6. **Withdrawn count or issues.**—Where an indictment contains two counts, and defendant pleads to the indictment, and after such plea and impanelment of jury a count is dismissed or abandoned by the state, and he is tried on remaining count, as to count so dismissed or abandoned he cannot be again tried. *Mizell v. State*, 83 Cr. R. 305, 203 S. W. 49.

7. **Discharge of jury.**—Where accused entered plea of not guilty before a sworn jury, jeopardy attached, and his plea of jeopardy after jury was discharged, and the case continued and transferred to another county for trial, should have been sustained. *Villareal v. State*, 82 Cr. R. 327, 199 S. W. 642.

8. **Judgment void, set aside, or reversed.**—In a prosecution for aggravated assault in which defendant was convicted only of the included offense of simple assault, it was error to fail to sustain a plea of former conviction thereof before a justice of the peace upon defendant's voluntary appearance before the state began a prosecution and plea of guilty, in the absence of proof of fraud therein, although the justice erroneously assessed a lower fine than allowed by statute. *Beasley v. State*, 84 Cr. R. 486, 208 S. W. 538.

9. **Identity of offenses.**—It is not always true that one transaction will constitute but one offense, but the volition must be identical. *Ex parte Jones*, 83 Cr. R. 12, 200 S. W. 1085.

11. — **Murder.**—Where defendant in shooting a man whom he killed accidentally killed his own wife, of whose murder he was acquitted, he cannot be prosecuted under a separate indictment for the murder of the other, for, since both resulted from the same act, there could be but one offense. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

14. — **Assault with intent to murder.**—Where defendant fired at one person and wounded another, it was within the discretion of the state to charge an assault on both or either of them; but conviction or acquittal in one case would bar prosecution in the other. *Jones v. State* (Cr. App.) 231 S. W. 122.

18. — **Assault.**—Accused's conviction for aggravated assault might be pleaded in bar of a subsequent prosecution for assault with intent to murder, if such higher offense was complete when lower offense was committed. *Munoz v. State*, 81 Cr. R. 629, 197 S. W. 871.

A plea of former conviction of simple assault will not bar a conviction of aggravated assault. *Beasley v. State*, 84 Cr. R. 486, 208 S. W. 538.

A conviction for assault, under an indictment charging that defendant, while unlawfully carrying or having about his person a pistol, did make an assault, etc., is not a bar to a subsequent prosecution for unlawfully carrying a pistol, for the two offenses are entirely distinct, and averments as to unlawfully carrying a pistol might be rejected as surplusage. *Young v. State*, 87 Cr. R. 184, 222 S. W. 1103.

40. — **Drunkenness and disturbing peace.**—Conviction for disturbing the peace by loud, vociferous language, etc., held not to bar conviction for assault by use of gun in an angry and threatening manner. *Clayton v. State*, 81 Cr. R. 385, 197 S. W. 591.

51. — **Violation of liquor laws.**—The conviction of the unlawful sale of intoxicating liquors will not preclude a conviction for unlawful possession of such liquors, and this is so notwithstanding the two prosecutions were based on the same transaction. *Chandler v. State* (Cr. App.) 231 S. W. 108; *Chandler v. State* (Cr. App.) 231 S. W. 109; *Chandler v. State* (Cr. App.) 232 S. W. 337.

That accused was convicted in United States District Court for selling liquor without license does not amount to former "jeopardy" barring prosecution in state court for pursuing business of selling intoxicating liquor in prohibition territory. *Smith v. State*, 82 Cr. R. 283, 199 S. W. 466.

That accused was convicted of individual, unlawful sales of intoxicating liquors in prohibition territory does not bar prosecution for pursuing business of selling such liquors in such territory, and individual sales may be shown to establish latter charge. *Smith v. State*, 82 Cr. R. 283, 199 S. W. 466.

On a plea of former jeopardy the fact that separate indictments charged accused with selling intoxicants to different parties does not necessarily establish separate offenses, where the sale might be made at the same time and jointly to both parties. *Westbrook v. State* (Cr. App.) 225 S. W. 750.

**54. Waiver of defense.**—In the absence of a plea of former jeopardy or former conviction, evidence showing that defendant had been convicted in federal court for the same transaction is immaterial. *Smith v. State*, 81 Cr. R. 446, 196 S. W. 519.

**55. Plea.**—In prosecution for gaming, court properly overruled defendant's plea of former conviction, which was not sworn to as art. 573 requires. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

General rule, requiring pleading of identity of transactions involved in two indictments, would not apply where the two indictments embraced but one act, and the difference was in name only, since the court would judicially know the proceedings on accused's application for habeas corpus under the first indictment, and pleading and proof would be dispensed with. *Ex parte Jones*, 83 Cr. R. 12, 200 S. W. 1085.

Adjudication by the court of matter pleaded as former jeopardy is necessary, where such plea is decided adversely by the court, and not submitted to the jury. *Whitener v. State*, 83 Cr. R. 281, 203 S. W. 48.

**56. Burden of proof.**—A plea of former jeopardy, setting out that after a trial had begun, defendant's plea entered, and evidence heard, the jury were wrongfully dismissed, raised a question of fact, and while the burden was on defendant to show an abuse of the court's discretion in discharging the jury, he had the right to show that the court erred therein, if possible. *Chadwick v. State*, 86 Cr. R. 269, 216 S. W. 397.

**57. Evidence.**—Where one on trial for murder alleged the killing was in self-defense, that while so defending himself he accidentally killed his own wife, of whose murder he was acquitted, evidence that both offenses were the result of a single act and volition was admissible. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357.

The question whether accused, who had been acquitted of murdering his own wife, had killed her accidentally while shooting in self-defense at another, or whether the killings were separate acts, held sufficiently raised by accused's testimony to require submission to the jury. *Id.*

Upon plea of former jeopardy, the record of the former trial does not control to the extent that it is res adjudicata, but parol evidence should be heard to show such identity of the offenses. *Id.*

**Art. 10. [10] Trial by jury shall remain inviolate.**

**In general.**—Much latitude must be given in the administration of the law concerning juvenile crimes, but the authorities cannot be too careful to see that no right is lost to one accused of a violation of the law through ignorance of the legal and constitutional guaranties of trial by jury and to be represented by counsel. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

**Injunction against disorderly house.**—Where an injunction against keeping of a disorderly house by relator had been issued after trial by jury, imprisonment ordered in contempt proceedings without jury trial for violation of the injunction is not illegal, though the act complained of was also a crime: *Ex parte Houston*, 87 Cr. R. 8, 219 S. W. 826.

**Art. 19. [19] Conservators of the peace; style of process.**

*Cited, Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244.

**Art. 20. [20] In what cases accused may be tried, etc., after conviction.**

*See Sterling v. State*, 25 Tex. App. 716, 9 S. W. 45, 8 Am. St. Rep. 452; *Huey v. State* (Cr. App.) 227 S. W. 186.

*Cited, Hooper v. State*, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

**Art. 21. [21] No conviction of felony except by verdict of jury.**

*See Sterling v. State*, 25 Tex. App. 716, 9 S. W. 45, 8 Am. St. Rep. 452; *Huey v. State* (Cr. App.) 227 S. W. 186.

**Art. 22. [22] Defendant may waive any right, except, etc.**

**1/2. Waiver in general.**—Defendant could not be held to have waived any right guaranteed him by the law, where, unless he waived it, he would have met death by lynching at the hands of a mob. *Liggon v. State*, 82 Cr. R. 514, 200 S. W. 530.

**1. Authority of attorney in general.**—In a prosecution for violating the local option law, it was competent for defendant's attorney to waive proof of records showing that the local option law was in effect; such fact not being a criminative fact. *Landers v. State*, 85 Cr. R. 109, 210 S. W. 694; *Sullivan v. State*, 83 Cr. R. 477, 204 S. W. 1169.

One accused of homicide is bound by an agreement of his counsel to the giving of a charge defining malice aforethought after the argument. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

**3/2. Conduct of trial in general.**—One accused of homicide could agree to correction of the charge, and is bound by an agreement of his counsel to the giving of a charge defining malice aforethought after the argument. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

In a prosecution for misdemeanor, the time allowed by statute to prepare for trial, the right to appear by attorney, as well as the right to have illegal evidence excluded, may be waived. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

**4. Right to trial by jury.**—*See Gordon v. State* (Cr. App.) 228 S. W. 1095.

The conviction of infant as a delinquent was not void, though the trial was without a jury, since delinquency is not a "felony" under art. 1197, as amended, and since in cases other than felony a jury may be waived under this article. *Ex parte Gordon* (Cr. App.) 232 S. W. 520; *Mince v. State*, 86 Cr. R. 327, 216 S. W. 834.



Under the Constitution, and in view of this article, the right of trial by jury must be held inviolate. *Crisp v. State*, 87 Cr. R. 137, 220 S. W. 1104.

In a prosecution for murder, where, after jury had been impaneled, and trial had proceeded for some time, one of the jurors was excused with the consent of defendant, and the case thereafter went to its final conclusion with only 11 jurors, such action was fatal error, and necessitates reversal of the conviction; defendant cannot waive the constitutional requirement that a jury consist of 12 men. *Dunn v. State* (Cr. App.) 224 S. W. 893.

5. **Objections to Jurors or jury.**—All of the grounds of challenge for cause stated in the statute, including that of failure of a juror to be a householder or a freeholder, may be waived by the accused. *McGowen v. State* (Cr. App.) 231 S. W. 763.

6. **Separation of jury.**—In a felony case, that defendant could not waive the provision that, when the jury separated, each juror should be accompanied by a court officer. *English v. State*, 28 Tex. App. 500, 13 S. W. 775.

7. **Evidence.**—In trial for homicide, error in admitting defendant's statements on a preliminary investigation in which she was charged or suspected of the crime was not waived by fact that she took stand to explain the testimony or to lessen its consequences. *Reynolds v. State*, 82 Cr. R. 443, 199 S. W. 636.

While counsel cannot agree to waive the introduction of criminative facts, accused may if the waiver is warranted by law. *Sullivan v. State*, 83 Cr. R. 477, 204 S. W. 1169.

**Art. 25. [25] Construction of this Code.**

Cited, *Addison v. State*, 85 Cr. R. 181, 211 S. W. 225.

**Art. 26. [26] When rules of common law shall govern.**

Cited, *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

CHAPTER TWO

THE GENERAL DUTIES OF OFFICERS CHARGED WITH THE ENFORCEMENT OF THE CRIMINAL LAWS

2. DISTRICT AND COUNTY ATTORNEYS

- Art.
- 34. Shall hear complaints, and what the same shall contain.
- 35. Duty when complaint has been made.
- 36. May administer oaths.
- 37. Shall not dismiss case, unless.
- 40a. County attorney of Jefferson county to represent state.

4. PEACE OFFICERS

- Art.
- 44. Duties and powers of peace officers.
- 45. May summon aid when resisted.

5. SHERIFFS

- 48. Shall be a conservator of the peace and arrest offenders.

2. DISTRICT AND COUNTY ATTORNEYS

**Article 34. [34] Shall hear complaints, and what the same shall contain.**

See *Harper v. State*, 82 Cr. R. 149, 198 S. W. 786; *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

**Authority to take complaint.**—For a complaint to be taken before the assistant county attorney, without reference being made to the county attorney, is proper practice. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

**Requisites and sufficiency—Time and place of offense.**—On motion in arrest, complaint charging date of offense as "on or about the third day of June, 1917," held insufficient and not curable by information alleging proper date. *Macumber v. State*, 82 Cr. R. 220, 199 S. W. 298.

A complaint for desertion of wife and child, which alleged that "in said county and state" defendant committed the acts complained of, with no reference elsewhere in the complaint to any county, is insufficient to show that the desertion occurred within the county where the prosecution was instituted. *Freeman v. State* (Cr. App.) 224 S. W. 1087.

**Designation and description of persons.**—In prosecution of a father for neglect to support minor children where complaint begins, "Personally appeared before undersigned authority this affiant who after being duly sworn," etc., and was signed by affiant and properly sworn to before proper officer and attested by proper jurat, defendant's motion to quash it because affiant's name was not given in body of complaint was correctly overruled. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855.

A complaint which charged that defendant, "an adult male, did unlawfully commit aggravated assault in and upon the person of one Mary Loo D., the said \_\_\_\_\_ then and there being a female," sufficiently charged that the person assaulted was a female. *Dickerson v. State*, 85 Cr. R. 378, 212 S. W. 497.

**Art. 35. [35] Duty when complaint has been made.**

See *Terry v. State* (Cr. App.) 24 S. W. 510; *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

**Art. 36. [36] May administer oaths.**

**Jurat.**—Complaint was invalid where jurat recited that complaint was sworn to and subscribed before the county attorney by his deputy (following *Arbetter v. State*, 79 Cr. R. 487, 186 S. W. 769). *Goodman v. State*, 85 Cr. R. 279, 212 S. W. 171.

A complaint reciting: "Sworn to and subscribed by R. A. D. [the affiant], before me, on this 18th day of October, 1918, \_\_\_\_\_, County Attorney of Ellis County, Texas. W. H. F., Assistant County Attorney, Ellis County." etc., sufficiently showed the affidavit was taken by W. H. F., the assistant county attorney. *Dickerson v. State*, 85 Cr. R. 373, 212 S. W. 497.

**Art. 37. [37] Shall not dismiss case, unless.**

See *Camron v. State*, 32 Cr. R. 180, 22 S. W. 682, 40 Am. St. Rep. 763; *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

**In general.**—The state is not bound by the agreement of a prosecuting attorney to dismiss, where the agreement has not been approved by the court. *Surginer v. State*, 36 Cr. R. 438, 217 S. W. 145.

**Art. 40a. County attorney of Jefferson county to represent state.—**

The County Attorney of Jefferson County shall represent the State in all prosecutions pending in said county court of Jefferson County at Law, and shall be entitled to the same fees as now prescribed by law for such prosecutions. [Acts 1915, 34th Leg., ch. 29, § 6; Acts 1919, 36th Leg., ch. 27, § 6.]

## 4. PEACE OFFICERS

**Art. 44. [44] Duties and powers of peace officers.**

See *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443.

**General powers and duties.**—Searching for unknown criminals is not a part of their official duty, and a constable may recover a reward for the arrest and conviction of a criminal in his own precinct; the offer having been made publicly, and having induced the constable to make the search. *Kasling v. Morris*, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

**Art. 45. [45] May summon aid when resisted.**

See *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443.

## 5. SHERIFFS

**Art. 48. [48] Shall be conservator of the peace and arrest offenders.**

See *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443.

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**TITLE 2**
**OF THE JURISDICTION OF COURTS IN CRIMINAL ACTIONS**

Chap.	Chap.
1. What courts have criminal jurisdiction.	3a. Criminal district courts.
2. Of the court of criminal appeals [and the supreme court].	3b. Criminal court of Port Arthur.
3. Of the district courts.	4. Of county courts.
	5. Of justices' and other inferior courts.

**CHAPTER ONE****WHAT COURTS HAVE CRIMINAL JURISDICTION****Article 63. [63] What courts have criminal jurisdiction.**

**Jurisdiction over persons.**—A soldier of the United States who murders a citizen of the state has no right to removal of a prosecution from a state court to a federal court under Act Cong. Aug. 29, 1916, § 3, art. 117 (U. S. Comp. St. § 2038a[117]), where it was not contended that the act was done under color of his office or status. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

Prior to passage of Act Cong. Aug. 29, 1916, the jurisdiction of the military tribunals over offenses committed by soldiers of the United States army was not exclusive. *Id.*

Although under Act Cong. Aug. 29, 1916, military authorities have the prior right to try a soldier who murdered a citizen, the soldier who has committed the crime cannot object to being tried by a state court, where the military authorities have not asserted any right. *Id.*

**Jurisdiction over subject matter.**—Courts of this state have no jurisdiction to punish Mexican soldiers killing a United States soldier incidental to a battle in Texas between Mexican and United States troops during a state of war between this country and Mexico. *Arce v. State*, 83 Cr. R. 292, 202 S. W. 951, L. R. A. 1918E, 358.

**Concurrent jurisdiction.**—If justice court first acquired jurisdiction of prosecution for gaming, justice should have retained jurisdiction and disposed of case. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

## CHAPTER TWO

### OF THE COURT OF CRIMINAL APPEALS [AND THE SUPREME COURT]

Art.	Art.
68. Appellate jurisdiction described.	81. Reporter to return opinions.
69. Power to issue writs.	87. Article 86 construed.
70. Power to ascertain matters of fact.	

#### Article 68. [68] Appellate jurisdiction.

**Jurisdiction in general.**—Court of Criminal Appeals has no jurisdiction to determine restraint and custody of minor under order of probate or district court; all of such matters being civil and within exclusive jurisdiction of civil courts. *Miller v. State*, 83 Cr. R. 495, 200 S. W. 389.

A contempt proceeding, criminal in its nature, cannot be reviewed by the Court of Civil Appeals. *Beverly v. Roberts* (Civ. App.) 215 S. W. 975.

**Stare decisis.**—As between the line of decisions of the court which the court believes to announce the law correctly and another line of decisions which appear to arrive at erroneous conclusions, it is court's duty to announce the error when its attention is called thereto, and to affirm its views of what the law really is. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

On the question of sufficiency of instructions as to corroboration of testimony of a seduced female, former opinions of the Court of Criminal Appeals, although valuable in their bearing on corroboration, were not controlling authority, where the question decided in such cases was not one relating to instructions. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

#### Art. 69. [69] Power to issue writs.

1. **Habeas corpus—power in general.**—Primarily the jurisdiction of Court of Criminal Appeals is appellate and generally where complete relief against any supposed error will be afforded by appeal the writ of habeas corpus is not available. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Under Const. art. 5, § 5, and arts. 69, 160, 174, 175, 181-183, Court of Criminal Appeals has jurisdiction to issue writ of habeas corpus in any case where person is illegally restrained of his liberty, and under Const. art. 5, § 3, and Rev. St. art. 1529, Supreme Court has concurrent jurisdiction where restraint grows out of civil case. *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

Where one is held in contempt proceedings on verbal order, and obtains writ of habeas corpus from Court of Criminal Appeals, court making order is without power to correct it, or to oust jurisdiction of Court of Criminal Appeals, which attaches by issuance of writ, by causing commitment to be issued. *Id.*

Where application for habeas corpus should have been presented to Supreme Court, restraint growing out of civil cause, but when application for writ was presented to Court of Criminal Appeals it did not contain copy of order or process against relator, but stated it could not be obtained, in compliance with art. 174, writ having been issued, it is duty of Court of Criminal Appeals to decide question. *Id.*

Generally speaking, Court of Criminal Appeals will not issue original writs of habeas corpus in cases where other courts have jurisdiction to do so. *Id.*

2. — **Grounds for writ and allowance thereof.**—Where accused was indicted for murder and was granted bail on application for habeas corpus, and a second indictment for robbery with a deadly weapon was based upon the same facts, failure to plead identity of the transactions cannot be supplied by second application for habeas corpus in such court, and an original application in the appellate court, not containing the facts made requisite to a valid second application by arts. 185 and 219. *Ex parte Jones*, 83 Cr. R. 12, 200 S. W. 1085.

3. — **Necessity of application to lower courts.**—Original writ of habeas corpus cannot be granted to secure release of woman committed to city farm because afflicted with syphilis on showing that both positive and negative results have come from various tests, since application for writ of habeas corpus to local courts would furnish the remedy. *Ex parte Brooks*, 85 Cr. R. 397, 212 S. W. 956.

5. — **Delinquent children.**—The Court of Criminal Appeals will not take jurisdiction of and inquire into the detention of a juvenile under a judgment by means of a writ of habeas corpus originally issued in such court, unless the judgment is absolutely void, but will relegate relator to his statutory remedy by appeal. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592; *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

6. — **Contempt proceedings.**—In contempt proceeding growing out of alleged failure to observe order in civil cause, Court of Criminal Appeals will refuse to grant

writ of habeas corpus, relegating party to his remedy in Supreme Court. *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

Relator, adjudged guilty of contempt in controversy over custody of dependent child, under Civ. St. arts. 2184-2190, a civil proceeding, will not be granted habeas corpus by Court of Criminal Appeals, but relegated to civil courts in view of Const. art. 5, §§ 3, 5, and Rev. St. art. 1529. *Ex parte Little*, 83 Cr. R. 375, 203 S. W. 766.

Under Rev. St. art. 1529, original application for writ of habeas corpus to obtain release from restraint under order of district court adjudging relator in contempt for refusing to obey an injunction issued in a divorce proceeding, pending in the court, to which relation and his wife were parties, should have been addressed to the Supreme Court, not to the Court of Criminal Appeals. *Ex parte Gregory*, 85 Cr. R. 115, 210 S. W. 204.

Application for habeas corpus writ in cases of restraint for violation of an injunction should be made to the Supreme Court. *Ex parte Houston*, 87 Cr. R. 8, 219 S. W. 826.

Where relator violated a restraining order, and was imprisoned for contempt, the Court of Criminal Appeals will not entertain an application for a writ of habeas corpus, for Rev. St. art. 1529, gives the Supreme Court authority to entertain applications for writs of habeas corpus in cases in which the restraint grows out of a civil case. *Ex parte Albritton*, 87 Cr. R. 453, 222 S. W. 561.

9. **Prohibition.**—Where application for writ of prohibition to prevent interference with enforcement of statute was granted and temporary writ issued, but before the hearing on the permanent writ the statute had been declared void, the application would be dismissed. *State v. Humphries*, 81 Cr. R. 322, 195 S. W. 194.

**Art. 70. [70] Power to ascertain facts.**

**In general.**—Where papers are in record, and were not presented to clerk for filing within proper time, but after time had elapsed in which they should have been filed, fact can be shown. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

Motion to abate by Assistant Attorney General and county attorney supported by affidavit of county attorney and clerk of district court that appellant is dead will be granted. *Burnett v. State*, 83 Cr. R. 511, 204 S. W. 328.

**Art. 81. [81] Reporter to return opinions.**

See *Hutcherson v. State*, 33 Cr. R. 67, 24 S. W. 908.

**Art. 87. [86] Article 86 construed.**

**Amount of fine.**—Under express provision of this article, appeal to Court of Criminal Appeals will not lie in case appealed from inferior court to the county court, where a fine of less than \$100 was there imposed. *Perkins v. State*, 82 Cr. R. 118, 198 S. W. 302.

**CHAPTER THREE**

**OF THE DISTRICT COURTS**

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| <p>Art.<br/>93. Special terms of district court may be held.</p> | <p>Art.<br/>95. Grand jury when selected shall discharge its duties as at a regular meeting.</p> |
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**Article 93. Special terms of district court may be held.**

**Special term in general.**—A judge may temporarily adjourn a session of court in one county and call a special term in another if it becomes advisable. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

**Art. 95. Grand jury when selected shall discharge its duties as at a regular meeting.**

**Validity of indictment.**—Indictment for murder, found at special term of court called by judge without giving 30 days' notice prior to time court was held, was valid. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

**CHAPTER THREE A**

**CRIMINAL DISTRICT COURTS**

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| <p><b>DALLAS COUNTY</b><br/>Art.<br/>97ee. Practice in.</p> <p><b>HARRIS COUNTY</b><br/>97u. Criminal district attorney of Harris county; assistants and stenographer; salaries; oath; removal; powers of assistants; fees.</p> | <p><b>TRAVIS AND WILLIAMSON COUNTIES</b><br/>Art.<br/>97x. Terms.</p> <p><b>NUECES, KLEBERG, KENEDY, WILLACY, AND CAMERON COUNTIES</b><br/>97½. Court created; jurisdiction; appeals.<br/>97½a. Jurisdiction of regular district courts diminished.</p> |
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Art.  
 97½b. Election of judge; qualifications; powers and duties; exchange, disqualification, etc.  
 97½c. Sheriff and clerk; district attorney; fees and salaries.  
 97½d. Seal.  
 97½e. Terms of court.  
 97½f. Procedure.  
 97½g. Grand and petit juries.  
 97½h. Transfer of causes.  
 97½i. Process in divorce and tax suits; in criminal cases; bonds and recognizances.

TARRANT COUNTY

97½ii. Court created; jurisdiction.  
 97½iii. Criminal judicial district created.  
 97½r. Criminal district attorney; election; term of office; qualifications; oath; bond.  
 97½rr. Same; powers and duties.  
 97½s. Same; compensation.  
 97½ss. Same; assistants.  
 97½t. Same; assistants; oaths, etc.  
 97½tt. Same; powers; fees.  
 97½u. Same; election.

BOWIE COUNTY

Art.  
 97¾. Court created; jurisdiction.  
 97¾a. Jurisdiction; transfer of causes.  
 97¾aa. Jurisdiction of bail bonds, etc.  
 97¾b. Seal of court.  
 97¾bb. Procedure.  
 97¾c. Jury laws to apply.  
 97¾cc. Rules of criminal procedure.  
 97¾d. Terms of court; grand jury.  
 97¾e. Continuance of term.  
 97¾ee. District attorney and county attorney.  
 97¾f. Sheriff and clerk.  
 97¾ff. Same powers as district court; rules.  
 97¾g. Appeal and error.  
 97¾gg. Jurisdiction of district court.  
 97¾h. Judge; election; term; qualifications; salary; powers; appointment.  
 97¾hh. Exchange of judges; disqualification or absence.  
 97¾i. Validation of process heretofore issued.  
 97¾ii. Court abolished.  
 97¾i2. Transfer of causes.  
 97¾i3. Repealed statutes reinstated.  
 97¾i4. When effective.

DALLAS COUNTY

Article 97ee. Practice in.

In general.—Despite provision that practice shall be same as on trial of other cases over which criminal courts of county have jurisdiction, under arts. 918, 919, appellant from conviction of misdemeanor in such county should have set out in recognizance penalty assessed, instead of following form provided in felony convictions by art. 903, and his appeal will be dismissed. *Lawler v. State*, 86 Cr. R. 534, 217 S. W. 383.

HARRIS COUNTY

Art. 97u. Criminal district attorney of Harris County; assistants and stenographer; salaries; oath; removal; powers of assistants; fees.

Validity.—Const. art. 5, § 1, specifically conferring on the Legislature power to enact a special law creating and providing for the organization of the criminal district court of Harris county, gave the Legislature power to include everything necessary to be done to such end, including provision for compensation to those who were to constitute the court, as the district attorney; the inhibition of Const. art. 2, § 56, against special laws regulating the affairs of counties, not applying. *Harris County v. Crooker* (Civ. App.) 224 S. W. 792.

Negative determination by Legislature, that the statute, so far as undertaking to fix the compensation of the district attorney for the criminal district court for Harris county, was about a matter to which a general law could have been made applicable, held conclusive of the point, so that the statute was not violative of Const. art. 3, § 56, prohibiting any local or special law where a general law can be made applicable. *Id.*

TRAVIS AND WILLIAMSON COUNTIES

Art. 97x. Terms.

Extension of term.—The judge of court at the June term, 1917, on July 21st entered an order, reciting a necessity, extending the term to July 28th, and the grand jury continued in session until July 27th when the indictment was found against petitioner. Held, that the indictment was not void because not found during or returned in a court in session. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

NUECES, KLEBERG, KENEDY, WILLACY, AND CAMERON COUNTIES

Art. 97½. Court created; jurisdiction; appeals.—That there is hereby created and established for the counties of Nueces, Kleberg, Kennedy, Willacy and Cameron a Criminal District Court, which shall have and exercise all of the criminal jurisdiction now vested in and exercised by the District Court of the Twenty-eighth Judicial District of Texas and said Criminal District Court shall try and determine all causes for divorce between husband and wife and adjudicate property rights in connection therewith in said counties, and try and determine all causes for the collection of delinquent taxes and the enforcement of liens for the

collection of same. All appeals from the judgments of said courts shall be to the Court of Criminal Appeals, except appeals in divorce cases and suits for the collection of delinquent taxes, which shall be to the Court of Civil Appeals under the same rules and regulations as now or may hereafter be provided by law for the appeals in criminal cases from district courts. [Acts 1916 (1917) 35th Leg., ch. 46, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 1.]

**Explanatory.**—The act amends ch. 46, Acts 35th Leg., Regular Session. Took effect August 17, 1921.

**In general.**—As Nueces county court was expressly given jurisdiction of all misdemeanors by Acts 23d Leg. c. 21, this act did not divest county court of criminal jurisdiction, in view of Const. 1876, art. 5, §§ 1, 16, as amended September 22, 1891, and section 22. *Belado v. State*, 83 Cr. R. 384, 203 S. W. 773.

**Art. 97<sup>1</sup>/<sub>2</sub>a. Jurisdiction of regular district courts diminished.**—From and after the time when this Act shall take effect, the District Court of the Twenty-eighth Judicial District composed of the counties of Nueces, Kleberg, Kenedy, Willacy and Cameron shall cease to have and exercise any criminal jurisdiction in either of said counties and shall cease to have and exercise any jurisdiction of divorce cases in either of said counties, and shall cease to have and exercise any jurisdiction of suits for the collection of any delinquent taxes or the enforcement of liens for same; provided, however, that if there shall be any criminal case on trial in the Twenty-eighth Judicial District Court when this Act shall go into effect, such District Court shall retain jurisdiction of such case until such trial shall be concluded and until appeal therein shall be perfected if an appeal shall be made therein and provided further that nothing in this Act shall affect the jurisdiction of the Twenty-eighth District Court to pronounce sentence in any criminal case tried in such court before this Act takes effect, or which shall be on trial when this Act goes into effect. [Acts 1916 (1917) 35th Leg., ch. 46, § 2; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 2.]

**Art. 97<sup>1</sup>/<sub>2</sub>b. Election of judge; qualifications; powers and duties; exchange; disqualification, etc.**—The Judge of said Criminal District Court for the counties of Nueces, Kleberg, Kenedy, Willacy and Cameron shall be elected by the qualified voters of said counties for a term of four years, and shall hold his office until his successor shall have been duly elected and qualified. He shall possess the same qualifications as are required of the Judge of the District Court, and shall receive the same salary as is now or may hereafter be paid to district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in or exercised by district judges in criminal cases. The Judge of said court may exchange with any district judge, as provided by law in cases of district judges; and in case of disqualification or absence of the judge, a special judge may be selected or appointed as provided by law in cases of district judges; provided that the Governor, by and with the consent of the Senate, shall, immediately upon this Act taking effect, appoint a judge of said court, who shall hold the office until the next general election after the passage of this Act and until his successor shall have been elected and qualified. [Acts 1916 (1917) 35th Leg., ch. 46, § 3; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 3.]

**Art. 97<sup>1</sup>/<sub>2</sub>c. Sheriff and clerk; district attorney; fees and salaries.**—The sheriff and clerk of the District Court of Nueces County, as now provided by law, shall be the sheriff and clerk, respectively, of said Criminal District Court of Nueces County; and the sheriff and clerk of the District Court of Kleberg County, as now provided by law, shall be the sheriff and clerk, respectively, of the Criminal District Court of Kleberg County; and the sheriff and clerk of the District Court of

Kenedy County, as now provided by law, shall be sheriff and clerk, respectively, of the Criminal District Court of Kenedy County; and the sheriff and clerk of the District Court of Willacy County, as now provided by law, shall be the sheriff and clerk, respectively, of the Criminal District Court of Willacy County; and the sheriff and clerk of the District Court of Cameron County, as now provided by law, shall be sheriff and clerk, respectively, of the Criminal District Court of Cameron County; and the District Attorney of the Twenty-eighth Judicial District elected and now acting for said district, shall be District Attorney for said Criminal District Court in the counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, and shall hold his office until the time for which he has been elected District Attorney for the Twenty-eighth Judicial District of Texas shall expire, and until his successor is duly elected and qualified; and there shall be elected for two years, beginning with the next general election after this Act takes effect, a District Attorney for said Criminal District Court, whose power and duties shall be the same as other district attorneys; and said clerk, sheriff and District Attorney shall respectively, receive such fees and salaries as are now or may hereafter be prescribed by law for such officers in the district courts of the State of Texas, to be paid in the same manner. [Acts 1916 (1917) 35th Leg., ch. 46, § 4; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 4.]

**Art. 97½d. Seal.**—Said Criminal District Court shall have a seal in like design as the seal now prescribed by law for district courts, except for Nueces County, the words "Criminal District Court of Nueces County, Texas" shall be engraved around the margin thereof; and for Kleberg County, the words, "Criminal District Court of Kleberg County, Texas" shall be engraved around the margin thereof; and for Kenedy County, the words "Criminal District Court of Kenedy County, Texas" shall be engraved around the margin thereof; and for Willacy County, the words "Criminal District Court of Willacy County, Texas" shall be engraved around the margin thereof; and for Cameron County, the words "Criminal District Court of Cameron County, Texas" shall be engraved around the margin thereof. [Acts 1916 (1917) 35th Leg., ch. 46, § 5; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 5.]

**Art. 97½e. Terms of court.**—The terms of said Criminal District Court shall be held in said district each year as follows:

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

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

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

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

In the county of Nueces, on the twelfth Monday after the first Monday in January of each year, and may continue in session ten weeks; and on the twelfth Monday after the first Monday in August of each year, and may continue in session ten weeks. [Acts 1916 (1917) 35th Leg., ch. 46, § 6; Acts 1917, 35th Leg., ch. 82, § 1; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 6.]

**Art. 97½f. Procedure.**—The trials and proceedings in said Criminal District Court shall be conducted in criminal cases according to the laws governing pleadings, practice and proceedings in criminal cases in the district courts. [Acts 1916 (1917) 35th Leg., ch. 46, § 7; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 7.]

**Art. 97½g. Grand and petit juries.**—A grand jury shall be drawn and selected for each term of said Criminal District Court held in Nueces, Kleberg, Kenedy, Willacy and Cameron counties in the manner now provided by law, and all grand and petit jurors for criminal cases drawn and selected for the Twenty-eighth Judicial District Court under existing laws at the time this Act takes effect, shall be as valid as if no change had been made, and the persons constituting such juries shall be required to appear and serve at the next ensuing term of this court as fixed by this Act, and their acts shall be as valid as if they had served as jurors in the court for which they were originally drawn, and all laws regulating the selection summoning and impaneling of grand and petit jurors in the district court shall govern said criminal district court, and jury commissioners shall be appointed for drawing juries for said court as is now or may hereafter be required by law in district courts, and under like rules and regulations. [Acts 1916 (1917) 35th Leg., ch. 46, § 8; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 8.]

**Art. 97½h. Transfer of causes.**—Immediately upon the taking effect of this Act, the criminal cases and tax suits and divorce cases now pending in the Twenty-eighth Judicial District Court in the respective counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, together with all records and papers relating thereto, shall be transferred to said Criminal District Court in each respective county, except as otherwise provided in Section 2 [Art. 97½a] hereof. [Acts 1916 (1917) 35th Leg., ch. 46, § 9; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 9.]

**Art. 97½i. Process in divorce and tax suits; in criminal cases; bonds and recognizances.**—All process and writs heretofore issued or served in divorce cases and suits for the collection of delinquent taxes pending in the Twenty-eighth Judicial District Court in either Nueces, Kleberg, Kenedy, Willacy or Cameron counties, returnable to the Twenty-eighth Judicial District Court, and all process and writs in criminal cases pending in said courts heretofore issued or served, returnable to said Twenty-eighth Judicial District Court, shall be considered returnable to the Criminal District Court herein created, at the time as hereinafter prescribed, and all such process and writs are hereby legalized and validated as if the same had been made returnable to said Criminal District Court of Nueces, Kleberg, Kenedy, Willacy and Cameron counties, hereby created, and at the time herein prescribed, and all bail bonds, bonds and recognizances in criminal cases pending in said Twenty-eighth Judicial District Courts, when this Act takes effect, binding any person or persons to appear in said court in either of the counties named in this Act, shall have the effect to require such person or persons to appear at the first term of said Criminal District Court held respectively in Nueces, Kleberg, Kenedy, Willacy and Cameron counties, where said bail bond, bond or recognizances have been given and taken in the Twenty-eighth Judicial District Court, after the taking effect of the Act, and there to remain in said court in said respective county from day to day and from term to term until fully discharged, under the same penalties as provided by law in such cases, and to the same effect as if the case or matter was still pending in the District Court in which said bail bond, bond or recognizance was originally given and taken, and all said bail bonds, bonds and recognizances shall have the same validity and be as valid and binding as if this Act had not been passed, and at the



first term of said Criminal District, Court held in the counties where said bail bond, bond or recognizance has been given and taken in the District Court of the Twenty-eighth Judicial District in said counties, respectively. [Acts 1916 (1917) 35th Leg., ch. 46, § 10; Acts 1921, 37th Leg. 1st C. S., ch. 8, § 10.]

Sec. 11 repeals all laws in conflict.

#### TARRANT COUNTY

##### Art. 97 $\frac{1}{2}$ ii. Court created; jurisdiction.

**Validity.**—Const. art. 5, § 1, providing the Legislature may establish such other courts as it may deem necessary, prescribe their jurisdictions and organizations, and conform thereto the jurisdictions of the district and other inferior courts, authorizes the creation of criminal district courts and the confirmation of the jurisdiction of the other district courts having jurisdiction in the same territory to that of such courts, and to confer on such courts exclusive jurisdiction of criminal matters within such territory. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

**Art. 97 $\frac{1}{2}$ iii. Criminal judicial district created.**—There is hereby created and established a Criminal Judicial District of Tarrant County, Texas, to be composed of the County of Tarrant, Texas, alone and which shall be co-extensive with the territorial boundaries and limits of said Tarrant County, and the Criminal District Court of Tarrant County, Texas, shall have and exercise all of the criminal jurisdiction of and for said Criminal District of Tarrant County, Texas, which is now conferred by law on said Criminal District Court. [Acts 1919, 36th Leg. 2d C. S., ch. 80, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

**Art. 97 $\frac{1}{2}$ r. Criminal district attorney; election; term of office; qualifications; oath; bond.**—There shall be elected by the qualified electors of the Criminal Judicial District of Tarrant County, Texas, an Attorney for said District who shall be styled the "Criminal District Attorney of Tarrant County" and who shall hold his office for a period of two years and until his successor is elected and qualified. The said Criminal District Attorney shall possess all the qualifications and take the oath and give the bond required by the Constitution and laws of this State, of other District Attorneys. [Id., § 2.]

**Art. 97 $\frac{1}{2}$ rr. Same; powers and duties.**—It shall be the duty of said Criminal District Attorney or his assistants as herein provided to be in attendance upon each term and all sessions of the Criminal District Court of Tarrant County, and of all sessions and terms of the County Court of Tarrant County, Texas, held for the transaction of criminal business, and to represent the State in all matters pending before said Courts, and to represent Tarrant County in all matters pending before such Courts, the Commissioners' Court of Tarrant County and Justice Courts and any other courts where said Tarrant County has pending business of any kind or matter of concern or interest. The Criminal District Attorney of Tarrant County shall have and exercise in addition to the specific powers given and the duties imposed upon him by this Act, all such powers, duties and privileges within such criminal district of Tarrant County as are by law now conferred, or which may hereafter be conferred upon District and County Attorneys in the various Counties and Judicial Districts of this State. [Id., § 3.]

**Art. 97 $\frac{1}{2}$ s. Same; compensation.**—Said Criminal District Attorney of Tarrant County shall be commissioned by the Governor and shall receive as salary and compensation the following and no more:

A salary of Five Hundred (\$500.00) Dollars from the State of Texas, as provided in the Constitution of the State of Texas, for the salary of District Attorney, and so much of the fees, commissions and perquisites earned by said office to make up the total compensation to the

sum of Six Thousand (\$6,000) Dollars; provided, that the amount of such salary, fees and perquisites to be received and retained by him shall never exceed the sum of Six Thousand (\$6,000) Dollars in any one year; and, provided, further, that all salaries, fees, commissions and perquisites so earned and received by such office in excess of \$6,000 during each and every fiscal year shall be paid into the County Treasury of said county in accordance with the terms and provisions of the maximum fee bill, except as to such portion of such excess as shall be used and expended in the payment of salaries to deputies, as hereinafter provided. [Id., § 4.]

**Art. 97½ss. Same; assistants.**—The Criminal District Attorney of Tarrant County, for the purpose of conducting the affairs of such office, shall be and is hereby authorized, by and with the written consent of the county judge of said county, to appoint such assistant district attorneys who shall have all the qualifications of the criminal district attorney, as are necessary to perform the duties and affairs of such office, not to exceed six in number, two of whom shall receive a salary not to exceed three thousand dollars each per annum; two of whom shall receive a salary not to exceed twenty-five hundred dollars each per annum; one of whom shall receive a salary not to exceed twenty-one hundred dollars per annum; one of whom shall receive a salary not to exceed fifteen hundred dollars per annum. Said criminal district attorney shall also be authorized, with the consent of the county judge of said county, to appoint, not to exceed two assistants who shall not be required to possess the qualifications prescribed by law for criminal district attorneys, who shall perform such duties as may be assigned to them by said criminal district attorney, and who shall receive as their compensation a salary not to exceed twenty-one hundred dollars each per annum. All salaries above mentioned shall be payable monthly, and the said salaries to be paid only out of the fees of office collected by said district attorney, said fees of office to be the same as are now allowed and permitted by law to be paid to the county and district attorneys of this State. The fixing of the amount of salaries to be paid by said criminal district attorney to said assistants shall be fixed and regulated by the commissioners court of said county by an order passed at a regular session of said court and duly spread upon the minutes of said court; provided that the two assistants to the district attorney who are not required to have the qualifications of a criminal district attorney shall, so far as Tarrant County is concerned, be in lieu of the assistants of like character provided for in any statutes of this State. [Acts 1919, 36th Leg. 2d C. S., ch. 80, § 5; Acts 1920, 36th Leg. 3d C. S., ch. 6, § 1 (§ 5).]

Took effect 90 days after adjournment which occurred June 18, 1920.

**Art. 97½t. Same; assistants; oath, etc.**—The Assistant Criminal District Attorneys above provided for when so appointed shall take the oath of office as such, and be authorized to represent the State before the Criminal District Court of Tarrant County in which the Criminal District Attorney of Tarrant County is authorized by this Act to represent the State, or to represent Tarrant County. Each of said Assistant Criminal District Attorneys shall be authorized to administer oaths, file information, examine witnesses before the Grand Jury, and generally to perform any duty devolving upon the Criminal District Attorney of Tarrant County, and to exercise any power conferred by law upon such Criminal District Attorney when by him so authorized and directed. [Acts 1919, 36th Leg. 2d C. S., ch. 80, § 6.]

**Art. 97½tt. Same; powers; fees.**—Said Criminal District Attorney of Tarrant County shall be clothed with all the powers and vested with all the rights and privileges conferred upon County Attorneys and

District Attorneys of this state, and shall receive no salary or compensation or perquisites or fees of any character save those provided in Section 4 of this Act [Art. 97 $\frac{1}{2}$ s]. All fees or commissions from all sources, including fees and commissions in all criminal and civil cases, and for the prosecution of all tax suits, and from every other source, shall be turned over to the County Treasurer of said County by the said District Attorney, subject only to the payment of the salary of himself and his deputies, as provided in this Act. [Id., § 7.]

**Art. 97 $\frac{1}{2}$ u. Same; election.**—The Criminal District Attorney of Tarrant County, as provided for in this Act shall be elected by the qualified voters of the Criminal Judicial District of Tarrant County at the next general election, but it is provided and directed that the present County Attorney of Tarrant County shall continue in office and assume the duties and be known as the “Criminal District Attorney of Tarrant County” and shall proceed to organize and arrange the affairs of the office of the Criminal District Attorney of Tarrant County, and appoint Assistants as provided for in this Act, and receive the compensation and salary provided for in this Act for such office until the next general election, and until his successor shall be elected and qualified. Provided this Act shall not be construed as, creating any Court additional to those now existing in Tarrant County. [Id., § 8.]

Sec. 9 repeals all conflicting laws.

#### BOWIE COUNTY

**Art. 97 $\frac{3}{4}$ . Court created; jurisdiction.**—There is hereby created for Bowie County a court called the “Criminal District Court of Bowie County,” which shall sit and hold its sessions at the county seat of said county, or in the city of Texarkana, Texas, in said county. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 1.]

**Explanatory.**—Took effect 90 days after July 22, 1919, date of adjournment. The court is abolished by Acts 1921, 37th Leg. 1st C. S., ch. 9, § 1, post, art. 97 $\frac{3}{4}$ il, and the acts creating it are repealed, the repealing act to take effect December 31, 1922.

**Construction and operation in general.**—The Criminal district court of Bowie county, created by this act, which has the officers and procedure of a district court and the jurisdiction of the district court over felonies given by Const. art. 5, § 8, and also the county court’s jurisdiction over misdemeanors, which under the Constitution could be conferred on the district courts by the Legislature, is, in view of Const. art. 5, § 1, as amended in 1891, authorizing the creation of other courts, and section 16, as amended, relating to jurisdiction of county courts where there is a criminal district court, to be classified as a district court within the meaning of the Constitution. *Rochelle v. State* (Cr. App.) 232 S. W. 838.

**Art. 97 $\frac{3}{4}$ a. Jurisdiction; transfer of causes.**—Said court is given original jurisdiction over all offenses of the grade of a felony, and over all offenses involving official misconduct, and over all offenses of the grade of a misdemeanor, and where such misdemeanor is committed inside the corporate limits of the city of Texarkana, Texas, in said county, its jurisdiction shall be concurrent with the jurisdiction of the corporation court of the city of Texarkana, Texas, and in all misdemeanor cases where the maximum punishment does not exceed a fine of two hundred (\$200.00) dollars, its jurisdiction shall be concurrent with the justices courts and the corporation courts in said county, and it is given appellate jurisdiction over all misdemeanors tried in the justices courts and in the corporation courts in said county, except cases tried in the corporation court of the City of Texarkana, Texas, and where the judgment in said court on appeal from the lower courts named above does not exceed a fine of one hundred (\$100.00) dollars, such judgment shall be final; said court is also given original jurisdiction over dependent and neglected children, and over delinquent children and over all juvenile cases and is made a juvenile court. The jurisdiction of the district court

of Bowie County and the jurisdiction of the county court of Bowie County, and the corporation court of the City of Texarkana and the justices courts of Bowie County and other inferior courts of Bowie County is hereby changed and made to conform to the jurisdiction of the criminal district court of Bowie County, as herein defined. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 2; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 2.]

**Pending causes.**—Pending appeal the district court was powerless to transfer cause to criminal district court, in view of art. 916. Walker v. State, 85 Cr. R. 482, 214 S. W. 331.

Before this act went into effect, the court was not in existence in such way as to authorize transferring causes to it for adjudication. Id.

Where defendant was indicted for murder on June 17th and on June 26th was arrested and released by the sheriff on bail bond, held that, where the indictment was found by the grand jury of the district court of Bowie county, the criminal district court of Bowie county, created by this act, which went into effect June 26th, is without jurisdiction to adjudge a forfeiture of the bond taken by the sheriff without authority; the criminal district court having no incumbent for more than two months after the act went into effect. Morrow v. State, 86 Cr. R. 354, 216 S. W. 1100.

**Jurisdiction.**—Criminal district court of Bowie county has not original jurisdiction of the prosecution of a misdemeanor of which the county court did not have exclusive original jurisdiction prior to the creation of the criminal district court. Eaton v. State, 85 Cr. R. 610, 215 S. W. 99.

The criminal district court has not original jurisdiction of prosecution for selling adulterated milk, justice court having jurisdiction thereof in view of Pen. Code, arts. 698-716, prescribing punishment of fine of not more than \$200. Eaton v. State, 85 Cr. R. 612, 215 S. W. 100.

Criminal district court for Bowie county, having jurisdiction to try all misdemeanors of which the county court previous to creation of criminal district court had exclusive original jurisdiction, had no jurisdiction over prosecution for simple assault; county court's jurisdiction to try simple assault cases having been concurrent with the justice court. Durst v. State, 85 Cr. R. 609, 215 S. W. 221.

**Art. 97 $\frac{3}{4}$ aa. Jurisdiction over bail bonds, etc.**—Said court shall have jurisdiction over all bail bonds and recognizances taken in proceedings had before said court, or that may be returned to said court from other courts, and may enter forfeitures thereof and final judgments, and enforce the collection of the same by proper process in the same manner as provided by law in district courts. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 3; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 3.]

**Art. 97 $\frac{3}{4}$ b. Seal of court.**—The said criminal district court of Bowie County shall have a seal similar to the seal of the district court with the words "Criminal District Court of Bowie County" engraved thereon and an impression of which seal shall be attached to all writs and other processes, except subpoenas, issuing from said court, and shall be used in the authentication of the official acts of the clerk of said Court. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 4; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 4.]

**Art. 97 $\frac{3}{4}$ bb. Procedure.**—The practice in said court shall be conducted according to the laws governing the practice in the district court, and the rules of pleading and evidence in the district court shall govern in so far as the same may be applicable. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 5; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 5.]

**Art. 97 $\frac{3}{4}$ c. Jury laws to apply.**—All laws regulating the selection, summoning and impaneling of grand and petit jurors in the district court shall govern and apply in the criminal district court in so far as the same may be applicable. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 6; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 6.]

**Art. 97 $\frac{3}{4}$ cc. Rules of criminal procedure.**—All rules of criminal procedure governing the district and county courts shall apply to and govern said criminal district court. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 7; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 7.]

**Validity of original section.**—Since the criminal district court, created by Acts 35th Leg. (4th Called Sess.) c. 28, was in effect a district court within the Constitution, the provision of that act authorizing a jury of 6 in a trial for misdemeanors is contrary

to the constitutional requirement that the jury in a district court shall be composed of 12 men. *Rochelle v. State* (Cr. App.) 232 S. W. 838; *Shipp v. State* (Cr. App.) 222 S. W. 840; *Bennett v. State* (Cr. App.) 232 S. W. 841.

**Art. 97<sup>3</sup>/<sub>4</sub>d. Terms of court; grand jury.**—Said court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday of April, one term beginning the first Monday of July, one term beginning the first Monday of October, one term beginning the first Monday of January. Each term shall continue until the term ends by operation of law or the business is disposed of. The grand jury shall be impaneled in said court for each term thereof, unless otherwise directed by the judge of said court. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 9; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 9.]

**Art. 97<sup>3</sup>/<sub>4</sub>e. Continuance of term.**—Whenever the criminal district court of Bowie County shall be engaged in the trial of any cause when the time for expiration of the terms of said court as fixed by law shall arrive, the judge presiding shall have the power, and may, if he deems it expedient, continue the term of said court until the conclusion of such pending trial; in such case the extension of such term shall be shown on the minutes of the court before they are signed. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 10; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 10.]

**Art. 97<sup>3</sup>/<sub>4</sub>ee. District attorney and county attorney.**—The district attorney for the fifth judicial district of Texas, which includes Bowie County, shall represent the pleas of the State in all felony cases and such other duties as are now, or may hereafter be imposed by law upon district attorneys in this state, in said criminal district court hereby created, and shall receive such fees and compensation therefor as are now, or may hereafter be prescribed by law for such officers in the district courts of this state, to be paid in the same manner and out of the same funds. The county attorney of Bowie County, Texas, shall represent the pleas of the state in misdemeanor cases, and in such other matters as are now, or may hereafter be prescribed and provided for as to county attorneys under the laws of this state in the criminal district court hereby created, and shall receive such fees therefor as are now, or may hereafter be prescribed and provided for as to county attorneys under the laws of this state in the criminal district court hereby created, and shall receive such fees therefor as are now or may hereafter be prescribed by law for such officers in the county and district courts of this state, to be paid in the same manner and out of the same funds. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 11; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 11.]

**Art. 97<sup>3</sup>/<sub>4</sub>f. Sheriff and clerk.**—The sheriff and the clerk of the district court of Bowie County shall be the sheriff and clerk, respectively, of said criminal district court under the same rules and regulations as are now or may hereafter be prescribed by law for the government of sheriffs and clerks of the district courts of this State; and said sheriff and clerk shall respectively receive such fees as are now, or may hereafter be prescribed for such officers in the district courts of the State, to be paid in the same manner. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 12; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 12.]

**Art. 97<sup>3</sup>/<sub>4</sub>ff. Same powers as district court; rules.**—In all such matters over which said criminal district court has jurisdiction, it shall have the same power within said district as is conferred by law upon the district court, and shall be governed by the same rules in the exercise of said power. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 13; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 13.]

**Art. 97<sup>3</sup>/<sub>4</sub>g. Appeal and error.**—Appeals and writs of errors may be prosecuted from said Criminal District Court to the court of criminal appeals in criminal cases and to the courts of civil appeals, in the same manner and form as from district courts in like cases. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 14; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 14.]

**Art. 97<sup>3</sup>/<sub>4</sub>gg. Jurisdiction of district court.**—From and after the taking effect of this Act, the district and county courts of Bowie County as now constituted, shall be and are hereby deprived and divested of all jurisdiction in all criminal cases and of all matters pertaining to criminal cases, and such jurisdiction is hereby given to the criminal district court of Bowie County. And all criminal cases pending in the district and county courts of Bowie County at the time the Act creating this court took effect shall by force of this Act be immediately transferred to the criminal district court of Bowie County, without any order for any such transfer being made by either of said courts, and the jurisdiction of the criminal district court of Bowie County shall attach to all of said cases from the time the Act creating said court took effect. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 15; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 15.]

**Art. 97<sup>3</sup>/<sub>4</sub>h. Judge; election; term; qualifications; salary; powers; appointment.**—The judge of the criminal court of Bowie County shall be elected by the qualified voters of Bowie County for a term of four years and shall hold his office until his successor shall have been elected and qualified. He shall possess the same qualifications as are required of judges of the district courts and shall receive the same salary as now or may hereafter be paid to the district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district and county judges of this state in criminal cases. Provided that the Governor, by and with the consent of the Senate, if in session, shall appoint a judge of said court who shall hold the office until the next general election after the passage of this Act, and until his successor shall have been elected and qualified. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 16; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 16.]

**Art. 97<sup>3</sup>/<sub>4</sub>hh. Exchange of judges; disqualification or absence.**—The judge of said criminal district court may exchange districts with or hold court for any district judge, as provided by law in cases of district judges, and in case of disqualification or absence of a judge, a special judge may be selected, and qualify as provided for district courts. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 17; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 17.]

**Art. 97<sup>3</sup>/<sub>4</sub>i. Validation of process heretofore issued.**—All orders heretofore made and all process heretofore issued in any criminal cause so transferred, and up to the time of its transfer hereunder, are hereby validated and made of full force and effect in the criminal district court of Bowie County. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 18; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 18.]

**Art. 97<sup>3</sup>/<sub>4</sub>i 1. Court abolished.**—That the Criminal District Court of Bowie County is hereby abolished and Chapter 28 of the General Laws of the Fourth Called Session of the 35th Legislature, and Chapter 8 of the General Laws of the Second Called Session of the 36th Legislature, are each and both hereby in all things repealed. [Acts 1921, 37th Leg. 1st C. S., ch. 9, § 1.]

**Art. 97<sup>3</sup>/<sub>4</sub>i 2. Transfer of causes.**—All Criminal cases pending in the Criminal District Court of Bowie County at the time this Act Takes

effect, shall by force of this Act be immediately transferred to the court, or courts of competent jurisdiction, without any order for any such transfer being made, and the jurisdiction of any such court, or courts, shall attach to all cases pending in said Criminal District Court when this Act takes effect, and it shall be the duty of the District Clerk of Bowie County to make any necessary transfer of papers, records, files, books and dockets to carry out the purposes of this Act. [Id., § 2.]

**Art. 97<sup>3</sup>/<sub>4</sub>i 3. Repealed statutes reinstated.**—All laws repealed expressly or impliedly by said Chapter 28 of the General Laws of the Fourth Called Session of the Thirty-fifth Legislature or by Chapter 8 of the General Laws of the Second Called Session of the Thirty-sixth Legislature, are hereby revived except in so far as the same may have been repealed by other statute or statutes, and the jurisdiction of the District Court of Bowie County, the County Court of Bowie County, the corporation court of the City of Texarkana, the justice courts of Bowie County and other inferior courts of Bowie County shall be the same as if the Criminal District Court of Bowie County had never been created by said Acts. [Id., § 3.]

**Art. 97<sup>3</sup>/<sub>4</sub>i 4. When effective.**—This Act shall take effect and be in force on and after December 31, 1922. [Id., § 4.]

## CHAPTER THREE B

### CRIMINAL COURT OF PORT ARTHUR

**Art.**

97<sup>3</sup>/<sub>4</sub>j. Court created; court of record; seal.

97<sup>3</sup>/<sub>4</sub>jj. Jurisdiction.

97<sup>3</sup>/<sub>4</sub>k. Judge and other officers.

97<sup>3</sup>/<sub>4</sub>kk. Conduct of prosecutions; appeals.

97<sup>3</sup>/<sub>4</sub>l. Pleading, practice and procedure; reporter.

97<sup>3</sup>/<sub>4</sub>ll. Jurors.

97<sup>3</sup>/<sub>4</sub>m. Powers of judge; docket.

**Art.**

97<sup>3</sup>/<sub>4</sub>mm. Costs.

97<sup>3</sup>/<sub>4</sub>n. Appeals.

97<sup>3</sup>/<sub>4</sub>nn. Costs and fines; collection; imprisonment.

97<sup>3</sup>/<sub>4</sub>o. County court of Jefferson County at Law No 2 abolished; judge and city attorney; election.

**Article 97<sup>3</sup>/<sub>4</sub>j. Court created; court of record; seal.**—There is hereby created and established a court for the trial of criminal causes and offenses of a criminal nature arising within the territorial limits of the city of Port Arthur, Texas, which court shall be called "Criminal Court of Port Arthur, Texas," and shall hold its sessions in said city, shall be open at all times for the transaction of business, shall be a court of record, and shall have a seal. [Acts 1919, 36th Leg. 2d C. S., ch. 14, § 1.]

Took effect July 22, 1919.

**Art. 97<sup>3</sup>/<sub>4</sub>jj. Jurisdiction.**—Said court shall have jurisdiction within the territorial limits of said city in all causes of a criminal nature arising under the ordinances of said city now in force or hereafter to be adopted; and also concurrently with any justice of the peace, in any precinct in which said city or any part thereof is situated and concurrently with the original jurisdiction of county courts and the county court of Jefferson County at law in all cases arising under the criminal laws of the State of Texas and under the juvenile, dependent and neglected children and delinquent children laws of said State. [Id., § 2.]

**Art. 97<sup>3</sup>/<sub>4</sub>k. Judge and other officers.**—Said court shall be presided over by a judge, or in case of his disqualification, absence, or inability to act, by a special judge, each of whom shall be a man learned in the law and licensed to practice in the State courts of the State of Texas; and shall have a clerk and other officers, employes and complete organization as provided for corporation courts organized under the gen-

eral laws of this State. The judge and city attorney of said court shall be elected by the qualified voters of said city of Port Arthur at each general primary and city election, shall qualify on the day that the commissioners of said city shall qualify, or as soon thereafter as practicable, and shall hold his office for two years and until his successor shall have been elected and qualified; providing such election shall be held by the regular officers holding the general primary and city election and the returns thereof shall be made to and canvassed by the commissioners of said city of Port Arthur, in the same manner as the other returns of said election; provided further, that when this bill becomes effective and to fill any vacancy in the office of said judge, the city commissioners of said city, shall call an election to elect a judge or city attorney of said court, who shall hold his office until the next general election; the special judge and other officers and employés of said court shall be appointed by the commission or governing body corresponding thereto of said city of Port Arthur, and they shall hold their offices or positions for such periods of time, not exceeding two years under any one appointment they shall be appointed for. The judge, city attorney and clerk of said court may be removed in the same manner as provided for the removal of county officers under the general laws of this State. The officers and employés of said court shall not receive any fees of office, but shall be paid such salaries as may be fixed by the governing body of the city, provided that the salary of the judge and city attorney of said court shall be fixed before his appointment or election and shall not be changed during any term of office, and that the special judge shall be paid only for the time he actually presides over said court and shall be paid at the same rate as the regular judge is paid. [Id., § 3.]

**Art. 97<sup>3</sup>/<sub>4</sub>kk. Conduct of prosecutions; appeals.**—Prosecutions in said court shall be conducted by the city attorney of said city, if so designated or if he desires so to do, or when the prosecution is under the penal code of this State, by the county attorney of Jefferson county, but said county attorney shall not in any such case receive any fees or compensation therefor, nor have the power to dismiss any prosecution in said court, except for reasons filed and approved by the judge of said court. Said city attorney shall, in all appeals to the Court of Criminal Appeals wherein the offense charged is in violation of a city ordinance, either brief said case or upon request, assist the Assistant Attorney General delegated to represent the State before the Court of Criminal Appeals in briefing the case. [Id., § 4.]

**Art. 97<sup>3</sup>/<sub>4</sub>l. Pleading, practice and procedure; reporter.**—All rules of pleading, practice and procedure prescribed for corporation courts organized under the general laws of this State in cities having special charters shall apply in said court in so far as the same are applicable and not otherwise therein provided; provided all writs and process of said court may be served anywhere in Jefferson County, Texas, and may be directed to and served by the sheriff, or any deputy sheriff or constable of said county, or by any police officer of said city of Port Arthur; and any of said officers may under the direction of the judge of said court act as attendant, bailiffs and peace officers of said court; and provided the judge of said court may upon request of the defendant in any case therein appoint a competent and disinterested person as stenographer or reporter in and for such case, who shall take an oath to well, truly and impartially perform the duties of reporter in such case; it shall be his duty to make a full and correct report or record, of all oral testimony offered therein, of all objections to the admissibility of testimony, of all rulings and remarks of the court thereon, and of all exceptions to such rulings; and to keep such record for future use for



the term of four years, and to furnish in duplicate to any person, upon payment therefor a transcript thereof or of any portion thereof certified to be true and correct, provided that any defendant who shall make an affidavit of his inability to pay for such duplicate copy shall be furnished with the same and the costs thereof shall be taxed as other costs in the case; he shall be paid at the rate of one (\$1) dollar per hour for making said report and fifteen (15c) cents per folio of one hundred (100) words for the original copy and no charge for the duplicate copy of the transcript and all same so paid shall be taxed as costs. [Id., § 5.]

**Art. 97 $\frac{3}{4}$ ll. Jurors.**—Jurors for said court shall be selected, summoned, empaneled and qualified from among the residents of said city of Port Arthur, liable for jury service under the general laws of this State, as follows: During the first month after the organization of said court, and thereafter during the months of December and June of each year, and at any time when there shall be an entire deficiency of jurors for said court and said judge thereof shall deem it expedient, the judge of said court shall appoint from among the residents of said city three (3) persons to perform the duties of jury commissioners of said court, who shall possess like qualifications and take the same oath, as jury commissioners for county courts, under the general laws of this State; and the same proceedings, so far as applicable, shall be had by said court and the officers thereof, and by such jury commissioners for procuring jurors for said court as are required by the general laws of this State for procuring jurors for county courts. Such commissioners shall select and place in the jury wheel the number of jurors for each week of the period for which juries are to be provided that shall be designated by the judge of said court; provided, that whenever for any reason, there is a partial or total deficiency of jurors present for the trial of any case or to serve for any day or week, then the judge of said court may in his discretion order the chief of police or any policeman of said city after taking the oath prescribed by the general laws, to summon sufficient number of qualified persons to make up the requisite number of jurors. Each juror, except those excused at their own request before, or on first call of the jury shall receive a fee of one dollar for each half day he may attend; that the jury wheel is to be used in all cases where a jury is demanded. [Id., § 6.]

**Art. 97 $\frac{3}{4}$ m. Powers of judge; docket.**—The judge of said court shall have the power to punish for contempt to the same extent and under the same circumstances as is conferred upon judges of county courts. He shall have the power to take and forfeit recognizances, to admit to bail and forfeit bonds under such rules and regulations as now govern the taking and forfeiture of the same in the county courts; provided, however, that in the forfeiture of any recognizance or bail bond, the sureties shall be cited to appear before such court on a date fixed by the court, not less than ten (10) days, nor more than fifteen (15) days from the entry of the order of forfeiture and judgment nisi, then and there to show cause why such judgment nisi should not be made final, in the manner provided by law for forfeiture of bail bonds or recognizances in the county courts; provided, that in case the sureties shall not be served with citation at least ten full days before the return date thereof, such order to show cause shall be heard and final judgment rendered at any time thereafter after the expiration of ten full days from the service of the citation. A scire facias docket shall be provided and kept for entering all proceedings had in forfeiting recognizances and bail bonds, in the same manner as provided by the general laws of the State for county courts. [Id., § 7.]

**Art. 97<sup>3</sup>/<sub>4</sub>mm. Costs.**—There shall be taxed against and collected from each defendant convicted before said court, such costs as may be prescribed by the city commissioners of said city, but in no case shall greater costs be prescribed than is prescribed by law to be collected of defendants in county courts of this State. All costs and fines imposed shall be paid to the clerk of said court and by him paid daily into the city treasury of said city of Port Arthur for the use and benefit of said city, except where otherwise expressly provided by law; and said city shall bear and pay all the salaries of the judges, officers and employes of said court, and all the expenses and costs or organizing, operating and maintaining said court. [Id., § 8.]

**Art. 97<sup>3</sup>/<sub>4</sub>n. Appeals.**—All trials in said court shall be final on the merits or facts, but from every conviction had in said court there shall be a right of appeal, whether such conviction be had under a prosecution for violation of an ordinance of said city or a law of the state, but such right of appeal shall be only to the Court of Criminal Appeals of Texas; and all such appeals shall accordingly be returnable to the Court of Criminal Appeals of Texas, and not otherwise; and the jurisdictions of all courts affected by this Act is hereby conformed hereto. [Id., § 9.]

**Art. 97<sup>3</sup>/<sub>4</sub>nn. Costs and fines; collection; imprisonment.**—Said court may enforce the collection of all fines and costs imposed and its judgments by imprisonment of the defendant in the city jail of said city of Port Arthur, or by working convicts in said court upon the streets, roads, highways, public grounds and works within the jurisdiction of said court; provided every convict shall receive a credit of one (\$1) dollars for each day he may be confined or worked; and provided his term of sentence or service shall in no event be greater than one day for each (\$1) dollars of fine and costs. Any person convicted in said court may have execution stayed in said cause by entering into a bond, to be approved by the chief of police, with two or more sureties, conditioned that such person will pay to the officers entitled to receive the same the amount of fine and costs in such case at the rate of five (\$5) dollars per week. In case payment is not made in accordance with the terms of said bond, proceedings to enforce the collection of said bond may be had as provided for the collection of forfeited bail bonds. [Id., § 10.]

**Art. 97<sup>3</sup>/<sub>4</sub>o. County court of Jefferson County at Law No. 2 abolished; judge and city attorney; election.**—After the due and legal organization of said criminal court of Port Arthur, Texas, the present county court of Jefferson County at Law No. 2, shall be abolished. The Act creating said county court of Jefferson County at Law No. 2 and all Acts and parts of Acts in conflict hereto are hereby repealed in so far as the same are in such conflict, that as soon as this Act becomes a law and goes into effect the commissioners of said city of Port Arthur shall call an election for the purpose of electing a judge and city attorney for said court, who will serve until the next biennial city election or until their successors are elected and qualified, at which time it will be necessary and regular for those aspiring for said above named offices to announce for said office in the same manner and form as prescribed by the charter of said city for the election of commissioners of said city, and thereafter shall hold their offices for the regular term of two years, or until their successor is elected and qualified. That any licensed practitioner who has a State license to practice law, shall be qualified to hold either office as city attorney or city judge. [Id., § 11.]

## CHAPTER FOUR OF COUNTY COURTS

### **Article 98. [91] Have exclusive jurisdiction of misdemeanors.**

See *Belado v. State*, 83 Cr. R. 384, 203 S. W. 773.

**3. Concurrent jurisdiction.**—Where sheriff swore to complaint against defendant for gaming before justice of the peace, and the justice, by mistake and under misapprehension of sheriff's intention not to try case before him placed his file mark on complaint, county court was not thereby deprived of jurisdiction. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

**5. Punishment as affecting jurisdiction.**—The county court has jurisdiction of a prosecution for an offense punishable by fine not less than \$25, nor more than \$100. *Ballew v. State*, 26 Tex. App. 483, 9 S. W. 765.

**10. Particular counties.**—As Nueces county court was expressly given jurisdiction of all misdemeanors by Acts 23d Leg. c. 21 (arts. 97½–97½i), creating criminal district court, "which shall have \* \* \* all of the criminal jurisdiction now vested in \* \* \* the district court," did not divest county court of criminal jurisdiction, in view of Const. 1876, art. 5, §§ 1, 16, as amended September 22, 1891, and section 22. *Belado v. State*, 83 Cr. R. 384, 203 S. W. 773.

Criminal district court for Bowie county, having jurisdiction to try all misdemeanors of which the county court previous to creation of criminal district court had exclusive original jurisdiction, had no jurisdiction over prosecution for simple assault; county court's jurisdiction to try simple assault cases having been concurrent with the justice court. *Durst v. State*, 85 Cr. R. 609, 215 S. W. 221.

### **Art. 100. [93] Power to issue writs of habeas corpus.**

See *Stirman v. Turner* (App.) 16 S. W. 787.

### **Art. 101. [94] Appellate jurisdiction.**

**Ordinance violations.**—In view of Const. art. 5, §§ 1, 22, and Civ. St. arts. 903, 904, 921, and Code Cr. Proc. arts. 101, 894, 897, an appeal may be taken to county court from corporation court, upon conviction of violation of a city ordinance, not constituting an offense defined by the Penal Code. *Taylor County v. Jarvis* (Com. App.) 209 S. W. 405.

**Art. 104½. County court at law of Galveston, Texas, created.**—There is hereby created a court to be held in Galveston county, to be called the "County Court of Galveston County at Law." [Loc. & Sp. Acts 1911, 32d Leg., ch. 104, § 1.]

**Art. 104½a. Same; jurisdiction; causes transferred to.**—The county court of Galveston county at law shall only have jurisdiction in criminal matters and causes, original and appellate, over which, by the general laws of the State, the county courts of this State would have jurisdiction; and all misdemeanor cases be and the same are hereby transferred to the county court of Galveston county at law, and all criminal writs and process in misdemeanor cases heretofore issued by or out of the criminal district court of said county be and the same are hereby made returnable to the county court of Galveston county at law. [Id. § 2.]

**Art. 104½b. Same; other jurisdiction not affected.**—This Act shall not affect the jurisdiction of the county court of Galveston county, which shall be exclusive in probate, civil or other matters, except as stated, nor shall it affect the jurisdiction of the commissioners court or of the county judge of Galveston county as the presiding officer of such court. All ex officio duties of the county judge shall be exercised by the said judge of the county court of Galveston county, except in so far as the same shall, by this Act, be committed to the judge of the county court of Galveston county at law. [Id. § 3.]

**Art. 104½c. Same; terms of court; practice; appeals and writs of error.**—The terms of the county court of Galveston county at law, and the practice therein and appeals and writs of error therefrom, shall be as prescribed by laws relating to county courts. The terms of the county court of Galveston county at law shall be held as now established for the terms of the county court of Galveston county until the same terms may be changed by the Commissioners Court. [Id. § 4.]

**Art. 104½d. Same; judge; election; term of office.**—There shall be elected in said county by the qualified voters thereof, at each general election, a judge of the county court of Galveston county at law, who shall be well informed in the laws of the State, who shall hold his office for two years, and until his successor shall have duly qualified. [Id. § 5.]

**Art. 104½e. Same; judge; bond; oath of office.**—The judge of the county court of Galveston county at law shall execute a bond and take the oath of office as required by law relating to county judges. [Id. § 6.]

**Art. 104½f. Same; special judge.**—A special judge of the county court of Galveston county at law may be appointed or elected, as provided by laws relating to county courts and to judges thereof. [Id. § 7.]

**Art. 104½g. Same; writs; power to issue.**—The county court of Galveston county at law, or the judges thereof, shall have power to issue all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of said court or of any other court or tribunal inferior to said court. [Id. § 8.]

**Art. 104½h. Same; clerk; deputy; salary; fees; seal of court; sheriff or constable to attend; prosecuting officer.**—The county clerk of Galveston county shall be the clerk of the county court of Galveston county at law. The county clerk shall have authority to appoint a suitable person special deputy for said court to be paid a salary by the county of Galveston, not to exceed the sum of one hundred (\$100.00) dollars per month; and said county clerk shall be entitled to the same fees for criminal cases in said court as is now or hereafter fixed by law for criminal cases in county courts of this State. He shall be allowed by the county to be paid out of the general fund the sum of six hundred (\$600.00) dollars as ex officio fees for said court. The seal of the said court shall be the same as that provided by law for county courts, except that the seal shall contain the words, "County Court of Galveston County, at Law." The sheriff of Galveston county, or the constable for the justices precinct in which is located the county site of said county, shall, in person or by deputy, attend the said court when required by the judge thereof; and shall receive the same fees allowed by law for attending the county court. The county attorney of Galveston county shall be prosecuting officer of said court, and shall receive the same fees as are established by law relating to county and district attorneys. [Id. § 9.]

**Art. 104½i. Same; juries.**—The jurisdiction and authority now vested by law in the county court for the appointment of jury commissioners and the selection and service of jurors shall be exercised by the county court of Galveston county at law. [Id. § 10.]

**Art. 104½j. Same; judge; vacancy in office of.**—Any vacancy in the office of the judge of the court created by this Act may be filled by the commissioners court of Galveston county until the next general election. The commissioners court shall, as soon as may be, after this Act shall take effect, appoint a judge of the county court of Galveston county at law, who shall serve until the next general election and until his successor shall be duly elected and qualified. [Id. § 11.]

**Art. 104½k. Same; judge; fees, salary.**—The judge of the county court of Galveston county at law shall collect the same fees as are now established by law relating to county judges in misdemeanor cases, all of which shall be by him paid monthly into the county treasury, and he shall receive an annual salary of twenty-one hundred (\$2100.00) dollars per annum, payable monthly, to be paid out of the county treasury by the commissioners court. [Id. § 12.]

**LIST OF SPECIAL ACTS AFFECTING THE CRIMINAL JURISDICTION OF THE REGULAR COUNTY COURTS.**—See Appendix at end of Civil Statutes, ante.

## CHAPTER FIVE

### OF JUSTICES' AND OTHER INFERIOR COURTS

**Article 106. [96] Original concurrent jurisdiction.**

Cited, *Wrenn v. State*, 32 Cr. R. 642, 200 S. W. 844.

**Art. 107. [97] Power to forfeit bail bonds.**

**Power in general.**—Under Const. art. 5, § 19, and this article, held where defendant did not appear in justice court for examination for rape in accordance with his bail bond therein for \$7,500, justice had jurisdiction to enter judgment forfeiting bond, although grand jury had returned an indictment against defendant for same offense. *Fleming v. Bonine* (Civ. App.) 204 S. W. 364.

## TITLE 3

### OF THE PREVENTION AND SUPPRESSION OF OFFENSES, AND THE WRIT OF HABEAS CORPUS

#### CHAPTER ONE

#### OF PREVENTING OFFENSES BY THE ACT OF A PRIVATE PERSON

**Articles 113, 114. [103, 104].**

Cited, *Miller v. State*, 31 Cr. R. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

## CHAPTER FIVE

## OF SUPPRESSION OF OFFENSES INJURIOUS TO PUBLIC HEALTH

**Article 148. [138] Court may restrain a trade, etc.**

**Construction and operation in general.**—This article does not authorize restraining writ, without proof and giving defendant opportunity to be heard. *Crowder v. Graham* (Civ. App.) 201 S. W. 1053.

"Unlawfully practicing medicine," within Pen. Code, arts. 754, 755, cannot be enjoined as "trade, business, or occupation injurious to health of those in the neighborhood," within meaning of Pen. Code, art. 694, and this article. *Id.*

**Art. 150. [140] Requisites of bond.**

See *Barton v. State* (Cr. App.) 230 S. W. 939.

## CHAPTER SEVEN

## OF THE SUPPRESSION OF OFFENSES AFFECTING REPUTATION

**Article 159. [149] On conviction for libel, court may order copies destroyed.**

See *Barton v. State* (Cr. App.) 230 S. W. 939.

## CHAPTER EIGHT

## OF THE SUPPRESSION OF OFFENSES AGAINST PERSONAL LIBERTY

**Article 160. [150] Writ of habeas corpus.**

See *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

**1. Nature and scope of remedy in general.**—The merits of a case involving guilt or innocence of an accused is not a proper subject of inquiry in a writ of habeas corpus. *Ex parte Rogers*, 83 Cr. R. 152, 201 S. W. 1157.

Relator, held under order of city health officer by virtue of quarantine regulation established in accordance with Civ. St. art. 4605½, under a statement of order of arrest that according to information of health officer she is affected with gonorrhoea, had the right to have the legality of her detention inquired into in a habeas corpus proceeding. *Ex parte Hardcastle*, 84 Cr. R. 463, 208 S. W. 531, 2 A. L. R. 1539.

Where a relator in habeas corpus is held under a judgment regular on its face and against which no direct attack is made, the question of the jurisdiction of the court to enter such judgment is the only one that can be considered. *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

Where the Assistant Attorney General moves to dismiss application for habeas corpus, accompanying the motion with affidavit of sheriff of county alleged by relator to have him in custody that he has never had relator in his custody in any way, there being also attached to the motion the official certificate of the county clerk that no commitment or warrant of any kind has ever issued for relator, the writ will be denied, and the application dismissed, since the writ of habeas corpus will not issue unless the party applying for it appears to be illegally restrained in some manner. *Ex parte Jonischkies* (Cr. App.) 224 S. W. 1092.

**3. Substitution for other remedy.**—The Court of Criminal Appeals will not take jurisdiction of and inquire into the detention of a juvenile under a judgment by means of a writ of habeas corpus originally issued in such court, unless the judgment is absolutely void, but will relegate relator to his statutory remedy by appeal. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592; *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389; *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

Primarily jurisdiction of Court of Criminal Appeals is appellate, and generally, where complete relief against any supposed error will be afforded by appeal, the writ of habeas corpus is not available. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Whether an indictment contains irregularities will not be passed upon on habeas corpus; that being a question which court refuses to consider except upon appeal. *Id.*

Where accused had been charged with murder and had been granted bail in such prosecution and was then prosecuted for robbery of the same person at the same time, his contention that the transactions were identical was available on plea of former jeopardy in the second prosecution, but not on application for habeas corpus to require the granting of bail. *Ex parte Jones*, 83 Cr. R. 12, 200 S. W. 1085.

Where defendant contended that he could not be convicted of felony for his theft of motorcar, but only of misdemeanor, he is entitled to obtain relief from conviction of felony by appeal, and not by habeas corpus. *Ex parte Jackson*, 83 Cr. R. 55, 200 S. W. 1092.

The Court of Criminal Appeals should not encourage or permit collateral attacks by habeas corpus on judgments in cases where the matters complained of should properly be brought by appeal. *Ex parte Roya*, 85 Cr. R. 626, 215 S. W. 322.

Where the county court authorized the probation officer to take charge of a de-

pendent child pending a motion for a new trial, such action, if error, could be corrected only upon motion for new trial or upon appeal, but not by means of writ of habeas corpus. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

While the court ordinarily declines to permit the functions of an appeal to be impinged by a writ of habeas corpus, the rule does not apply to the case of a mere child whose parents were not notified of the proceedings and who had no opportunity to prepare for an appeal. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386

Where relator has failed to perfect his appeal from judgment of conviction, relief can be had on application for habeas corpus only if the judgment is void for failure of facts stated in the complaint to constitute an offense. *Ex parte Ballard*, 87 Cr. R. 460, 223 S. W. 222.

**6. Enforcement of speedy trial.**—Where one indicted for gaming gave bail bond which was declared forfeited, and he thereafter, being in jail, offered to plead guilty, but the plea was refused, he was not entitled to discharge on writ of habeas corpus. *Ex parte Bostick*, 81 Cr. R. 411, 196 S. W. 531.

**7. Invalidity or irregularity of proceedings in general.**—Habeas corpus is proper remedy for boy under 17, after dismissal of indictment, sentenced by court to Boys' Industrial School as delinquent without complaint or information against him. *Ex parte Ramseur*, 81 Cr. R. 413, 195 S. W. 864.

Where relator had been indicted for murder, and had been granted bail, and was then indicted for robbery with firearms involving the same transaction, and refused bail on his application, fraud or bad faith cannot, on habeas corpus, be imputed to the grand jury returning the indictment in the robbery case, or the court and county executive officers. *Ex parte Funk*, 85 Cr. R. 527, 213 S. W. 655.

Where relator, having been indicted for murder and granted bail, was then indicted for robbery with firearms, whether the offense of murder and the offense of robbery are identical transactions is a question of fact, dependent upon evidence produced before the trial court on the trial of such cases, and cannot be considered on application for habeas corpus. *Id.*

Judgment committing applicant to sheriff's custody, not shown to be void, cannot be reviewed on habeas corpus proceedings. *Ex parte Smith*, 110 Tex. 55, 214 S. W. 320.

Where applicant does not contend that he was adjudged guilty without evidence being heard, and does not bring up all the evidence, the court's refusal to sustain his defense is not reviewable on habeas corpus proceeding. *Id.*

A habeas corpus proceeding by one convicted of a crime is a collateral attack upon the judgment of conviction, and a presumption of validity is to be indulged in favor of the judgment. *Ex parte Adlof*, 86 Cr. R. 13, 215 S. W. 222.

Where, shortly after the court's refusal to discharge from custody relator, convicted of swindling, whose conviction was reversed on appeal and the prosecution ordered dismissed, the grand jury returned another indictment against relator, he is not held under the court's order that he be held to await the action of the grand jury to file a new indictment, but under an indictment pending against him, and he cannot obtain his discharge by habeas corpus. *Ex parte Albertson*, 86 Cr. R. 129, 215 S. W. 453.

Where it appears that no complaint was filed or that no warrant or capias was issued, or in the case of an infant with parents living in the vicinage that no notice was given them and no opportunity afforded for a trial by jury, or to be represented by counsel of the infant's or the parents' choice, the judgment may be attacked by habeas corpus. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

Where a judgment convicting a minor of delinquency recites a sufficient complaint and information, and there is nothing conflicting with such recital, the law, requiring proceedings shall begin by complaint and information, is not therefore shown disregarded, and the conviction is not subject to collateral attack on habeas corpus. *Guinn v. State* (Cr. App.) 228 S. W. 233.

**9. Void or voidable judgment.**—Habeas corpus is not a method of appeal, and is a collateral attack which cannot be invoked where there have been mere irregularities in proceedings of another court, but only where the judgment of such other court is absolutely void. *Ex parte Grimes* (Civ. App.) 216 S. W. 251; *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637; *Ex parte Adlof*, 86 Cr. R. 13, 215 S. W. 222, *Ex parte Roach*, 87 Cr. R. 370, 221 S. W. 975.

A judgment may be attacked as void by habeas corpus if matters alleged in the attack are such as, if true, the trial court would have been without jurisdiction either of the person of the relator or of the subject-matter, or to render the particular judgment. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

Where a judgment, properly entered and duly certified, fixed the time of confinement upon conviction of a minor of delinquency, such judgment cannot be impeached in a collateral proceeding in habeas corpus by a memorandum made by the trial judge on his docket on the ground that the memorandum constituted a judgment and did not fix the time of confinement. *Guinn v. State* (Cr. App.) 228 S. W. 233.

In the absence of some extraordinary reason therefor, it is the practice of this court to refuse to determine a question of fact upon an application for a writ of habeas corpus, so that a judgment, convicting a minor of delinquency, will not be declared void upon the ground that notice was not served upon the parents as required, in the face of a recital in the judgment that such jurisdictional notice was given. *Id.*

**10. Invalidity or insufficiency of indictment, information, or complaint.**—When indictment regularly presented attempts to charge an offense defined by Code, a discharge on habeas corpus will not be awarded, however irregularly the offense may be charged, though, if offense charged is unknown to the law, accused will be discharged. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

An indictment charging that liquors were unlawfully transported into prohibited territory, would sufficiently charge an offense to suffice, on application for habeas

corpus, unless there was no law on which the prosecution could be founded. (Per Morrow, J.) Ex parte Fulton, 86 Cr. R. 149, 215 S. W. 331.

Defendant convicted in county court of violating an ordinance can attack the judgment of conviction by original application to the Court of Criminal Appeals for writ of habeas corpus on ground that the complaint was void, in that it charged no act which could be held penal. Ex parte Jonischkies (Cr. App.) 227 S. W. 952.

**11. Former jeopardy.**—Where relator, after being acquitted of one charge of murder, was indicted on another, he cannot by habeas corpus raise the issue of *autrefois acquit*; the appropriate remedy being by special plea entered in the court in which the second indictment was pending. Ex parte Spanell, 85 Cr. R. 304, 212 S. W. 172.

**14. Invalidity of ordinances.**—In habeas corpus proceeding by one convicted under an ordinance which could not be held valid from any angle, the relator will be discharged. Ex parte Adlof, 86 Cr. R. 13, 215 S. W. 222.

**15½. Custody of children.**—Where a district court in divorce proceedings has determined the custody of minor children, such court has not the exclusive authority to change its determination, but habeas corpus before another court will lie by the husband against the wife under changed conditions to obtain a modification of the order as to custody. Foster v. Foster (Civ. App.) 230 S. W. 1064

## 1. DEFINITION AND OBJECT OF THE WRIT

### Art. 161. [151] What a writ of habeas corpus is, etc.

See Childers v. State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 399.

### Art. 163. [153] Not invalid for want of form.

See Stirman v. Turner (App.) 16 S. W. 787.

## 2. BY WHOM AND WHEN GRANTED

### Art. 165. [155] By whom writ may be granted.

**Jurisdiction.**—The district court has jurisdiction under Const. art. 5, §§ 8, 16, of a proceeding in habeas corpus to determine question of the custody of a minor, notwithstanding the county court, under Civ. St. arts. 4091, 4122, had appointed a guardian, who had taken the custody of the minor; for the district court, as a court of equity, had jurisdiction to determine whether the guardian was fulfilling his duty and exercising his authority in a manner conformably to the best interests of the minor. Anderson v. Cossey (Civ. App.) 214 S. W. 624.

### Art. 167. [157] After indictment, returnable, where, etc.

**In general.**—A habeas corpus proceeding seeking bail must be made returnable in the county where the offense was committed. Ex parte Mitchell, 81 Cr. R. 517 196 S. W. 540.

### Art. 169. [159] When the applicant is charged with misdemeanor.

**In general.**—Under the express provisions of this article, applications for writs of habeas corpus in misdemeanor cases should be made to the county judge. Ex parte Smallwood, 87 Cr. R. 268, 221 S. W. 293.

### Art. 174. [164] Requisites of petition.

See Ex parte Smith, 23 Tex. App. 100, 5 S. W. 99; Ex parte Alderete, 203 S. W. 763.

**Requisites of petition.**—Where petitioner sought a writ of habeas corpus to obtain the custody of his minor children, he should, if relying on a divorce decree awarding the custody of the children to him, plead the decree. Cox v. Cox (Civ. App.) 214 S. W. 627.

Habeas corpus proceedings to recover the custody of a minor child are in the nature of a civil action to determine the right to such custody in which the public has no concern, and the rights of the parties are to be determined as in any other civil action, so that the petition should plead facts necessary to petitioner's right to custody and those showing the incompetency of the other party. Vickers v. Faubion (Civ. App.) 224 S. W. 803.

In a proceeding by a husband against his divorced wife for a writ of habeas corpus to determine custody of minor daughters originally awarded to the wife, petition held to allege developments after the decree materially altering the conditions then prevailing sufficient, in the absence of special exception, to sustain the writ as against a plea in abatement. Foster v. Foster (Civ. App.) 230 S. W. 1064.

**Petition as pleading, not evidence.**—Application for writ of habeas corpus in and of itself is not evidence of any of allegations therein stated, but is mere pleading, which must be proved like other allegations to entitle party to relief sought. Ex parte Clark, 82 Cr. R. 192, 198 S. W. 954; Ex parte Cain, 86 Cr. R. 509, 217 S. W. 386.

A record consisting only of the application for habeas corpus with a copy of the *capias* attached, and containing no complaint, statement of facts, or other proof showing the prosecution against relator, and accompanied by no brief, so that it cannot be determined under which section of Acts 35th Leg. (1917) c. 60 (Civ. St. arts. 7314-7314q), the prosecution was brought, does not raise the question of the constitutionality of any of the sections of that act, and application will be dismissed for insufficiency of the record. Ex parte Smallwood, 87 Cr. R. 268, 221 S. W. 293.

**Art. 175. [165] The writ shall be granted without delay, unless, etc.**

See *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

**Art. 177. [167] Judge may issue a warrant of arrest, when.**

**Extradition.**—Where, in habeas corpus proceeding to obtain release from sheriff, it appears by the return that relator before issuance of the writ had been delivered to another person for the purpose of taking him to another state in obedience to a requisition, application will be dismissed. *Ex parte Ranger*, 85 Cr. R. 651, 215 S. W. 301.

Application for writ of habeas corpus seeking relief from writ of requisition will be dismissed, where it appears that since the granting of the writ the applicant has voluntarily submitted himself to the jurisdiction of the courts of the state issuing requisition, has pleaded guilty, and has been sentenced. *Sanders v State*, 86 Cr. R. 202, 215 S. W. 856.

Where a requisition shows that an affidavit has been made against the accused in the demanding state, and that a demand has been made upon the Governor of the state of the forum, which certifies that the affidavit is authentic, the requirements of the law are met, and it is immaterial, on habeas corpus to secure the release of one held under an extradition warrant, that the prosecuting attorney of a county of the demanding state was allowed to testify that certain acts constitute an offense under the law of that state. *Ex parte Roselle*, 87 Cr. R. 470, 222 S. W. 248.

One attacking on habeas corpus a warrant for extradition, which is regular on its face, etc., has the burden of showing that the prima facie case of regularity was not in accordance with the facts. *Id.*

Objection to the jurat of a justice of the peace affixed to the affidavit, a copy of which accompanied the Governor's extradition warrant, and which affidavit was certified as authentic by the Governor of the demanding state, on the ground that it did not state the number of the justice's precinct, will not be considered in habeas corpus proceedings, where there was nothing to show that in the demanding state a complaint sworn to before a justice of the peace was void, unless he stated in his jurat the number of his precinct, for, even though there was a technical defect in the jurat, it might be amended. *Id.*

In habeas corpus proceedings a fugitive from justice arrested under an extradition warrant will not be discharged because of substantial defects in the pleadings of the state, under the laws of the demanding state. *Id.*

In habeas corpus proceedings brought by one arrested on an extradition warrant, the question of identity is always one to be considered. *Ex parte Jowell*, 87 Cr. R. 556, 223 S. W. 456, 11 A. L. R. 1407.

Evidence in habeas corpus proceedings remanding for extradition should have that degree of certainty which would justify the magistrate to commit the accused. *Id.*

Where relator in habeas corpus proceedings had been arrested on an extradition warrant issued by the Governor at the request of the Governor of Montana, refusal of an application for continuance to take depositions to show that he was not in the state of Montana at the time of the alleged offense nor thereafter was error, since, if the application for continuance was true relator was entitled to his discharge. *Id.*

Where extradition warrant issued by Governor contained the recital, "And whereas, said demand is accompanied by a copy of said affidavit, duly certified as authentic, by the Governor of said state," a presumption arose in favor of the legality of the extradition warrant, and the burden was on the alleged fugitive to show in a habeas corpus proceeding that no proper affidavit accompanied the requisition papers and that the Governor was not in possession of the proper papers authorizing the issuance of the warrant. *Ex parte Gradington (Cr. App.)* 231 S. W. 781.

**Art. 181. [171] The words "confined," imprisoned, etc.**

See *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.  
Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331.

**Art. 182. [172] By restraint, is meant, etc.**

See *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.  
Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331

**Art. 183. [173] The writ of habeas corpus is intended to be applicable, when.**

Cited, *Ex parte Fulton*, 86 Cr. R. 149, 215 S. W. 331; *Lowe v. State (Cr. App.)* 226 S. W. 674.

**Cases in which remedy may be invoked.**—Where, when application for habeas corpus was filed, sheriff had no commitment for relator, and was holding him under verbal order of trial judge, writ should have been granted. *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

Where there is nothing but the application for habeas corpus, which shows that defendant was placed in jail following an adjudication that he was in contempt of the district court for refusing to answer questions before a grand jury, the Court of Appeals is unable to decide upon what the judgment was rendered, and must dismiss the application upon the presumption that the commitment was regular, and was based upon proper facts. *Ex parte Berry*, 85 Cr. R. 204, 210 S. W. 799.

Where the act penalized for contempt is beyond the jurisdiction of the trial court to punish, the Court of Criminal Appeals will review the case and relieve under a writ of habeas corpus. *Ex parte Kemper*, 86 Cr. R. 251, 216 S. W. 172.



**Art. 184. [174] Person committed in default of bail is entitled to the writ, when.**

**Time for application.**—Where during the trial accused presented application for writ of habeas corpus so as to try to get bail during the further pendency of the trial, the application was properly refused as coming too late. *Mirick v. State*, 84 Cr. R. 388, 204 S. W. 222.

**Art. 185. [175] Person afflicted with disease may be removed, when.**

Cited, *Ex parte Jones*, 83 Cr. R. 12, 200 S. W. 1085.

### 3 SERVICE AND RETURN OF THE WRIT, AND PROCEEDINGS THEREON

**Art. 190. [180] How the returns shall be made.**

See, *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

**Art. 192. [182] Custody of prisoner pending examination on habeas corpus.**

**Release on bail.**—Order of Court of Criminal Appeals releasing relator on bail pending decision whether writ of habeas corpus should be issued or not did not suspend trial court's power to have written on minutes judgment it had rendered. *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

**Art. 201. [191] Where party is indicted for capital offense.**

See *Ex parte Smith*, 23 Tex. App. 100, 5 S. W. 99.

**Determination of question.**—In determining whether or not a homicide case is bailable, the decisions of the courts before the change in the law eliminating degrees of murder may be looked to. *Ex parte Cole* (Cr. App.) 230 S. W. 175.

**Art. 204. [194] Action of court upon examination.**

**Determination of case.**—Relator, who was arrested for violating the anti-vice law and remanded in habeas corpus proceedings, having been discharged since notice of appeal was given to court on appeal, motion of Attorney General to dismiss appeal should be sustained. *Ex parte Stedham*, 84 Cr. R. 523, 208 S. W. 930.

On original application for habeas corpus, the Court of Criminal Appeals will not inquire into correctness of trial court's judgments on questions of fact. *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

On application for habeas corpus by infant convicted as a delinquent and sentenced to criminal training school or reformatory it will be presumed that the parents were given the required notice and, in the absence of a showing as to a request for the submission of the question of suspended sentence at the time of the trial, that the judgment of the court was proper, as against contention that court should have suspended sentence. *Id.*

**Art. 205. [195] If the commitment be informal or void, etc.**

See, *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

**Defective commitment or warrant.**—Where defendant is held for trial under indictment for murder, the court will not order his discharge on habeas corpus merely because the commitment or warrant of arrest was informal. *Ex parte Nelson*, 84 Cr. R. 570, 209 S. W. 148.

**Art. 206. [196] If there be probable cause to believe an offense has been committed.**

**Probable cause.**—In habeas corpus proceedings for discharge of prisoner charged with violation of Disloyalty Act, § 1 (Pen. Code, art. 173½), court will not discharge prisoner, though complaint does not set out the language used, or show wherein it was calculated to provoke a breach of the peace, and does not allege that it was used in the presence and hearing of a United States citizen, where there is probable cause to believe an offense has been committed. *Ex parte Acker*, 85 Cr. R. 364, 212 S. W. 500.

**Art. 210. [200] Costs of the proceedings, how disposed of.**

**Persons liable.**—The court will not tax costs against the sheriff, who merely arrested relator on a warrant issued by the proper authorities. *Ex parte White*, 82 Cr. R. 85, 198 S. W. 583.

**Items taxable as costs.**—Relator should not be taxed with costs of a stenographer employed by the adverse parties, when other stenographers were employed by the court. *Ex parte White*, 82 Cr. R. 85, 198 S. W. 583.

Where relator in habeas corpus acted from a belief that the law under which he was confined was unconstitutional, he should not be taxed with the clerk's fees and the Attorney General's fees. *Id.*

The relator in habeas corpus is properly taxed with the costs of witnesses and sheriffs made after the writ was sued out. *Id.*

**Art. 211. [201] If the court be in session, the clerk shall record the proceedings.**

See, *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

## 4. GENERAL PROVISIONS

**Art. 216. [206] A person discharged before the indictment shall not be again imprisoned, unless, etc.**

See *Morrow v. State*, 86 Cr. R. 354, 216 S. W. 1100.

**Subsequent arrest.**—Where Court of Criminal Appeals determined facts authorized judgment of district court under which relator was held, it having been entered in record, and relator's discharge being on ground that when order of Court of Criminal Appeals was made there was no judgment entered or process issued authorizing his detention, order discharging from custody is no impediment to subsequent enforcement of judgment of district court by proper process. *Ex parte Alderete*, 83 Cr. R. 358, 203 S. W. 763.

**Art. 217. [207] A person once discharged or admitted to bail may be committed, when.**

**Bail on second arrest.**—Where defendant, who had been charged in justice court with murder, was remanded to jail without bail, and on habeas corpus proceedings was released, held, that the sheriff was not authorized, where defendant was thereafter indicted for murder and arrested on *capias*, to accept bail, and a bond so accepted was without authority. *Morrow v. State*, 86 Cr. R. 354, 216 S. W. 1100.

**Art. 219. [209] A party may obtain the writ a second time, when, etc.**

**Second application.**—Where accused was indicted for murder and was granted bail on application for habeas corpus, and a second indictment for robbery with a deadly weapon was based upon the same facts, failure to plead identity of the transactions cannot be supplied by second application for habeas corpus in such court, on an original application in the appellate court, not containing the facts made requisite to a valid second application. *Ex parte Jones*, 83 Cr. R. 12, 200 S. W. 1085.

## TITLE 4

## THE TIME AND PLACE OF COMMENCING AND PROSECUTING CRIMINAL ACTIONS

Chap.

1. The time within which criminal actions may be commenced.

Chap.

2. Of the county within which offenses may be prosecuted.

## CHAPTER ONE

## THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED

Art.

227. For theft, etc., five years.

Art.

229. Misdemeanors, two years.

**Article 227. [217] For theft, etc., five years.**See *Fulcher v. State*, 33 Cr. R. 22, 24 S. W. 292.**Art. 229. [219] Misdemeanors, two years.**Cited, *Mitten v. State*, 24 Tex. App. 346, 6 S. W. 196.

**Misdemeanors in general.**—Prosecution for wife desertion which took place four years and more before the complaint was filed in the county court, and about four years before it was sworn to, is barred by limitations. *Perry v. State*, 37 Cr. R. 226, 220 S. W. 549.

## CHAPTER TWO

## OF THE COUNTY WITHIN WHICH OFFENSES MAY BE PROSECUTED

Art.

234. For offenses committed wholly or in part without the state.

Art.

254. Prosecution for rape, commenced and carried on where, takes precedence of other cases.

235. Forgery and uttering forged papers.

256. Conviction, etc., in one county bar to prosecution in another

243. Person receiving an injury in one county and dying in another, offender, where prosecuted.

257. Proof of jurisdiction sufficient to sustain allegation of venue, when.

245. Property stolen in one county and carried to another.

258. Offenses not enumerated, prosecuted where.

253. Conspiracy

253a. Prosecution for bigamy.

**Article 234. [224] For offenses committed wholly or in part without the state.**Cited, *Sims v. State*, 28 Tex. App. 447, 13 S. W. 653; *Haley v. State* (Cr. App.) 228 S. W. 208.

**Offense without the state.**—One who steals property in another state, and brings it into Texas, may be tried and punished in Texas. *McKenzie v. State*, 32 Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795

Where a swindler obtained a bill of lading by falsely representing that he had loaded a car with pipe to be shipped to a point in another state where he exchanged the bill for another, showing a second shipment to another point, and deposited with such bill a draft on the consignee for collection, and obtained advancements against such draft by means of a forged telegram, advising that the draft had been paid, the fact that a prosecution might have been had in the state where the original bill was obtained did not prevent the courts of the state wherein the subsequent fraudulent transactions occurred from having jurisdiction. *Taylor v State* (Cr. App.) 232 S. W. 525.

**Art. 235. [225] Forgery and uttering forged papers may be prosecuted where.**—The offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed, or deposited or placed with another person, firm, association or corporation either for collection or credit for the account of any person, firm, association or corporation; all forging and uttering, using or passing, of forged instruments in writing which concern or affect the title to land in this State

may also be prosecuted in the county in which the seat of Government is located, or in the county in which the land, or any part thereof concerning or affecting the title to which the forgery has been committed, is situated. [O. C. 190a; Acts 1921, 37th Leg. 1st C. S., ch. 25, § 1.]

Took effect Nov. 15, 1921.

**Forgery.**—On a trial for fraudulently altering a bank check, it is not necessary, for conviction, that the offense should be committed in the county where the trial is had. *Mason v. State*, 32 Cr. R. 95, 22 S. W. 408.

Courts of county to which forged instrument was sent held not to have jurisdiction of prosecution for forging same. it not appearing instrument was attempted to be used or passed in that county for fraudulent purposes. *Carlson v. State*, 82 Cr. R. 19, 193 S. W. 147.

Prosecution may be maintained in the county where defendant deposited the forged check for collection. *Cone v. State* (Cr. App.) 232 S. W. 816.

**Art. 243. [233] Person receiving an injury in one county and dying in another, offender, where prosecuted.**

Cited, *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

**Murder.**—By direct provision of statute, venue may be either in county where shooting occurs, or where deceased person dies. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

**Art. 245. [235] Property stolen in one county and carried to another, offender prosecuted where.**

See *Green v. State* (App.) 12 S. W. 872.

Cited, *Strickland v. State*, 81 Cr. R. 643, 197 S. W. 1104.

**In general.**—Where calf was stolen in one county and taken into another, latter county may be given as venue of theft. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

A prosecution for theft need not necessarily be maintained in the county where the property was charged to have been taken, but may be maintained in the county into or through which the property may have been carried. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

**Art. 253. [242] Conspiracy, where prosecuted.**

**Charge.**—In a prosecution for conspiracy to commit murder, instruction on venue held erroneous as on the weight of the testimony and contrary to this article. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

**Art. 253a. Prosecution for bigamy.**—Prosecutions for bigamy may be commenced and carried on in the county where the bigamous marriage occurred or in any county in this State in which the parties to such bigamous marriage may live or cohabit together as man and wife. [Acts 1921, 37th Leg., ch. 70, § 1.]

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

**Art. 254. Prosecution for rape commenced and carried on where, takes precedence, etc.**

**Construction and operation in general.**—Where defendant attacked an indictment for statutory rape on the ground that it was returned by the grand jury of Smith county, but charged that the offense was committed in Wood county, the courts will take judicial notice that the two counties are in the same judicial district, and that this article was applicable. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

**Art. 256. [244] Conviction, etc., in one county, bar to prosecution in another, when.**

**Former jeopardy.**—Where accused entered plea of not guilty before a sworn jury, jeopardy attached, and his plea of jeopardy after jury was discharged, and the case continued and transferred to another county for trial, should have been sustained. *Villareal v. State*, 82 Cr. R. 327, 199 S. W. 642.

**Art. 257. [245] Proof of jurisdiction sufficient to sustain allegation of venue, when.**

**Proof of venue.**—In a prosecution for perjury before the grand jury, evidence held sufficient to establish venue in the county charged. *Allen v. State*, 82 Cr. R. 416, 199 S. W. 633; *Sherman v. State*, 83 Cr. R. 205, 202 S. W. 93.

In a prosecution for aggravated assault, evidence by the prosecuting witness that "defendant struck me while we were both engaged in assisting in threshing grain on the Ida Cherryhomes farm in Young county, Tex.," was sufficient to show venue. *Knight v. State*, 87 Cr. R. 134, 220 S. W. 333.

**Art. 258. [246] Offenses not enumerated prosecuted where.**

Cited, *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

## TITLE 5

## OF ARREST, COMMITMENT AND BAIL

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| <p>Chap.<br/>1. Of arrest without warrant.<br/>2. Of arrest under warrant<br/>3. Of the commitment or discharge of the accused<br/>4. Of bail.<br/>    1. General rules applicable to all cases of bail.</p> | <p>Chap.<br/>4. Of bail—Continued.<br/>    2. Recognizance and bail bond.<br/>    3. Surrender of the principal by his bail.<br/>    4. Bail before the examining court.</p> |
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## CHAPTER ONE

## OF ARREST WITHOUT WARRANT

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|---|---|
| <p>Art.<br/>259. Arrest without warrant, when.<br/>260. Same.<br/>261. Who may authorize.</p> | <p>Art.<br/>262. When felony has been committed.<br/>264. In such cases must take the offender before the nearest magistrate.</p> |
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**Article 259. [247] Arrest without warrant, when.**

Cited, *McKinney v. State* (Cr. App.) 22 S. W. 146.

**Act justifying arrest.**—A deputy sheriff had the right to arrest without a warrant a person who in his presence was creating a disturbance by shooting, hollering, and cursing. *Samino v State*, 83 Cr. R. 481, 204 S. W. 233

An officer may make an arrest without a warrant, where a felony or an offense against the public peace is committed in his presence. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

**Force in making arrest.**—Defendant, who discovered deceased in his corncrib stealing corn, and who attempted to arrest him, as authorized by this article, when deceased's wife, at his request, came with a shotgun, had the right to prevent deceased from securing it and using it. *Fread v. State*, 85 Cr. R. 121, 210 S. W. 695.

**Art. 260. [248] Same.**

Cited, *McKinney v. State* (Cr. App.) 22 S. W. 146.

**Authority to request arrest.**—Act of sheriff in arresting relator for failure or refusal to register, without warrant or other process, on verbal request of chairman of local exemption board under federal Selective Draft Act (U. S. Comp. St. 1918, §§ 2019a, 2019b, 2044a-2044k), held violative of Const. U. S. Amend. 5 forbidding that any citizen shall be deprived of liberty without due process of law, and similar provision of Texas Constitution, neither U. S. Comp. St. §§ 1534-1706, nor Selective Draft Act, authorizing any such proceeding. *Ex parte Jones*, 84 Cr. R. 497, 208 S. W. 525.

**Art. 261. [249] Municipal authorities may authorize arrest without warrant, when.**

Cited, *Pratt v. Brown*, 80 Tex. 608, 16 S. W. 443; *McKinney v. State* (Cr. App.) 22 S. W. 146.

**Validity of ordinance.**—Ordinances authorizing policemen of a city to make arrests without warrant for all violations of law, passed under the charter of the city empowering it to pass such ordinances, are legal. *Gulf, C. & S. F. Ry. Co. v. Kriegel* (Civ. App.) 204 S. W. 1071.

**Right to make arrest.**—A town marshal may make an arrest without a warrant for a felony or an offense against the public peace committed in his presence, where the ordinances of the city confer such authority. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

**Art. 262. [250] May arrest without warrant when felony has been committed.**

**Authority of officer.**—A peace officer has no authority, beyond the limits of his county, to arrest a party accused of crime. *Ledbetter v. State*, 23 Tex. App. 247, 5 S. W. 226.

A de facto deputy sheriff could arrest without a warrant one who had committed a felony and was about to escape. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

**Art. 264. [252] In such cases must take the offender before the nearest magistrate.**

**Civil liability.**—Where the petition in an action for false imprisonment alleges that plaintiff was arrested without warrant, and was imprisoned without an examination, and these allegations are not contradicted, a judgment for defendants cannot be sustained. *Newby v. Gunn*; 74 Tex. 455, 12 S. W. 67.

## CHAPTER TWO

### OF ARREST UNDER WARRANT

Art. 265. Definition of "warrant of arrest." 268. "Complaint" is what. 269. Requisites of complaint. 270. Warrant issued by magistrate, etc., extends to every part of the state.	Art. 272-277. [Note.] 288. What force may be used. 290. Authority to make arrest must be made known.
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#### Article 265. [253] Definition of "warrant of arrest."

Cited, Childers v. State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

#### Art. 268. [256] "Complaint" is what.

See Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812; Halbadier v. State, 87 Cr. R. 129, 220 S. W. 85.

#### Art. 269. [257] Requisites of complaint.

See Halbadier v. State, 87 Cr. R. 129, 220 S. W. 85.  
 Cited, Jefferson v. State, 24 Tex. App. 535, 7 S. W. 244.

4. **Form and requisites in general.**—In prosecution of a father for neglect to support minor children where complaint begins, "Personally appeared before undersigned authority this affiant who after being duly sworn," etc., and was signed by affiant and properly sworn to before proper officer and attested by proper jurat, defendant's motion to quash it because affiant's name was not given in body of complaint was correctly overruled. Utsler v. State, 81 Cr. R. 501, 195 S. W. 855.

14. **Quashing.**—That evidence showed that tires stolen belonged to P. was no ground for motion to quash complaint, which alleged that property belonged to H.; proper procedure being an objection to proof on ground of variance. Taylor v. State, 85 Cr. R. 101, 210 S. W. 539.

#### Art. 270. [258] Warrant issued by magistrates, etc., extends to every part of the state.

Cited, Childers v. State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

#### Arts. 272-277. [260-265].

See Cabell v. Arnold (Civ. App.) 22 S. W. 62.

#### Art. 288. [276] What force may be used.

Cited, Roberts v. State, 23 Tex. App. 170, 4 S. W. 879.

#### Art. 290. [278] Authority to arrest must be made known.

See Cabell v. Arnold (Civ. App.) 22 S. W. 62.  
 Cited, Roberts v. State, 23 Tex. App. 170, 4 S. W. 879.

**Form of arrest.**—It is not necessary to make an arrest in formal words, and the fact of arrest can be shown by surrounding facts and circumstances. Bonatz v. State, 85 Cr. R. 292, 212 S. W. 494.

## CHAPTER THREE

### OF THE COMMITMENT OR DISCHARGE OF THE ACCUSED

Art. 294. Defendant shall be informed of his right to make statement, etc. 295. Voluntary statement of accused.	Art. 299. Witnesses shall be examined in presence of the accused. 300. Testimony shall be reduced to writing, signed and certified.
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#### Article 294. [282] Defendant shall be informed of his right to make statement, etc.

See Dodson v. State (Cr. App.) 232 S. W. 836.

#### Art. 295. [283] Voluntary statement of accused.

See Dodson v. State (Cr. App.) 232 S. W. 836.  
 Cited, Kirby v. State, 23 Tex. App. 13, 5 S. W. 165.

**Voluntary statement.**—One on trial for murder had stated, on his own examining trial, that what he testified as state's witness on the examining trial of another, accused of the same offense, was the truth, and that he had no more to say. Such testimony was reduced to writing, but was sworn to by defendant, and was not attested by the magistrate. Held, that it was inadmissible against him, as a "voluntary statement." Walker v. State, 28 Tex. App. 112, 12 S. W. 503.

**Art. 299. [287] Witnesses shall be examined in the presence of accused.**

Cited, *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207.

**Art. 300. [288] Testimony shall be reduced to writing, signed and certified.**

Cited, *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

**Testimony and certificate.**—Showing that testimony at examining trial of witness since removed from state was not reduced to writing by magistrate with formality required, necessary for oral proof thereof held sufficient. *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

## CHAPTER FOUR OF BAIL

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| <p><b>1. GENERAL RULES APPLICABLE TO ALL CASES OF BAIL</b></p> <p>Art.<br/>315. Definition of "bail."<br/>316. Definition of "recognizance."</p> <p><b>2. RECOGNIZANCE AND BAIL BOND</b></p> <p>320. Requisites of a recognizance.<br/>321. Requisites of a bail bond.<br/>325. In what manner bail shall be taken.<br/>326. Property exempt from sale shall not be liable for, etc.<br/>329. Rules for fixing amount of bail.</p> | <p><b>3. SURRENDER OF THE PRINCIPAL BY HIS BAIL</b></p> <p>Art.<br/>336. Sheriff, etc., may take bail bond, when.<br/>337. Sheriff, etc., cannot take bail in felony case when court is in session.<br/>339. Sureties are severally bound, etc.</p> <p><b>4. BAIL BEFORE THE EXAMINING COURT</b></p> <p>343. Reasonable time given to procure bail.<br/>345. When accused is ready to give bail, a bond shall be prepared, etc.<br/>346. Accused shall be liberated, etc.</p> |
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### 1. GENERAL RULES APPLICABLE TO ALL CASES OF BAIL

#### Article 315. [303] Definition of "bail."

**Bail or recognizance.**—Mere fact that to end of appellant's recognizances were signed names of appellant and sureties, under circumstances that judgment entering recognizance recited appellant and sureties came into open court and were properly recognized, as required by statute, did not constitute it a bail bond. *Dickey v. State*, 82 Cr. R. 154, 198 S. W. 309.

#### Art. 316. [304] Definition of "recognizance."

**Recognizance.**—Mere fact that to end of appellant's recognizance were signed names of appellant and sureties, under circumstances that judgment entering recognizance recited appellant and sureties came into open court and were properly recognized, as required by statute, did not constitute it a bail bond. *Dickey v. State*, 82 Cr. R. 154, 198 S. W. 309.

A recognizance, "This day came into open court W., defendant in the above entitled and numbered cause, who together with S., J., and T., sureties, acknowledged themselves jointly and severally indebted to the state of Texas, \* \* \* conditioned that the said W., who stands charged with the offense of a felony, to wit, unlawfully selling intoxicating liquors, in this court, shall appear before this court from day to day and from term to term of the same, and not depart therefrom without leave of this court in order to abate a judgment of the Court of Criminal Appeals of the state of Texas in this case," is such as is required for the appearance of an accused, but is not the recognizance required upon appeal under arts. 902, 903, nowhere stating that accused has been convicted of any named offense. *Westbrook v. State* (Cr. App.) 227 S. W. 1104.

### 2. RECOGNIZANCE AND BAIL BOND

#### Art. 320. [308] Requisites of a recognizance.

See *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

Cited, *Reed v. State* (Cr. App.) 22 S. W. 969.

**Appearance.**—Where convicted defendant recognized February 16th to appear before district court on 1st day of July and there to remain to answer on charge by indictment, etc., to abide judgment of Court of Criminal Appeals, recognizance was insufficient as not requiring defendant to appear before district court from time of entering into it. *Clay v. State*, 83 Cr. R. 527, 204 S. W. 330.

#### Art. 321. [309] Requisites of a bail bond.

**6. Form and requisites in general.**—Bail bonds are statutory, and the terms of the statute must be strictly followed. *Turpin v. State*, 86 Cr. R. 96, 215 S. W. 455.

Where there is a difference between the date of execution and approval of a bail bond, the date of execution controls. *Raymond v. State*, 87 Cr. R. 178, 220 S. W. 88.

**5. Designation of offense.**—A bond naming offense of “violating the local option law” created no liability on the surety, since it neither stated that the offense was a felony, nor named an offense *eo nomine* prescribed by law. *Anderson v. State*, 83 Cr. R. 130, 201 S. W. 994; *Saunders v. State*, 86 Cr. R. 322, 216 S. W. 870.

Where a bail bond set out that defendant committed a felony by attempting to export munitions of war into Mexico in violation of the Presidential Proclamation of March 12, 1914, held that the bond was sufficient, having set out that the offense was a felony, which was all that was required by the statute, notwithstanding the original proclamation of President Taft, under the Congressional Resolution of March 14, 1912, making a violation a felony, had been revoked before March 12, 1914; a similar proclamation having been issued by President Wilson before and in effect at the time the offense was alleged to have occurred. *United States v. Buchanan* (D. C.) 255 Fed. 915.

Bail bond describing the offense with which the principal was charged as “unlawfully keeping intoxicating liquor in violation of law, a felony,” held sufficient in the description, all that is necessary being to state that defendant is charged with a felony or misdemeanor; the remainder of the descriptive language used in the bond might be treated as surplusage. *Briggs v. State*, 87 Cr. R. 473, 222 S. W. 246.

**Art. 325. [313] In what manner bail shall be taken.**

See *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

**Art. 326. [314] Property exempt from sale shall not be liable for, etc.**

See *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

**Art. 329. [317] Rules for fixing amount of bail.**

**Amount of bail.**—In an ordinary case of arson, where it appeared that accused could not get any one to go bail for more than \$1,500, the court erred in requiring a bond for \$6,000. *Ex parte Bowman*, 83 Cr. R. 598, 204 S. W. 329.

**3. SURRENDER OF THE PRINCIPAL BY HIS BAIL**

**Art. 336. [324] Sheriff, etc., may take bail bond, when.**

See *Russey v. Wilson* (Civ. App.) 202 S. W. 974.

**Art. 337. [325] Sheriff, etc., not authorized to take bail in felony case when court is in session.**

**Unauthorized bail.**—Where bail bond was taken and approved by sheriff during the term, forfeiture thereof will not be sustained; no bond having been fixed by the court either by an order entered upon the docket or verbally. *Turpin v. State*, 86 Cr. R. 96, 215 S. W. 455.

Where the indictment charged the offense of murder, which is a capital offense on its face, the sheriff is not authorized to fix and take bail himself, and, where the sheriff did take bail without authority, the bond is void and cannot be forfeited on *scire facias*. *Morrow v. State*, 86 Cr. R. 354, 216 S. W. 1100.

**Art. 339. [327] Sureties are severally bound, etc.**

**Judgment.**—A judgment against sureties on bail bond must follow the statute and decree sureties jointly and severally liable, and it is not enough to render judgment only specifically against each surety for the amount stipulated in the bond. *Saunders v. State*, 86 Cr. R. 322, 216 S. W. 870.

**4. BAIL BEFORE THE EXAMINING COURT**

**Art. 343. [331] Reasonable time given to procure bail.**

See *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 978.

**Action for refusal.**—In an action against a sheriff and his sureties for refusing plaintiff reasonable time to furnish bail, an instruction that it was the sheriff's duty to prepare the bail bond was not required under evidence showing that plaintiff prior to his incarceration was never ready to give bond. *Russey v. Wilson* (Civ. App.) 202 S. W. 974.

**Art. 345. [333] When accused is ready to give bail, a bond shall be prepared, etc.**

**Authority to take bail.**—Magistrate had authority, while his court was in session, to take bond of one accused of felony. *Ex parte Evans*, 81 Cr. R. 366, 195 S. W. 861.

**Duty to prepare bond.**—In an action against a sheriff and his sureties for refusing plaintiff reasonable time to furnish bail, an instruction that it was the sheriff's duty to prepare the bail bond was not required under evidence showing that plaintiff prior to his incarceration was never ready to give bond. *Russey v. Wilson* (Civ. App.) 202 S. W. 974.

**Art. 346. [334] Accused shall be liberated upon giving bond.**

**Right to liberty.**—Where justice of peace, while his court was in session, approved bond of one accused of felony, accused was entitled to discharge from custody. *Ex parte Evans*, 81 Cr. R. 366, 195 S. W. 861.



## TITLE 6

## SEARCH WARRANTS

## CHAPTER THREE

## OF THE EXECUTION OF A SEARCH WARRANT

**Article 376. [364]** All persons have the right to prevent the consequences of theft, etc.

**Rights and liabilities of private person.**—Any person having reasonable ground to believe that property is stolen may arrest the offender and seize the property whether he is an officer or not. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

## TITLE 7

## OF THE PROCEEDINGS SUBSEQUENT TO COMMITMENT OR BAIL, AND PRIOR TO THE TRIAL

Chap.

1. The organization of the grand jury.
2. Of the duties, privileges and powers of the grand jury
3. Of indictments and informations.
4. Of proceedings preliminary to trial.
  1. Of enforcing the attendance of defendant and of forfeiture of bail.
  2. Of the capias.
  3. Of witnesses and the manner of enforcing their attendance.
  4. Service of a copy of the indictment.

Chap.

4. Of proceedings preliminary to trial—Continued.
5. Of arraignment and of proceedings where no arraignment is necessary.
6. Of the pleadings in criminal actions.
7. Of the argument and decision of motions, pleas and exceptions.
8. Of continuance.
9. Disqualification of the judge.
10. Change of venue.
11. Of dismissing prosecutions.

## CHAPTER ONE

## THE ORGANIZATION OF THE GRAND JURY

Art.

389. Shall select grand jurors.
400. When less than twelve attend, court shall order others summoned.

Art.

409. Any person may challenge, when.
416. Oath of grand jurors.
- 419a. Bailiff's compensation.

**Article 389. [377]** Shall select grand jurors.

**Race discrimination.**—Where both accused and deceased were negroes, evidence held not to show race discrimination, as alleged, in selecting grand and petit jurors, in that no negroes were selected. *Roberts v. State*, 81 Cr. R. 227, 195 S. W. 189.

**Art. 400. [388]** When less than 12 attend, court shall order others summoned.

**Construction and application in general.**—The statute authorizing the court to summon talesmen in the original organization of the grand jury does not apply to a discharge of or to the absence of one of the grand jurors after the body has been impaneled, so that where the grand jury took a recess from the 17th of January to the 17th of February, and on January 23d were reconvened by the court, ten of the jurors only responding to the call, that the court summoned other citizens to take the place of the two absent jurymen invalidated the organization of the grand jury, and an indictment found by the jury when so organized was a nullity. *Wright v. State*, 86 Cr. R. 434, 217 S. W. 152.

**Art. 409. [397]** Any person may challenge, when.

**Time of making challenge.**—An objection that one of the grand jurors was a non-resident of the county in which the indictment was found cannot be raised against the indictment. *Lienburger v. State* (Cr. App.) 21 S. W. 603.

Although accused did not object to array of grand jurors, he is not too late in presenting that question after return of indictment. *Roberts v. State*, 82 Cr. R. 227, 195 S. W. 189.

**Art. 416. [404] Oath of grand jurors.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

Cited, *Murchison v. State*, 24 Tex. App. 8, 5 S. W. 508; *Addison v. State*, 85 Cr. R. 131, 211 S. W. 225.

**Secrecy as to proceedings.**—Indictment found after state's and district attorney, sheriff, and chief of police were before grand jury discussing whether to proceed by injunction or indictment, was invalid. *McGregor v. State*, 83 Cr. R. 35, 201 S. W. 184.

In homicide prosecution where it was alleged in the indictment that grand jury did not know the means by which deceased was killed, it was not error to permit foreman of grand jury to testify as to the efforts made by the grand jury to ascertain such means and their inability to do so. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

In a murder prosecution, it was not error to refuse to require the district attorney to deliver certain written statements in his possession containing testimony of witnesses before the grand jury, such statements not being public documents, and accused having no right to inspect them. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

— **Confession before grand jury.**—Confession is not inadmissible merely because made before grand jury. *Oliver v. State*, 82 Cr. R. 529, 197 S. W. 185.

**Art. 419a. Bailiff's compensation.**—Each grand jury bailiff appointed as such bailiff by the court shall receive as compensation for his services the sum of Three Dollars for each day that he may serve as a grand jury bailiff. [Acts 1919, 36th Leg., ch. 26, § 3.]

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## CHAPTER TWO

### OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY

Art. 425. Deliberations shall be secret.	Art. 432. Duties of grand jury.
426. Attorney representing the state may go before, etc.	439. Oaths of witnesses.
427. Attorney may examine witnesses, etc.	445. Indictment shall be presented in open court.
428. Grand jury may send for attorney representing the state, etc.	446. Presentation to be entered of record, etc.

**Article 425. [413] Deliberations shall be secret.**

See *McGregor v. State*, 83 Cr. R. 35, 201 S. W. 184.

Cited, *Murchison v. State*, 24 Tex. App. 8, 5 S. W. 508.

**Art. 426. [414] Attorney representing the state may go before, etc.**

See *McGregor v. State*, 83 Cr. R. 35, 201 S. W. 184; *Ratcliff v. State* (Cr. App.) 225 S. W. 53.

**Art. 427. [415] Attorney may examine witnesses, etc.**

See *McGregor v. State*, 83 Cr. R. 35, 201 S. W. 184.

**Art. 428. [416] Grand jury may send for attorney representing the state, etc.**

See *McGregor v. State*, 83 Cr. R. 35, 201 S. W. 184.

**Art. 432. [420] Duties of grand jury.**

**Offenses subject to inquiry.**—Grand jury is only empowered to inquire into violations of criminal laws. *Ait v. State*, 83 Cr. R. 337, 203 S. W. 53.

**Art. 439. [427] Oaths to witnesses.**

Cited, *Murchison v. State*, 24 Tex. App. 8, 5 S. W. 508.

**Art. 445. [433] Indictment shall be presented in open court.**

**Extension of term.**—Under art. 974, fixing the terms of the criminal district court of Travis county, and Civ. St. art. 1726, authorizing extension of term until the conclusion of a pending trial, indictment found during such extension was not void, because not found during or returned in a court in session. *Ex parte McKay*, 82 Cr. R. 221, 199 S. W. 637.

Acts 34th Leg. c. 139 (Civ. St. art. 30, subd. 66), authorized extension of March term of district court of Hill county beyond end of seven weeks specified, where business of grand jury was unfinished, and an indictment returned during extension was not invalid for that reason, but was returned into open court. *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

Acts 34th Leg. c. 139, did not authorize the extension of the March term of the district court of Hill county beyond the end of the seven weeks specified, because the business of the grand jury was not finished, and an indictment returned during extension would be invalid (Per Davidson, J.). *Id.*

**Special term.**—An indictment cannot be attacked where found at a special term, because a term of court was then in session in another county in same district. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

#### Art. 446. [434] Presentment to be entered of record, etc.

**Filing and record in general.**—The transcript of a case entitled "The State of Texas vs. Arch English. No. 154," which recited that the grand jury presented, in open court, "the following bill of indictment, which was thereupon ordered to be filed, to-wit, 'The State of Texas vs. ———. File No. 172,'"—failed to show the return of an indictment marked "No. 154." *English v. State* (App.) 18 S. W. 678.

### CHAPTER THREE

#### OF INDICTMENTS AND INFORMATIONS

Art.	Art.
447. Felonies presented by indictment only.	471. Proof not dispensed with.
449. All offenses must be presented by indictment or information.	472. Libel; indictment for.
450. An "indictment" is what.	473. Disjunctive allegations.
451. Requisites of an indictment.	474. Statutory words need not be strictly followed.
452. What should be stated in an indictment, etc.	476. Defects of form do not affect trial, etc.
453. The certainty required.	477. Definition of an "information."
454. Particular intent; intent to defraud.	478. Requisites of an information.
456. Allegation of name.	479. Shall not be presented until oath has been made, etc.
457. Allegation of ownership.	481. Indictment, etc., may contain several counts.
458. Description of property.	482. When indictment or information has been lost, mislaid, etc.
460. Certainty; what sufficient.	483. Order transferring cases.
462. "Public place"—Allegation of.	484. What causes shall be transferred to justice of the peace at county seat.
464. Selling intoxicating liquor—Sufficient allegations as to.	485. Duty of clerk of district court when case is transferred.
465. Perjury; sufficient allegations for.	
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#### Article 447. [435] Felonies presented by indictment only.

Cited, *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210.

**Necessity of indictment.**—The accusation against the principal in bail bond being by complaint for a felony in the district court, the forfeiture of the bond is invalid, since accusation should have been by indictment. *Turpin v. State*, 86 Cr. R. 96, 215 S. W. 455.

#### Art. 449. [437] All offenses must be presented by indictment or information.

**Necessity of indictment or information.**—A complaint and information in county court or an indictment in district court are necessary to sustain a conviction. *Turman v. State*, 81 Cr. R. 320, 196 S. W. 181.

The information is a prerequisite to a prosecution in the county court for keeping a disorderly house for the purpose of men and women meeting for sexual intercourse. *Reynolds v. State*, 82 Cr. R. 326, 198 S. W. 958.

No prosecution for a criminal offense can be had except upon complaint or indictment. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

#### Art. 450. [438] An indictment is what.

See *Kennedy v. State*, 86 Cr. R. 450, 216 S. W. 1086.

**Meaning and requisites of indictment in general.**—An indictment, partly printed and partly written, is not invalid. *O'Bryan v. State*, 27 Tex. App. 339, 11 S. W. 443.

**Joinder of parties.**—Where offense is joint or jointly charged, state does not meet allegations of information by showing it was committed by separate acts of alleged joint actors, and, under such circumstances, indictment or information cannot combine two as jointly acting together. *Sampson v. State*, 83 Cr. R. 594, 204 S. W. 324.

#### Art. 451. [439] Requisites of an indictment.

1. In general.—It is wholly unnecessary that an indictment allege the penalty for the crime. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

When an indictment in a murder case contains more than one count, and the first count is abandoned, the formal parts thereof will be applied to the second count as against the objection that such count is defective, in lacking the formal headings and the other necessary matter to make it legal. *Ellis v. State*, 85 Cr. R. 529, 213 S. W. 264.

An indictment charging that defendant "did then and there unlawfully and willfully attempt to procure, and did procure, and was concerned in procuring," a female named as an inmate of a house of prostitution, although following the words of the statute, held insufficient as not disclosing the acts or omissions of accused by which he was charged to have procured the female inmate. *Kennedy v. State*, 86 Cr. R. 450, 216 S. W. 1086.

The rule that it is sufficient if the indictment follows the language of the statute applies only where the indictment is framed under a statute which defines the acts con-

stituting the offense in a manner that will inform accused of the nature of the charge, the test being, not that the indictment follows the statute, but that it is a compliance with the law prescribing the requisites of an indictment, an "indictment" being a written statement of the grand jury accusing person therein named of some act or omission which by law is declared to be an offense, such offense to be set forth in plain and intelligible words, in view of arts. 450, 451, and Const. art. 1, § 10. *Id.*

**2. Commencement.**—Under Bill of Rights, § 10, in view of section 29, an indictment, leaving out the words "by the" in the formal clause "by the authority of the state," held fatally defective, so that court erred in not allowing amended motion for new trial for alleged discovery that indictment had been amended by inserting such omitted words. *Alvarado v. State*, 83 Cr. R. 181, 202 S. W. 322.

An indictment, commencing "in the name and by the authority of the state of Texas," is a literal compliance with this article, where such words are in quotation, and is sufficient, although the word "the" does not precede the word "authority" in Const. art. 5, § 12, relating to style of writs and process, where the words are not in quotation. (Per Prendergast, J.) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

**3. Presentation and act of grand jury.**—Indictment alleging, "The grand jury of C. county, Tex., upon their oaths present in the district court thereof, at the March term, A. D. 1917," sufficiently shows that grand jury was duly organized at court then in session. *Carrillo v. State*, 81 Cr. R. 636, 197 S. W. 998.

Where an indictment recited that it was found by the grand jury organized at the October term, the indictment was returned on November 21st, and on accused's application the venue was changed on November 24th, a motion then made to quash the indictment on the ground that there was a misnomer of the term of court at which it was returned was properly overruled, for the statement of the term of court at which the indictment was presented is not one of the statutory requirements, but is, at most, a matter of form, available only on motion to quash presented in due time, and under art. 630, it is contemplated that an exception to the form of the indictment should be made in the court in which the indictment is filed before the venue is changed. *Finch v. State* (Cr. App.) 232 S. W. 528.

**7. Jurisdiction and venue.**—Where an indictment shows it was brought by the grand jury of M. county, that M. county had adopted the local option liquor law, and alleges defendant did "then and there" violate said law, the words "then and there" held to refer to M. county. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

An information for desertion of wife and children, which alleged that defendant in the county of the prosecution married and became the father of the children, and that he deserted them, is insufficient to show that the desertion occurred within the county, so that a motion to quash the information should have been sustained. *Freeman v. State* (Cr. App.) 224 S. W. 1087.

Where an indictment alleged that defendant, in the county of Johnson, was then and there a person who had theretofore married a woman who was then and there his lawful wife, etc., and while she was alive married another woman, etc., it sufficiently alleged that the alleged bigamous marriage took place in Johnson county. *Burgess v. State* (Cr. App.) 225 S. W. 182.

**10. Time and limitations.**—An indictment charging that the offense alleged therein was committed on a specified day, which is the same as that in which the indictment was returned and filed, and containing no allegation that it was committed prior to the presentment, is fatally defective. *Andrews v. State* (App.) 14 S. W. 1014; *Gill v. State* (Cr. App.) 20 S. W. 578.

The offense of engaging in the business of selling liquors in prohibition territory, laid by the indictment as committed on or about a certain day, embraces a period of three years prior and up to the filing of the indictment. *Jackson v. State*, 82 Cr. R. 333, 200 S. W. 150; *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

An indictment for assault to rape, which alleges that the offense was committed "on or about the 8th day of December, one thousand eight hundred and nine," is substantially defective. *Reed v. State* (App.) 13 S. W. 865.

The facts may show that the offense was committed either before or after the alleged date, provided the date fixed in the indictment precedes the return of the indictment so that there was no fatal variance where indictment charged that burglary was committed on December 1st, and the evidence showed that accused was on the 18th of the same month found in possession of property which came out of the burglarized house. *Connor v. State*, 85 Cr. R. 98, 210 S. W. 207.

The date alleged in an indictment for violation of the local option law is not binding, and the state may show any date within the period of limitation as the date of the sale on which it elects to seek a conviction. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

Indictment charging burglary held sufficient without specific allegation that offense was committed anterior to presentation of indictment, where it appeared from recitals in the indictment that the date of the offense alleged was before indictment was filed. *Dixon v. State*, 86 Cr. R. 406, 216 S. W. 1097.

The date on which the offense is alleged to have taken place must be a date anterior to the filing of the indictment. *Id.*

An indictment for violating the local option law, alleging that on a certain date the sale of liquor had been prohibited in a certain county, that on that date defendant unlawfully engaged in the business of selling liquor, and that on a date more than a year later he made certain specific sales, without alleging that prohibition was still in effect, was not defective; the state not being bound by the specific dates alleged. *White v. State*, 86 Cr. R. 420, 217 S. W. 389.

The date of an offense is practically immaterial, provided the offense is alleged to have been committed prior to filing of the indictment and within the period of limitation. *Id.*

An indictment, presented on August 31st, which charged the offense of passing the forged instrument to have been committed on July 31, and anterior to the presentment, is not subject to attack on the ground that it fails to charge facts showing that the offense was committed anterior to the presentment. *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238.

11. — **Proof.**—Where indictment was returned April 23, 1917, charging an offense on December 24, 1916, which was a misprint for December 24, 1915, evidence was properly admitted as to the offense on December 24, 1915, which was within the period of limitation and prior to the indictment. *Vann v. State*, 84 Cr. R. 97, 206 S. W. 80.

The evidence must show that defendant's illegal sale of intoxicating malt liquor occurred prior to the filing of the indictment therefor. *Wales v. State*, 85 Cr. R. 391, 212 S. W. 503.

12. **Statement of offense.**—If, eliminating surplusage, the constituent elements of the offense are so averred as to apprise defendant of the charge against him and to enable him to plead the judgment in bar of another prosecution for the same offense, the indictment is good. *Jennings v. State* (Cr. App.) 229 S. W. 525.

13. — **Setting out written instruments.**—Where a written instrument enters into an offense as a part or basis thereof or when its proper construction is material, the instrument should be set out in the indictment. *Rudy v. State*, 81 Cr. R. 272, 195 S. W. 187.

17. **Conclusion.**—Where an indictment failed to conclude with the words "against the peace and dignity of the state" or any equivalent declaration, it was void under Const. art. 5, § 12, declaring that prosecution shall be carried on in the name of the state of Texas and shall conclude "against the peace and dignity of the state." *Revill v. State*, 87 Cr. R. 1, 218 S. W. 1044.

18. **Signature.**—In view of art. 576, signature of foreman of grand jury is not essential to validity of indictment; signature of another as acting foreman being sufficient. *Parkinson v. State*, 87 Cr. R. 176, 220 S. W. 774.

It is not necessary to the validity of an indictment that the signature of the foreman appear thereon, and the same may be amended under the court's direction by attaching the foreman's name after filing. *Searcy v. State* (Cr. App.) 232 S. W. 319.

#### **Art. 452. [440] What should be stated in an indictment, etc.**

Cited, *Jones v. State* (App.) 19 S. W. 677.

**Proof.**—Wherever descriptive averments are made in indictment, whether necessary or not, proof must meet them, and all necessary allegations must be met by corresponding evidence. *Kahane v. State*, 83 Cr. R. 19, 201 S. W. 994.

In a trial for murder committed with a stick, which the indictment described with unnecessary particularity, the trial court correctly instructed the jury that it was sufficient if they believed the proof showed that the stick used was substantially the same as described in the indictment, in view of the rule that proof is sufficient, if it shows that the weapon charged in the indictment and the one proved to have been used are such that the nature and result of their use would be the same. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

#### **Art. 453. [441] The certainty required.**

Cited, *Barner v. State* (Cr. App.) 20 S. W. 559; *Johnson v. State*, 83 Cr. R. 33, 201 S. W. 187.

1. **Certainty in general.**—The indictment should set out the particular offense charged with such certainty as that a presumptively innocent man, seeking to know what he must meet, may ascertain fully therefrom the matters charged against him. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

Indictment for burglary must allege whatever is necessary to be proved with such certainty as will put the accused on notice and enable him to plead the judgment rendered in bar of subsequent prosecution for the same offense. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

The whole indictment must be looked to to ascertain whether it lacks certainty. *Scott v. State* (Cr. App.) 228 S. W. 1099.

10. **Violation of liquor law.**—To show prohibition law was in effect, an indictment need only allege that a prohibition election was held, that the result was declared by an order of the commissioners' court, and that an order was made prohibiting the sale of liquor. *Wright v. State*, 83 Cr. R. 415, 203 S. W. 775.

#### **Art. 454. [442] Particular intent; intent to defraud.**

4. **"Knowingly."**—Indictment charging that defendant did "unlawfully attempt to pass as true to O. a forged instrument in writing, \* \* \* which said instrument in writing the said G. [defendant] then and there knew to be forged," held sufficient as against contention that it did not allege in the statutory language that defendant "knowingly" attempted to pass the instrument; the allegation that he knew it to be forged being sufficient. *Jennings v. State* (Cr. App.) 229 S. W. 525.

7. **Intent to defraud.**—Taking with intent to appropriate to use or benefit of taker being under Penal Code, art. 1329, an essential element of theft, and such intent therefore being required by this article, to be stated in the indictment, it not doing so, but stating that taking was with intent to appropriate to use and benefit of the owner, was bad. *Arocha v. State*, 86 Cr. R. 656, 218 S. W. 759.

#### **Art. 456. [444] Allegation of name.**

Cited, *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

1. **In general.**—A complaint and information describing the accused as "one Persqual" are fatally defective. *Persqual v. State* (App.) 8 S. W. 477.

It is error for the court to decide as matter of law that a person was correctly described as "Mrs. C. Davis" on proof that her husband's name was C. Davis, but the question should have been submitted to the jury to find whether she was known by the name "Mrs. C. Davis." *Davis v. State* (App.) 11 S. W. 647.

In prosecution for slander, information which failed to give either Christian name or initials of injured party, or state that they were unknown, held defective. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

Indictment for perjury, charging defendant with falsely testifying before the grand jury investigating his relations with an unmarried woman, one Bradshaw, he being a married man, was not bad because, where it spelled the name Bradshaw correctly some 20 times, it once misspelled it Bardshaw, and under such indictment evidence of defendant's intimacy with the woman was admissible. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

Where the name of accused is originally properly set out in an information, and afterward referred to as the "said" party, a variance in the spelling or setting out of the name is of no importance. *Estrada v. State* (Cr. App.) 226 S. W. 685.

3. **Suffix "Jr." or "Sr." as part of name.**—The suffix "Jr." or the suffix "Sr." form no part of a name, and may be regarded as surplusage. *Hardin v. State* (Cr. App.) 227 S. W. 676.

5. **When name is unknown.**—In indictment charging reception of stolen property, it is necessary to name parties from whom stolen property was received by defendant, if names are known, and, if not, grand jury is justified in alleging names are unknown to it. *Kahanek v. State*, 83 Cr. R. 19, 201 S. W. 994.

An indictment for receiving stolen goods should allege either the name of the thief or that his name was to the grand jurors unknown. (Per Davidson, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

Charge submitting case should conform to indictment, charging, "some person to the grand jury unknown," and should not authorize conviction on intent to kill "any" person. *Cannon v. State*, 83 Cr. R. 154, 202 S. W. 83.

The state having alleged that property was received from some person to the grand jury unknown, it was necessary to prove it. *Moore v. State*, 84 Cr. R. 256, 206 S. W. 683.

To justify indictment alleging that defendant received property from some person to the grand jurors unknown, it must be shown that grand jury did not know, and could not have ascertained by reasonable diligence, from whom alleged stolen property was received by defendant. *Id.*

Where defendant claimed to have purchased automobile from specified person, and grand jury had in its possession, at the time it returned the indictment, the bill of sale to defendant from such person, it was error for the grand jury to charge defendant with fraudulently receiving the automobile from an unknown owner, without charging that he had received it from the person from whom he claimed to have purchased it in good faith. *Harper v. State* (Cr. App.) 227 S. W. 190.

6. **Names held to be the same or idem sonans.**—Indictment for perjury committed in trial for arson, alleging that burned building was owned by "said" Virgil Tidwell and two others, where indictment showed that, whether name was "R. B.," "R. V." or "Virgil," the same person was meant, held not misleading or prejudicial. *Herndon v. State*, 82 Cr. R. 232, 198 S. W. 788.

"Matoska," and "Matosky." *Poldrack v. State*, 86 Cr. R. 272, 216 S. W. 170.

"McPherson" and "McPherson." *Hardy v. State*, 86 Cr. R. 515, 217 S. W. 939, 8 A. L. R. 1357.

There is no material variance between a name as stated in the indictment and the name established by evidence, if they may be sounded alike without violence to the letters in the different spelling, or if they are pronounced rather indiscriminately one way or the other, and the difference in spelling is slight. *Davis v. State* (Cr. App.) 224 S. W. 510.

"Hodge," and "Hodges." *Id.*

"J. H. Alphian," and "J. H. Alphin." *Escobedo v. State* (Cr. App.) 225 S. W. 377.

9. **Corporation.**—An indictment which sets out the forged note by its tenor need not allege that the payee, a bank, is a corporation; the bank not being the injured party. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

If the name only of the party injured by the giving of a worthless check is alleged, it is proper and sufficient to prove that the injured party was an individual; but if the proof under such allegations should show that the injured party was a corporation, there would be a variance, and if the injured party injured is alleged to be a bank, the indictment is bad, if it fails to allege whether it is an individual, partnership, corporation, or joint-stock company. *Whitaker v. State*, 85 Cr. R. 272, 211 S. W. 787.

An affidavit and information for swindling, by giving a check on a bank in which defendant had no funds, or any reasonable prospects of having funds, need not allege that the bank, which was not the injured party, was an incorporated bank or a copartnership. *Id.*

14. **Theft.**—That name of owner of stolen calf was J. L. P. and not J. R. P., as alleged, was not material variance. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

15. **Violation of liquor law.**—In prosecution for procuring and delivering intoxicants to persons enlisted in military forces of the United States, verdict of jury held to solve, in favor of the state, any question of variance as to names of soldiers to whom liquor was given and names charged in indictment. *Crosby v. State*, 85 Cr. R. 297, 212 S. W. 168.

### Art. 457. [445] Allegation of ownership.

See *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

In general.—Indictment charging embezzlement of money belonging to "Mesquite Camp No. 575, Woodmen of the World, a fraternal order and society," is insufficient;

name showing that owner was not a natural person, and status of owner not being averred. *Green v. State*, 82 Cr. R. 420, 199 S. W. 622.

In prosecution for unlawfully breaking, pulling down, and injuring fence of another without his consent, that fence was in possession of person in whom ownership was alleged, and that such person did not consent to breaking down of fence, is essential to conviction. *McCullers v. State*, 86 Cr. R. 247, 216 S. W. 182.

In a prosecution for receiving and concealing stolen property, an instruction that the ownership and possession of the property alleged to have been stolen might be alleged in the person having the actual care, control, and management of the same, though another individual or corporation was the general owner, held correct. *Fallon v. State* (Cr. App.) 230 S. W. 170.

On a trial for the theft of and the receiving and concealing of certain stolen automobile casings, testimony of the superintendent of the company from which they were taken was admissible to sustain the allegation of ownership and possession of the casings in him as an individual; it showing that he had the actual care, management, and control of the same. *Id.*

The rules with reference to the allegation and proof of ownership in the offense of robbery are not more restrictive than those pertaining to the offense of theft. *Guyon v. State* (Cr. App.) 230 S. W. 408.

**General and special ownership.**—Where indictment for larceny alleged ownership in railroad station agent, no conviction could be had without proof either that he owned it or had possession and control as agent of the railroad. *Butler v. State*, 83 Cr. R. 354, 203 S. W. 597.

Evidence held to show that ownership of stolen automobile was as alleged, and was not in the keeper of wagon yard where the automobile was temporarily stored, so as to warrant conviction of larceny. *Thomas v. State*, 83 Cr. R. 282, 203 S. W. 773.

An information charging the swindling of one C. out of \$10 by giving a worthless check, and alleging C. to be owner of property obtained, was not sustained by evidence that C., as an employer of a company, cashed the check with the company's money, where it was not shown that he was a special owner, having exclusive possession and management of such money. *Whitaker v. State*, 85 Cr. R. 272, 211 S. W. 787.

Where, according to the evidence, S., the owner of cattle stolen, placed them in the pasture of H., controlled by one T., who looked after the place, and to both of whom, under Rev. St. art. 5664, rent was due from S. under their pasturer's lien, and ownership was alleged to be in S., there was a variance, and the indictment should have alleged ownership in T. or real ownership in S. and special ownership in T. *Rabe v. State*, 85 Cr. R. 373, 212 S. W. 502.

Where the owner of an automobile sold it and received a check in payment but was to keep the car until the purchaser could call and get it and it was stolen while in the possession of the original owner, the ownership, so far as the prosecution for larceny was concerned was properly alleged to be in the original owner; he having the control, care and management of the property. *Torrence v. State*, 85 Cr. R. 310, 212 S. W. 957.

In larceny prosecutions, while ownership may be generally alleged to be in the general or special owner, under the statute ownership must be alleged to be in the party who has the actual control, care, and management of the property, and it is not sufficient to allege ownership only in the real owner, although an allegation that possession is in the real owner does not detract from the indictment. *Id.*

There is fatal variance between a larceny indictment alleging that stolen cotton was in possession of a landlord and proof that tenant had possession and control of cotton under agreement that one-half net proceeds from its sale belonged to landlord as rental. *Bergfeld v. State*, 85 Cr. R. 489, 213 S. W. 986.

When one leaves the state and asks another to look after his house and property, an indictment may allege ownership in the one left to care for the house. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

Where a mother sent a watch to her son by parcels post, and the package reached the son's office in bad condition, with wrapper broken, so that the mail carrier who brought it was told claim would be made if anything was missing, and thereafter the watch in a small box was found by the janitor of the building in front of the elevator on the floor on which the son had his office, at the time of the finding of the watch by the janitor, its care was in the mail carrier, with whom it would remain until delivery, and in prosecution of the janitor for larceny of the watch, ownership thereof should have been alleged in such carrier in the alternative with the son. *Holland v. State*, 87 Cr. R. 89, 219 S. W. 458.

An indictment for robbery which named a special owner in possession is sufficient; consequently, though money stolen from a bank belonged to the corporate bank, the indictment is sufficient where an employee of the bank who was special custodian and had a special property therein was named as owner. *Guyon v. State* (Cr. App.) 230 S. W. 408.

In a prosecution for burglary, though the real ownership of the stolen property is in a corporation, if possession is in an individual, it is sufficient to name him as the owner. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

**Joint or common ownership.**—Where an indictment alleges the ownership in one person, proof that the property was owned jointly by him and others does not constitute a variance. *Pitts v. State* (App.) 14 S. W. 1014.

Where the property of D. and S. was taken from their room, if a burglarious entry was made of said room, it might support a conviction under a count alleging that the burglarized premises belonged to D., and that the property intended to be taken was his. *Russell v. State*, 86 Cr. R. 580, 218 S. W. 1051.

In a prosecution for burglary, allegation and proof of ownership of partnership property by either partner is sufficient. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

**Ownership by husband or wife.**—Where the property stolen is community property and the spouses are living together, the ownership is properly laid in the husband. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

**Estate ownership.**—Ownership of a horse stolen from a ranch was properly alleged to be in one J. A. M., where the proof showed it belonged to the M. estate, of which J. A. M. was one of the heirs, and that J. A. M. had charge of the ranch properties and stock owned by the estate, although he had a hired foreman on the particular ranch who looked after the ranch when J. A. M. was not there; for such possession, care, and control as the foreman had of the horse was merely that of a servant and employé, and joint with that of J. A. M. *Hartman v. State*, 35 Cr. R. 582, 213 S. W. 936.

Where a building and property therein was in the control of G. L., the building belonging to an estate in which G. L. and several others were equally interested, and the property in the building belonging to a corporation, state, in a prosecution for burglary, need not allege or prove that the property was taken without the consent of such other interested persons; indictment having alleged that G. L. was the owner and in possession of both the premises and property, and testimony showing that no one else had anything to do with the management of the property. *Brown v. State*, 85 Cr. R. 618, 215 S. W. 97.

**Unknown ownership.**—If the owner of stolen goods is alleged to be unknown in the indictment for the larceny, and on trial the evidence shows the name of the owner, the state is required to go further, and show that the grand jury did not know the name of the owner, and could not by reasonable diligence have obtained such information. *Trinkle v. State* (Cr. App.) 225 S. W. 754.

In a prosecution for larceny of automobile tires, the indictment, in the count under which the conviction occurred, alleging theft from an unknown owner, such conviction cannot stand, where it appears that for purposes of the law of theft the goods, when stolen, were owned by an express company, which had received and receipted for them, and that the jury by the exercise of due diligence could have discovered the facts and laid the ownership properly in the indictment. *Id.*

Allegations that the accused received stolen property "from some person to the grand jurors unknown," and that said property had been theretofore acquired by another in such manner as to make the acquisition theft, held sufficient to charge receiving and concealing stolen property. *Fallon v. State* (Cr. App.) 230 S. W. 170.

#### Art. 458. [446] Description of property.

**In general.**—An indictment alleging the theft of "on" horse was sufficient, as words not essential to constitute the offense may be rejected as surplusage. *Barner v. State* (Cr. App.) 20 S. W. 559.

Indictment for theft of a bale of cotton, giving its value, need not allege its weight. *Bell v. State*, 34 Cr. R. 160, 205 S. W. 986.

Description of property in indictment for theft as "one bale of seed cotton, of the value of \$100," is sufficiently specific. *Tolbert v. State*, 84 Cr. R. 159, 205 S. W. 987.

A description of property, which is merely a classification, without stating the number and kind of the property is insufficient. *Luce v. State* (Cr. App.) 224 S. W. 1095.

#### Art. 460. [448] Certainty; what sufficient.

See *Todd v. State* (Cr. App.) 229 S. W. 515.

Cited, *Barner v. State* (Cr. App.) 20 S. W. 559; *Bigham v. State*, 31 Cr. R. 244, 20 S. W. 577; *Johnson v. State*, 33 Cr. R. 33, 201 S. W. 187; *Wright v. State*, 33 Cr. R. 415, 203 S. W. 775.

2. **Notice of offense charged in general.**—The indictment should set out the particular offense charged with such certainty as that a presumptively innocent man seeking to know what he must meet may ascertain fully therefrom the matters charged against him. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

#### Art. 462. [450] "Public place;" allegation of.

**In general.**—Written complaint, charging the offense of drunkenness in a public place as substantially prescribed by Pen. Code, art. 204, held sufficient. *Harper v. State*, 82 Cr. R. 149, 198 S. W. 786.

#### Art. 464. [452] Selling intoxicating liquor; sufficient allegations as to.

**In general.**—Under indictment for following business of selling intoxicating liquors in prohibition territory, whether alleging unlawful sales to other persons or not state may prove such other sales to show offense charged. *Mackey v. State*, 81 Cr. R. 630, 199 S. W. 482.

An indictment, that defendant gave intoxicating liquor to one named, "then and there being under the age of 21 years, without the written consent of the parent. \* \* \* of the said —, against the peace," etc., was too uncertain as to who was the minor and as to consent. *Earnest v. State*, 33 Cr. R. 41, 201 S. W. 175.

An indictment need only allege that a prohibition election was held, that the result was declared by an order of the commissioners' court, and that an order was made prohibiting the sale of liquor. *Wright v. State*, 33 Cr. R. 415, 203 S. W. 775.

#### Art. 465. [453] Perjury; sufficient allegation for.

3. **Grand jury proceedings.**—In an indictment for perjury alleged to have been committed before a grand jury, the allegations must show that the matter under investigation was a violation of law. *Carpenter v. State*, 31 Cr. R. 298, 195 S. W. 199.

An indictment for perjury alleged to have been committed before the grand jury should allege that the jury was investigating whether an offense had been committed in



the county, since it has no right to investigate a crime in another county, rape excepted. *Id.*

Indictment for perjury before grand jury investigating charge of illegal liquor selling, alleging prior prohibition election, was not bad for omitting specifically to allege that liquor selling was unlawful at date of investigation. *Timmins v. State*, 82 Cr. R. 263, 199 S. W. 1106.

Indictment for perjury before grand jury investigating charge of illegal liquor selling in a certain county was not defective in failing to show that inquiry was confined to transactions taking place in that county. *Id.*

An indictment for perjury, charging that defendant made false statements before the grand jury which was investigating his relations with an unmarried woman, he being a married man, did not need to allege that defendant, or some other person, was in fact guilty of some crime, as adultery, in the matter about which he falsely testified. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

**4. Jurisdiction and authority to administer oath.**—An indictment for perjury or false swearing need not set up with particularity the facts showing the jurisdiction of the court in which the oath was charged to have been administered, or of the officer alleged to have administered the oath; but it is essential that averment be made, at least in substance, that the officer who administered the oath was qualified, etc. *Green v. State*, 86 Cr. R. 556, 217 S. W. 1043.

**5. Oath.**—In a prosecution for false swearing, the indictment should allege directly the administering of an oath, and it is insufficient that it appears inferentially from the jurat that the oath was administered by a notary public. *Green v. State*, 86 Cr. R. 556, 217 S. W. 1043.

**6. Setting forth testimony or statement in writing in general.**—In an indictment for perjury, it is always necessary to allege distinctly and clearly what the false testimony was upon which the alleged offense is based and to traverse it. *Carpenter v. State*, 81 Cr. R. 298, 195 S. W. 199.

In indictment for perjury by testimony that another had signed an order for goods, before the grand jury investigating a charge of forgery against the witness, it is advisable to set forth the alleged forged order. *Id.*

An indictment for perjury held to allege sufficiently that defendant testified to the matter assigned as perjury. *Ice v. State*, 84 Cr. R. 418, 208 S. W. 345.

**8. Use of words deliberately and willfully.**—In indictment for perjury, setting out an indictment for arson, in trial of which perjury was committed, omission of word "willful" from charging part of indictment for arson did not render indictment fatally defective, so that defendant could not be convicted of perjury. *Herndon v. State*, 82 Cr. R. 232, 198 S. W. 788.

**9. Materiality of testimony or statement.**—Indictment for falsely testifying before the grand jury, in a prosecution for forgery, that another than the witness then accused had signed an order for goods, alleging that it was, before the grand jury, a material inquiry whether another had signed the order, was insufficient; the material inquiry being whether accused had signed the order. *Carpenter v. State*, 81 Cr. R. 298, 195 S. W. 199.

Indictment for perjury committed before grand jury held insufficient, in that it failed to show materiality of false testimony, or that matters inquired about could become a matter for investigation of grand jury. *Alt v. State*, 83 Cr. R. 337, 203 S. W. 53.

Indictment for perjury by testifying falsely to a material issue relating to the presence of one C. at a certain place and time where an assault was committed, held insufficient where it did not, allege that C. committed the assault. *Morris v. State*, 83 Cr. R. 521, 204 S. W. 106.

An indictment for perjury held to allege sufficient facts from which the materiality of the alleged perjured testimony could be inferred. *Ice v. State*, 84 Cr. R. 418, 208 S. W. 345.

**12. Proof and variance.**—Indictment for perjury charging defendant with falsely testifying before the grand jury investigating his relations with an unmarried woman, one Bradshaw, he being a married man, was not bad because, where it spelled the name Bradshaw correctly some 20 times, it once misspelled it Bardshaw, and under such indictment evidence of defendant's intimacy with the woman was admissible. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

#### **Art. 468. [456] Description of money, etc., in theft, etc.**

**Embezzlement in general.**—An indictment charging embezzlement by the appropriation of "certain money, to wit, \$6,667, which said money was of the value of \$6,667," sufficiently described the property. *Wray v. State* (Cr. App.) 232 S. W. 808.

#### **Art. 471. [459] Proof not dispensed with.**

**In general.**—The proof must correspond with the material allegation. *Hoffman v. State*, 85 Cr. R. 11, 209 S. W. 747.

#### **Art. 472. [460] Libel; indictment for.**

**In general.**—An indictment, which set out a newspaper article that charged fire was of an incendiary origin, held insufficient to charge offense of criminally libeling the person named in the indictment as the one against whom it was directed, notwithstanding this article; there being no innuendo showing the applicability of the article to the one claimed to be libeled or that the diatribe in the article against Jews was directed against him. *Potter v. State*, 86 Cr. R. 380, 216 S. W. 886.

#### **Art. 473. [461] Disjunctive allegations.**

**In general.**—Information, charging that defendant unlawfully and fraudulently took from growing, standing, and ungathered corn, sufficiently charged statutory offense,

since statutory offenses which may be committed in divers ways may be charged conjunctively, or a single phase may be charged. *Sampson v. State*, 83 Cr. R. 594, 204 S. W. 324.

The word "or," in Disloyalty Act, § 1, forbidding the use of language in the presence and hearing of another person of and concerning the United States of America, etc., which language is disloyal to the United States of America, etc., or is of such nature as to be reasonably calculated to provoke a breach of the peace, etc., was intended to be and should be read "and," and each element of the offense must be charged conjunctively. *Fromme v. State*, 85 Cr. R. 366, 212 S. W. 501.

Where there are various ways set forth in a statute by which an offense may be committed, an indictment may charge the various methods conjunctively. *Black v. State*, 86 Cr. R. 253, 216 S. W. 181.

**Violation of liquor law.**—An indictment or information, conjunctively charging the various phases of the statute prohibiting the selling or giving of intoxicating liquors to soldiers, including giving, selling, procuring, and all other means, is proper. *Wales v. State*, 86 Cr. R. 183, 217 S. W. 384.

**Unlawfully practicing medicine.**—Complaint and information for unlawfully practicing medicine, preferred under Pen. Code, arts. 750, 755, averring conjunctively several matters in articles defining offense, and following substantially an approved form, were sufficient. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

#### Art. 474. [462] Statutory words need not be strictly followed.

Cited, *Johnson v. State*, 83 Cr. R. 33, 201 S. W. 187.

**Following language of statute in general.**—In adultery prosecution, indictment containing no allegation that the habitual carnal intercourse was "without living together" held fatally defective; such words being statutory statement and requirement. *Haley v. State*, 84 Cr. R. 591, 209 S. W. 408; *Yates v. State*, 84 Cr. R. 590, 209 S. W. 407.

Pen. Code, 1022, subd. 2, defines an aggravated assault to be when committed "in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement." Defendant was charged of an assault "at Hickory Grove school-house." Held, that since "at" conveyed the same meaning as "in," the charge was sufficient. (*Augustine v. State*, 20 Tex. 450, and *State v. Nolan*, 8 Rob. [La.] 517, followed.) *Blackwell v. State*, 30 Tex. App. 416, 17 S. W. 1061.

Generally an indictment following the language of the statute is sufficient, but where a written instrument enters into an offense as a part or basis thereof or when its proper construction is material, the instrument should be set out in the indictment. *Rudy v. State*, 81 Cr. R. 272, 195 S. W. 187.

Indictment for burglary of residence at night held not defective for using the word "steal" in place of the statutory word "theft." *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Words of statute, or others of similar or more potent force, must be used in indictment. *White v. State*, 83 Cr. R. 31, 201 S. W. 186.

Complaint for wife desertion, following the language of the statute, and alleging that defendant deserted his "wife," naming her, held not insufficient as failing to allege defendant was married. *Turner v. State*, 84 Cr. R. 605, 209 S. W. 406.

A complaint and information for violating the Sunday law, stating that defendant was a dealer "of" wares and merchandise, instead of "in" wares and merchandise, as used in the statute, was not invalid. *Helms v. State*, 84 Cr. R. 621, 209 S. W. 657.

An indictment attempting to set up former convictions for similar offenses, charging defendant with "unlawfully selling intoxicating liquors," held insufficient to charge a violation of the law, so as to form a basis for enhanced punishment under Pen. Code, art. 1620, as in charging an offense the indictment must follow the statute. *Brittian v. State*, 85 Cr. R. 491, 214 S. W. 351.

The rule that it is sufficient if the indictment follows the language of the statute applies only where the indictment is framed under a statute which defines the acts constituting the offense in a manner that will inform accused of the nature of the charge, the test being, not that the indictment follows the statute, but that it is a compliance with the law prescribing the requisites of an indictment. *Kennedy v. State*, 86 Cr. R. 450, 216 S. W. 1086.

Since an indictment in the language of the statute is frequently insufficient even if the statute attempts to describe but one offense, the fact that an indictment charging several distinct offenses was in the language of the statute defining those several offenses does not make it valid. *Todd v. State* (Cr. App.) 229 S. W. 515.

**Negating exceptions or exemptions.**—An information for selling milk adulterated by adding water, under Pen. Code, art. 706, declaring it unlawful for any person to sell or expose for sale adulterated or impure milk, containing proviso that skimmed milk may be sold if the can or package it is taken from is marked "skimmed milk," was not defective because containing no negative allegation that the sale was not a sale of skimmed milk so marked, as the statute contains no proviso authorizing a sale of water. *Quarternick v. State*, 84 Cr. R. 40, 204 S. W. 328.

It is not necessary that an indictment charging rape upon a girl under 18 years of age negative her previous unchastity. *Kerley v. State* (Cr. App.) 230 S. W. 163.

#### Art. 476. [464] Defects of form do not affect trial, etc.

Cited, *Johnson v. State*, 83 Cr. R. 33, 201 S. W. 187.

**2. Effect in general.**—Insufficiency of indictments or complaints as to matters of substance may be availed of for first time in Court of Criminal Appeals. *Yates v. State*, 84 Cr. R. 590, 209 S. W. 407.

If an indictment or information is defective in some matter of substance, it will not support a judgment, and an attack may be made for the first time in appellate court. *Woodard v. State*, 86 Cr. R. 632, 218 S. W. 760.

3. **Spelling, handwriting and grammar.**—An indictment charging a violation of the law prohibiting the sale of intoxicating liquors in prohibition territory, omitting the letter "i" in the middle of the word "intoxicating," when first used, held not open to attack. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

In prosecution for swindling by obtaining stock of goods by means of note and mortgage on property not owned by defendant, the mere variance of one letter in copying mortgage into the indictment, whereby the word "become" was spelled "becoke," would not be material. *Albertson v. State*, 84 Cr. R. 574, 208 S. W. 923.

That the pleader in writing the complaint in a prosecution for misdemeanor theft spelled the word "corporeal," "carporeal," does not render the indictment invalid. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

A complaint and information which charged defendant with unlawfully carrying a "pistle" will be construed as charging defendant with unlawfully carrying a pistol, and the rule of bad spelling will apply, notwithstanding it was contended that the word "pistle" was an obsolete word meaning a letter. *Garza v. State*, 87 Cr. R. 537, 222 S. W. 1105.

Incorrect grammar, bad spelling, bad handwriting, and the use of words not technically in their correct sense or places will none of them make an indictment bad, unless they cause the thing intended to be charged to lack sense or certainty. *Westbrook v. State* (Cr. App.) 227 S. W. 1104.

An indictment under the Dean Law, relating to sales of intoxicating liquors, was not bad by reason of using the word "or" instead of the word "nor" in the expression, "Not for mechanical, scientific, or sacramental purposes." *Id.*

Under the Dean Law, prohibiting the sale of intoxicating liquors, the use of the word "and" between the words "scientific" and "sacramental" in an indictment instead of "or," in negating the statutory exceptions, does not render the indictment void, particularly since such words may be used interchangeably and such use places no additional burden on the defendant, the state being required to prove that a sale was not under any of the statutory exceptions. *Bell v. State* (Cr. App.) 228 S. W. 232.

Indictment charging swindling alleging that "S. [defendant] did falsely pretend and fraudulently represent to the said J. [prosecuting witness] that he had in his possession a certain valid writing obligatory, \* \* \* and did then and there, by means of said false pretense and fraudulent representation, fraudulently induce the said J. \* \* \* to exchange his said \$84.15 for the said pretended writing obligatory," held sufficient against objection that it was indefinite and uncertain as to whom the pronouns "he" and "his" related. *Scott v. State* (Cr. App.) 228 S. W. 1099.

5. **Typographical error.**—Though the first letter of the word "February" was so indistinct or blurred as to appear to be "R," instead of "F," in the date in an indictment of the commission of a crime, the defendant was not misled thereby. *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

7. **Omissions.**—The signature of the foreman of the grand jury to an indictment is a matter of form, and its omission will not invalidate the indictment. *Searcy v. State* (Cr. App.) 232 S. W. 799; *Robinson v. State*, 24 Tex. App. 4, 5 S. W. 509.

Failure of information, charging defendant with desertion of minor children, to allege the children to be in destitute and necessitous circumstances, as required by Pen. Code, art. 640a, is available to defendant on appeal, notwithstanding that question was raised for the first time by a motion in arrest of judgment, filed more than two days after the conclusion of the trial in the lower court; such information being fatally defective. *Woodard v. State*, 86 Cr. R. 632, 218 S. W. 760.

8. **Surplusage or redundancy.**—See *Smith v. State*, 87 Cr. R. 219, 220 S. W. 552.

Allegations not essential to constitute the offense, and which might be entirely omitted without affecting the charge against defendant, and without detriment to the indictment, are treated as mere surplusage and may be entirely disregarded. *Jennings v. State* (Cr. App.) 229 S. W. 525.

Indictment charging that defendant did "unlawfully attempt" to pass a forged instrument, and that he did "pass or attempt to pass" the instrument as true, held not bad for repugnancy, it being apparent that the defendant was charged with attempting to pass the instrument, the words "pass or" being surplusage. *Id.*

If a count in an indictment contains inconsistent allegations, both of which cannot be true, and there is no means of ascertaining from the face of the indictment which is meant, the indictment is bad for repugnancy, but, if it can be ascertained from the face of the indictment which is meant, the unnecessary part may be disregarded as surplusage. *Id.*

In an indictment for statutory rape, an allegation as to assault upon prosecutrix could be eliminated as surplusage without affecting the pleading. *Young v. State* (Cr. App.) 230 S. W. 414.

The use of the words "the same," instead of the word "said," did not render indictment bad where both words could be entirely eliminated from the indictment and it would still charge a complete offense. *Seebold v. State* (Cr. App.) 232 S. W. 328.

9. **Repugnancy.**—If a count in an indictment contains inconsistent allegations, both of which cannot be true, and there is no means of ascertaining from the face of the indictment which is meant, the indictment is bad for repugnancy. *Jennings v. State* (Cr. App.) 229 S. W. 525.

Indictment charging that defendant did "unlawfully attempt" to pass a forged instrument, and that he did "pass or attempt to pass" the instrument as true, held not bad for repugnancy. *Id.*

10. **Duplicity.**—The fact that the court submitted to the jury only one of the several distinct offenses charged in one count of the indictment does not cure the defect in the indictment. *Todd v. State* (Cr. App.) 229 S. W. 515.

Charging a number of distinct felonies in one count of an indictment violates the right of accused under Bill of Rights, § 10, to demand the nature and cause of the ac-

cusation against him, since an offense is but one act or omission forbidden by positive law under Pen. Code, art. 53, so that the defect is not a matter of form, but of substance, and warrants a reversal. *Id.*

12. **Failure to allege date of local option election.**—In prosecution for sale of intoxicants in prohibition territory, held that, after motion to quash indictment, and district attorney's motion to amend by inserting date on which prohibition election was held, court properly permitted amendment by insertion of date before announcement to try case on merits. *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

In prosecution for violation of local option law, where information did not state whether election for local option was held before or after violation was made a felony, motion to quash should have been sustained as one of form. *Shipley v. State*, 84 Cr. R. 278, 208 S. W. 342.

13. **Denial of motion to quash counts not submitted.**—Where defendant was indicted on a count for forgery and on another for passing a forged instrument, and moved to quash the first, which the state dismissed, and conviction was had on the second, no reversible error is presented, even if conceded that the forgery count was subject to demurrer. *Churchill v. State*, 87 Cr. R. 193, 220 S. W. 326.

18. **Forgery.**—In an indictment for passing a forged check, an allegation that the check bore an indorsement was surplusage, but it did not render the indictment insufficient, even though the indorsement thereon was genuine. *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238.

20. **Assault and rape.**—In an indictment for statutory rape, an allegation that prosecutrix was under 15 years of age was favorable to accused, the statutory age of consent being 18 years, as thereby the pleader placed a greater burden on the state than required by law; and was not objectionable on the ground that an acquittal thereunder on proof that prosecutrix was over 15 would not bar a subsequent prosecution by indictment charging her to be under 18. *Young v. State* (Cr. App.) 230 S. W. 414.

#### Art. 477. [465] Definition of an information.

**Construction and operation in general.**—Under the provision that an information contain the name of the person accused, or it be stated that his name is unknown, and give a reasonably accurate description of him, and article 456, a complaint and information describing the accused as "one Persqual" are fatally defective. *Persqual v. State* (App.) 8 S. W. 477.

#### Art. 478. [466] Requisites of an information.

**Requisite 2.**—Although by Civ. St. 1811—170, the court created was denominated "the county court of Wichita county at law," it was by the use of the words "at law" in its designation that such court was differentiated in name from the county court already in existence, so that an information stating its presentment in "the county court of Wichita county at law" was not defective as not conforming to the requirement, that from the information it must appear to have been presented in a court of competent jurisdiction, where the distinguishing words "at law" were preserved throughout all the pleadings. *Pelz v. State* (Cr. App.) 230 S. W. 154.

Information for unlawfully carrying a pistol presented in the "county court at law of Wichita county" was not subject to quashal on the ground the court was designated by act of the Legislature as the "court of Wichita county at law." *Dodaro v. State* (Cr. App.) 231 S. W. 394.

**Requisite 4.**—An information charging that "— did then and there" commit the offense charged was fatally defective. *Minchen v. State* (Cr. App.) 20 S. W. 712.

**Requisite 5.**—Where complaint charged offense of using indecent language over telephone as committed in Wichita county, information founded thereon charging such offense in county of — will not support conviction. *Mays v. State*, 83 Cr. R. 218, 202 S. W. 733.

**Requisite 6.**—An information, alleging an offense committed subsequent to the date it purports to have been filed, is bad. *Winn v. State*, 87 Cr. R. 485, 223 S. W. 230.

Where the complaint and information, sworn to on February 12, 1920, alleged that theft of property of the value of less than \$50 was committed on February 11, 1920, and the state's evidence proved that the offense was committed on March 9th, thereafter, the variance was fatal. *Estrada v. State* (Cr. App.) 226 S. W. 685.

**Requisite 7.**—An information, alleging that prosecuting witness stated accused threatened to take his life, etc., held insufficient because not positively alleging accused's commission of offense, but only that affiant charged him with it. *Janks v. State*, 81 Cr. R. 493, 196 S. W. 182.

In prosecution for selling property on false representation that it was unincumbered, failure to directly allege existence and nonpayment of debt secured by mortgage held fatal; an inferential allegation not being sufficient. *Moore v. State*, 81 Cr. R. 606, 197 S. W. 728.

#### Art. 479. [467] Shall not be presented until oath has been made, etc.

Cited, *Owens v. State*, 25 Tex. App. 552, 8 S. W. 658.

2. **Necessity of complaint in general.**—A misdemeanor cannot be prosecuted in the county court without a complaint as a predicate for the information. *McDonald v. State*, 86 Cr. R. 304, 216 S. W. 166; *Reynolds v. State*, 82 Cr. R. 326, 198 S. W. 958; *Adair v. State* (Cr. App.) 226 S. W. 413.

It is not necessary that the presentation for contempt be supported by an affidavit, but it may be made by the prosecuting attorney in his official capacity. *Ex parte Kahn* (Cr. App.) 232 S. W. 797.

4. **Variance between complaint and information.**—Variance between date of offense as alleged in complaint and that charged in information held fatal. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

5. **Authority to make complaint.**—The Court of Criminal Appeals cannot assume from mere identity of names that the maker of a complaint for adultery was the same person as the woman named in the complaint as the adulteress, to sustain defendant's contention that such woman was an accomplice, and therefore not a credible person. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

In view of art. 795 and this article, the wife is not a credible witness, and is not competent to make complaint supporting an information against her husband for disturbing the peace of third parties. *Stribling v. State*, 86 Cr. R. 195, 215 S. W. 857.

Any person, including an accomplice, who is competent to testify against defendant is a "credible" person. *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

6. **Authority to take complaint.**—For a complaint to be taken before the assistant county attorney, without reference being made to the county attorney is, under art. 34, proper practice. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

7. **Force and requisites of complaint.**—Allegations in complaint would not aid information defective in substance. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

A complaint that defendant kept a house to be used by "mer for the purpose of meeting by mutual appointment made by another for the purpose of sexual intercourse" does not state an offense, and is a variance from information charging it was done for the purpose of men and women meeting for such intercourse. *Reynolds v. State*, 82 Cr. R. 326, 198 S. W. 958.

A complaint for adultery made "upon evidence and belief" of affiant was good and sufficient to support an information. *Burnett v. State* (Cr. App.) 228 S. W. 239.

8. **Time and place of offense.**—In a prosecution for aggravated assault a complaint alleging that the offense was committed on July 4, "191," was fatally defective. *Oyervides v. State*, 82 Cr. R. 201, 198 S. W. 786.

In prosecution for unlawfully carrying a pistol, proof to sustain conviction must show that the unlawful carrying was before the filing of complaint. *Cassi v. State*, 86 Cr. R. 369, 216 S. W. 1099.

11. **Verification.**—A complaint forming the predicate for an information, the jurat to which is signed "D. L., County Attorney, by O. B. B., Assistant County Attorney," is insufficient, for, while either the county attorney or his assistant could administer the oath, the county attorney could not administer it by his assistant. (Per *Davidson, J.*; *Prendergast, P. J.*, contra.) *Arbetter v. State*, 79 Cr. R. 487, 186 S. W. 769.

Under art. 10, because complaint charging defendant with gaming was sworn to by sheriff before justice of the peace, that of itself did not give justice jurisdiction to try case. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

Where the affidavit or complaint on which an information is founded is signed by an incompetent person, it is void, and the whole proceedings based thereon falls. *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

12. **Filing.**—Where sheriff swore to complaint against defendant for gaming before justice of the peace, and the justice, by mistake and under misapprehension of sheriff's intention not to try case before him, placed his file mark on complaint, county court was not thereby deprived of jurisdiction. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

13. **Amendment and correction of complaint.**—Allegation in complaint that offense was committed on July 4, "191," held not cured by the information. *Oyervides v. State*, 82 Cr. R. 201, 198 S. W. 786.

Although jury had been sworn, where oral motion to amend was made in open court and testimony in connection with it showed that officer before whom affidavit was made complied with law, court did not err in permitting complaint to be amended by adding thereto the jurat; it being unnecessary to make motion in writing. *Nichols v. State*, 84 Cr. R. 522, 208 S. W. 931.

Where a complaint for misdemeanor is sufficient except for an amendable defect but there is a variance between the complaint and information as to the time of the offense, a new information may be filed based on the complaint. *Stockton v. State* (Cr. App.) 225 S. W. 514.

14. **Taking advantage of defects on appeal.**—The Court of Criminal Appeals cannot assume from mere identity of names that the maker of a complaint for adultery was the same person as the woman named in the complaint as the adulteress, to sustain defendant's contention that such woman was an accomplice, and therefore not a credible person; all presumptions favoring the legality of proceedings in trial courts. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

On appeal from a conviction, question as to whether complaint was defective and did not support information may not be reviewed, where no motion to quash was filed and motion in arrest of judgment did not urge such ground, but because appellant claimed the evidence was insufficient; the attention of the court being first called to the defects in an amended motion for new trial, filed more than a month after the judgment was rendered. *Burnett v. State* (Cr. App.) 228 S. W. 239.

#### Art. 481. [469] Indictment, etc., may contain several counts.

5. **Allegations in count as supplying defects in others—Commencement and conclusion.**—When an indictment in a murder case contains more than one count, and the first count is abandoned, the formal parts thereof will be applied to the second count as against the objection that such count is defective, in lacking the formal headings and the other necessary matter to make it legal. *Ellis v. State*, 85 Cr. R. 529, 213 S. W. 264.

15. **Theft.**—It is proper to charge in separate counts of the same indictment the theft of and the receiving and concealing of stolen property. *Fallon v. State* (Cr. App.) 230 S. W. 170.

15½. **Forgery.**—The fact that forgery and uttering a forged instrument are charged in separate counts in the same indictment does not render the indictment duplicitous. *Gumpert v. State* (Cr. App.) 229 S. W. 329.

17. **Duplicity.**—Misdemeanors of riot and of unlawful assembly were chargeable in same complaint and same information. *Ligon v. State*, 82 Cr. R. 147, 198 S. W. 787.

A complaint charging defendant with having taken part in an unlawful assembly with reference to two separate persons is not defective as charging separate and distinct offenses; unlawful assembly being one offense, though committed against two persons. *Reynolds v. State*, 82 Cr. R. 505, 199 S. W. 1092.

An indictment containing but one count, in which two different and distinct felonies with different penalties are completely alleged, is bad for duplicity. *Crouch v. State*, 84 Cr. R. 221, 206 S. W. 525.

Information charging a restaurant keeper with failure to furnish female employes with suitable seats when not engaged in active duties as required by art. 1451k, was not defective, though it also charged a failure to give notice required by such statute; the statute providing no penalty for violations of the provision requiring such notice. *Glanges v. State*, 87 Cr. R. 158, 220 S. W. 95.

The rule that, when several ways are set forth in the same statute by which an offense may be committed, they may be charged conjunctively in the same count in the indictment, applies only where the statute defines but one offense, and not where it defines several distinct offenses, some of which did not involve the others. *Todd v. State* (Cr. App.) 229 S. W. 515.

An information and complaint for using another's automobile without his consent was not duplicitous because it charged in one count that accused had driven and operated, and caused to be driven and operated, said car. *Pelz v. State* (Cr. App.) 230 S. W. 154.

19. — **Misdemeanors in general.**—In misdemeanor cases, the state may charge separate and distinct offenses in different counts. *Williams v. State* (Cr. App.) 232 S. W. 507.

20. — **Misdemeanor and felony.**—Information charging defendant with being delinquent child within juvenile delinquent law, held not duplicitous as charging felonies and misdemeanors. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 339.

21. — **Unlawful practice of medicine.**—Complaint and information for unlawfully practicing medicine, preferred under Pen. Code. arts. 750, 755, averring conjunctively several matters in articles defining offense, and following substantially an approved form, were sufficient. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

22. — **Violation of liquor law.**—In indictment for following business of selling intoxicating liquors in prohibition territory, allegations that defendant made other and different sales of liquor in violation of law were not improper, and did not render indictment bad. *Mackey v. State*, 81 Cr. R. 630, 199 S. W. 482.

Allegation that defendant "did then and there, unlawfully and knowingly, directly and indirectly, purchase for and procure for, and did then and there give and deliver, and did then and there cause to be given and delivered," is in the terms of the statute, and contention that indictment is duplicitous because of such allegation cannot be sustained. *Crosby v. State*, 85 Cr. R. 297, 212 S. W. 163.

An indictment charging that defendant received, transported, exported and delivered, solicited, and took orders for and furnished intoxicating liquors charges a number of separate and distinct felonies in the same count, some of which were not involved in some of the others, and produced confusion and uncertainty as to the offense intended to be charged, so that the indictment was bad for duplicity, though all the offenses charged therein were stated disjunctively in the same statute. *Todd v. State* (Cr. App.) 229 S. W. 515.

25. — **Forgery.**—Under Pen. Code, art. 937, providing punishment for any person who shall "pass" or "attempt to pass" a forged instrument, both an attempt and a passing may be charged conjunctively in the same count; both being embraced in the same definition and made punishable in the same manner. *Smith v. State*, 81 Cr. R. 534, 197 S. W. 589.

In an indictment for violation of Pen. Code, art. 943, the commission of the offense by altering, changing, mutilating, destroying, and injuring the documents may be alleged conjunctively, though they are inconsistent with each other. *Smith v. State*, 87 Cr. R. 219, 220 S. W. 552.

27. — **Assault and robbery.**—Under statute relative to robbery, indictment held not duplicitous because charging that property was taken by assault, violence, and putting in fear, and also by using and exhibiting a pistol. *Lay v. State*, 82 Cr. R. 202, 198 S. W. 291.

An indictment for robbery alleging defendant assaulted another by exhibiting a firearm, etc., is not objectionable as duplicitous, for the robbery statute, declaring that, if any person by assault or violence or by putting in fear of life or bodily injury shall fraudulently take from the person or possession of another any property with the intent to appropriate the same to his own use he shall be punished, etc., and, when exhibiting a firearm or other deadly weapon, the punishment shall be death or confinement, etc., does not denounce two offenses, and an indictment may properly refer to the exhibition of a firearm as aggravation. *Crouch v. State*, 87 Cr. R. 115, 219 S. W. 1099.

An indictment charging the offense of robbery with firearms was not vulnerable to motion to quash as duplicitous in that it charged two separate and distinct offenses; i. e., robbery by force and the placing in fear of bodily harm of the persons robbed and robbery with firearms, which may be punished by death. *Roberto v. State* (Cr. App.) 224 S. W. 890.

28. — **Murder.**—An indictment for murder may, in a single count, charge the murder of two or more persons by the same act. *Jones v. State* (Cr. App.) 231 S. W. 122.

30. — **Burglary and theft.**—Indictment held not duplicitous as charging both burglary of residence at night and another breaking and entering of house. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

In indictment for burglary, alleging that defendant did "break and enter" "in the daytime and at night," was not duplicitous. *Young v. State*, 84 Cr. R. 232, 206 S. W. 529.

33. **Election.**—Where one count charged sale of personal property on false representation that it was unincumbered, and another count a fraudulent disposition of mortgaged property, held, that the failure to require an election was not error. *Moore v. State*, 81 Cr. R. 606, 197 S. W. 728.

In prosecution by complaint and information for offense of unlawful assembly, there being several counts charging offense, while defendant was also charged with riot, trial court properly refused to require state to elect as between offenses charged in several counts. *Ligon v. State*, 82 Cr. R. 147, 198 S. W. 787.

34. — **What constitutes.**—In Texas, the trial judge, by selecting the count in the indictment on which the jury shall pass, elects for the state. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

Where, under indictment charging swindling and fraudulent disposition of mortgaged property, only the count charging swindling was submitted, held, that this was equivalent to an election. *Moore v. State*, 81 Cr. R. 606, 197 S. W. 728.

40. — **Assault to murder, maiming, disturbing the peace, and robbery.**—Where indictment contains both robbery by assault and use of deadly weapons, that part, charging the use of deadly weapons, which merely enhances the punishment, is not essential; and it is within the power of the state to abandon that phase and prosecute on the other, under Pen. Code 1911, art. 1327. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

Where an indictment charged both robbery by assault and robbery by use of deadly weapons, action of the state in announcing that that part of the indictment making it a capital case would not be insisted upon, when sanctioned by the trial judge by confining the accused to 10 peremptory challenges, amounted to a dismissal of that part of the indictment which made the case capital, or at least amounted to an election upon the part of the state to abandon that part of the indictment, which did not prejudice its right to proceed with the remainder, which charged a felony not requiring a special venire. *Id.*

42. — **Rape.**—Court correctly refused to require state to elect between count charging forcible rape, and count charging rape upon girl under 15 years of age. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298.

Where accused was charged with rape, and evidence showed that he raped the victim and also held her while another also raped her, if he desired the state to elect the offense, it was incumbent on him to move for election. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

#### Art. 482. [470] When indictment or information has been lost, mislaid, etc.

See *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

1. **Constitutionality.**—This article does not violate Const. art. 1, § 10, providing that "no person shall be held to answer for a criminal offense, unless on indictment of a grand jury." *Withers v. State*, 21 Tex. App. 210, 17 S. W. 725.

10. **Suggestion of loss and proceedings thereon in general.**—Where there is no intimation in the record that a copy substituted for a lost indictment was not a substantial copy of the original, no error is shown by the substitution by order of the court on written motion. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

13. **Necessity of substituting papers substantially the same.**—The indictment substituted for a lost original, must be substantially a reproduction of the original. *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 978.

15. **Notice.**—Substitution for a lost indictment is a judicial act, which must be upon notice giving defendant the right to contest the substitution. *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 978.

#### Art. 483. [471] Order transferring cases.

**Authority and jurisdiction.**—County court held without jurisdiction of prosecution transferred from district court, where transcript from district court did not show presentation of any indictment against defendant. *Herenz v. State*, 82 Cr. R. 438, 199 S. W. 618.

As indictment must be presented in district court county court can only acquire jurisdiction by order of transfer as required by statute. *Dalton v. State*, 82 Cr. R. 614, 200 S. W. 385.

**Order.**—An order of the district court transferring a case to county court, reciting that grand jury came into open court and through their foreman delivered to the court the following indictment, to wit: "The State of Texas v. Will Venn, File No. 4558"—sufficiently shows that indictment was filed in district court. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

**Record on appeal.**—Where a prosecution for a misdemeanor was begun by an indictment returned to the district court, which did not have jurisdiction, a conviction in county court cannot be sustained where the record does not show that the cause was transferred to the county court by order of the district court. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

**Art. 484. [472]** What causes shall be transferred to the justice of the peace at county seat.

See *Herenz v. State*, 82 Cr. R. 438, 199 S. W. 618.

**Art. 485. [473]** Duty of clerk of district court when case is transferred.

See *Herenz v. State*, 82 Cr. R. 438, 199 S. W. 618.

**Order of transfer.**—Where a prosecution for a misdemeanor was begun by an indictment returned to the district court, which did not have jurisdiction, a conviction in county court cannot be sustained where the record does not show that the cause was transferred to the county court by order of the district court. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

**Bill of costs.**—A bill of costs accruing in the district court, which accompanies an indictment in its transfer to the county court, need not be itemized. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

## CHAPTER FOUR

### OF PROCEEDINGS PRELIMINARY TO TRIAL

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| <p><b>1. OF ENFORCING THE ATTENDANCE OF DEFENDANT AND FORFEITURE OF BAIL</b></p> <p>Art.<br/>488. Bail, forfeited when.<br/>489. Manner of taking a forfeiture.<br/>490. Citation to sureties.<br/>491. Requisites of citation.<br/>492. Citation, how served and returned.<br/>493. Served by publication, when.<br/>497. Case shall be placed on the civil docket.<br/>499. Proceeding shall not be set aside for defect of form, etc.<br/>500. Causes which will exonerate from liability on forfeiture.<br/>501. Judgment final, when.<br/>502. Judgment final by default, when.<br/>503. The court may remit, when.<br/>504. Forfeitures shall be set aside, when.</p> <p style="text-align: center;"><b>2. OF THE CAPIAS</b></p> <p>507. Capias shall issue at once in all felony cases.<br/>518. Any officer making arrest may take bail in misdemeanor, etc.<br/>519-522. [Note.]</p> <p><b>3. OF WITNESSES, AND THE MANNER OF FORCING THEIR ATTENDANCE</b></p> <p>529. Before fine is entered against witness it must appear, etc.<br/>530. What constitutes disobedience of a subpoena.<br/>535. Definition and requisites of an attachment.<br/>536. When an attachment may be issued.<br/>537, 538. [Note.]<br/>539. Where witness resides out of county, etc., defendant or state entitled to subpoena, when.</p> <p><b>4. SERVICE OF A COPY OF THE INDICTMENT</b></p> <p>551. Copy of the indictment delivered to defendant in case of felony.<br/>552. Service of copy and return of writ.<br/>553. When defendant is on bail in felony.</p> <p><b>5. OF ARRAIGNMENT, AND PROCEEDINGS WHERE NO ARRAIGNMENT IS NECESSARY</b></p> <p>555. No arraignment of defendant, except, etc.<br/>556. Arraignment; for what purpose.<br/>557. No arraignment until two days after service of copy, etc.</p> | <p>Art.<br/>558. Court shall appoint counsel, when.<br/>559. Name as stated in indictment.<br/>560. If defendant suggests different name.<br/>563. Indictment read.<br/>565. Plea of guilty not received, unless, etc.<br/>566. Jury shall be impaneled, when.<br/>567. Same proceedings in respect to name of defendant in all cases.</p> <p><b>6. OF THE PLEADINGS IN CRIMINAL ACTIONS</b></p> <p>569. Defendant's pleading.<br/>570. Motion to set aside indictment, etc., for what causes, only.<br/>572. Only special pleas for defendant.<br/>573. Special pleas must be verified.<br/>575. Exceptions to the substance of an indictment.<br/>576. Exceptions to the form of indictment.<br/>577. Motions, etc., shall be in writing.<br/>578. Two days allowed for filing written pleadings.<br/>580. Defendant may file written pleadings at any time, etc.<br/>581. Plea of guilty in felony case.<br/>582. Plea of guilty in misdemeanor.</p> <p><b>7. OF THE ARGUMENT AND DECISIONS OF MOTIONS, PLEAS AND EXCEPTIONS</b></p> <p>593. In cases of felony.<br/>597. When exception is on account of form.<br/>598. Amendment of indictment or information.<br/>599. Amendments, how made.<br/>601. Former acquittal or conviction.</p> <p style="text-align: center;"><b>8. OF CONTINUANCE</b></p> <p>605. For sufficient cause shown.<br/>608. First application by defendant.<br/>609. Subsequent application by defendant.<br/>610. Defendant shall swear to his application.<br/>612. Statements in application may be denied under oath, etc.<br/>613. Proceedings when denial is filed.<br/>616. Continuance after trial commenced, when.</p> <p><b>9. DISQUALIFICATION OF THE JUDGE</b></p> <p>617. Causes which disqualify judges.<br/>618. Proceedings when judge of district court is disqualified.</p> |
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| <p>Art.<br/>624. When a justice of the peace is disqualified.</p> <p>10. CHANGE OF VENUE</p> <p>626. Change of venue by court.<br/>627. State may have change of venue.<br/>628. When granted to defendant.<br/>629. Where jury cannot be procured for trial of felony.<br/>630. Application may be made before announcing ready for trial.<br/>632. When adjoining counties are all subject to objection, etc.<br/>632b. Change of venue in certain cases.</p> | <p>Art.<br/>633. Application for change of venue may be controverted, how.<br/>634. Order of judge shall not be revised on appeal, unless, etc.<br/>635. Clerk's duties in case of change of venue.<br/>636. Same.<br/>637. If defendant is on bail, shall be recognized.<br/>639. If defendant be in custody.</p> <p>11. OF DISMISSING PROSECUTIONS</p> <p>643. Prosecution may be dismissed by state's attorney, etc.</p> |
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## 1. OF ENFORCING THE ATTENDANCE OF DEFENDANT AND OF FORFEITURE OF BAIL

### Article 488. [476] Bail forfeited, when.

See *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

### Art. 489. [477] Manner of taking a forfeiture.

1. **Judgment nisi in general.**—Since, under arts. 488–643, judgment nisi on forfeiture of bail bond is interlocutory, and does not become final, in view of arts. 490, 493–498, until citation is entered, dismissal of motion to set aside judgment nisi left such judgment in statu quo, and the order was not appealable, in view of arts. 504, 960, and art. 2078, providing that appeals lie only from final judgments. *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

Recitals in a judgment forfeiting a bail bond as to service of citation will not on direct attack, as writ of error, prevail against recitals in the sheriff's return. *Saunders v. State*, 86 Cr. R. 413, 217 S. W. 148.

7. **Dismissal as to principal or co-surety.**—On scire facias to forfeit a bail bond pending appeal, the trial court did not err in dismissing as to the principal. *Swim v. State*, 86 Cr. R. 576, 218 S. W. 761.

10. **Variance between judgment and bond.**—There was a fatal variance between a judgment nisi, declaring upon a bond requiring an appearance before the district court to answer upon a charge by indictment, and a bond entered in obedience to an order of the magistrate, binding over accused to answer any accusation that might be preferred by a grand jury; no indictment having been returned at the time of the execution of the bond. *Raymond v. State*, 87 Cr. R. 178, 220 S. W. 88.

The names of the parties, including the sureties to defendant's appearance bond, are an essential part of judgment nisi on such bond when forfeited, and, on effort to make the judgment final, a variance in that the judgment nisi named three sureties, while the bond proved on trial names only two of such three, is a matter so material as to render the bond inadmissible. *Fitzgerald v. State* (Cr. App.) 225 S. W. 1096.

In scire facias on a forfeited bail bond, variance between the name of defendant in the indictment judgment nisi, and bail bond is fatal. *Uppenkamp v. State* (Cr. App.) 229 S. W. 544.

### Art. 490. [478] Citation to sureties.

See *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

**Function of citation or scire facias.**—In cases of forfeiture of bail bond, the scire facias writ serves a dual purpose: First, as citation of the sureties; second, as the state's pleading—there being no more necessity of putting it in evidence than to put in the citation and petition in a civil suit. *Uppenkamp v. State* (Cr. App.) 229 S. W. 544.

In cases of forfeiture of bail, in so far as the scire facias writ performs the office of the petition, the state is bound by the essential matters therein stated, and the allegation and proof must substantially correspond; the proof being the indictment, bail bond, and judgment nisi against defendant. *Id.*

### Art. 491. [479] Requisites of citation.

See *Saunders v. State*, 86 Cr. R. 413, 217 S. W. 148.

**In general.**—The citation need not recite that a capias had issued for the arrest of defendant, nor that he had been arrested. *Conner v. State* (App.) 9 S. W. 63.

**Requisite 3. Name of principal, etc.**—The names "Joe Oppenkamp" and "Joseph Uppenkamp" are not idem sonans, to avoid variance between the scire facias writ in proceedings on a forfeited bail bond and the proof, consisting of the indictment, bail bond, and judgment nisi; the scire facias naming defendant as "Joseph Uppenkamp," the indictment naming him as "Joe Oppenkamp," the bail bond naming him as "Joseph Uppenkamp," and the judgment nisi using both names. *Uppenkamp v. State* (Cr. App.) 229 S. W. 544.

**Requisite 5. Forfeiture of bond.**—A scire facias being both a petition and citation, where it describes a judgment nisi declaring a forfeiture on a bail bond as having been taken on a certain date, it is error on the trial to allow the state to introduce a judgment of forfeiture of a different date, the variance being fatal. *Highsaw v. State* (App.) 19 S. W. 762.

Citation to sureties on forfeited bail bond not naming amount for which the forfeiture was taken held insufficient. *Curfman v. State*, 81 Cr. R. 323, 195 S. W. 194.

On scire facias to forfeit bail bond pending appeal in a felony case, citation held to have sufficiently recited the term of court at which the forfeiture was taken, and the amount of the forfeiture. *Swim v. State*, 86 Cr. R. 576, 218 S. W. 761.

**Art. 492. [480] Citation shall be served and returned as in civil actions.**

**1. Service and return in general.**—Judgment of forfeiture cannot be entered against the sureties on a bail bond who were not served with citation. *Saunders v. State*, 86 Cr. R. 413, 217 S. W. 148.

A judgment against sureties on a bail bond, rendered on default, cannot be sustained, where the scire facias upon which the final judgment was rendered was served only upon one of them, in view of Vernon's Ann. Code Cr. Proc. 1916, art. 492. *Saunders v. State*, 86 Cr. R. 464, 217 S. W. 949.

**9. Insufficient return and citation.**—A judgment against sureties on a bail bond, rendered on default, cannot be sustained where the return on the scire facias was: "Came to hand the 20th day of January, 1919, at \_\_\_\_\_ o'clock \_\_\_\_\_m, and executed March 29, 1919, by delivering to Dan Skeans in person a true copy of this writ. [Signed] Tom Ford, Sheriff Cooke County, Texas"—such return being insufficient. *Saunders v. State*, 86 Cr. R. 464, 217 S. W. 949.

Sheriff's return on such citation reading, "Came to hand on the 23d day of January, 1920, and executed on the 2d day of February, 1920, by delivering to the within names," and containing the names of such sureties, held insufficient to support a judgment by default against the sureties. *Grammer v. State* (Cr. App.) 230 S. W. 165 (2 cases).

A default judgment against sureties on bond of an accused who failed to appear must be reversed where it does not appear from the officer's return that the sureties were each served with copy of the scire facias writ. *Finley v. State* (Cr. App.) 230 S. W. 420.

**Art. 493. [481] Citation may be served by publication.**

See *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

**Art. 497. [485] Cases shall be placed upon civil docket.**

Cited, *Pleasants v. State*, 29 Tex. App. 214, 15 S. W. 43.

**New trial, writ of error or appeal.**—The failure of parties appealing from judgments on forfeited bail bonds to file briefs in the appellate court or in the trial court as required by District and County Courts Rule 102 (142 S. W. xxiv), and Civil Courts of Appeals Rule 29 (142 S. W. xii), requires dismissal of the appeal for want of jurisdiction. *Davis v. State* (Cr. App.) 226 S. W. 409; *Swim v. State*, 86 Cr. R. 576, 218 S. W. 761.

To obtain relief at the hands of the Court of Criminal Appeals from the trial court's refusal to grant motion of surety on a bail bond for rehearing or new trial after default judgment against him, it must be affirmatively shown that the discretion of the trial court has been abused. *Briggs v. State*, 87 Cr. R. 473, 222 S. W. 246.

**Art. 499. [487] Proceedings shall not be set aside for defect of form, etc.**

**Amendment or correction.**—In scire facias on a forfeited bail bond, where there was a fatal variance between the scire facias writ and the proof, consisting of the indictment, bail bond, and judgment nisi, in that the scire facias named defendant as "Joseph Uppenkamp," while the indictment and judgment nisi named him as "Joe Oppenchamp," on notice to the sureties and proper proof, the state could have had amendment to the judgment nisi to make it speak truth, if the two parties named in the judgment and bond were identical. *Uppenkamp v. State* (Cr. App.) 229 S. W. 544.

**Art. 500. [488] Causes which will exonerate from liability on forfeiture.**

**Cause 1. Invalidity of bond.**—The accusation against the principal in bail bond being by complaint for a felony in the district court, the forfeiture of the bond is invalid, since accusation should have been by indictment. *Turpin v. State*, 86 Cr. R. 96, 215 S. W. 455.

**Cause 3. Sickness of principal.**—Where it was not shown that the principal either appeared or gave cause for not appearing, the fact that his failure to appear was not due to his fault was no defense. *Markham v. State*, 33 Cr. R. 91, 25 S. W. 127.

**Other causes.**—That the principal defendant is innocent, or the indictment defective, or barred by limitation, is no defense. *United States v. Davenport* (D. C.) 266 Fed. 425.

**Art. 501. [489] Judgment final, when.**

**7. Judgment final in general.**—Since judgment nisi on forfeiture of bail bond is interlocutory, and does not become final, until citation is entered, dismissal of motion to set aside judgment nisi left such judgment in statu quo, and the order was not appealable. *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

The omission of the name of the defendant from a judgment forfeiting his bail bond would not render it void so that it was subject to collateral attack. *Fleming v. Bonine* (Civ. App.) 204 S. W. 364.

**Art. 502. [490] Judgment final by default, when.**

**Default judgment.**—Judgment of forfeiture cannot be entered against the sureties on a bail bond who were not served with citation. *Saunders v. State*, 86 Cr. R. 413, 217 S. W. 148.

**Art. 503. [491] The court may remit, when.**

Cited, *Conner v. State* (App.) 9 S. W. 63.

**Art. 504. [492] Forfeiture shall be set aside, when, etc.**

See *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

## 2. OF THE CAPIAS

**Art. 507. [495] Capias shall issue at once in all felony cases.**

Cited, *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.

**Art. 518. [506] Officer making arrest may take bail in misdemeanor, etc.**

See *Russey v. Wilson* (Civ. App.) 202 S. W. 974; *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

**Arts. 519–522. [507–510]**

Cited, *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.

## 3. OF WITNESSES AND THE MANNER OF ENFORCING THEIR ATTENDANCE

**Art. 529. [517] Before fine is entered against witness, it must appear, etc.**

See *Perea v. State* (Cr. App.) 227 S. W. 305.

**Art. 530. [518] What constitutes disobedience of a subpoena.**

See *Mills v. State*, 83 Cr. R. 515, 204 S. W. 642; *Perea v. State* (Cr. App.) 227 S. W. 305.

**Art. 535. [523] Definition and requisites of an attachment.**

Cited, *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111.

**Art. 536. [524] When an attachment may be issued.**

Cited, *Homan v. State*, 23 Tex. App. 212, 4 S. W. 575; *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111.

**Defendant's request.**—Upon nonattendance of defendant's subpoenaed witness, defendant's failure to have attachment issued, constituted lack of diligence. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

**Arts. 537, 538. [524a, 525a]**

Cited, *Lowe v. State* (Cr. App.) 226 S. W. 674.

**Art. 539. Where witness resides out of the county, etc., defendant or state entitled to subpoena, when.**

Cited, *Homan v. State*, 23 Tex. App. 212, 4 S. W. 575.

## 4. SERVICE OF A COPY OF THE INDICTMENT

**Art. 551. [540] Copy of indictment delivered to defendant in case of felony.**

See *Abrigo v. State*, 29 Tex. App. 143, 15 S. W. 408.

Cited, *Revill v. State*, 87 Cr. R. 1, 218 S. W. 1044.

**Validity.**—While Const. art. 1, § 10, declaring that defendant shall have the right to demand the nature and cause of the accusation against him, and a copy thereof, cannot be abridged by the Legislature, those articles of the Code of Criminal Procedure providing for the service of indictments on defendants are not invalid, being an extension of the constitutional provision and recognizing the right of a defendant in all cases to have a copy of the indictment. *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

**Accused not in custody.**—Where defendant was at large on bond, held that, while he was entitled to service of indictment on demand, he was not entitled to two days' delay for preparation for trial upon his demanding service of indictment. *Revill v. State*, 87 Cr. R. 1, 218 S. W. 1044.

Where defendant was not under bond nor under arrest when the indictment was returned, but was at a later term arrested and gave bond, he was entitled to have a copy of the indictment served upon him before he could be forced to trial. *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

**Sufficiency of copy.**—Defendant's motion that he had not been served with copy of indictment, and asking postponement for service, was correctly overruled, where indictment as served merely omitted letter "e" in the word "corporeal" describing property defendant had intended to steal. *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

**Waiver.**—The right of a defendant to have a copy of the indictment served upon him, which is guaranteed by Const. art. 1, § 10, can be waived only by the defendant, and such waiver cannot be made by his counsel. *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

Where defendant was not under bond or under arrest at the time the indictment was returned, and at a subsequent term he was arrested and gave bond, but nothing was done because the presiding judge was disqualified, defendant's act in giving bond was not a waiver of his right to have a copy of the indictment served upon him when arrested, and so he was entitled on demand thereafter to have a copy of the indictment served upon him before he could be forced to trial. *Id.*

Where one indicted for embezzlement was not served with a copy of the indictment, but obtained one from the clerk, when released on bond, at which time his case was continued until a later term, the failure to serve the copy while he was in jail, though the statute is mandatory, did not require a reversal; the object of the statute being to afford the accused the opportunity of examining the indictment before pleading, and defendant having waived service. *Wray v. State* (Cr. App.) 232 S. W. 808.

#### Art. 552. [541] Service of copy and return of writ.

See *Abrigo v. State*, 29 Tex. App. 143, 15 S. W. 408; *Harris v. State*, 32 Cr. R. 279, 22 S. W. 1037; *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060; *Wray v. State* (Cr. App.) 232 S. W. 808.

Cited, *Revill v. State*, 87 Cr. R. 1, 218 S. W. 1044.

#### Art. 553. [542] When defendant is on bail in felony.

See *Abrigo v. State*, 29 Tex. App. 143, 15 S. W. 408.

**In general.**—Where defendant was not under bond nor under arrest when the indictment was returned, but was at a later term arrested and gave bond, he was entitled to have a copy of the indictment served upon him before he could be forced to trial. *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

**Defendant on bail.**—Where no copy of the indictment had been served on accused, it appearing that before it was returned he had been arrested and given an appearance bond, held that, where accused demanded service of a copy of the indictment before trial, the refusal of the court to direct service was reversible error; accused being entitled to service of a copy even though he was at liberty on bond. *Revill v. State*, 87 Cr. R. 1, 218 S. W. 1044.

Under the statute, where defendant was at large under bond when indictment was returned, and had not been in jail since executing his first bond, and so was entitled to demand a copy of the indictment at any time, he could not delay demanding it till case was called, and then have two days to plead it. *Mayer v. State*, 87 Cr. R. 512, 222 S. W. 571.

Where one indicted for embezzlement was not served while in jail with a copy of the indictment, but his attorney, on his release on bail, procured a copy from the clerk and advised him of the nature of the accusation, the failure to serve him personally will not work a reversal; the law not requiring service on him in person while at large. *Wray v. State* (Cr. App.) 232 S. W. 808.

### 5. OF ARRAIGNMENT AND OF PROCEEDINGS WHEN NO ARRAIGNMENT IS NECESSARY

#### Art. 555. [544] No arraignment of defendant, except, etc.

**Time for arraignment.**—It is not error to arraign accused after the jury is sworn individually and collectively. *Russell v. State* (Cr. App.) 206 S. W. 79.

**Venue.**—Where defendant in a homicide case is regularly arraigned in the district court of the proper county, failure to arraign him in a county where venue was first made is an irregularity which does not require reversal. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

#### Art. 556. [545] An arraignment; for what purpose.

See *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757.

Cited, *McGrew v. State*, 31 Cr. R. 336, 20 S. W. 740; *Smith v. State*, 21 Tex. App. 227, 17 S. W. 471.

#### Art. 557. [546] No arraignment until two days after service of copy, etc.

See *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757.

Cited, *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

**Time for arraignment.**—The court, when an accused is confined in jail without trial, and especially when he wants to plead guilty to a misdemeanor, ought to accept the plea of guilty. *Ex parte Bostick*, 81 Cr. R. 411, 196 S. W. 531.

Where defendant was at large on bond, held that, while he was entitled to service of indictment on demand, he was not entitled to two days' delay for preparation for trial upon his demanding service of indictment. *Revill v. State*, 87 Cr. R. 1, 218 S. W. 1044.

**Postponement of trial.**—That a criminal case has been continued for the term is not sufficient ground for refusing to take a plea of guilty. *Ex parte Bostick*, 81 Cr. R. 411, 196 S. W. 531.

There was no merit in defendant's motion to quash array and jury panel, on ground that the trial court, on defendant's objection that he had not been allowed two days after arrest to file written pleadings, etc., reset his case for the week following and directed jurors present and regularly drawn to report back for duty on the follow-

ing Monday, which they did, with some exceptions properly filled by talesmen summoned by the sheriff under the court's direction. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

**Art. 558. [547] Court shall appoint counsel, when.**

See *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757.

**Appointment of counsel.**—Defendant, convicted of assault to murder, having had the benefit of consultation and advice from counsel of his own choice, who abandoned his case when the trial was ready to begin, and of counsel appointed by the court in preparing an application for suspended sentence, and of another counsel appointed by the court to aid in selecting a jury, cannot plead that he was thereby misled into believing that such counsel would continue their services, when, so far as is shown, they withdrew when they had finished the task requested of them by the trial court, without any misunderstanding. *Holden v. State* (Cr. App.) 232 S. W. 803.

It was not obligatory on the court to appoint counsel for one accused of crime, unless he be charged with a capital offense, or it appear that he is insane, or that he desires an application to be presented for a suspended sentence. *Id.*

**Art. 559. [548] Name as stated in indictment.**

See *Morris v. State*, 30 Tex. App. 95, 16 S. W. 757.

Cited, *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471.

**Effect of misnomer.**—Where defendant in a criminal case does not complain that his name is incorrectly stated or spelled in the indictment until a motion for new trial is filed, he has waived such point. *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172.

Where defendant in a prosecution for cattle theft was indicted under the name of "Bargas," to which he pleaded without objection, he could not on appeal contend that his true name was "Vargas," and that hence there was a variance. *Bargas v. State*, 86 Cr. R. 231, 216 S. W. 173.

That defendant's name, Gonzales, was misspelled "Gonzilas," was no ground for quashing the indictment, since accused on suggestion could have had his name, properly spelled, inserted. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

**Art. 560. [549] If defendant suggests different name.**

See *Boren v. State*, 32 Cr. R. 637, 25 S. W. 775.

**In general.**—Where defendant has been indicted under the name of "John Myatt," and at the trial suggests that his name is "Marion Myatt," the failure of the court to substitute defendant's correct name in the indictment is reversible error. *Myatt v. State*, 31 Cr. R. 523, 21 S. W. 256.

In a prosecution for forgery, defendant's suggestion during the trial that the name which he was charged with having forged was his true name, did not deprive the state of its right to prove that the name so suggested was not in fact defendant's correct name. *Chadwick v. State* (Cr. App.) 232 S. W. 842.

**Art. 563. [552] Indictment read.**

Cited, *Smith v. State*, 21 Tex. App. 277, 17 S. W. 471.

**Art. 565. [554] Plea of guilty not received, unless, etc.**

**In general.**—In a prosecution for murder, where the defendant pleaded guilty, and the court submitted the case to the jury to find the degree and assess the punishment, counsel agreed that only evidence of the sheriff would be submitted, and the court asked certain questions in relation to his plea. Held, that such questions did not violate such agreement. *Burton v. State*, 33 Cr. R. 138, 25 S. W. 782.

The charge and judgment showing that, before receiving the plea of guilty, on which defendant was convicted, he was admonished of the consequences of his plea, and defendant having merely filed a motion for new trial, alleging the judgment and verdict were contrary to the law and evidence, there is nothing to review. *Kimball v. State*, 84 Cr. R. 161, 205 S. W. 989.

**Construction and effect of plea.**—A plea of guilty under the Texas practice admits all the criminal facts alleged, and evidence is admitted only to enable the jury to determine the penalty. *Gipson v. State*, 86 Cr. R. 364, 216 S. W. 870; *Bell v. State*, 86 Cr. R. 363, 216 S. W. 879; *Williams v. State*, 86 Cr. R. 366, 216 S. W. 881.

**Sanity of accused.**—The question of sanity, when such plea is offered, is solely for the court, and relates only to the mental condition when accused makes his plea, and not to such condition when the offense was committed. *Taylor v. State* (Cr. App.) 227 S. W. 679.

A written plea filed by defendant's attorneys alleging insanity is inconsistent with defendant's plea of guilty, so that the court could not accept the plea of guilty and at the same time accept the plea that accused was insane when he committed the offense. *Id.*

Where after plea of guilty, it appears at the hearing to assess the punishment that defendant was insane when he committed the offense or that for any other reason he was not guilty, the court should permit the withdrawal of the plea of guilty and enter a plea of not guilty. *Id.*

**Art. 566. [555] Jury shall be impaneled, when.**

**Construction and operation in general.**—In a prosecution for the small misdemeanor of gaming, evidence is not required under plea of guilty as in felony cases. *Ex parte Bostick*, 81 Cr. R. 411, 196 S. W. 531.

**Evidence.**—Where defendant entered a plea of guilty to a charge of the unlawful manufacturing of intoxicating liquors, and was assessed the lowest penalty, he is not in a position to urge as a ground for reversal the insufficiency of the evidence to prove his guilt. *Coats v. State*, 86 Cr. R. 234, 215 S. W. 856; *Terretto v. State*, 86 Cr. R. 188, 215 S. W. 329.

Where the evidence introduced was sufficient to enable the jury to determine that the defendant on his plea of guilty should receive the lowest punishment provided by law, the case may not be reversed for lack of sufficient evidence to show guilt. *Terretto v. State*, 86 Cr. R. 188, 215 S. W. 329.

Defendant, who pleaded guilty to charge of assault with intent to kill, cannot complain of the refusal of a continuance because of the absence of a witness whose testimony could not affect the punishment, but was admissible solely on the issue of guilt. *Taylor v. State* (Cr. App.) 227 S. W. 679.

The assessment of the lowest punishment by the jury precludes questioning the sufficiency of the evidence, at least where there is legal evidence to support the judgment. *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238.

**Art. 567. [556] Same proceedings in respect to name of defendant in all cases.**

See *Chadwick v. State* (Cr. App.) 232 S. W. 842.

## 6. OF THE PLEADINGS IN CRIMINAL ACTIONS

**Art. 569. [558] Defendant's pleading.**

**In general.**—A written plea filed by defendant's attorneys alleging insanity is inconsistent with defendant's plea of guilty, and is not authorized by arts. 569 and 572, or by article 581, so that the court could not accept the plea of guilty and at the same time accept the plea that accused was insane when he committed the offense. *Taylor v. State* (Cr. App.) 227 S. W. 679.

**Art. 570. [559] Motion to set aside indictment, etc., for what causes only.**

Cited, *Trevino v. State*, 27 Tex. App. 372, 11 S. W. 447.

**4. Presence of unauthorized person.**—An objection to the want of qualification of a grand juror after indictment found cannot be entertained, this article not being applicable in such case. *Lacy v. State*, 31 Cr. R. 78, 19 S. W. 896.

"Deliberating" means weighing with view of decision, mutual discussion, and examination for and against. *McGregor v. State*, 83 Cr. R. 35, 201 S. W. 184.

Indictment found after state's and district attorney, sheriff, and chief of police were before grand jury discussing whether to proceed by injunction or indictment, was invalid. *Id.*

**5. Defects in preliminary proceedings.**—That prosecuting witness testified after start of trial that he would not have sworn to complaint charging accused with "habitual" carnal intercourse, if he had known that complaint so charged, is not sufficient to quash complaint, where prosecuting attorney stated that he read over the entire complaint to prosecuting witness before he signed. *Webb v. State*, 86 Cr. R. 337, 216 S. W. 865.

Where a complaint was read over to prosecuting witness before he swore to it, the burden of proof is on accused, on motion to quash because prosecuting witness would not have signed complaint had he known what it contained, to show fraud. *Id.*

**7. Race discrimination.**—In trial of negro for murder of a white man, there was no error in the court's refusing to quash the indictment because no negroes were on the jury commission or on the grand jury. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

**8. Defects in indictment or information in general.**—Failure of indictment for forgery to embrace averments explaining the words, "I N Bank, Groveton," the forged instrument being an acknowledgment of the receipt of \$100 for the account of I N Bank, held not to render the indictment subject to quashal on motion. *Martin v. State*, 85 Cr. R. 89, 209 S. W. 668.

**13. Want of jurisdiction.**—Motion to dismiss, alleging court had no jurisdiction because the suit was instituted in justice court, and was still pending therein, did not prove itself. *Wrenn v. State*, 83 Cr. R. 642, 200 S. W. 844.

**Art. 572. [561] Only special pleas for defendant.**

See *Huey v. State* (Cr. App.) 227 S. W. 186.

**1. Same offense.**—A plea of former jeopardy, setting out that after a trial had begun, defendant's plea, entered, and evidence heard, the jury were wrongfully dismissed, raised a question of fact; and, while the burden was on defendant to show an abuse of the court's discretion in discharging the jury, he had the right to show that the court erred therein, if possible and, if not satisfied with the ruling, to bring the matter up for review. *Chadwick v. State*, 86 Cr. R. 269, 216 S. W. 397.

On a plea of former jeopardy the fact that separate indictments charged accused with selling intoxicants to different parties does not necessarily establish separate offenses, where the sale might be made at the same time and jointly to both parties. *Westbrook v. State* (Cr. App.) 225 S. W. 750.

**8. Evidence.**—The burden is upon the accused to prove his defense of former jeopardy. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

The question whether accused, who had been acquitted of murdering his own wife, had killed her accidentally while shooting in self-defense at another, or whether the

killings were separate acts, held sufficiently raised by accused's testimony to require submission to the jury. *Id.*

Where defendant in county court was convicted of gaming on complaint sworn to before assistant county attorney, and information based thereon filed originally in county court, overruling of defendant's motion to dismiss, setting up prosecution was for same offense for which complaint had been filed in justice court, such complaint not being attached to motion and no evidence being introduced on such plea, was not reversible error; after introducing evidence on point, defendant not calling for ruling or asking charge thereon. *Wrenn v. State*, 84 Cr. R. 146, 206 S. W. 94.

9. **Other pleas.**—A written plea filed by defendant's attorneys alleging insanity is inconsistent with defendant's plea of guilty, and is not authorized by arts. 569 and 572, or by art. 581, so that the court could not accept the plea of guilty and at the same time accept the plea that accused was insane when he committed the offense. *Taylor v. State* (Cr. App.) 227 S. W. 679.

### Art. 573. [562] Special plea must be verified.

**Verification.**—In prosecution for gaming, court properly overruled defendant's plea of former conviction, which was not sworn to. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

### Art. 575. [564] Exceptions to the substance of an indictment.

See *McDaniel v. State*, 24 Tex. App. 552, 7 S. W. 249.

**Motion.**—Under art. 847 and this article, the validity of the statute creating the trial court cannot be attacked by motion in arrest of judgment. *Victor v. State*, 86 Cr. R. 462, 217 S. W. 698.

### Art. 576. [565] Exceptions to the form of an indictment.

See *McDaniel v. State*, 24 Tex. App. 552, 7 S. W. 249.

**Grounds of exception.**—An information purporting to have been presented by a district attorney is not invalidated by reason of the want of the official signature of the county or district attorney. *Jones v. State*, 30 Tex. App. 426, 17 S. W. 1080.

In prosecution for violation of local option law, where information did not state whether election for local option was held before or after violation was made a felony, motion to quash should have been sustained as one of form. *Shipley v. State*, 84 Cr. R. 278, 208 S. W. 342.

Signature of foreman of grand jury is not essential to validity of indictment; signature of another as acting foreman being sufficient. *Parkinson v. State*, 87 Cr. R. 176, 220 S. W. 774.

**Motion.**—Where an indictment recited that it was found by the grand jury organized at the October term, the indictment was returned on November 21st, and on accused's application the venue was changed on November 24th, a motion then made to quash the indictment on the ground that there was a misnomer of the term of court at which it was returned was properly overruled, for the statement of the term of court at which the indictment was presented is not one of the statutory requirements, but is, at most, a matter of form, available only on motion to quash presented in due time, and under article 630, it is contemplated that an exception to the form of the indictment should be made in the court in which the indictment is filed before the venue is changed. *Finch v. State* (Cr. App.) 232 S. W. 528.

### Art. 577. [566] Motions, etc., shall be in writing.

**Verbal motion.**—If verbal motion to quash had been made prior to trial, with an agreement to reduce it to writing and later file it, it would be in ample time, and the fact that it was filed subsequently and judgment entered subsequently did not affect the situation. *Shipley v. State*, 84 Cr. R. 278, 208 S. W. 342.

### Art. 578. [567] Two days allowed for filing written pleadings.

Cited, *Venn v. State*, 86 Cr. R. 633, 218 S. W. 1060.

**Time allowed.**—Defendant not arrested under substituted complaint and information until put on trial, held then entitled to two days in which to plead, though complaint was filed more than six days before trial. *Arrelano v. State*, 82 Cr. R. 128, 198 S. W. 314.

### Art. 580. [569] Defendant may file written pleadings at any time, etc.

**In general.**—Where trial court offered to permit defendant to file plea of former conviction as of date before making his announcement of ready, but refused to permit him to withdraw announcement, defendant refusing to file plea for that reason, there was no error. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

### Art. 581. [570] Plea of guilty; how made in felony case.

Cited, *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

**In general.**—A written plea filed by defendant's attorneys alleging insanity is inconsistent with defendant's plea of guilty, and is not authorized by arts. 569 and 572, or by this article, so that the court could not accept the plea of guilty and at the same time accept the plea that accused was insane when he committed the offense. *Taylor v. State* (Cr. App.) 227 S. W. 679.

**Art. 582. [571] Plea of guilty in misdemeanor.**

See *Gordon v. State* (Cr. App.) 228 S. W. 1095.

**In general.**—Where relator, having been convicted of a misdemeanor in a city court, and having had a fine entered against him, removed from the county, and wrote to the county attorney, of such county, inclosing \$4 to be applied on his fine, but the county attorney construed it as an instruction to plead guilty of an offense in justice court, and a purported judgment was entered in justice court on relator's plea of guilty by the county attorney for a fine of \$1 for an offense not named, there being no complaint or other papers in the cause except a *capias pro fine*, under which relator was arrested, the justice court acquired no jurisdiction to render judgment against relator, and the judgment was void. *Ex parte Grimes*, 81 Cr. R. 405, 195 S. W. 858.

**Waiver of jury.**—Defendant, an ignorant negro, was charged with aggravated assault on a female, and, when brought into court and asked by the prosecuting officer what he was going to do, said he slapped her and reckoned he was guilty, whereupon, in reply to the judge's inquiry, he stated that he would plead guilty and the judge fixed a somewhat severe sentence, after prosecuting officer had stated that defendant was a bad negro and should have heavy punishment. Held, that the facts were insufficient to sustain waiver of jury trial, and defendant should have been granted a new trial, in view of the hasty conduct of the trial and of the fact that the state improperly brought in issue the question of his character and reputation. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

A jury may be waived in misdemeanor cases. *Id.*

## 7. OF THE ARGUMENT AND DECISION OF MOTIONS, PLEAS AND EXCEPTIONS

**Art. 593. [582] In cases of felony.**

See *Turner v. State*, 21 Tex. App. 198, 18 S. W. 96.

**Art. 597. [586] When exception is on account of form.**

See *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

See *Osborne v. State*, 23 Tex. App. 431, 5 S. W. 251.

**In general.**—Where an indictment recited that it was found by the grand jury organized at the October term, the indictment was returned on November 21st, and on accused's application the venue was changed on November 24th, a motion then made to quash the indictment on the ground that there was a misnomer of the term of court at which it was returned was properly overruled. *for*, under arts. 451, 576, 597, the statement of the term of court at which the indictment was presented is not one of the statutory requirements, but is, at most, a matter of form, available only on motion to quash presented in due time, and under article 630, it is contemplated that an exception to the form of the indictment should be made in the court in which the indictment is filed before the venue is changed. *Finch v. State* (Cr. App.) 232 S. W. 528.

**Art. 598. [587] Amendment of indictment or information.**

**Matters of form.**—In prosecution for sale of intoxicants in prohibition territory, held that, after motion to quash indictment, and district attorney's motion to amend by inserting date on which prohibition election was held, court properly permitted amendment by insertion of date before announcement to try case on merits. *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

**Matters of substance.**—In prosecution for slander, where information was defective for variance, and in failing to state given name or initials of injured party, such defects could not be cured by amendment. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 353.

Allegation in indictment as to county in which offense was committed is matter of substance. *Patterson v. State*, 84 Cr. R. 157, 205 S. W. 986.

Error in indictment, alleging that defendant appeared before grand jury on a certain date and testified falsely to something which did not occur, until a subsequent date, was a matter of substance and not of form, and could not be held immaterial or cured by amendment. *Johnson v. State*, 84 Cr. R. 243, 206 S. W. 527.

**Defendant's right to amendment.**—Defendant, charged with perjury, had right on request to have indictment changed by obliteration of alias. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

**Art. 599. [588] Amendments, made how.**

**Mode of amendment.**—In prosecution for sale of intoxicants in prohibition territory, held that, after motion to quash indictment, and district attorney's motion to amend by inserting date on which prohibition election was held, court properly permitted amendment by insertion of date before announcement to try case on merits. *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

**Art. 601 [590] Former acquittal or conviction; when a bar and when not a bar.**

See *Cooper v. State*, 25 Tex. App. 530, 8 S. W. 654.

## 8. OF CONTINUANCE

**Art. 605. [594] For sufficient cause shown.**

1. **Discretion of court.**—Continuance in a criminal trial is not a matter of absolute right, but is for the sound judicial discretion of the trial judge. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.



2. **Grounds in general.**—Where defendant had practically two days between service and trial, and was unusually well equipped with experienced attorneys with more than ordinary knowledge of the persons summoned as veniremen, motion to postpone trial to give additional time to investigate veniremen was properly overruled. (Per Prendergast, J.) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

The court did not err in refusing a motion for continuance, in that all but five of the jurors on the bench disqualified; tit. 8. c. 4, providing for the formation of juries in cases less than capital, specifically taking care of any case where, from any cause, the number of jurors in the box or in the panel is reduced below the number required. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

In prosecution for murder the fact that Court of Criminal Appeals had not acted on application for bail was not sufficient ground for continuance. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

3. **Other prosecution pending.**—Where accused's conviction on charge of selling intoxicants was pending, his trial upon a separate indictment, charging a similar sale at the same time to another person, should be postponed pending determination of the appeal, in order that if the judgment be affirmed the accused might interpose a plea of former jeopardy. *Westbrook v. State* (Cr. App.) 225 S. W. 750.

6. **Physical and mental condition of accused.**—In a prosecution for assault with intent to murder, held, that court did not err in denying a motion to allow accused to withdraw his announcement of ready and continue the cause, in that defendant was suffering from a wound and could not talk loudly. In the absence of a showing that the jurors did not hear the witness; court qualifying the bill by stating that accused spoke perfectly distinctly and showed no evidence of any illness whatever. *Walker v. State* (Cr. App.) 232 S. W. 509.

7. **Want of preparation.**—In rape case, held that it was error not to allow attorneys appointed by the state more than two days to prepare their defense. *Jones v. State*, 84 Cr. R. 4, 204 S. W. 437.

It cannot be asserted for the first time on appeal that defendant was hurried into his trial. *Wilson v. State*, 87 Cr. R. 533, 223 S. W. 217.

Where the only ground for an application for postponement of trial was that accused had been so recently arrested and that his counsel had been engaged in another trial up to the morning of the instant trial, refusal of postponement was not error where it did not appear that accused was not given his statutory two days between the date of the arrest and his trial or that he had been injured by the refusal of postponement. *Felz v. State* (Cr. App.) 230 S. W. 154.

8. **Local prejudice.**—Where accused negro had killed a white man and, in the 10 days between the killing and the trial, such strong public sentiment was created against accused by publicity given the state's side of the case that the authorities deemed a strong guard of soldiers necessary for accused's protection, his motion for continuance should have been granted or change of venue ordered. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

9. **Absence of counsel.**—In prosecution for larceny where experienced counsel selected by appellant and familiar with the case conducted it skillfully, refusal to continue case because of absence of leading counsel was not an abuse of trial court's discretion. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

Where defendant, who had been on bail nearly a year, asked continuance, stating he was without counsel, and immediately thereafter his counsel appeared, although not informed of trial date, and cause was set for another day, and during trial defendant's counsel after moving for postponement left to engage in trial of another case in which he had been employed subsequent to setting case, held that defendant was not deprived of counsel. *Johnson v. State*, 84 Cr. R. 567, 208 S. W. 928.

Where accused was represented by two able attorneys, who represented him in trial with zeal and ability, order overruling motion for continuance on account of absence of chief counsel will not be held reversible error. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

The absence of one of defendant's counsel at the beginning of the trial was not ground for continuance where other and able counsel were present and defendant's rights were fully and fairly protected. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

## Art. 608. [597] First application by defendant for a continuance.

### SUBD. 1

½. **Application in general.**—In absence of an affirmative showing that an application for continuance is the first, it is presumed that it is a subsequent application. *Mitchell v. State*, 87 Cr. R. 560, 222 S. W. 983.

1. **Name and residence of witness.**—Application for continuance based on absence of witness must state residence of witness, and the time when he left the county of his residence, if temporarily absent therefrom. *Mills v. State*, 84 Cr. R. 515, 204 S. W. 642.

Court did not err in refusing an application for a continuance because service had not been had upon certain witnesses, where the application was general in its terms and indefinite as to witnesses and residences; witnesses being only described as "Big Boy," "Red," etc. *Beard v. State*, 87 Cr. R. 205, 220 S. W. 342.

An application for continuance for absence of witnesses, not stating the address or residence of any of such witnesses, the same not appearing from the attached subpoenas nor stating that the residence of said witnesses is unknown, is fatally defective. *Young v. State* (Cr. App.) 230 S. W. 414.

Court did not abuse its discretion in denying an application for a continuance by reason of absence of witnesses whose names were alleged to be unknown, where ac-

cused in his testimony named several residents of the city who knew such absent persons and their whereabouts. *Barnes v. State* (Cr. App.) 230 S. W. 986.

#### SUBD. 2

**4. Diligence and excuse for delay in general.**—Diligence to secure attendance of witness whose absence was made ground of motion for continuance held insufficient. *Walker v. State*, 83 Cr. R. 484, 204 S. W. 227; *Jeffries v. State*, 82 Cr. R. 42, 198 S. W. 778; *Mason v. State*, 83 Cr. R. 528, 204 S. W. 331; *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

Defendant's motion for continuance on account of absence of witness was properly overruled, where no diligence to secure attendance of witness was shown. *Wrenn v. State*, 84 Cr. R. 146, 206 S. W. 94; *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353; *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

In prosecution for assault to murder, court's action in overruling defendant's motion for continuance to secure testimony of three witnesses, who resided in city where case was tried, two or three being present at trial and not put on stand, held proper. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

An application for continuance based on absence of witness must state facts showing that due diligence had been used in effort to obtain the witness. *Mills v. State*, 83 Cr. R. 515, 204 S. W. 642.

On application for continuance for absence of unsubscriptions witness upon ground that diligence in procuring witness was unnecessary in view of agreement with opposing attorney that it would be unnecessary to subpoena witness in all cases pending against defendant, such agreement was addressed to the sound discretion of trial court in the nature of an equitable showing for continuance. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

In a prosecution for seduction, where defendant applied for a continuance on the ground of absent witnesses, and it appeared that witnesses whom it was stated would testify to a material matter were in France with the American Expeditionary Forces, and that by no diligence could their testimony have been obtained, defendant without any showing of diligence is entitled to a continuance. *Bosley v. State*, 86 Cr. R. 619, 218 S. W. 750.

The presumption is that an application for a continuance was properly overruled, and the action of the trial court will be sustained where the only showing of diligence to procure the testimony of absent witnesses is that an attachment was issued and appearance bond given more than a year prior to trial, with no showing as to whether they appeared or what subsequently became of them, especially where the materiality of the testimony is not made apparent so as to render it probable that defendant was injured. *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

It is incumbent on applicant for a second continuance for absent witness to allege or show what diligence has been exercised. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

The burden is on defendant, moving for continuance for the absence of a witness, to show the use of necessary diligence to procure her attendance. *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

Where continuance was granted at the July term for absence of certain witnesses, refusal to grant a second continuance for absence of same witnesses during the following January held proper, where there was no showing of an effort to procure the attendance of such witnesses until January. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

Refusal of the fourth application, for continuance for absence of witnesses, where application did not show when witnesses had been served with subpoenas, or that witnesses had ever appeared, held proper; no diligence being shown. *Bell v. State*, 88 Cr. R. 64, 224 S. W. 1108.

Where it did not appear that absent witness was present or served with process at the preceding term of the court, or the one at which the trial was had, and where witness had not been summoned in any manner during the term at which trial was had, and where testimony of witness on examining trial was different from that expected from him according to application for continuance, refusal of application held proper. *Lucas v. State* (Cr. App.) 225 S. W. 257.

In a prosecution for murder, defendant's application for a continuance to secure the testimony of absent witnesses should have been granted; the witnesses being at some unknown point in another part of the state, so that it was impossible to secure their attendance without a postponement, and the evidence showing that efforts to secure their attendance were made in good faith and diligently pursued. *Giles v. State* (Cr. App.) 231 S. W. 765.

Where about 14 days elapsed between the filing of indictment for murder and issuance of defendant's subpoena, which was returned not executed in about three days, and the case was set for trial about 10 days thereafter, during which time no further effort was made to secure the witness' attendance, and the affidavit of the witness attached to the motion for new trial indicates that he was at San Antonio, in the army, so that a casual inquiry at camp headquarters would have disclosed his whereabouts, held that affidavit indicates that by exercise of diligence the defendant could have secured the witness' attendance, and hence was not entitled to a continuance. *Boaz v. State* (Cr. App.) 231 S. W. 790.

**5. Process.**—Where the offense occurred June 19, 1915, and process by defendant for witnesses was not issued until January, 1917, a few days before the trial, and it was never returned, refusal of a continuance for the absence of such witnesses was not error. *Clay v. State*, 81 Cr. R. 293, 195 S. W. 600.

Placing process in hand of constable instead of sheriff held not a want of diligence. *Dozier v. State*, 82 Cr. R. 321, 199 S. W. 287.

Where witness absent because of illness was served with process in ample time and

at the same time as other witnesses who attended, held, that there was no lack of diligence. *Id.*

Where process for all witnesses was issued at the same time and served on all but one, who had left the state, held, that there was no want of diligence. *Id.*

Discretion of court in overruling defendant's application for continuance on account of absence of witnesses was not abused where trial took place October 1st, and subpoenas for absent witnesses were not issued until 29th of September. *Marshall v. State*, 82 Cr. R. 623, 200 S. W. 836.

Application for continuance must show what was done with process for absent witness, whether it was served, and when it was returned. *Id.*

Where the homicide occurred in August, 1916, the indictment was returned January 5, 1917, a subpoena for an absent witness was not applied for until July 6th, and a new subpoena issued on July 24th, and returned on 2d of August, there was no sufficient showing of diligence to warrant a continuance when the trial was called for August 1st. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

Under indictment returned January 4th, when case was called for trial July 20th, issuance of process for witness on June 26th did not show sufficient diligence to warrant continuance, where accused knew of the testimony and the witness' absence at an earlier date. *Watson v. State*, 201 S. W. 988, 83 Cr. R. 131.

Where an indictment was returned in September and process was not asked for a known witness until six days before the trial in November, there was not sufficient diligence to entitle defendant to a continuance. *Coprew v. State*, 83 Cr. R. 151, 202 S. W. 81.

Where a subpoenaed witness moved to another county before the term of court at which the case was called for trial, party moving for continuance because of absence of such witness has not exercised proper diligence in effort to secure his attendance if witness was not again subpoenaed in the county to which he had moved. *Mills v. State*, 204 S. W. 642, 83 Cr. R. 515.

Defendant, arrested on the 13th and tried on the 28th of the same month, failed to show diligence entitling him to new trial, where he had no process issued for absent witnesses until three days before trial. *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765.

Where accused was indicted nearly a year before trial, but issued subpoena for absent witness only a few days before trial, and the testimony would have been only for impeachment, continuance was properly denied, in view of court's statement that the witness would not have testified as alleged. *Porter v. State*, 84 Cr. R. 164, 205 S. W. 985.

Where defendant was arrested April 25, 1917, indicted for murder October 12th following, and tried May 28, 1918, and state contested his motion for a continuance to procure attendance of his wife as a witness on ground of no diligence, held there was no error in denying motion; he having procured no process for wife until May 11, 1918. *McClendon v. State*, 84 Cr. R. 259, 206 S. W. 686.

Where defendant was indicted April 18th and tried September 7th and a subpoena for a witness was returned May 2d unexecuted, the subsequent diligence, based upon inability to learn witness' whereabouts when he was in an adjoining state and corresponding with persons in defendant's neighborhood, was so insufficient as to warrant overruling motion for continuance. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

Continuance on ground of absence of witness was properly refused, where application for subpoena was filed only three days before the trial, though defendant was indicted more than two weeks prior thereto, and there was no showing of issuance of subpoena, or service or attempted service upon witness, and no reason given for witness' non-appearance. *Albertson v. State*, 84 Cr. R. 574, 208 S. W. 923.

Upon nonattendance of defendant's subpoenaed witness, defendant's failure to have attachment issued, under art. 536, constituted lack of diligence. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

Failure to apply for subpoenas until the 15th of the month, where the prosecution began on the 9th, held lack of the diligence required to warrant continuance on ground of absence of witness. *Id.*

Where refusal to grant continuance upon ground of absence of witness is complained of, record should disclose whether or not the subpoena was returned, and, if returned, the information therein imparted should appear. *Id.*

Application for continuance on ground of absence of witnesses was properly denied, where application, stating that witnesses for whom subpoena had been issued were without the state, did not state when or how information as to their absence reached defendant, nor when subpoenas were sent to the respective counties to which issued, nor by whom sent, if at all, and where subpoenas were not attached or in evidence, nor accounted for in any way, and no showing is made as to when the witnesses left the state nor that they had been or were recently in the counties in which subpoenas were issued. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

Upon application for continuance, because of the absence of a witness, where process was issued for the witness in July, 1918, and defendant knew that such witness was in the United States Army in Camp Travis, and the witness was home on a furlough about Christmas, 1918, and January 1, 1919, and was in the county, and defendant's father then saw and talked with the witness and asked him to attend the trial, but then made no effort to secure process, there was insufficient diligence shown to require a continuance in February, 1919. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

Where defendant duly subpoenaed his wife to testify in his behalf, and at the time of trial moved for a continuance on account of her absence, and it appeared that the sheriff, when he attempted to bring her in by attachment, found her in bed in an advanced condition of pregnancy, defendant's motion for continuance on the ground of absence of his wife, who was a material witness, should have been granted. *McDonald v. State*, 86 Cr. R. 304, 216 S. W. 166.

Where indictment was filed on January 4, 1919, and soon afterwards subpoenas were issued for a number of witnesses, but one for L. was not procured until February 8th,

and was returned not served, witness not being found within the county, and the case was called for trial February 15th, a motion for continuance on account of the absence of L. was properly overruled, where no reason or excuse was shown for failure to sooner secure the issuance of the subpoena for L. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

Where indictment was returned September 3 and arrest made on September 4 and accused issued subpoena for witness on September 6, and trial began on September 8, court erred in refusing to grant a continuance, where service could not be had upon the witness because temporarily absent from the county; the testimony of the witness being material. *Torez v. State*, 86 Cr. R. 465, 217 S. W. 948.

Where the application for continuance failed to show when a subpoena for an absent witness was issued, and no date was mentioned nor copy of subpoena attached, the denial of defendant's motion for continuance to procure the testimony of such witness was not error, as legal diligence was not shown. *Hughes v. State*, 86 Cr. R. 611, 218 S. W. 1048.

Diligence to procure the attendance of a witness, for whose absence a second application for continuance of a trial for homicide was made, was not shown, where it appeared that after the first continuance defendant saw the witness, but did not get out process for his appearance, relying on his promise to appear. *Bocknight v. State*, 87 Cr. R. 428, 222 S. W. 259.

Where indictment for hog theft was returned in March, 1919, and no process was taken out by defendant for a witness until March, 1920, and subpoena then issued was not served, while it is not shown that any process was ever issued for another witness, though he had received instruction from the court to return for trial, the diligence in attempting to procure the attendance of such witnesses was insufficient to call for continuance on account of their absence. *Bradford v. State*, 88 Cr. R. 122, 224 S. W. 901.

Where application for continuance for absence of witness did not show that effort was made to obtain presence of witness at preceding term of court, and did not give date of subpoena issued at term at which trial was had, and where such witness was not served with process at the latter term, and, though it was stated that he could be procured in 24 hours, no attachment or other process was asked for witness, and no further effort made, to obtain his testimony, refusal of application held proper, sufficient diligence not having been exercised. *Lucas v. State* (Cr. App.) 225 S. W. 257.

A motion for a continuance for the absence of witnesses who were duly subpoenaed to appear at the preceding term from which the case was continued on the state's motion, which did not show whether the witnesses appeared at the former term, did not negative the right of defendant to have attachment issued for the witnesses to which he would have been entitled if they had failed to appear when subpoenaed, and therefore does not show the diligence necessary to entitle him to continuance. *Godby v. State* (Cr. App.) 225 S. W. 516.

Where defendant was indicted in March, and the case was set for trial on September 16th and tried on September 17th, and process for absent witnesses was not issued until September 14th, and the witnesses were in town on the 16th, when defendant's co-defendant was tried and no attachment was issued for them, the diligence was not sufficient, and the overruling of the motion for a continuance did not require a new trial, especially where their testimony on the question of alibi would have been cumulative. *Suber v. State* (Cr. App.) 227 S. W. 314.

Where an indictment returned August 16th was set for trial for August 23d, and postponed to August 24th, subpoenas for absent witnesses first obtained on August 23d were too late to authorize a continuance because of the absence of the witnesses. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

Where process was not issued for witnesses until two months after indictment and arrest, and was returned not executed four months prior to trial, no sufficient diligence was shown to require the granting of a motion for continuance to secure the testimony of the witnesses, in the absence of an explanation of the delay in issuing process or the failure to renew efforts to secure the attendance of the witnesses. *Shamblin v. State* (Cr. App.) 228 S. W. 241.

Where defendant appellant was arrested and placed in jail in October, indicted in November, employed counsel December 4th, and the case was set for December 6th, and defendant was previously brought from jail and informed by the court that, if he would give the names of his witnesses to the clerk, process would be issued for them, which he failed to do, no diligence was shown warranting a continuance for not being able to secure a witness from another county. *Moore v. State* (Cr. App.) 229 S. W. 508.

An application for a continuance; filed August 10, 1920, after indictment in May, showing that no subpoenas were issued for the absent witnesses until August 9, 1920, the day before the case was set for trial, did not show diligence, and a continuance was properly refused. *Freddy v. State* (Cr. App.) 229 S. W. 533.

In a prosecution for unlawfully selling intoxicating liquor, where a continuance because of the absence of defendant's wife, was asked, a showing that the wife had been duly subpoenaed, but was not able to appear because of illness, as certified to by a doctor, held sufficient as to diligence. *Byrd v. State* (Cr. App.) 231 S. W. 399.

In a prosecution for unlawfully selling intoxicating liquor, where a continuance was asked for the absence of a witness, diligence did not sufficiently appear upon a mere showing that a subpoena had been asked but had not been served. *Id.*

The failure of accused to avail himself of the compulsory process to which he is entitled to compel the attendance of a witness in his behalf defeats his right to a continuance because of the absence of such witness. *Roberts v. State* (Cr. App.) 231 S. W. 759.

The issuance of subpoena for the absent witness in another case against the same defendant, which did not secure the attendance of the witness, is not sufficient diligence to entitle accused to a continuance of the case on trial. *Id.*

In a prosecution for robbery, an application for a continuance for the absence of a

witness, failing to show the date of issuance of subpoena, held insufficient. *Searcy v. State* (Cr. App.) 232 S. W. 799.

7. **Deposition.**—Denial of continuance for absence of witness to secure whose testimony state proposed that defendant could take his deposition, etc., held not erroneous. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

Where defendant, prosecuted for murder, had a subpoena issued for a witness, a resident of the county, and the return of subpoena disclosed that witness had left a year before, and was in the army, so that the return indicates that knowledge of his departure, if not possessed by defendant appellant, could have been acquired by the use of diligence, and witness' deposition taken, and if the subpoena had been issued soon after indictment, such information would have come to defendant in time to secure the witness, defendant was not entitled to continuance because of lack of diligence. *Boaz v. State* (Cr. App.) 231 S. W. 790.

### SUBD. 3

8. **Facts expected to be proved, and their materiality in general.**—As the fact that a wife refused to give up custody of her young children does not relieve the husband from his legal duty to support and maintain them when they are in destitute and necessitous circumstances, in prosecution under such statute a refusal of motion to continue on account of absence of a witness who would testify to wife's refusal was not reversible error. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855.

In prosecution for bigamy, application for continuance to enable defendant to prove by his brother that second marriage was consummated under duress was properly overruled, where there was no evidence of duress. *Beck v. State*, 82 Cr. R. 21, 198 S. W. 144.

Where testimony of two absent witnesses would have been inadmissible, overruling motion for continuance was not reversible error. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

Defendant's application for continuance to secure testimony of two witnesses held properly denied for failure to show materiality of testimony. *Marshall v. State*, 82 Cr. R. 623, 200 S. W. 836.

Where two were indicted together and filed statutory affidavits, and defendant was tried first, trial resulting in a hung jury, and thereafter other indicted person was convicted, there was no error on defendant's second trial in refusing to postpone trial to enable defendant to obtain testimony of convicted person. *Hammitt v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

Application for a continuance because of absence of witness should be genuine and truthful, and should state as accurately as possible what witness would testify to. *Glascoe v. State*, 85 Cr. R. 234, 210 S. W. 956.

The court did not err in refusing a continuance on the ground of absence of witnesses, where diligence as to one witness was insufficient, and the court states that it was not shown that witnesses would give alleged testimony, and it was evident that the absent testimony would not, if present, have brought about a different result. *Carneal v. State*, 86 Cr. R. 274, 216 S. W. 626.

In a prosecution for murder, on defendant's application for a continuance to secure the testimony of absent witnesses, the state could not contest the truth of the absent testimony, but only defendant's diligence to secure the same; the application being her first. *Giles v. State* (Cr. App.) 231 S. W. 765.

An application for a continuance must not only set out the facts expected from the absent witness, but must make it appear that they are material, and showing their relevancy. *Eason v. State* (Cr. App.) 232 S. W. 300.

On an issue as to whether prosecuting witness in a prosecution for assault with intent to murder made a threatening demonstration before defendant fired, where it was agreed that an absent witness was with prosecuting witness a few moments before the firing began, it was not so improbable that he saw what took place as to justify ignoring an application for a continuance to procure his testimony. *Burton v. State* (Cr. App.) 232 S. W. 506.

It was error to deny a continuance on the ground that the absent witness whose testimony was sought would not corroborate defendant's theory, in view of uncontroverted evidence of ill feeling between the parties, a previous difficulty between them, prosecuting witness' conduct in arming himself, threats by him, and defendant's description of his conduct immediately prior to the assault. *Id.*

10. **Selling liquor.**—In a prosecution for unlawfully selling intoxicating liquor, evidence of absent witnesses held material, so that it was error to refuse a continuance on the ground of the absence of such witnesses. *Byrd v. State* (Cr. App.) 231 S. W. 399.

In a prosecution for having in possession equipment for manufacturing intoxicating liquor not for medicinal, etc., purposes, denial of continuance to procure the testimony of witnesses to the fact that the equipment was on the premises when defendant took possession of them held not erroneous, as such evidence could furnish no defense. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

11. **Assault and homicide.**—Where state claimed deceased was killed with pistol of defendant's father, defendant held entitled to continuance for absence of the father, who would have testified as to keeping the pistol in a locked trunk, to which he carried the key. *Dozier v. State*, 82 Cr. R. 321, 199 S. W. 287.

Where defendant and the assaulted person were friendly before a shooting, and immediately after drove home together in a friendly manner, it was error to refuse a continuance to obtain testimony of such assaulted person, that he did not think defendant was shooting at him, and as to what was said between the two immediately after the shooting. *Covington v. State*, 83 Cr. R. 22, 201 S. W. 179.

In prosecution for homicide, absence of witness expected to prove that the wound penetrated straight in, and that therefore deceased was standing straight when accused

stabbed him. was not sufficient ground for continuance; it being immaterial whether wound was straight or slanting or whether deceased was stooping or standing straight at time of stabbing. *Mills v. State*, 83 Cr. R. 515, 204 S. W. 642.

Continuance should have been granted for absence of witness who would have testified that the assaulted person said that the shooting was accidental. *Mitchell v. State*, 84 Cr. R. 36, 204 S. W. 767.

Upon the question of deceased's being armed, where defendant's motion for postponement of murder trial to secure a witness shows no material conflict between what he wanted to prove by the witness and what other witnesses stated, the refusal to postpone was not reversible error. *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

In a prosecution for murder, it was not error to refuse a continuance because of the absence of a witness who would merely testify to an admission by deceased of misconduct toward defendant's wife; such admission not being material unless communicated to defendant. *Beck v. State*, 85 Cr. R. 578, 213 S. W. 662.

**12. — Insanity.**—In prosecution for murder, court properly overruled defendant's application for continuance to procure testimony of witness by whom defendant expected "to prove that he was present on the night of the killing, and saw defendant immediately after the killing, and would testify that defendant was insane at the time," statement being too general. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

A witness who was not an expert could not state her conclusion as to defendant's insanity without first giving the facts on which the opinion was based, so that an affidavit for continuance because of the absence of such witness which merely stated she would testify accused was insane was insufficient. *Taylor v. State* (Cr. App.) 227 S. W. 679.

In a prosecution for assault with intent to murder, testimony by an absent witness that defendant was subject to attacks of temporary insanity, though relevant, would not be of controlling importance to justify continuance, where the witness could not testify to defendant's mental condition at the time of the assault, and other witnesses had testified to his periods of insanity. *Roberts v. State* (Cr. App.) 231 S. W. 759.

In a prosecution for assault to murder, where the defense was insanity, held not within discretion of trial judge to overrule an application for continuance on account of absence of a witness on the question of insanity where there was sufficient diligence and absent witness' testimony was probably true, was material, and likely to change the result. *Roberts v. State* (Cr. App.) 231 S. W. 762.

**13. — Self-defense.**—In a prosecution for assault with intent to murder, the testimony of a witness who was with prosecuting witness at the time of the assault was of such materiality on the issue as to whether the latter presented a gun in an offensive attitude before defendant fired as to render it incumbent on the court to grant defendant's application for a continuance to procure his testimony. *Burton v. State* (Cr. App.) 232 S. W. 506.

**14. — Threats.**—In a prosecution for murder, it was not error to refuse a continuance because of the absence of a witness who would merely have testified to uncommunicated threats; there being no issue of self-defense. *Beck v. State*, 85 Cr. R. 578, 213 S. W. 662; *Eason v. State* (Cr. App.) 232 S. W. 300.

There having been no lack of diligence, and it not appearing the testimony could be procured from other source, known to defendant, continuance should have been granted for absence of witness who would testify that a few days before the homicide deceased told him he was going to kill defendant with a gun he was carrying, and that he (witness) told this to defendant two days before the homicide. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

**15. Rape.**—In rape trial, continuance asked to secure testimony of absent witness that prosecutrix had taken a man into her room was improperly refused. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

**17. Burglary.**—Where evidence was that defendant assisted in a burglary by hauling off and concealing the goods, there was no error in refusing a continuance on the ground that the other, if present, would testify that he committed the burglary. *Coprew v. State*, 83 Cr. R. 151, 202 S. W. 81.

In prosecution for burglary committed on the 13th of the month, where defendant claimed to have purchased the stolen property found in his possession from an employé of a certain café on the 6th day of the following month, refusal to continue trial for absence of café proprietor on affidavit that the proprietor would testify merely that he had an employé with a specified name on the 26th and 27th days of the month during which the burglary took place, in absence of attempt to identify the employé so named as the man from whom the defendant claimed to have purchased the property or attempt to produce him at the trial as a witness or otherwise, held proper. *Revels v. State*, 88 Cr. R. 36, 224 S. W. 689.

**18. Robbery.**—In prosecution for being accomplice, to a robbery, applications for continuance by accused held properly denied; it not appearing that the testimony of absent witnesses, if given, would have affected or changed the verdict convicting accused. *Slaughter v. State* (Cr. App.) 230 S. W. 172.

In a prosecution for robbery, where the state contended that defendant and other negroes, broke into a boarding car, robbing Mexicans therein, the denial of a continuance because of the absence of a witness who would testify that a few minutes before the trouble arose he saw several Mexicans and negroes gambling, and shortly thereafter he heard a commotion, held not error, as such evidence, if admitted, would not have resulted in a more favorable verdict for defendant, it being entirely possible gambling preceded the robbery. *Hardy v. State* (Cr. App.) 231 S. W. 1097.

**19. Theft.**—Refusal of continuance in prosecution for larceny for absence of witness is not error; his promised testimony being immaterial. *Hollis v. State*, 83 Cr. R. 612, 204 S. W. 432.

Testimony by absent witnesses that on a certain date they heard another make arrangements with accused to transport an automobile but not identifying that automobile with the one accused was charged with having stolen, and which fixed the date of the conversation as subsequent to the date accused was arrested when in possession of the car, would not have materially affected the verdict so as to entitle accused to a continuance. *Godby v. State* (Cr. App.) 225 S. W. 516.

Where an automobile stolen from a city street was found the next morning in defendant's possession, with the license tags missing and the engine number mutilated, and defendant claiming that he was employed by T. to drive the car, but his own testimony did not show that T. had any opportunity to mutilate the engine number without his knowledge or participation, the refusal of a continuance because of the absence of a witness, who would have testified that defendant and T. came to his garage together in the car for gasoline and oil, was not ground for reversal. *Clowers v. State* (Cr. App.) 228 S. W. 226.

**21. Seduction.**—In a prosecution for seduction, refusal of a continuance on the ground that an absent witness would have testified that the hotel wherein prosecuting witness and another girl stayed three months before the offense was a disorderly house held not an abuse of discretion. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

In a prosecution for seduction, defendant was not entitled to a continuance for failure to procure a witness by whom he intended to prove that witness had kept company with prosecutrix and had sexual intercourse with her, where defendant did not allege whether such acts occurred before or after the alleged seduction, since, if after, the evidence was immaterial. *Stracner v. State*, 86 Cr. R. 89, 225 S. W. 305.

**22. Cumulative testimony.**—Refusal of continuance for absence of witnesses was not error, where other witnesses at the trial testified to the same facts that absent witnesses would have testified to. *Bell v. State*, 88 Cr. R. 64, 224 S. W. 1108; *Armstrong v. State* (Cr. App.) 227 S. W. 485.

The absence of witnesses who testified at a former trial on behalf of defendant to facts to which several other witnesses did testify at the second trial, some of them more strongly for defendant than the absent witnesses, does not give a right to a continuance. *English v. State*, 87 Cr. R. 507, 224 S. W. 511.

The rule that a continuance will not be granted for absence of witness whose testimony will be merely cumulative does not apply to the first application for a continuance or to testimony in corroboration of the husband or the wife or a near relative of the accused. *Sherwood v. State* (Cr. App.) 225 S. W. 1101.

On defendant's first application for a continuance, the fact that the testimony of absent witnesses would be cumulative does not as a rule enter into the question. *Suber v. State* (Cr. App.) 227 S. W. 314.

The rule as to cumulative testimony is not to be applied strictly to first applications for continuance. *Byrd v. State* (Cr. App.) 231 S. W. 399.

**23. Corroborating testimony.**—A continuance to get impeaching testimony was properly refused, where other witnesses testified to the same matter. *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

Testimony to support that of another witness occupies the same position, so far as continuance to obtain it is concerned, as impeaching evidence. *Taylor v. State* (Cr. App.) 229 S. W. 552.

**25. Impeaching testimony.**—Ordinarily a continuance will not be granted to procure the testimony of absent witnesses, where such testimony merely goes to the impeachment of the state's witness. *Russell v. State* (Cr. App.) 228 S. W. 948; *White v. State*, 82 Cr. R. 286, 199 S. W. 1117; *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

Where accused was indicted nearly a year before trial, but issued subpoena for absent witness only a few days before trial, and the testimony would have been only for impeachment, continuance was properly denied, in view of court's statement that the witness would not have testified as alleged. *Porter v. State*, 84 Cr. R. 164, 205 S. W. 985.

Testimony that state's witness, an accomplice, had stated he and not defendant had committed the burglary charged, was hearsay as to defendant and admissible only to impeach the witness if he denied the statements, and a continuance to obtain such testimony was properly denied. *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

The refusal of the trial court to grant a continuance to procure impeaching evidence is rarely reviewed. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

The refusal of the trial court to grant a continuance on account of the absence of a witness whose testimony would only have gone to the impeachment of one of the state's witnesses held not an abuse of discretion, particularly where it would be doubtful whether the alleged evidence of the absent witness would be admissible, as it related to an immaterial inquiry. *Id.*

In a prosecution for homicide, where continuance was asked because of an absent witness, evidence by the absent witness that he was present at the time and did not hear a remark by defendant to his brother concerning their pistols to which a witness for the state testified is not impeaching testimony only, but was admissible to negative the fact that accused made the remark. *English v. State*, 87 Cr. R. 507, 224 S. W. 511.

**26. Alibi.**—Action of trial court in denying new trial to defendant, convicted of horse theft, on account of denial of continuance to procure testimony of witnesses who would prove alibi, held correct. *Cooley v. State*, 83 Cr. R. 340, 203 S. W. 356.

Where, after motion by county attorney to quash depositions, on the ground that art. 824, as to preliminary affidavit, had not been complied with, defendant presented an application for a continuance and as one of the reasons therefor stated that clerk of court who issued commission was without the state, but if present would testify that the affidavit was filed, held, that defendant was entitled to continuance to obtain testimony of clerk, though a witness appeared and testified as to alibi; the depositions

in question being sufficient if believed to establish an alibi. *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

In prosecution for automobile theft in which defendant claimed an alibi, refusal of first application for a continuance for absence of witness, who would have corroborated testimony of defendant's wife that defendant at time of the commission of the crime was not in the town in which the crime was committed, was error, notwithstanding cumulative nature of the testimony. *Sherwood v. State* (Cr. App.) 225 S. W. 1101.

Where defendant, prosecuted for burglary, asked a continuance to secure a witness in another county to testify that he saw defendant at a place 80 or 90 miles distant from the burglarized house on the preceding night, the continuance was properly denied for immateriality of the testimony, since the defendant could easily have traveled that distance by train or other conveyance during the night. *Moore v. State* (Cr. App.) 229 S. W. 508.

**27. Admissions to prevent continuance.**—Court did not err in refusing to continue trial upon ground of absent witness, where the facts to which witness would have testified were admitted by state to be true. *Glascoe v. State*, 85 Cr. R. 234, 210 S. W. 956.

Where defendant's motion for continuance upon ground of absent witness is denied, state may thereafter admit the truth of facts to which such witness would have testified, since it could have called the witness himself. *Id.*

Defendant's motion for continuance on the ground of the absence of a female witness, who, though duly subpoenaed, was unable to attend on account of her physical condition, cannot be denied because of the offer of the state to merely admit that if she were present, she would testify as claimed by defendant. *McDonald v. State*, 86 Cr. R. 304, 216 S. W. 166.

Admission by district attorney after the conclusion of the testimony that absent witness would have testified as indicated in an application for a continuance, and that his testimony was true, cannot relieve any error of the court in overruling the application for continuance, as such admission by the state's attorney must be made at the time of overruling a continuance as a means of avoiding such continuance. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

Introduction of written testimony of absent witnesses was not a waiver by accused of his motion for a continuance, where court asked state's counsel if he intended to offer to permit the use of the written testimony before the jury, and received an affirmative reply, and informed the counsel for the accused, in the absence of jury, that, in the event he failed to read the testimony, he would permit comment upon such failure in argument, accused protesting the ruling and asserting his continued reliance upon his motion for continuance. *Medford v. State* (Cr. App.) 229 S. W. 504.

An application for a continuance because of the absence of witnesses which complies with the statute and shows such reason for continuance or postponement as the trial court would be bound to grant cannot be defeated by an admission on the part of the state that the absent witnesses named in the application would, if present, give the testimony set out in the application; it being necessary that the admission embrace not only the fact that the witnesses would give the testimony, but that the facts were true. *Id.*

Court did not err in denying an application for a continuance because of the absence of defendant's wife, where the district attorney said that he was willing to admit that the wife, if present, would testify as stated by defendant, and that her testimony was true, and that defendant might make such statement to the jury any time during the trial, if he desired. *Walker v. State* (Cr. App.) 232 S. W. 509.

#### SUBD. 4

**28. Cause of absence of witness.**—In prosecution for slander by imputing want of chastity, defendant held entitled to continuance for unavoidable absence of witness under subpoena, injured in automobile accident while on his way to attend trial. *Lemcke v. State*, 83 Cr. R. 273, 202 S. W. 744.

In ruling on an application for continuance because of the absence of a witness, the court is not bound to accept a telegram from a physician that the witness could not appear because of the sickness of his child. *Roberts v. State* (Cr. App.) 231 S. W. 759.

#### SUBD. 5

**29. Delay.**—An application for continuance on the ground of the absence of witnesses, which merely stated that it was not made solely for delay, is insufficient. *Russell v. State* (Cr. App.) 228 S. W. 948.

#### SUBD. 6

**30. Probability of securing attendance of witness.**—A requested continuance in order to secure the attendance of an absent witness held properly refused, in view of the witness' testimony before the grand jury, failure to show diligence in securing her attendance, and the probability that she had entirely disappeared. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

Where defendant immediately after indictment obtained and promptly forwarded to proper officers subpoenas for certain witnesses, and where defendant's application for continuance stated the residence of such witnesses, and the returns of the officers did not indicate that such witnesses were not residents of the counties named, refusal of continuance was error, notwithstanding judge's opinion that the witnesses were transient persons and there was no probability of securing their attendance. *Barton v. State* (Cr. App.) 227 S. W. 317.

A continuance because of the absence of a witness who is a fugitive from justice should be refused. *Young v. State* (Cr. App.) 230 S. W. 414.

**32. Discretion of court.**—Exercise of trial court's discretion as to continuance is subject to review, but generally reversal for an abuse of discretion by the trial court



in refusing a continuance will take place only where from the evidence at the trial the appellate court believes that if the absent witness had testified a more favorable verdict to the accused would have resulted. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

Where abuse of the discretion vested in trial court with reference to denying an application for continuance is charged, the presumption is in favor of the correctness of his ruling until its vice is affirmatively shown. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

Court held not to have abused its discretion in refusing to grant a second application for continuance by reason of absence of witnesses. *Brown v. State*, 85 Cr. R. 618, 215 S. W. 97.

In a homicide case, a continuance requested in order to secure an absent witness cannot be refused solely upon the ground that the witness had been indicted and hence was disqualified, where it appears that the indictment was secured by the district attorney with the sole purpose of bringing her back as a witness. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

The truth of the first or any subsequent application for continuance on the ground of the absence of witnesses is addressed to the sound discretion of the trial court, and the denial of an application will not be held reversible error, unless the record leads to the conclusion that had the absent witness been present the result would have been different. *Russell v. State* (Cr. App.) 228 S. W. 948.

**33. Denial of continuance as ground for new trial—In general.**—In prosecution for pandering, held, new trial should have been granted; continuance to procure testimony contradicting wife, chief state witness, having been denied. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

Denial of continuance because of absence of witness held not an abuse of discretion, where there was no probability of securing her personal attendance and an opportunity to procure her testimony by other means had been declined. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

Trial court held not to have erred in overruling defendant's motion for continuance grounded on absence of witnesses, nor in refusing him new trial because thereof. *Walker v. State*, 83 Cr. R. 484, 204 S. W. 227.

To motion for new trial for refusal of continuance for absence of witness should be attached her affidavit that she would have testified as alleged. *Hollis v. State*, 83 Cr. R. 612, 204 S. W. 432.

Denial of an application for continuance of murder trial to procure witnesses, which does not show where they reside or to what county the subpoenas were to issue, or that such testimony could not be secured from others present, or account for the delay in issuing other than because of impeaching testimony, held not an abuse of discretion. *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

The court did not err in refusing a continuance on the ground of absence of witnesses, where diligence as to one witness was insufficient, and the court states that it was not shown that witnesses would give alleged testimony, and it was evident that the absent testimony would not, if present, have brought about a different result. *Carneal v. State*, 86 Cr. R. 274, 216 S. W. 626.

A conviction will not be reversed for denial of a motion to continue or postpone which was not sworn to by accused or by any one for him. *Wallace v. State*, 87 Cr. R. 527, 222 S. W. 1104.

Where developments on the trial showed that witnesses named in application for continuance were in a position to have known the facts attributed to them in the application, and where it did not appear on motion for new trial that the absent witnesses were unwilling to testify the court should have granted a new trial. *Barton v. State* (Cr. App.) 227 S. W. 317.

Where defendant was charged with a violation of the liquor law, and the state's witness testified that defendant was operating a still in a pasture, the denial of continuance on the ground of an absent witness, who, defendant asserted, would testify that about the time fixed by the state's witness there was no still in the pasture, was not error, in view of the fact that no affidavit of the witness was attached to the motion, that subpoenas were not applied for until four days after defendant's arrest, and that there was other testimony to support defendant's contention that there was no still in the pasture. *Russell v. State* (Cr. App.) 228 S. W. 948.

**34. — Materiality, truth, and effect of absent testimony.**—Where continuance is properly overruled for want of diligence, motion for new trial because of absent testimony should only be granted when it is reasonably probable that a more favorable verdict would have resulted. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

Where there was sharp issue of fact touching immediate incidents of homicide, it was error to deny motion for new trial for refusal of continuance on account of absence of witness, whose absence was satisfactorily accounted for, and whose testimony, if believed, might have resulted in verdict of acquittal. *Hughes v. State*, 83 Cr. R. 550, 204 S. W. 640.

Refusal of an application for a continuance in a criminal case is not authorized because of affidavits controverting the truth of the purported testimony. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

Where an affidavit for continuance for the absence of two witnesses set out their proposed testimony as identical, and one of them became a witness for the state and told a different story from that set out in the application, the court below was justified in concluding that the absent witness, if present, would testify the same as the witness who had testified. *McKinney v. State*, 85 Cr. R. 105, 210 S. W. 700.

On application for continuance upon ground of absence of witness, where it plainly appears from other testimony that the absent witness would not testify as alleged, or that such testimony is improbable, and not likely true, the application for continuance is properly denied. *Glascoe v. State*, 85 Cr. R. 234, 210 S. W. 956.

In a prosecution for murder, denial of continuance for the absence of the witness stabbed by defendant at the time of the killing held not error, the facts expected to be proved by such witness on the face of the record not probably being his testimony. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

A new trial need not be granted because of the absence of a witness for which continuance was refused, unless it was reasonably probable that with his presence a verdict more favorable to accused would have resulted, and the probable truth of the testimony of the absent witness must therefore be made to appear. *Bocknight v. State*, 87 Cr. R. 428, 222 S. W. 259.

In prosecution for placing poison in drinking water with intent to injure and kill another, where most of the state's testimony tending to show the commission of the offense involved defendant's wife in one way or another, and where wife, if present, would have given very material testimony, refusal to grant continuance for absence of wife because of illness held reversible error. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

Where it appeared only inferentially that an absent witness was in a position to hear a remark by accused to which a witness for the state testified, and the fact that he would testify that he heard no such remark was not supported by an affidavit of the witness, there was no showing of abuse by the trial court of his discretion in denying the motion for continuance because of the absence of such witness. *English v. State*, 87 Cr. R. 507, 224 S. W. 511.

Where witnesses who had better opportunities for knowing defendant than the absent witness and were friendly to defendant testified, but were not questioned as to his sanity, the denial of a continuance for the absence of the witness can be sustained on the ground that it was not shown that, if present, she would testify that defendant was insane, or that, if she did so testify, her testimony would be probably true. *Taylor v. State* (Cr. App.) 227 S. W. 679.

Defendant, who pleaded guilty to charge of assault with intent to kill, cannot complain of the refusal of a continuance because of the absence of a witness whose testimony could not affect the punishment, but was admissible solely on the issue of guilt. *Id.*

Where defendant, who was charged with a violation of the liquor laws, applied for continuance on the ground of the absence of a witness who, he asserted, would contradict testimony of the state's witness that defendant was operating a still in a pasture, the denial of the motion on the ground that the absent testimony, viewed in the light of the record, was probably not true, or would not have changed the result, held not an abuse of discretion. *Russell v. State* (Cr. App.) 228 S. W. 948.

Where defendant, prosecuted for burglary, asked a continuance to procure a witness to testify to having seen him 80 or 90 miles distant from the burglarized house on the preceding night, it was not an abuse of discretion for the trial court to refuse a continuance, inasmuch as there was positive evidence of disinterested witnesses that defendant appellant was near the scene of the burglary on the morning of the day alleged, so that the court would have been justified in concluding the expectant testimony was probably untrue. *Moore v. State* (Cr. App.) 229 S. W. 508.

The court cannot deny a new trial for error in overruling a continuance to procure the testimony of absent witness, where sufficient diligence was shown, because the court does not believe, in view of the testimony given at the trial, that the claimed testimony of the absent witnesses was true, where affidavits of those witnesses attached to the motion for new trial stated their testimony, since the court cannot substitute his decision as to the weight and truthfulness of the testimony for that of the jury. *Mathason v. State* (Cr. App.) 229 S. W. 548.

In passing upon a motion for new trial, based in part on the refusal of a continuance, the trial court may take into consideration the likelihood that the absent witnesses named in the application for continuance would not have testified as stated, or that their testimony, if so given, would not likely be true. *Young v. State* (Cr. App.) 230 S. W. 414.

In a prosecution for statutory rape, where prosecutrix's age was the vital issue in the case, and it clearly appeared that she was a person of perverted and depraved morals, held that accused should not have been deprived of any legitimate testimony, however slight, that might tend to contradict her, or to show that her testimony as to her age was not true, so that it was error to deny continuance to procure testimony of absent witnesses as to her age, even though she claimed that she had also had intercourse with them, and had told them at the time she was over the age charged. *Id.*

In passing upon a motion for new trial based in part on the refusal of a continuance, the trial court may take into consideration the likelihood that the absent witnesses named in the application for continuance would not have testified as stated. *Id.*

In a prosecution for homicide, where defendant was convicted of manslaughter, and the evidence tended to show that he struck and killed deceased to gratify his revenge, the refusal of a second continuance because of the absence of a witness who would testify to a communicated threat was not error, for, while it is sometimes error to refuse an application for a continuance to secure a witness who will testify to a threat, yet, as the entire record indicated that no different result could have occurred had the absent witness been present and testified, the refusal of the continuance was not error. *Hoover v. State* (Cr. App.) 230 S. W. 982.

### Art. 609. [598] Subsequent application by defendant.

**Construction of application.**—Where a continuance was refused, but the court allowed an adjournment, a supplemental motion for a continuance on the day adjourned to was a second application. *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

In absence of an affirmative showing that an application for continuance is the first, it is presumed that it is a subsequent application. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

**Procurement of testimony from other source.**—On a second application for continuance, it must be alleged and shown that absent testimony cannot be procured from any other source known to defendant. *Brown v. State*, 85 Cr. R. 618, 215 S. W. 97; *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326; *Cortez v. State*, 82 Cr. R. 143, 198 S. W. 781; *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381; *Taylor v. State* (Cr. App.) 227 S. W. 679.

Defendant's application for second continuance to procure testimony of three absent witnesses was properly denied, where his testimony showed he might have proved same matters otherwise than by witnesses named. *Cortez v. State*, 82 Cr. R. 143, 198 S. W. 781.

A second continuance was properly refused, where no diligence was shown to secure the witness, and other witnesses testified to the facts expected to be testified to by the absent witness. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

Where defendant made a second application for continuance because of the absence of his sister, who would testify he was insane, but at the trial he introduced two brothers-in-law with whom he was associated before the offense more closely than with the absent sister, and neither was asked any questions tending to show the insanity of defendant, there was no showing that the evidence could not have been obtained from sources other than the absent witness, so that the denial of continuance was not shown to be erroneous. *Taylor v. State* (Cr. App.) 227 S. W. 679.

**Cumulative testimony.**—Denial of a second continuance on account of absence of defendant's wife and another witness was not error, where it was made to secure cumulative testimony. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

The denial of a second motion for continuance filed by defendant, who was accused of murder, on the ground of the absence of a witness to whom deceased made threats, which were communicated by the witness to defendant, was error, and cannot be sustained on the theory that the testimony of such witness was merely cumulative because other witnesses testified to threats; it appearing the absent witness was the only one who had communicated the threats, and that defendant had to rely solely on his testimony as to the communication thereof. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

Where the testimony of an absent witness as to a previous difficulty between defendant and deceased was merely cumulative, other witnesses testifying to the main facts, although there was some difference as to the minor details, a second continuance will not be granted. *Hoover v. State* (Cr. App.) 230 S. W. 982.

**Diligence.**—A second application for a continuance, stating that defendant had made diligent inquiry, and exerted all means in his power to find the exact location of a witness, and had located him in D., and no process was issued after a prior application, where there was a return that witness was out of the county, did not show diligence. *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

Denial of second continuance on account of absence of defendant's wife and another witness was not error, where there was a lack of diligence in procuring their attendance. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

#### Art. 610. [599] Defendant shall swear to his application.

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

A conviction cannot be reversed by reason of refusal of trial court to grant a verbal application for a postponement of the case, or a continuance, whether made before or after trial had commenced. *Walker v. State* (Cr. App.) 232 S. W. 509.

#### Art. 612. [601] Statements in application may be denied under oath, etc.

See *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

**Denial.**—It is error to permit the state to traverse accused's application for continuance because of absent witnesses, not only as to diligence, but also as to the fact of the presence of the witnesses at the scene of the crime, and to permit the state to introduce witnesses on a hearing of the traverse to show the said absent witnesses were not present at the scene of the crime. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

#### Art. 613. [602] Proceedings when denial is filed.

**Denial of grounds of application.**—It is error to permit the state to traverse accused's application for continuance because of absent witnesses, not only as to diligence, but also as to the fact of the presence of the witnesses at the scene of the crime, and to permit the state to introduce witnesses on a hearing of the traverse to show the said absent witnesses were not present at the scene of the crime. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

**Trial of issue.**—Although state may controvert and court determine accused's diligence, it is not within court's province on such hearing to pass upon weight of evidence accused desires from absent witness. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

In a prosecution for burglary, court properly sustained an objection to a question by defendant's counsel as to whether or not it was not a fact that he had inquired about a great number of people, and none of them would be positive whether they saw him at a place other than the place of the crime; the purpose of the inquiry being to show the materiality of testimony of absent witnesses, the fact that a great many people could not remember whether defendant was at a certain place not being an excuse for his failure to subpoena all those whom he knew would be cognizant of his presence there. *Brown v. State*, 85 Cr. R. 618, 215 S. W. 97.

**Affidavits.**—Where affidavit used by state in accused's motion for new trial was lost, state could not substitute new affidavit therefor after court's adjournment. *Jeffries v. State*, 82 Cr. R. 42, 198 S. W. 778.

**Art. 616. [605] Continuance after trial commenced, when.**

See *Williams v. State*, 24 Tex. App. 32, 5 S. W. 658.  
Cited, *Roach v. State*, 21 Tex. App. 249, 17 S. W. 464.

**Application.**—A conviction cannot be reversed by reason of refusal of trial court to grant a verbal application for a postponement of the case, or a continuance, whether made before or after trial had commenced. *Walker v. State* (Cr. App.) 232 S. W. 509.

**Grounds.**—Court did not err in denying motion to withdraw his announcement of ready for trial on ground that previous to trial state witness had told defendant's counsel that he had only bought liquor from defendant once at certain place, but on trial testified to another sale of liquor at different place; there being nothing to indicate that defendant could secure testimony, and no statement concerning truth of record sale of liquor. *Powers v. State*, 83 Cr. R. 462, 204 S. W. 325.

Where defendant, charged with murder, lost testimony of desired witness, because witness was indicted for complicity in same offense, but defendant did not move for postponement on ground of surprise, he could not for first time set up matter in his motion for new trial. Defendant should have moved for postponement, and then have demanded witness' trial first. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

**Surprise.**—Refusal of accused's motion to withdraw his announcement of ready for trial to obtain pardon of convict witness because of surprise on being informed that such witness was convict, held not error. *Simpson v. State*, 81 Cr. R. 389, 196 S. W. 835.

There was no error in refusing continuance or postponement to enable a witness, objected to as a convict, to produce his pardon from another county, where defendant knew of the conviction, and so was not surprised, as stated in application. *Thompson v. State*, 84 Cr. R. 148, 205 S. W. 988.

A motion to postpone a murder trial to secure the testimony of a witness, without disclosing any efforts to procure the witness between adjournment of trial on Saturday evening and filing motion Monday morning, held to contain none of the elements of surprise required to authorize a continuance. *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

Where defendant's witness testified to seeing deceased put his hand in his bosom and seeing a pistol handle therein at the time the fatal shot was fired, and the state by cross-examination and summoning grand jurors laid the foundation for impeachment by proving he testified otherwise before grand jury, early in the trial, such was notice to defendant to secure his character witnesses, and he cannot complain that he was refused a postponement therefor. *Id.*

**Discretion of court.**—The granting of a postponement is a matter resting largely in the discretion of the trial court. *Minor v. State*, 86 Cr. R. 362, 216 S. W. 864.

Where defendant answered ready, and after the introduction of testimony asked for a postponement on the ground that his wife was ill with typhoid-malarial fever, but it appeared that she had been sick for two weeks before beginning of trial, which did not occupy more than 2½ hours, held, that the trial court's denial of postponement was not an abuse of discretion. *Id.*

**9. DISQUALIFICATION OF THE JUDGE****Art. 617. [606] Causes which disqualify judges.**

**Counsel.**—A judge who, while holding the office of district attorney, heard the complaint of the prosecuting witness, reduced it to writing, caused it to be signed and sworn to by him, and attested the same, has acted as counsel for the state, and is therefore disqualified from presiding at the trial of defendant for the offense charged in the complaint. *Terry v. State* (Cr. App.) 24 S. W. 510.

One who, as assistant county attorney, under duties prescribed by Pen. Code, arts. 426-428, assisted the grand jury is disqualified, as having been counsel for the state, to sit as judge. *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

**Effect of disqualification.**—A judge disqualified to try a criminal case may nevertheless set it upon the docket but he cannot decide how many special veniremen shall be drawn nor preside when list from which jury is to be selected are drawn as provided by art. 661. *Taylor v. State*, 81 Cr. R. 359, 195 S. W. 1147.

Order changing venue made on judge's own motion under Code Cr. Proc. art. 626, being made by judge disqualified to sit in case, is void; judicial discretion being involved. *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

**Art. 618. [607] Proceedings when judge of district court is disqualified.**

Cited, *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

**Validity and construction in general.**—Conceding the authority of the Legislature to pass laws facilitating the exercise of the right of the parties under Const. art. 5, § 11, to select a person to try the case in lieu of a disqualified judge, such laws cannot be inconsistent with the terms or restrictive of the right given by the Constitution so that this article is invalid so far as it makes such right conditional on the impossibility of securing a judge by exchange of districts, and the parties may select a person to try the case without complying with that article. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

A special district judge elected by the bar to try a particular criminal case on the disqualification of the regular district judge under Const. art. 5, § 11, held not to have power to sit as judge, he not having been selected by the attorneys in the case under Civ. St. arts. 1676, 1677; art. 1678, providing for election by the bar only when the regular judge is absent or unable to preside, not applying. *Strahan v. State*, 87 Cr. R. 324, 221 S. W. 976.

**Selection by agreement.**—Where the parties by agreement appointed an attorney to try the case pursuant to Const. art. 5, § 11, the fact that the Governor thereupon appointed him did not detract from the force of his selection by the parties. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

**Art. 624. [611] When a justice of the peace is disqualified.**

Cited, *Wrenn v. State*, 83 Cr. R. 642, 200 S. W. 844.

10. CHANGE OF VENUE

**Art. 626. [613] District judge may order change of venue on his own motion, when.**

Cited, *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196; *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

**Power and duty of court in general.**—A defendant cannot obtain a change of venue for the prejudice of the judge before whom the prosecution is commenced, there being no provision therefor in the statutes. *Johnson v. State*, 31 Cr. R. 456, 20 S. W. 985.

Where trial for murder resulted in a hung jury, judge on his own motion for ample grounds stated in his order properly changed venue to district court of another county. *Flewellen v. State*, 83 Cr. R. 563, 204 S. W. 657.

The provisions of the venue statute prescribing means for either the state or accused to obtain a change of venue, and Code Cr. Proc. art. 629, making special provision for change of venue in cases where unsuccessful efforts have been made to obtain a jury, are not limitations upon the power vested in the trial court to change venue on its own motion when satisfied that a trial alike fair and impartial to the state and accused cannot be had. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

**Order for change of venue.**—Order changing venue made on judge's own motion being made by judge disqualified to sit in case, is void; judicial discretion being involved. *Patterson v. State*, 83 Cr. R. 169, 202 S. W. 88.

Trial court having power, granted by Const. art. 3, § 45, to change venue, failure to observe the provision requiring reason to be embraced in order, does not vitiate it, in absence of abuse of discretion. *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

Plea to jurisdiction because order changing venue designated court to which case was sent as "criminal district court, place 2, Dallas county," instead of "No. 2," held properly overruled; "place" being surplusage. *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202.

A change of venue as to one jointly indicted changes the venue as to all. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

The regularity or irregularity of a recognizance made on change of venue cannot affect the validity of the order changing the venue; it being the order which confers venue on the new forum, and not the recognizance. *Haley v. State* (Cr. App.) 223 S. W. 208.

**Art. 627. [614] State may have change of venue, when, etc.**

Cited, *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

**Art. 628. [615] Change of venue; when granted on application of defendant.**

See *Roe v. State*, 25 Tex. App. 33, 8 S. W. 463; *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468; *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

Cited, *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

**3. Grounds in general.**—A defendant cannot obtain a change of venue for the prejudice of the judge before whom the prosecution is commenced, there being no provision therefor in the statutes. *Johnson v. State*, 31 Cr. R. 456, 20 S. W. 985.

**4. Local prejudice.**—In prosecution for assault to murder, court's finding there existed no such prejudice as entitled defendant to change of venue, held supported by preponderance of evidence; there being no abuse of discretion, such as would authorize Court of Criminal Appeals to reverse for failure to change venue, under article 634. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

Where accused negro had killed a white man and, in the 10 days between the killing and the trial, such strong public sentiment was created against accused by publicity given the state's side of the case that the authorities deemed a strong guard of soldiers necessary for accused's protection, his motion for continuance should have been granted or change of venue ordered. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

**5. Dangerous combination against accused.**—Where about 95 per cent. of those summoned as jurors had prejudged a murder case, and a strong combination of influential people in the county had gone so far as to threaten those who signed defendant's bond, held, in view of the fact that officers of the law had whipped witnesses in an endeavor to make them testify against defendant, that defendant was entitled to a change of venue. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

**10. Hearing and determination.**—Where the evidence on defendant's motion for change of venue bearing on the issue of prejudice and combination in the county was conflicting, the motion is addressed to the sound discretion of the trial court. *Henderson v. State* (Cr. App.) 229 S. W. 535.

**Art. 629. [616] Where jury cannot be procured for trial of felony.**

Cited, *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

**In general.**—The provisions of the venue statute prescribing means for either the state or accused to obtain a change of venue, and this article, are not limitations upon the power vested in the trial court to change venue on its own motion when satisfied that a trial alike fair and impartial to the state and accused cannot be had. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

**Art. 630. [617] Application may be made before announcing ready for trial, etc.**

**Time for filing application.**—An application for change of venue on the ground of prejudice after nine jurors had been selected was too late. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

**Disposition of other motions and pleas.**—A motion to quash made after the venue had been changed was too late, since all special pleas and exceptions must, in view of this article, be presented before change of venue is had. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199; *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

Where an indictment recited that it was found by the grand jury organized at the October term, the indictment was returned on November 21st, and on accused's application the venue was changed on November 24th, a motion then made to quash the indictment on the ground that there was a misnomer of the term of court at which it was returned was properly overruled, for, under arts. 451, 576, 597, the statement of the term of court at which the indictment was presented is not one of the statutory requirements, but is, at most, a matter of form, available only on motion to quash presented in due time, and, under this article, it is contemplated that an exception to the form of the indictment should be made in the court in which the indictment is filed before the venue is changed. *Finch v. State* (Cr. App.) 232 S. W. 528.

**Art. 632. [619] Where adjoining counties are all subject to objection.**

Cited, *Atchison, T. & S. F. Ry. Co. v. Stevens*, 109 Tex. 262, 206 S. W. 921.

**In general.**—Finding of court in order changing venue of his own motion, into county not adjoining that in which prosecution was commenced, because of prejudice against the accused, is presumed to speak the truth, and will not be revised on appeal unless it be affirmatively shown that accused was materially injured by such change of venue, and unless bill of exceptions stating facts be filed at the time, under article 634. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

**Art. 632b. Change of venue in certain cases.**—In case it should appear to the judge before whose court the defendant stands charged with a violation of this Act that either the State or the defendant can not obtain a fair and impartial trial in the community, it shall be his duty to change the venue either of his own motion or on application of the attorney representing the State or defendant, said case to be transferred to an adjoining county if similar conditions do not there exist, and if similar conditions appear to exist in all the adjoining counties as those authorizing the change of venue, then the judge shall order said case transferred to a court of competent jurisdiction in some county of the State where the State and the defendant can obtain a fair and impartial trial. [Acts 1918, 35th Leg. 4th C. S., ch. 70, § 2.]

Took effect 90 days after March 27, 1918, date of adjournment.

For section 1 of this act, see ante, Civ. St., art. 7136a.

**Art. 633. [620] Application for change of venue may be controverted, how.**

**Form and sufficiency of controverting affidavits.**—Where accused's motion for change of venue on both grounds authorized by art. 628, as to change of venue, was contested by state's affidavits attacking the means of knowledge of his compurgators, it was not necessary that the contesting affidavits also attack the credibility of such compurgators; the contest applying to both grounds of motion. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

In prosecution for murder, where state controverted application for change of venue, and it was shown by a number of witnesses, who were acquainted throughout the county, that defendant could obtain a fair and impartial trial therein, and the only witness who testified that defendant could not obtain a fair and impartial trial was related to defendant, the trial court properly denied the application. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390.

Where the issue made by the state, based on an affidavit attacking the credibility and means of knowledge of defendant's compurgators in his application for change of venue, was in statutory form, the court did not err in overruling defendant's demurrer thereto. *Carlile v. State* (Cr. App.) 232 S. W. 822.

**Scope of issues.**—On the hearing of evidence on the issue of change of venue, the trial court commits no error in enlarging the scope of the hearing to extend beyond the

question of the credibility and means of knowledge of defendant's compurgators and in hearing evidence as to the existence of prejudice in fact. *Carlile v. State* (Cr. App.) 232 S. W. 822.

**Burden of proof.**—Where state opposed application for change of venue, defendant had burden of establishing existence in county of alleged prejudice against him. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390.

**Art. 634. [621] Order of judge shall not be revised on appeal, unless, etc.**

**Review on appeal in general.**—In the absence of arbitrary action or abuse of discretion in denying change of venue, the judge's decision will not be overturned. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014; *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537; *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

In prosecution for assault to murder, court's finding there existed no such prejudice as entitled defendant to change of venue held supported by preponderance of evidence; there being no abuse of discretion, such as would authorize Court of Criminal Appeals to reverse for failure to change venue. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

Where evidence heard on application for change of venue was not filed and verified during term at which case was tried, court on appeal is not privileged to consider it. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

In prosecution of bank president for murder of state commissioner of banking, denial of motion for change of venue on ground of impossibility of having fair trial in county, held not to require reversal, in view of facts stated in judge's qualification of defendant's bill. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

Finding of court in order changing venue of his own motion under Code Cr. Proc. 1911, art. 632, into county not adjoining that in which prosecution was commenced because of prejudice against the accused, is presumed to speak the truth. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

The Court of Criminal Appeals will not conclude the trial court has abused the discretion confided in him in the disposition of matters such as change of venue, unless injury appears. *Carlile v. State* (Cr. App.) 232 S. W. 822.

**Objection and exception.**—Assignment of error to change of venue will not be sustained, where appellant did not take exception when venue was changed. *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196; *Alarcan v. State*, 87 Cr. R. 458, 222 S. W. 982.

Though it affirmatively appears from order that trial judge changed venue without believing fair trial could not be had in county, Court of Criminal Appeals has no jurisdiction to review matter, unless it appears defendant excepted to order; otherwise the presumption he acquiesced prevails. *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

In view of art. 744, Rev. St. art. 2059, independently of this article, no review of such order can lawfully be made on appeal unless it is shown that defendant objected below. *Id.*

No error in defendant's recognizance on change of venue is brought up for review where no objection was raised to the jurisdiction of the trial court except by plea to the jurisdiction setting up that the order changing venue incorrectly designated the court to which the case was sent. *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202.

Pleas to the jurisdiction in cases whose venue has been changed will not be entertained by the new court, or by the Court of Criminal Appeals unless the matter complained of was preserved by proper bill of exceptions taken in the court a quo. *Id.*

Error in a change of venue must be excepted to in the court from which the change is made, and cannot avail in a plea to the jurisdiction of the court to which such venue is changed. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

**Bill of exceptions.**—Bill of exceptions containing evidence, to denial of change of venue on account of prejudice, filed more than a month after court adjourned for the term, and without showing that the delay was caused by the court officers, cannot work reversal of conviction. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

Bill of exceptions to overruling of motion to change venue, signed by county attorney, but not by defendant's counsel, nor approved by court, and not containing statement of facts except in question and answer form, held not to be considered. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

Statement of facts introduced on motion for change of venue, attached to statement of facts on appeal, was not statement of facts such as is required in bill of exceptions to ruling on motion to change venue. *Id.*

Finding of court in order changing venue of his own motion, under art. 632, into county not adjoining that in which prosecution was commenced, because of prejudice against the accused, is presumed to speak the truth, and will not be revised on appeal unless it be affirmatively shown that accused was materially injured by such change of venue, and unless bill of exceptions stating facts be filed at the time. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

**Art. 635. [622] Clerks' duties in case of change of venue.**

See *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

**Requisites of transcript.**—The court to which the venue of a case is changed acquires no jurisdiction, where the indictment was not transmitted to it, because it had been lost in the other court, and not substituted, since under Bill of Rights, § 10, no citizen can be tried for felony except upon an indictment, and the court to which the venue was changed, therefore, cannot grant an order for substitution of the indictment. *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 978.

**Supplying deficiencies in transcript.**—The court to which the venue of a criminal prosecution is changed may order certiorari to bring up missing papers, or original or certified copies, from the court from which the case was transferred. *Hollingsworth v. State*, 86 Cr. R. 399, 221 S. W. 978.

**Art. 636. [623] Same.**

See *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

**Papers required to be copied.**—This article does not require the clerk to make a copy of testimony taken on a preliminary examination; and, therefore, it was no objection to the admission of parol evidence of such examination that a certified copy from the clerk was not produced nor accounted for. *Byrd v. State*, 26 Tex. App. 374, 9 S. W. 759.

**Art. 637. [624] If defendant is on bail, shall be recognized.**

See *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

**Order.**—An order directing a change in venue should also either direct that defendant be placed in custody or fix the amount of the recognizance, and it would be incomplete in the absence of such recital. *Haley v. State* (Cr. App.) 228 S. W. 208.

**Defective recognizance.**—Mere fact of a defective recognizance on change of venue would not render void a judgment of a court of otherwise competent jurisdiction, and it was immaterial that such a recognizance given on change of venue bound accused to appear before "the district court of Dallas county," and not before criminal district court No. 2 of said county; there being no such court in existence as the district court of Dallas county. *Haley v. State* (Cr. App.) 228 S. W. 208.

**Objections to recognizance.**—The trial court is the proper place to present objections to the recognizance on change of venue. *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202.

**Art. 639. [626] If defendant be in custody.**

**Order.**—An order directing a change in venue should also either direct that defendant be placed in custody or fix the amount of the recognizance, and it would be incomplete in the absence of such recital. *Haley v. State* (Cr. App.) 228 S. W. 208.

11. OF DISMISSING PROSECUTIONS

**Art. 643. [630] Prosecution may be dismissed by state's attorney,**

etc.

See *Camron v. State*, 32 Cr. R. 180, 22 S. W. 682, 40 Am. St. Rep. 763.

TITLE 8

OF TRIAL AND ITS INCIDENTS

Chap.

1. Of the mode of trial.
2. Of the drawing of jurors, and of the special venire in capital cases.
3. Of the formation of the jury in capital cases.
4. Of the formation of the jury in cases less than capital.
5. Of the trial before the jury.
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Chap.

7. Of evidence in criminal actions.
  1. General rules.
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CHAPTER ONE

OF THE MODE OF TRIAL

Art.

644. Jury the only mode of trial, when.  
 645. Jury shall consist of what number.  
 645b. Same; Criminal District Court of Tarrant County.  
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Art.

646. Defendant must be personally present, etc.  
 648. Defendant on bail.  
 650. Criminal docket shall be kept.  
 653. Defendant required to plead.

**Article 644. [631] Jury the only mode of trial, when.**

Cited, *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

**Art. 645. [632] Jury; when of twelve, when of six.**

**In the district court.**—The Constitution requires a jury of 12 men for misdemeanor trials in the criminal district court of Bowie county, and the Legislature was not authorized to provide for a trial before a jury of 6. *Bennett v. State* (Cr. App.) 232 S. W. 841; *Shipp v. State* (Cr. App.) 232 S. W. 840.

Since the criminal district court, created by Acts 35th Leg. (4th Called Sess.) c. 28, was in effect a district court within the Constitution, the provision of that act (§ 8) authorizing a jury of 6 in a trial for misdemeanors is contrary to the constitutional requirement that the jury in a district court shall be composed of 12 men. *Rochelle v. State* (Cr. App.) 232 S. W. 838



**Art. 645b. Same; Criminal District Court of Tarrant county.**—Said Criminal District Court of Tarrant County shall try all misdemeanor cases coming before it with six jurors instead of twelve jurors, unless a jury be waived by the defendant. [Acts 1917, 35th Leg., ch. 77, § 8.]

**Art. 645c. Same; Criminal District Court of Bowie county.**—Said criminal district court of Bowie County [Arts. 97 $\frac{3}{4}$ –97 $\frac{3}{4}$ i4] shall try all misdemeanor cases coming before it with six jurors instead of twelve jurors, unless a jury be waived by the defendant. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 8; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 8.]

**Explanatory.**—The court above referred to is abolished as of Dec. 31, 1922. See art. 97 $\frac{3}{4}$ i4, ante.

**Art. 646. [633] Defendant must be personally present, etc.**

See *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153.

**Presence during particular proceedings.**—Gen. Laws 1907, c. 139, § 9, specifically amends White's Ann. Code Cr. Proc. art. 647, being now article 660, Vernon's Ann. Code Cr. Proc. 1916, so that it no longer requires that a special venire be drawn in "open court," and there is no law giving defendant's attorney right to be present at such drawing, but the fact that the defendant's counsel was then absent at the court's request did not show that the court was not open when the drawing was made in the courtroom, in the presence of court and clerk. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

When a juror has been sworn in a capital case he is impaneled and the trial judge cannot excuse him in the absence of the defendant, and it was error for the trial judge to dismiss a colored juror because of objections by white jurors outside of court and by agreement with the attorneys for the state and defendant. *Crow v. State* (Cr. App.) 230 S. W. 148.

The law permits a juror in a criminal case to file an affidavit presenting certain excuses making it unnecessary, in that instance, for him to appear in person; and unless these affidavits are on file, veniremen should not be excused except in open court and in defendant's presence. *Id.*

**Art. 648. [635] Defendant on bail.**

See notes under art. 900, post.

**Art. 650. [637] Criminal docket shall be kept.**

See *Barnes v. State* (Cr. App.) 230 S. W. 986.

**Art. 653. [640] Defendant required to plead.**

Cited, *Bonnard v. State*, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431.

## CHAPTER TWO

### OF THE DRAWING OF JURORS, AND OF THE SPECIAL VENIRE IN CAPITAL CASES

Art.	Art.
655. Definition of a "special venire."	661a. Special venire how summoned.
656. State may obtain order for special venire, etc.	664. Certain officers to select jurors.
657. Defendant may obtain special venire, when.	667. In case no jurors, or not a sufficient number have been selected, etc.
658. Order of court shall state what, and writ shall issue accordingly.	668. Service of writ.
659. Capital cases may be set for particular day.	669. Return of writ.
660. Manner of selecting special venire.	670. Sheriff shall be instructed by court as to summoning jurors.
660a. Same.	671. Defendant served with copy of list, etc.
661. Same.	672. One day's service of copy before trial.

**Article 655. [642] Definition of a special venire.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

Cited, *Taylor v. State*, 81 Cr. R. 359, 195 S. W. 1147.

**In general.**—A special venire, which was executed by the sheriff, will not be vacated because improperly directed to the "sheriff or any constable," instead of the sheriff. (*Suit v. State* [Tex. App.] 17 S. W. 458, followed.) *Jackson v. State*, 30 Tex. App. 664, 18 S. W. 643.

Where accused requested the court to direct the sheriff to continue his efforts to summon the men designated on the special venire panel who had not been served, he cannot justly complain of the service by the sheriff of all men found on the list, including those taken from the list of summoned jurors in response to accused's motion

to quash on the ground they were irregularly served. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

The court was not required to sustain accused's motion to quash special venire, relating to jurors irregularly served, but present in court in obedience to the venire writ. *Id.*

**Capital case.**—That jury imposed imprisonment, instead of death in capital case, does not affect the right of the defendant to a venire in accordance with law relating to capital cases. *Clayton v. State*, 83 Cr. R. 57, 201 S. W. 172.

**Number served or appearing.**—Where officers lawfully drew 150 jurors for special venire, of whom sheriff served 92, the others being out of the county or not found after diligent search, and none were excused before the case was called for trial and only those having legal exemptions were excused, save those excused by consent of the parties, and no juror was forced upon defendant, who did not exhaust his challenges, there was no error. *Hubert v. State*, 83 Cr. R. 448, 203 S. W. 900.

In a homicide case, where a special venire of 50 men were regularly ordered for appearance, but only 35 were served with summons to appear, the fact that all the veniremen were not summoned did not require the court to quash the venire. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

Where a special venire of 50 men was ordered for appearance, but only 35 were served with summons, it was error for the court to dismiss the 35 veniremen and order a new venire, when both the accused and the state were ready for trial and no motion was made to quash. *Id.*

That out of 500 persons named in the special venire list only 200 men were summoned, and approximately 100 excused for good cause, leaving only about 100 men from which to select a jury, does not show want of diligence justifying quashal of the writ on that ground. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

In the absence of proof of lack of sufficient diligence, accused must show, to require quashal of the venire for nonservice on part of the list, that the number of jurors available under the venire was insufficient to enable him to obtain an impartial jury. *Id.*

**Art. 656. [643] State may obtain order for special venire, etc.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Art. 657. [644] Defendant may obtain special venire, when.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

Cited, *Roberts v. State*, 30 Tex. App. 291, 17 S. W. 450.

**In general.**—In a capital case, the accused is entitled to a special venire, and may demand such at the time the case is called for trial. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

**Art. 658. [645] Order of the court; writ.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Order.**—A judge disqualified to sit in a criminal case cannot decide how many special veniremen shall be drawn, nor preside when list from which jury is to be selected are drawn as provided by art. 661. *Taylor v. State*, 81 Cr. R. 359, 195 S. W. 1147.

Assuming that an entry nunc pro tunc of order to clerk to issue venire writ may not be made except there be some written evidence of the original order, a written memorandum made by the judge at the time, and in addition thereto a venire writ issued by the clerk at the time the order was made, certifying under the seal of the court that the order had been made, was a compliance with this requirement. *Barnes v. State* (Cr. App.) 230 S. W. 986.

**Art. 659. [646] Capital cases may be set for particular day.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Art. 660. [647] Manner of selecting special venire.**

See *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

**In general.**—The court judicially knows that El Paso is a large city situated on the border of the state, and that veniremen in such county are not listed by jury commissioners, but are listed by drawing from a wheel the names of taxpayers. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Gen. Laws 1907, c. 139, § 9, specifically amended White's Ann. Code Cr. Proc. art. 647, being now art. 660, so that it no longer requires that a special venire be drawn in "open court," and there is no law giving defendant's attorney right to be present at such drawing, but the fact that the defendant's counsel was then absent at the court's request did not show that the court was not open when the drawing was made in the courtroom, in the presence of court and clerk. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

Code Cr. Proc. 1895, art. 647, relating to the drawing of special venires, was repealed by the amendment of the Jury Law of April, 1907, whereby such section was rewritten, and by Code revision of 1911, whereby such article as amended was brought forward as art. 660, while the original article was omitted from the Code. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Art. 660a. Same.**—Whenever a special venire is ordered in counties not using the wheel system, and to which Article 660, Revised Code of Criminal Procedure of 1911 is not applicable, all the names of all the persons selected by the jury commissioners to do jury service for the

term at which such venire is required shall be placed upon tickets of similar size and color of paper, and the tickets placed in a box and well shaken up; and from this box the clerk, in presence of the judge, in open court, shall draw the number of names required for such special venire, and shall prepare a list of such names in the order in which they are drawn from the box, and attach such list to the writ and deliver the same to the sheriff. [Acts 1919, 36th Leg., ch. 37.]

Took effect March 7, 1919.

**Art. 661. [647a] Same.**

**Drawing the venire.**—A judge disqualified to sit in a criminal case cannot decide how many special veniremen shall be drawn under art. 658, nor preside when list from which jury is to be selected are drawn, as provided by this article. *Taylor v. State*, 81 Cr. R. 359, 195 S. W. 1147.

Where there were 84 jurors selected for term of court and 60 were discharged without being drawn or serving on a venire, the drawing of the remaining 24 and the adding of 24 names by the sheriff, in a capital case, was not a compliance with this article, and a conviction cannot stand. *Clayton v. State*, 83 Cr. R. 57, 201 S. W. 172.

Where in a murder trial all the names on the regular venire except 20 had been drawn for other special venires and the clerk placed the names of such 20 jurors in the box with the names on the special venire list, mixing them thoroughly and drawing therefrom the special venire in another case, and from the remaining names drawing the special venire for the murder trial, 9 of the men so drawn being among the 20 remaining in the regular venire list, a motion to quash the special venire because not drawn in accordance with law was properly overruled. *Cotton v. State*, 86 Cr. R. 337, 217 S. W. 158.

Jurors selected for jury service during the term must first be economized and used, and until this has been done a list of jurors drawn for special venire list are not authorized to be placed in the jury box and drawn to serve on special venire, and where the names of all the petit jurors and those specially drawn for special venire service are all placed in the box at once, a special list drawn therefrom including some of each kind of jurors was not a proper venire. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

In a murder prosecution, it was not error to order a special venire drawn from the list prepared by the jury commissioners, in view of arts. 656, 658, 659, 661, 661a, Rev. St. arts. 5135, 5136, and Const. art. 1, § 15. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Art. 661a. Special venire, how summoned.**

See *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**Art. 664. Certain officers to select jurors.**

**Constitutionality.**—Equal protection of laws is not denied colored persons by Constitution, which grants discretion to certain officers in selection of jurors which can be used to abridge right of such colored persons to serve on such juries, when it is not shown that their actual administration is evil. *Roberts v. State*, 81 Cr. R. 227, 195 S. W. 189.

**Art. 667. [649] In case no jurors or not a sufficient number.**

**In general.**—Arts. 644-654, constitute rules for drawing juries in capital cases, and complaint of failure of court to resort to jury wheel for talesmen cannot be sustained, in view of this article, where there is a failure to select jury from special venire. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

**Art. 668. [650] Service of writ.**

**In general.**—In a prosecution for murder, defendant's motion to quash the venire because the provision requiring the sheriff executing the writ of special venire verbally to summon the veniremen in person, was not observed, was properly denied, where all the special venire summoned by mail were either in attendance on the court or had been excused for sickness or other legal cause. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

**Art. 669. [651] Return of writ.**

**In general.**—In the absence of any challenge on the part of accused of sufficiency of sheriff's return, a general statement that jurors not summoned could not be found after diligent search would be sufficient; but since accused challenged conclusion that jurors could not be found after diligent search, the court erred in overruling motion to quash venire, without requiring sheriff to make an amended return, showing at least in a general way what efforts he had made to summon the unsummoned jurors. *Whittington v. State*, 86 Cr. R. 1, 215 S. W. 456.

**Art. 670. [652] Sheriff shall be instructed by court as to summoning jurors.**

See *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255.

**Art. 671. [653] Copy of list of jurors shall be served on defendant, etc.**

**Errors in names.**—Where four names on a copy of special venire served on defendant were misspelled or a wrong initial given, and such jurors were excused without the

objection of defendant on trial for murder and without use of his challenges which were not exhausted, and he asked no attachment for them, such errors in names were immaterial. (Per Prendergast, J.) Porter v. State, 86 Cr. R. 23, 215 S. W. 201.

A heavy penalty assessed held not to show that defendant, convicted of murder, was injured by not having a copy of the special venire sooner, where the record shows the jury were selected from the regular venire, and that defendant did not exhaust his challenges. Id.

Where the state exhausted a challenge in each instance of variance between the name of the juror as shown on the original venire and the officer's return and copy, and where no service was shown on the juror drawn, defendant waived his right to have such juror attached and brought in, defendant is not entitled to have quashed the service on him of a purported copy of the jurors summoned on account of variance between the return and copy. Hardy v. State (Cr. App.) 231 S. W. 1097.

#### Art. 672. [654] One day's service of copy before trial.

**In general.**—Out of the list of 60 included in a special venire but 50 were summoned, and of these only 33 attended. Held, that it was error to proceed to select a jury from those in attendance without first issuing process to compel the attendance of the other 17 venire men. Cahn v. State, 27 Tex. App. 709, 11 S. W. 723.

Where defendant had practically two days between service and trial, and was unusually well equipped with experienced attorneys with more than ordinary knowledge of the persons summoned as veniremen, motion to postpone trial to give additional time to investigate veniremen was properly overruled. (Per Prendergast, J.) Porter v. State, 86 Cr. R. 23, 215 S. W. 201.

## CHAPTER THREE

### OF THE FORMATION OF THE JURY IN CAPITAL CASES

Art. 673. Names of jurors to be called, etc.	Art. 691. Number of challenges in capital cases.
676. Persons summoned as jurors may claim exemption, how and when.	692. Challenge for cause.
677. May be excused by consent of parties.	693. Evidence may be heard, etc.
680. Defendant may challenge array, when.	695. No juror shall be impaneled, when.
686. Court shall proceed to try qualifications of persons summoned.	697. Judge shall decide qualifications of jurors.
687. Mode of testing qualifications.	698. Oath to be administered to each juror.
690. A peremptory challenge.	699. Court may adjourn persons summoned, etc., but jurors, when sworn, should not separate, unless, etc.

#### Article 673. [655] In capital cases, names of jurors to be called, etc.

Cited, Osborne v. State, 23 Tex. App. 431, 5 S. W. 251; Rodriguez v. State, 23 Tex. App. 503, 5 S. W. 255.

**In general.**—In view of this article, and arts. 674 and 675, relating to their oaths and excuses, and arts. 686–688, relating to challenges and qualifications, it was error to refuse defendant appellant's requests to call all veniremen and hear their general excuses so it might be known who were to be examined on their voir dire, so he could exercise his challenges intelligently. Crow v. State (Cr. App.) 230 S. W. 148.

In a prosecution for murder the trial court should not have called in the jurors four at a time, instead of all, and sworn and tested them primarily and received their excuses, since this left both state and defendant to act in the dark with reference to other veniremen, and is improper practice. Id.

#### Art. 676. Persons summoned as jurors may claim exemption, how and when.

**In general.**—The law permits a juror in a criminal case to file an affidavit presenting certain excuses making it unnecessary, in that instance, for him to appear in person; and unless these affidavits are on file, veniremen should not be excused except in open court and in defendant's presence. Crow v. State (Cr. App.) 230 S. W. 148.

#### Art. 677. [658] May be excused by consent of parties.

Cited, Livar v. State, 26 Tex. App. 115, 9 S. W. 552.

#### Art. 680. [661] Defendant may challenge array, when.

**Grounds.**—Where both accused and deceased were negroes, evidence held not to show race discrimination, as alleged, in selecting grand and petit jurors, in that no negroes were selected. Roberts v. State, 81 Cr. R. 227, 195 S. W. 189.

It appearing that the jurors summoned responded, and that, after eliminating those properly excused for good cause, there remained about 100 veniremen, and that in selecting the jury the appellant did not exhaust his peremptory challenges, and no ob-

jectionable juror having been forced upon him, there was no prejudicial error in overruling the motion to quash the venire. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

There was no merit in defendant's motion to quash array and jury panel, on ground that the trial court, on defendant's objection that he had not been allowed two days after arrest to file written pleadings, etc., reset his case for the week following, and directed jurors present and regularly drawn to report back for duty on the following Monday, which they did, with some exceptions properly filed by talesmen summoned by the sheriff under the court's direction. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

The failure of some of the veniremen to respond is not a ground for quashing the writ of venire. *Clark v. State*, 87 Cr. R. 107, 220 S. W. 100.

**Art. 686. [667] Court shall proceed to try qualifications of persons summoned.**

**In general.**—It was error to refuse defendant appellant's request to call all veniremen and hear their general excuses so it might be known who were to be examined on their voir dire, so he could exercise his challenges intelligently. *Crow v. State* (Cr. App.) 230 S. W. 148.

**Art. 687. [668] Mode of testing qualifications.**

Cited, *Hunter v. State*, 30 Tex. App. 314, 17 S. W. 414.

**In general.**—Persons who have legally declared their intention of becoming citizens are not, by reason of their foreign birth, disqualified to act as jurors. *Abriego v. State*, 29 Tex. App. 143, 15 S. W. 408.

In a verbal address, delivered while testing jurors for the week as to their qualifications, the court should not have discussed the question of reasonable doubt, and how from the viewpoint of the court it ought to be considered. *Redwine v. State*, 85 Cr. R. 437, 213 S. W. 636.

**Art. 690. [671] A peremptory challenge.**

**Nature of right to challenge.**—In a prosecution for rape, where the court, on statement by the prosecutor that he would not insist on the death penalty, improperly denied accused the right to 15 peremptory challenges and restricted him to 10, and the record showed that accused desired to challenge five other jurors after exercising his peremptory challenges, the denial was error, for such jurors will be deemed objectionable, for, as relating to a peremptory challenge, a juror is "objectionable" if the accused desiring to eliminate him makes known his wish in a timely and orderly manner. *Kerley v. State* (Cr. App.) 230 S. W. 163.

**Failure to exercise all challenges.**—Where officers lawfully drew 150 jurors for special venire, of whom sheriff served 92, the others being out of the county or not found after diligent search, and none were excused before the case was called for trial, and only those having legal exemptions were excused, save those excused by consent of the parties, and no juror was forced upon defendant, who did not exhaust his challenges, there was no error. *Hubert v. State*, 83 Cr. R. 448, 203 S. W. 900.

Where venireman was excused upon peremptory challenge, and the court offered to restore the challenge to accused, no error appeared, even though the juror was subject to challenge for cause. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

Error of court in failing to sustain challenge for cause does not require reversal, where the juror was excused on peremptory challenge of accused, and the court allowed an additional peremptory challenge. *Whittington v. State*, 86 Cr. R. 1, 215 S. W. 456.

**Art. 691. [672] Number of challenges in capital cases.**

**Denial of right.**—The arbitrary denial of the right to 15 peremptory challenges in a prosecution for rape which is punishable by death or imprisonment in the penitentiary is a denial of a fair trial, even though the prosecutor stated that he would not insist on the death penalty. *Kerley v. State* (Cr. App.) 230 S. W. 163.

**Art. 692. [673] A challenge for cause may be made for what reason.**

See *Nalley v. State*, 28 Tex. App. 387, 13 S. W. 670,

**SUBD. 2**

**4. In general.**—That defendant did not know that one of the jurors was not a householder or freeholder, and thereby subject to challenge at the time he was accepted, will not of itself require the granting of a new trial. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

**SUBD. 3**

**5. In general.**—Refusal to grant new trial, when it was disclosed that one of the jurors who had rendered verdict of guilty of murder was an unpardoned convict, requires reversal of judgment. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

Verdict of conviction returned by jury whose foreman had been convicted in court of United States of a felony and remained unpardoned must be set aside; "conviction," as used in statute, including conviction in another jurisdiction. *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

**SUBD. 5**

**8. In general.**—Where contention that insanity of juror rendered verdict void was not raised below, it will not be considered. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

## SUBD. 8

16. **Trial of similar case.**—Jurors who served in a prosecution for violation of local option law, in which a verdict of guilty has been rendered against defendant, could not be challenged for cause in a later prosecution for a violation of the local option law against the same defendant, where the violation charged was sale at a different time, and to different parties and under different circumstances. *Venn v. State*, 85 Cr. R. 151, 210 S. W. 534.

## SUBD. 11

21. **Circumstantial evidence.**—Where defendant, accused of murder, was not present at the time of the killing, and where his guilty connection therewith was more an issue in the case than the fact of death, the fact that there was an eyewitness to the actual homicide, or that a person who fired the shot declared that defendant had hired him to so do, did not take the case from the domain of circumstantial evidence, and authorized challenge for cause for conscientious scruples of jurors. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

## SUBD. 12

23. **In general.**—When the jurors had qualified by saying that they had no prejudice against the defendant, it was not error to exclude the question: "Have you, from hearsay or otherwise, so prejudged the defendant that you think him such a person as would be likely to commit the offense?" *Messic v. State* (Cr. App.) 225 S. W. 626.

That a juror, upon his examination, misled the defendant with reference to his being impartial, without a showing that defendant learned of juror's prejudice subsequent to his acceptance, is insufficient for a new trial. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

Where defendant in murder case lived in house of ill fame with his wife, it was proper to ask the jurors if such fact would influence them, as a basis for a peremptory challenge, but not for disqualification. *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84.

Evidence that a juror was in favor of a felony conviction, although other jurors favored acquittal or conviction of an aggravated assault with a fine of only \$25, the jury finally agreeing on conviction of an aggravated assault with a fine of \$100, is not sufficient to show that the juror was prejudiced. *Samino v. State*, 83 Cr. R. 481, 204 S. W. 233.

24. **Race prejudice.**—Where an alleged criminal libel contained a diatribe against Jews and it appeared that four or five members of the jury panel were of the Jewish race or connected with them and would have admitted that they would be prejudiced against one criticizing the Jews as a race, defendant was entitled to bring out such matter on voir dire examination, and his challenge against such persons for cause should be sustained. *Potter v. State*, 86 Cr. R. 380, 216 S. W. 886.

27. **Prejudice against offense.**—Where a talesman, when tested as to his qualifications as a juror in a prosecution for violating the local option law, stated positively he would not under any circumstances accord accused the benefit of the suspended sentence law, the statement was a cause for challenge. *Fernandez v. State*, 82 Cr. R. 129, 198 S. W. 301.

Prejudice against the offense with which defendant is charged is not bias or prejudice against him, made ground of challenge for cause. *Bartlett v. State*, 82 Cr. R. 468, 200 S. W. 339.

## SUBD. 13

31. **Opinions of jurors in general.**—Where, although the environment of a juror was such as to have given him opportunity to have formed some opinion touching the merits of the case, nothing was disclosed which would have made him subject to challenge for cause, and he was excused on peremptory challenge and no objectionable juror was forced on accused, and he failed to exhaust his peremptory challenges, no error was shown. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

This subdivision does not require the trial court to act independently of a challenge of a juror for cause by either party, but to accurately prescribe the test which shall be legally sufficient to sustain such challenge when made. *Lowe v. State* (Cr. App.) 226 S. W. 674.

33. **Basis of opinion.**—Juror, who, after having been summoned as a venireman, had been told by a friend that accused in his opinion was guilty and ought to be hung, and who on examination stated that he understood that the information had been obtained from those who knew more about it than the friend did, though the friend knew something of the facts, was a biased juror, and challenge for cause should have been sustained, although he disclaimed the formation of any opinion and the possession of any bias or prejudice. *Whittington v. State*, 86 Cr. R. 1, 215 S. W. 456.

That juror had formed an opinion did not render him incompetent, if the opinion was formed by mere reading, or if it appears to the court that such reading will not influence him in arriving at any verdict. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

40. **Fixity of opinion.**—If a juror declares on his voir dire that he has an opinion which will not affect his verdict, the court has large judicial discretion to declare him competent. *Bartlett v. State*, 82 Cr. R. 468, 200 S. W. 339.

In prosecution for theft of automobile, two jurors who had formed opinion as to defendant's guilt from talking with prosecuting witness were subject to challenge for cause, though they stated they could try case on evidence. *Collins v. State*, 84 Cr. R. 228, 206 S. W. 688.

## DECISIONS IN GENERAL

43. **In general.**—Accused cannot complain on motion for new trial that the court did not discharge a juror, whose examination showed him subject to challenge for cause, where the juror was accepted by accused with full knowledge of the matter set up in the motion for new trial. *Lowe v. State* (Cr. App.) 226 S. W. 674.

There is no duty on the court of his own motion to discharge a juror whose examination shows him subject to challenge for cause, unless one of the parties sees fit to make such challenge, in view of arts. 636, 695. *Id.*

**50. Examination of jurors.**—The trial court in its discretion may refuse to allow jurors to be asked questions in hypothetical form. *Houston v. State*, 33 Cr. R. 190, 202 S. W. 84.

Where an alleged criminal libel contained a diatribe against Jews and it appeared that four or five members of the jury panel were of the Jewish race or connected with them and would have admitted that they would be prejudiced against one criticizing the Jews as a race, defendant was entitled to bring out such matter on voir dire examination, and his challenge against such persons for cause should be sustained. *Potter v. State*, 86 Cr. R. 380, 216 S. W. 886.

**51. Time to raise objection.**—If accused accepts a juror after learning that he has an opinion and refuses to challenge him for cause, he cannot afterward complain that the juror was not fair and impartial. *Lowe v. State* (Cr. App.) 226 S. W. 674.

It is too late after verdict to complain of errors committed in the impaneling or organization of the jury. *Id.*

### Art. 693. [674] Other evidence may be heard.

**In general.**—The granting or rejection of defendant's request to have veniremen excluded from the courtroom during the examination of others on their voir dire is largely within the trial judge's discretion, depending on the convenience of the courtroom and other facilities, but granting such request is proper practice, and preferable. *Crow v. State* (Cr. App.) 230 S. W. 148.

### Art. 695. [676] No juror shall be impaneled, when.

**In general.**—Refusal to grant new trial, when it was disclosed that one of the jurors who had rendered verdict of guilty of murder was an unpardoned convict, requires reversal of judgment. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

Verdict of conviction, returned by jury whose foreman had been convicted in court of United States of a felony and remained unpardoned, must be set aside; "conviction" as used in statute, including conviction in another jurisdiction. *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

**Waiver of objections.**—All grounds of challenge for cause may be waived, except that the proposed juror has been convicted of theft or felony, or that he is under indictment for theft or felony, or that he is insane or so physically defective as to render him unfit. *Lowe v. State* (Cr. App.) 226 S. W. 674.

In a prosecution for bank robbery, where a venireman stated that he had an opinion and was a director of the bank robbed, whereupon the district attorney asked that such juror be excused, and defendant's counsel objected on the ground that the indictment named another as owner, and that the record did not disclose any interest of the bank which would disqualify the juror, defendant cannot be granted a new trial because such person served as juror, though the evidence showed that the funds stolen belonged to the bank, for he waived any disqualification. *Guyon v. State* (Cr. App.) 230 S. W. 408.

### Art. 697. [678] Judge shall decide qualifications of jurors, etc.

**In general.**—Where accused waives his grounds of challenge for cause and accepts a juror, the trial court may not of his own motion stand said juror aside and proceed without him. *McGowen v. State* (Cr. App.) 231 S. W. 763.

### Art. 698. [679] Oath to be administered to each juror.

Cited, *Anderson v. State*, 32 Cr. R. 528, 24 S. W. 897.

**Necessity of oath.**—A conviction by an unsworn jury is a mere nullity. *Crisp v. State*, 87 Cr. R. 137, 220 S. W. 1104.

**Sufficiency of oath.**—Omission of the words "So help me God" from oath administered to jurors in criminal action held fatal, and to require that verdict be set aside; such words being an essential part of the oath, under art. 714. *Crisp v. State*, 87 Cr. R. 137, 220 S. W. 1104; *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

### Art. 699. [680] Court may adjourn persons summoned, etc., but jurors, when sworn, shall not separate, etc.

**In general.**—In a prosecution for murder, resulting in conviction of manslaughter, where, after ten jurors were selected, impaneled, and sworn, one of them was permitted by the court, without consent of defendant or his counsel, and without being accompanied by an officer, to go to his home, about a mile distant, where a member of his family was sick, and there remain away from the courthouse, separated from the other members of the jury, for about an hour, such action was error, necessitating reversal as in violation of the mandatory provisions of the statute. *Garner v. State* (Cr. App.) 231 S. W. 389.

## CHAPTER FOUR

## OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL

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| <p>Art.<br/>703. Duties of clerk when parties are ready for trial.</p> <p>704. When court shall direct other jurors to be summoned.</p> <p>706. When number is reduced, etc., by challenge, others to be drawn, etc.</p> | <p>Art.<br/>714. Oath to be administered to jurors.</p> <p>715. When there are no regular jurors court shall order jurors to be summoned.</p> |
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**Article 703. [683] Duties of clerk when parties are ready for trial.**  
Cited, *Corzine v. State* (Cr. App.) 226 S. W. 686.

**Art. 704. [684] When other jurors to be summoned.**

See *Corzine v. State* (Cr. App.) 226 S. W. 686.

**Disqualification of officer summoning.**—That constable, who was witness in criminal case, summoned talesmen was not error. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

**Art. 706. [686] When number is reduced, etc., by challenge, others to be drawn, etc.**

**In general.**—The court did not err in refusing a motion for continuance, in that all but five of the jurors on the bench disqualified. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

**Art. 714. [694] Oath to be administered to jurors.**

**In general.**—The failure to swear, in a body, the jury in a criminal case, is fatal to a conviction. *Stephens v. State*, 33 Cr. R. 101, 25 S. W. 286

Omission from form of oath administered to jury of "So help you God," made a part thereof by this article, held fatal; the quoted words being a material part of the prescribed oath. *Crisp v. State*, 87 Cr. R. 137, 220 S. W. 1104; *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

**Art. 715. [695] When there are no regular jurors, court shall order jurors to be summoned.**

**In general.**—Action of court in having sheriff summon jury for week, there being none present because of court accidentally, at previous term, having failed to appoint jury commission, is in conformity with this article. *Fitzgerald v. State*, 82 Cr. R. 130, 198 S. W. 315.

## CHAPTER FIVE

## OF THE TRIAL BEFORE THE JURY

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| <p>Art.<br/>717. Order of proceeding in trial.</p> <p>718. Testimony allowed at any time before, etc., if, etc.</p> <p>719. Witnesses placed under rule.</p> <p>724. Order of argument, how regulated.</p> <p>726. Defendant's right to sever on trial.</p> <p>727. Same.</p> <p>728. Defendants may agree upon the order in which they will be tried, etc.</p> <p>729. May dismiss as to one who may be witness.</p> <p>732. In such case the court may commit, when.</p> <p>734. The jury are judges of the facts.</p> <p>735. Charge of court to jury.</p> <p>736. Charge shall not discuss the facts, etc.</p> <p>737. Either party may ask written instructions.</p> <p>737a. Correction of charge after objections thereto; no further charge after argument begins, except, etc.; review.</p> | <p>Art.<br/>738. Charges shall be certified by judge.</p> <p>739. No charge in misdemeanor, except, etc.</p> <p>740. No verbal charge in any case, except, etc.</p> <p>743. Judgment not to be reversed unless error prejudicial, etc.</p> <p>744. Bill of exceptions.</p> <p>745. Jury in felony case shall not separate until, unless, etc.</p> <p>746. In misdemeanor case jury may separate.</p> <p>748. No person shall be with jury or permitted to converse with them.</p> <p>749. Punishment for violation of preceding article.</p> <p>751. Jury shall take papers in the case.</p> <p>753. Jury may communicate with court.</p> <p>754. Jury may ask further instructions.</p> <p>755. Jury may have witness re-examined, when.</p> <p>756. Defendant shall be present, when.</p> <p>759. Disagreement of jury.</p> |
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## Article 717. [697] Order of proceeding in trial.

### SUBD. 1

1. *In general.*—It is error to admit evidence without having the information read; the defendant being required to plead to the information only, and not the complaint. *Messenger v. State*, 81 Cr. R. 465, 198 S. W. 330.

The court having selected the count on which defendant should be tried, constituting an election, the whole information should not have been read to the jury. *Dodd v. State*, 82 Cr. R. 139, 198 S. W. 783.

It is not error to arraign accused after the jury is sworn individually and collectively. *Russell v. State* (Cr. App.) 206 S. W. 79.

The provision requiring the indictment to be read to the jury on the trial of a criminal case, is mandatory and not directory merely. *Theriot v. State* (Cr. App.) 231 S. W. 777.

### SUBD. 3

4. *In general.*—Preliminary statement of prosecuting attorney, as to what he expected to prove, including defendant's statement, held not objectionable, on ground that such statement was made by defendant while in jail without warning. *Herndon v. State*, 82 Cr. R. 232, 198 S. W. 788.

An accused may demand of the state to make a statement of its case before the introduction of testimony, and require it to develop its case upon the original showing, so that defendant on his defensive propositions would have the state's full case to meet. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

In a prosecution for murder, where the evidence was circumstantial, the trial court should have required the state to make a statement of its case on request of defendant. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241.

In a prosecution for murder, failure of the trial court to require the district attorney to make an opening statement held harmless, no injury being disclosed by the record. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

It was not error to refuse to instruct the jury not to consider the preliminary statement of the prosecuting attorney as evidence where such statement appears throughout to be stating facts which the state expected to show by witnesses, and nothing therein appears to make it probable or possible for the jury to consider that the attorney was testifying as a witness. *Brooks v. State* (Cr. App.) 227 S. W. 673.

This subdivision is directory; but when facts are shown, indicating that the refusal of a request that the state make such an opening statement was injurious to defendant, such refusal will be held error. *Wray v. State* (Cr. App.) 232 S. W. 808.

### SUBD. 4

5. *In general.*—Permitting the state to withdraw evidence, held error, regardless of whether the evidence was introduced by the state or elicited by accused on cross-examination of the state's witness. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

Where defendant was charged with sale of liquor in October and sales were also shown in November, December, and January, motion to require election on which it would rely should have been granted, and if sale in October was selected, evidence of other sales should have been withdrawn. *Gustamente v. State*, 81 Cr. R. 640, 197 S. W. 998.

An accused may demand of the state to make a statement of its case before the introduction of testimony, and require it to develop its case upon the original showing, so that defendant on his defensive propositions would have the state's full case to meet. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

6. *Order of evidence.*—Where state offered a writing in evidence, and on defendant's objection, but before a ruling by the court, it was withdrawn, accused had no right to vary sequence of introduction of testimony so as to compel introduction or reception of such writing in his behalf while state was introducing its testimony. *Taylor v. State*, 85 Cr. R. 101, 210 S. W. 539.

The order of testimony is not fixed by ironclad rules, and is confided largely to the discretion of the trial courts, and their actions regulating the same will ordinarily be upheld unless by some unusual variance from the customary procedure some injury appears probable. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

In a prosecution for murder, court did not abuse its discretion in permitting a witness to testify, after defendant had closed his evidence in chief, that deceased was manager of her farm on which accused was a tenant, and that on one occasion when a misunderstanding came up over the division of pecans accused became very angry and insisted that deceased was the one who was causing him the trouble; it not appearing that the court refused accused the privilege of introducing evidence upon the matter. *Id.*

The order of introduction of testimony is almost wholly discretionary with the trial court, and appellate court will not review its action, unless it is made to appear that injury had probably resulted. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

Defendant, who claims to have had insufficient education and mentality to understand the statement made by him at examining trial, is not entitled to introduce evidence of such lack of mentality at time of admission of statement in evidence, to support objection thereto, but will be required to wait and produce such evidence as a part of his defense to enable jury to pass on the weight, if any, to be attached to the statement. *Lucas v. State* (Cr. App.) 225 S. W. 257.

7. *Eyewitnesses.*—The state is not bound to introduce all or any of the eyewitnesses to a transaction. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

### SUBD. 5

8. *In general.*—Though court should control and limit defendant's opening statement, the privilege of making such statement, when properly asked and not abused, cannot be denied. *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616.

That defendant's motion for leave to make an opening statement was accompanied by a written memorandum outlining his proposed statement did not militate against his right to make it. *Id.*

A defendant who relied on insanity at the time of the commission of the offense cannot, under guise of stating the defense relied on, read an affidavit setting forth his insanity. *Barton v. State* (Cr. App.) 230 S. W. 989.

#### SUBD. 6

9. Number of witnesses.—Where defendant offered evidence of his previous good character for honesty and truthfulness, and, after witnesses had been introduced along that line, state admitted his reputation was as claimed, the practice, to save examining a great number of witnesses, was proper. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

#### SUBD. 7

11. In general.—The receipt of evidence in rebuttal, though out of its order, is discretionary. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

In a prosecution for murder, resulting from a blow with a club, the admission of evidence that an eyewitness was asked some five minutes later, and after the assailant had run away, if he knew who struck the blow, and he stated he did, if hearsay, was not reversible error, where the same evidence came without objection from other sources, and the appellant in developing the case made it pertinent as bearing upon the credibility of witness by trying to show that the witness had stated that the assailant was one other than defendant; a reversal not being authorized by the admission of competent and relevant evidence coming out of its order. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

The common-law rule does not apply in criminal cases; therefore, in a prosecution for robbery, where some of the victims testified in chief, defendant cannot complain that after closing his case the others testified, on the theory that such testimony was not rebuttal. *Hardy v. State* (Cr. App.) 231 S. W. 1097.

12. Admissible rebuttal.—In prosecution for passing forged instrument, where defendant gave testimony as to his financial resources, evidence as to status of his account with grocer was properly received in rebuttal. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

#### CONDUCT OF TRIAL IN GENERAL

13. In general.—Arrest of defendant's witness for perjury on leaving stand, and next day procuring him to testify for state, after impressing him that unless he did so he would be sent to penitentiary, was improper. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

17. Conduct of judge.—See art. 787 and notes.

18. Misconduct of prosecuting attorney.—Permitting the state to exhibit one by one sixteen bottles of whisky in presence of the jury, after defendant had admitted every material and admissible fact that could have been established by the exhibition of the whisky, was error. (Per Gaines, Special Judge.) *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

A remark by the prosecuting attorney, while examining a witness, that he was laying a predicate for a perjury case, was prejudicial, where the witness had failed to give testimony adverse to the state, and therefore could not be contradicted or impeached. *Bell v. State*, 84 Cr. R. 197, 206 S. W. 516.

There was no error in that county attorney offered in evidence inquest proceedings compelling accused to make an objection in presence of jury, where no statement was made by county attorney of contents of said papers and court promptly sustained defendant's objection and told jury not to consider the matter. *Gilbert v. State*, 84 Cr. R. 616, 209 S. W. 658.

In a prosecution for homicide, where defendant stated that his brother, who was present, was crazy about half the time, and refused the offer of the prosecution to introduce a purported written statement by the brother, argument of the prosecutor that it was a fair inference from the fact the brother did not testify, and that defendant would not agree for his written statement to be introduced, that it was adverse to him, was improper, and aggravated the impropriety of the attempt by the prosecution to get the statement before the jury. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

In prosecution for murder resulting in conviction of assault to murder, where a witness testified that he did not remember that after the difficulty he heard defendant's son say to defendant, "You ought not to have cut him," and where counsel for the state, after the witness' denial that he had not testified to the contrary before the grand jury, was permitted to produce a book not placed in evidence, purporting to contain grand jury evidence, which the witness was requested to look at and to read to himself, which he did, and then reiterated his statement that he did not remember, there was no error. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

The prosecuting attorney should not announce before the jury that he was ready in five cases pending against the defendant. *Hunt v. State* (Cr. App.) 229 S. W. 869.

19. — Improper questions.—Prosecutor's objectionable remarks in cross-examination of defendant's witness held no ground for reversal, where court told jury not to consider such remark. *Steel v. State*, 82 Cr. R. 433, 200 S. W. 381.

In prosecution for assault to murder, resulting in conviction of aggravated assault, state's question to defendant as to whether he had been named as correspondent in divorce petition of assaulted person against wife held improper. *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 897.

Where attorney for state asked improper questions of jury after it had come in court for a reading of some of the testimony, the court's reprimand and its order that he take his seat left such remarks without prejudice. *Thomas v. State*, 83 Cr. R. 323, 204 S. W. 999.

Browbeating and making innuendoes against defendant's witnesses in their cross-examination held not a fair way of examination, and not conducive to a fair trial. *Newman v. State*, 85 Cr. R. 556, 213 S. W. 651.

In a prosecution for statutory rape, held that the conduct of the state's attorney in asking objectionable questions was such as to deny defendant a fair trial and to necessitate reversal. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

In a prosecution for assault to murder, where the trial court excluded original testimony as to the good reputation of prosecutor, he should not have permitted the county attorney, on cross-examination of witnesses, subsequently to introduce the same matter. *Jupe v. State*, 86 Cr. R. 573, 217 S. W. 1041.

In prosecution for bigamy, involving issue of whether defendant was married to alleged first wife, conduct of prosecuting attorney in asking defendant if he had not been warned by a certain neighbor that his course of conduct would likely get him into the penitentiary, where objection thereto was sustained by court, held not ground for reversal. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

The prosecuting attorney should not have repeated a question to a witness after the court had ruled thereon, sustaining objection. *Smith v. State* (Cr. App.) 230 S. W. 161.

20. — **Prejudice.**—Where the whole course of the state's attorney throughout the trial was such as to prejudice the rights of defendant, improper questions, the very asking of which was prejudicial, being propounded, and it appeared from the verdict that such conduct might have affected the result, judgment of conviction will be reversed for misconduct, though objections to some questions were sustained, and some questions the jury were instructed not to consider. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

22. **Restrictions on defendant's counsel.**—Where defendant's counsel repeated question which had been asked and answered several times, after court had directed him not to repeat it, the action of the court in assessing a fine of \$25 against the attorney and in requiring the fine to be paid held proper. *Redwine v. State*, 87 Cr. R. 387, 221 S. W. 605.

### Art. 718. [698] Testimony allowed at any time before argument.

See *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999; *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

**In general.**—Where accused's wife described the knife with which he killed deceased, and her description was not controverted, and the evidence then closed, it was not an abuse of discretion to decline to open the evidence the next day for the admission of the knife. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

The court trying a prosecution for failure to support minor children did not abuse its discretion in denying defendant leave to take the stand and explain a part of the testimony in regard to which he contended the prosecuting attorney, then making the closing argument for the state, was in error. *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1043.

Under the statute, the court had authority to permit testimony to be introduced after the evidence had closed, and before argument had begun. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

When it appears that the ends of justice will be subserved by the introduction of testimony, the privilege of introducing such evidence any time before argument is closed should not be denied, in the absence of some reason therefor; the discretion permitted the court by such statute being a judicial one. *Mandosa v. State* (Cr. App.) 225 S. W. 169.

In a prosecution for theft, court erred in refusing to open the case, after the evidence was closed and before the argument was completed, upon defendant's offer to introduce evidence that a witness for the state made an effort to induce the owners of the stolen property to forego a prosecution and offered to pay for the property. *Id.*

**Time for receiving evidence.**—It was certainly too late, after the jury had retired to consider their verdict, to again reopen the case to hear further testimony. *Ming v. State* (Cr. App.) 24 S. W. 29.

### Art. 719. [699] Witnesses placed under rule.

**In general.**—The matter of excusing a witness from the rule is one confided to the sound discretion of the trial court, and the action of the court in excusing a witness from the rule will not be reviewed on appeal, unless it appears from the bill of exceptions that discretion of the court has been abused. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

**Exemptions from rule.**—The rule should not be enforced as to attorneys engaged in the particular case on trial. *Boatmeyer v. State*, 31 Cr. R. 473, 20 S. W. 1102.

Where murder trial was attended by great crowd, so that assistance of sheriff in keeping order was necessary, trial court properly exercised discretion in refusing to have sheriff placed under rule with other witnesses. *Vestal v. State*, 83 Cr. R. 184, 202 S. W. 94.

An interpreter, who has listened to the testimony of other witnesses, is not, by reason thereof, incompetent to testify as to a confession of accused, where the testimony of such other witnesses and that of interpreter did not relate to same facts. *Trevino v. State*, 83 Cr. R. 562, 204 S. W. 996.

If defendant wishes to use his wife as witness, he must observe the rules of the court in reference to placing witnesses under the rule. *Jupe v. State*, 86 Cr. R. 573, 217 S. W. 1041.

In a prosecution for assault with intent to murder one S., where the record disclosed that the occurrence was a shooting in which J., a brother of S., participated, the court abused its discretion in permitting J. to remain in the courtroom, where accused invoked the rule, merely because he was considered an injured party, and the state desired to have his aid in the conduct of its case. *Freddy v. State* (Cr. App.) 229 S. W. 533.

**Testimony of witnesses violating, or not under, rule.**—Whether witness who has been in the courtroom while under the rule should be permitted to testify is within the judicial discretion of the court. *Wagley v. State*, 87 Cr. R. 504, 224 S. W. 687; *Fitzgerald v. State*, 82 Cr. R. 130, 198 S. W. 315; *Shamblin v. State* (Cr. App.) 228 S. W. 241.

The presence of a witness during part of the examination of another was not error, where he appears to have been brought in only for the time necessary to inquire of the witness whether he identified him as the person to whom defendant had handed the pocketbook which the defendant was accused of stealing. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Refusal to permit a witness who had been in the courtroom during the trial, in violation of the rule, to testify to a matter of impeachment of the prosecutrix in seduction, was a matter within the sound discretion of trial court, and court on appeal will not reverse case; no abuse of discretion being shown. *Scoggins v. State*, 84 Cr. R. 519, 208 S. W. 930.

Where it is not shown that court abused its discretion in permitting a witness who was under the rule to testify after violating the rule, and the witness before giving his testimony was interrogated and declared that he had heard none of the testimony, and accused after such interrogation made no further objection to the witness, there was no reversible error. *Patterson v. State*. 85 Cr. R. 643, 215 S. W. 308.

In a prosecution for wife murder, there was no error in permitting a witness to testify for the state after he had been sworn with the other witnesses, and ordered placed under the rule, though such witness remained in the courtroom during the time the other witnesses were testifying, he being county attorney and the state's assistant in the prosecution of the case. *Pounds v. State* (Cr. App.) 230 S. W. 683.

Where a witness was summoned after trial began, and came into the courtroom and remained some hours without the knowledge of any one apparently connected with the case, it was not an abuse of the trial court's discretion to permit such witness to testify. *Eason v. State* (Cr. App.) 232 S. W. 300.

### Art. 724. [704] Order of argument.

1. **Limiting time.**—Where case had required less than two hours to try, and court stated that it was his opinion that 25 minutes was ample time for argument, it was not error so to limit time. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

Where the introduction of evidence in a trial for abortion occupied a little over four hours, a limitation of the time for argument to an hour and a half to each side was not unreasonable, or an abuse of the trial court's discretion. *Earnest v. State*, 87 Cr. R. 651, 224 S. W. 777.

3. **Control by court.**—The manner of argument by attorneys in criminal prosecution is a matter within the discretion of the court. *Cagle v. State*, 82 Cr. R. 347, 200 S. W. 153.

5. **Scope of argument.**—Where defendant was convicted of theft of a carburetor from an automobile upon the testimony of a witness who stole the carburetor and whom defendant had helped, it was error not to permit counsel to address the jury on the matter of corroboration of accomplice's testimony. *Newton v. State*, 86 Cr. R. 508, 217 S. W. 939.

7. **Illustrations.**—In prosecution for murder, it was not error to allow state's counsel in his argument to draw rough sketch of roads, fences, fields, and pastures described by witnesses, touching scene of homicide; sketch not being handled by jury, but merely used as illustration. *Borror v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In trial for murder, remark of counsel for state that case reminded him of first assassination, referring to story of Cain and Abel, was not improper; state's theory being that homicide was assassination. *Id.*

Allowing state's attorney to put on deceased's coat and have colleague take accused's position, where no objection was made at the time, was not error. *Russell v. State* (Cr. App.) 206 S. W. 79.

10. **Matters outside of issues.**—The argument of the prosecuting attorney that no effort had been made to attack defendant's reputation because such attack was not permitted by law, while not commendable, held not ground for reversal. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596, *Lee v. State* (Cr. App.) 225 S. W. 261.

Where evidence showed that bootlegging was prevalent in territory mentioned, an argument based on such evidence was proper. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

In prosecution of former train porter for burglary, argument that the oldest train porter on a certain railroad had been sent to the penitentiary was improper. *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735.

In a prosecution of a negro for larceny of cotton, a statement by the county attorney to the jury that they knew "that last fall cotton was good, and any negro could have had money sufficient to go to the Dallas fair," did not constitute reversible error. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

In prosecution for swindling by giving worthless check, wherein defendant testified that he expected to deposit funds in time to meet it and was prevented from doing so, prosecutor's statement that it was a frequent offense and that there were many poor checks in district attorney's office, notwithstanding statement of defendant's attorney that defendant had said he had offered to pay check, was unjustified. *Whitaker v. State*, 85 Cr. R. 272, 211 S. E. 787.

Statement of state's counsel in a homicide case: "Let's call a halt. There are too many murders committed in W. county. The records of this county show that six murders have been committed in W. county within the last six months, and four within four miles of the courthouse"—was improper, where such matters were not before the jury. *Gusters v. State*, 87 Cr. R. 181, 220 S. W. 92.

A remark of state's counsel in his argument, referring to the testimony of an ac-

complice, "A grand jury of your county heard his statement, and upon his statement they have said he was guilty," was not legitimate argument. *Shaw v. State* (Cr. App.) 229 S. W. 509.

In a prosecution for assault to murder, where the case was submitted solely on the question of aggravated assault, a statement by the prosecutor that, if defendant had not been guilty, his attorney would not have filed an application for a suspended sentence, is reversible error, as the court failed to instruct the jury to disregard the statement, for, in case of a felony where defendant applies for suspended sentence, that fact cannot be argued as guilty circumstance, and when the question of felony was passed out of the case by elimination of the charge of assault to murder, the question of suspended sentence was also eliminated. *Tamaya v. State* (Cr. App.) 230 S. W. 146.

Prosecuting attorney's remark to the jury that "other juries have heretofore disbelieved such a defense as this defendant has interposed" held improper. *Seebold v. State* (Cr. App.) 232 S. W. 328.

On a trial for murder, a remark of the state's attorney that a jury in the same county had assessed the death penalty against one conspiring to kill another exceeded the limits of proper argument, but did not call for reversal where it was in reply to argument of defendant's counsel that he would not be guilty of murder because he did not fire a shot, and he was given only a penalty of seven years; there being no request for charge to disregard the remarks. *Monday v. State* (Cr. App.) 232 S. W. 831.

11. **Facts not in evidence.**—In absence of evidence, it is error for district attorney in opening argument to say, "You know the defendant is guilty, because the officers have been 'chousing' him for the last five or six years for violating the local option laws." *Lagow v. State*, 81 Cr. R. 460, 197 S. W. 217.

County attorney's reference in argument that witness called by defendant was not a witness at a former trial held not error as having basis in facts. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298.

In a prosecution under a city ordinance it was erroneous for county attorney in his argument to state that the ordinance had been passed, in the absence of proof. *White v. State*, 82 Cr. R. 274, 198 S. W. 964.

In prosecution for incest with his niece, where the letter in evidence did not state that she had given birth to a child, or was about to do so, or suggest the existence of such letter, an inference used in argument that she had written and that defendant had received such letter was not justified. *Hollingsworth v. State*, 82 Cr. R. 337, 199 S. W. 626.

In prosecution for unlawful gaming in a private residence, argument of counsel as to defendant, "He comes here with a grown boy; he sometimes lets play his hand, and asks an honest jury to turn him loose," was not improper, being based on the evidence or inferences therefrom. *Cagle v. State*, 82 Cr. R. 347, 200 S. W. 153.

There being evidence that deceased was stabbed in breast, and that there was an absence of provocation, remark of county attorney that defendant drove his knife into heart of deceased without provocation will not justify reversal. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

County attorney must confine himself in argument within rule of discussion as to facts admitted. *Carroll v. State*, 83 Cr. R. 369, 203 S. W. 599.

Where the district attorney desires to testify, he should take the stand, be sworn, and make the statements under oath as any other witness. *Walker v. State*, 84 Cr. R. 136, 206 S. W. 96.

In a prosecution for arson by burning defendant's own ties and lumber yard, in the total absence of evidence to show that the lumber market was bad at the time, and that defendant would have profited by collecting the fire insurance, statement of a prosecuting attorney in closing argument that just before the fire the lumber market was bad, etc., held an infringement of defendant's rights. *Kelley v. State*, 86 Cr. R. 281, 216 S. W. 188.

In a prosecution for seduction, statement of private prosecuting counsel in argument that it was said they had not corroborated prosecutrix, but that she claimed she wrote to defendant to help, and that instead of coming back to marry her, as he had promised, he merely sent her abortive medicine, held improper, in the absence of evidence other than prosecutrix's as to the correspondence. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

In a prosecution for seduction, where the child of the parties was not introduced in evidence, the remarks of private prosecuting counsel about the resemblance of the child to defendant were improper. *Id.*

Where a state's attorney's statement was tantamount to a statement that the fact sought by his question, which was objected to, was the truth, and that defendant's counsel knew it and did not want the truth to come out, the question having assumed matters outside the record, his statement was improper and prejudicial, and the Court of Criminal Appeals will not speculate as to the amount of the injury. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

The argument of counsel for the state that defendant killed an old man 61 years old with his leg shot off, and his comment on the objection of defendant's counsel to such argument, were improper, where there was no evidence that deceased's leg was shot off. *Patterson v. State*, 37 Cr. R. 95, 221 S. W. 596.

In a prosecution of a switchman for the theft of automobiles tires from a car, where he claimed that he had taken them from a car unloaded by consignee, and was taking them to a railroad agent when arrested, a statement of the district attorney that it was the duty of the defendant to note the number and initial of all cars in which freight was left, and report it to the yard office, held not error, as against the objection that there are no rules requiring employes to take number and initial of cars. *Monroe v. State* (Cr. App.) 230 S. W. 995.

Where one accused of robbery claimed to have been at home asleep at the hour the same was committed, as his father and others in the house knew, and his father

was not used as a witness by either party, though summoned by the defense and present in court, argument by the district attorney that defendant's father was not put on the stand because he had told the arresting officer, before he knew his son was arrested, that defendant did not get home until 10 o'clock the night of the robbery, and because he was already "sewed up," was harmful error, though the court reprimanded the attorney and verbally instructed the jury not to consider the argument, no evidence having been introduced that any such conversation occurred between defendant's father and the officer. *Stanchel v. State* (Cr. App.) 231 S. W. 120.

Reference by the prosecuting attorney in argument to immaterial testimony brought out on cross-examination of one of defendant's witnesses, consisting of the witness' opinion that defendant would kill deceased, was improper and called for admonition from the court. *Theriot v. State* (Cr. App.) 231 S. W. 777.

12. — **Excluded evidence.**—In a prosecution for threatening to take life, remarks by prosecuting attorney that a year before the act charged defendant had been interviewed by the postmaster and sheriff regarding his alleged seditious language, evidence of which had been excluded, called for reversal. *Young v. State*, 86 Cr. R. 594, 218 S. W. 505.

13. — **Incorrect statement.**—Bill of exceptions to statement of prosecuting attorney that evidence showed certain facts, when in fact such facts were covered by counsel's agreement as to what absent witnesses would testify to, does not show error, where court submitted to jury what the agreement was. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Where the evidence fully justified reference to accused's acts in throwing rocks at deceased just before the murder, that the county attorney imputed such testimony to the wrong witness was not error. *Redick v. State*, 83 Cr. R. 225, 202 S. W. 743.

14. — **Character of witness.**—In prosecution for murder, remark of district attorney that accused had not informed H., "one of the best men in the county" of the shooting, as to which fact there was no testimony, was not error. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

16. **Comment on evidence.**—In a prosecution for perjury, evidence that defendant got a certain female drunk on whisky which he was charged with having testified falsely to have bought from a certain person, having told the girl that he bought it one place but for her to say he got it somewhere else, being admitted without objection as *res gestæ*, it was proper for the district attorney to comment thereon. *Allen v. State*, 82 Cr. R. 416, 199 S. W. 633.

In prosecution for murder by shooting, argument by state's attorney that it was matter of common knowledge that shots are often deflected from straight course on striking object, held not error as improper comment, in absence of expert testimony. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In a prosecution for unlawfully carrying a pistol, where state's witness testified without objection that appellant was in possession of a pistol and struck witness on the head with it, and defendant testified that he had no pistol, but struck witness with a stick, the prosecuting attorney was warranted in making comment upon such evidence in his argument. *Patterson v. State*, 85 Cr. R. 643, 215 S. W. 308.

Where there was an issue of fact as to whether accused had indorsed a check delivered to an alleged coconspirator, and an admitted signature of the accused in evidence, court did not err in permitting the prosecuting attorney to discuss the comparison of signatures in his argument. *Miller v. State* (Cr. App.) 225 S. W. 262.

In a prosecution for manslaughter, where defendant filed an application for suspended sentence, as he had a right to do under the law, closing argument by the state's attorney that, whenever a man comes before the jury and asks for a suspended sentence, it is a plea of guilty, was improper. *Mason v. State* (Cr. App.) 223 S. W. 952.

In a prosecution for murder, argument for the state that defendant was going around and telling his various witnesses named in the argument what to swear in view of the testimony, held not seriously objectionable. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In a prosecution for wife murder, where, during the closing argument, the district attorney took the hammer which was in evidence as the weapon of the killing and said, "I do not know who explained it better than Dr. ——— himself, who on cross-examination stated that it occurred to him that she had been pecked from ear to ear with a blunt instrument," such argument, in view of the description of the wounds generally, was within the record, and the district attorney within his rights. *Pounds v. State* (Cr. App.) 230 S. W. 683.

Where defendant was adjudged insane by a commission purporting to act under Civ. St. arts. 150-156, 159-165, which act was subsequently declared unconstitutional, a remark by the prosecutor that the judgment was void, etc., was not error, for it was but a comment on facts which were before the jury; the judgment of insanity, etc., having been introduced. *Barton v. State* (Cr. App.) 230 S. W. 989.

Argument of prosecuting attorney assuming that whisky is intoxicating is proper. *Banks v. State* (Cr. App.) 230 S. W. 994.

In a prosecution for keeping and exhibiting a gaming table and bank for the purpose of gaming, where the prosecuting attorney on cross-examination of defendant had undertaken to develop the fact that defendant was living in a warehouse, it was proper for defendant's counsel in argument to jury to refer to the matter. *Roach v. State* (Cr. App.) 232 S. W. 504.

17. — **Deductions.**—In prosecution for unlawful gaming in a private residence, argument of counsel as to defendant, "He comes here and asks you to shield him behind a clause of the statute known as a place commonly resorted to," was not improper, being based on the evidence or inferences therefrom. *Cagle v. State*, 82 Cr. R. 347, 200 S. W. 153.

Remarks of counsel in argument which are legitimate deductions from and comment on various phases of the evidence are permissible. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

In a prosecution for seduction, argument of the assistant county attorney in substance that prosecutrix was corroborated by the birth of her child held erroneous. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

Circumstances in evidence in a homicide case, held to authorize the deduction, and so to authorize the prosecuting attorney in argument to intimate, that jealousy on account of a certain woman was at the bottom of the affair. *Gray v. State*, 88 Cr. R. 1, 224 S. W. 513.

In a prosecution for abortion, where there was testimony that her paramour told prosecutrix that he went to see defendant, and that he thereafter took her there, an argument by the prosecuting attorney that the paramour made a trip and arranged with the defendant for the operation was an inference or deduction from the evidence which is permissible. *Earnest v. State*, 87 Cr. R. 651, 224 S. W. 777.

Where defendant denied pawning a suit of clothes stolen by burglars, but the officer, who had been shadowing the man who pawned the clothes, testified that he knew defendant and that defendant was the man, the argument of the prosecuting attorney that the officer "knew defendant before then, \* \* \* I guess he did know him," was not erroneous. *Jones v. State* (Cr. App.) 229 S. W. 865.

Where there was evidence that defendant was the man who pawned a stolen suit of clothes and that the pawn ticket was signed by another name, the argument by prosecuting attorney that defendant signed a false name to the pawn ticket was a legitimate deduction from the testimony. *Id.*

It was improper for the state's attorney to argue that the fact that defendant had asked for a suspended sentence should be considered by jury on the issue of defendant's guilt or innocence. *Parker v. State* (Cr. App.) 232 S. W. 497.

18. — **Witnesses.**—Where witness had testified that he had been summoned, it was not error for prosecuting attorney to comment upon fact that he was not voluntary witness. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

District attorney's statement that the more he talked with the prosecuting witness the more he was impressed with her truth held not within the rule against giving testimony in the argument. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

Where defendant's motion for continuance on ground of absence of two witnesses was denied, and state thereafter produced one of the witnesses and admitted the facts to which the other would have testified, prosecutor's statement in argument that the state had found one of the witnesses and brought him to court, but were unable to find the other, and therefore admitted the truth of his testimony, was not objectionable. *Glascoe v. State*, 85 Cr. R. 234, 210 S. W. 956.

Argument of prosecuting officer, to the effect that defendant's former conviction and suspended sentence offered strong reasons why he might falsify his testimony, held justifiable. *Gordon v. State*, 86 Cr. R. 262, 216 S. W. 184.

19. **Challenge to opposing counsel.**—The prosecuting attorney's challenge to accused's counsel to submit case without argument disapproved. *Lancaster v. State*, 82 Cr. R. 473, 200 S. W. 167, 3 A. L. R. 1533.

20. **Opinion as to guilt.**—In trial for theft, district attorney's argument to the jury, stating the jury could tell by accused's looks that he was a thief and that he had lied held reversible error. *Thurman v. State*, 85 Cr. R. 276, 211 S. W. 785.

23. **Other offenses by accused.**—Argument of prosecuting attorney, in a prosecution for assault to murder, that "everybody was telling [the person assaulted] that P. C. had caused the death of D., and that there was such a suspicion that they, P. C., his wife, and defendant, J. P., were connected with the death of D., that shortly afterwards they left the state," was improper, when not based upon evidence. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

In a criminal trial, the discussion before the jury of evidence of other crimes introduced for the purpose of impeaching the defendant as a witness should not be extended to details not proved and not admissible. *Long v. State*, 84 Cr. R. 529, 208 S. W. 922.

In prosecution for failure to support wife and children, remarks of prosecuting attorney, referring to defendant as living in adultery with another woman, while his children at home were barefooted and cold, held, under the evidence, not to transcend the limitations upon a legitimate argument. *Morrison v. State*, 85 Cr. R. 20, 209 S. W. 742, 6 A. L. R. 1607.

In a prosecution for theft, where defendant testified on cross-examination that he had not been indicted in another county, and there was no testimony of such an indictment, a statement by state's counsel in closing that defendant had been so indicted was unauthorized and prejudicial, and the court's instruction not to regard it did not cure the error. *Beach v. State*, 85 Cr. R. 64, 210 S. W. 540.

In prosecution of restaurant keeper for failure to provide woman employes with suitable seats when not engaged in active duties, statement of attorney for state during argument to jury that defendant had sold rotten meat with maggots in it, where court refused to withdraw such remark on defendant's written request therefor, held ground for reversal. *Glances v. State*, 87 Cr. R. 158, 220 S. W. 95.

23½. **Conduct of accused at trial.**—Exercise by defendant of his right to interrogate the jurors during selection with reference to their fairness, if taken, should not be used as an argument against him before the jury as an inducement to bring about a conviction. *Garrett v. State*, 83 Cr. R. 364, 203 S. W. 598.

24. **Appeal to sympathy or prejudice.**—Under rules 39, 41, and 121 of Supreme Court, in prosecution for sale of intoxicants in prohibition territory, held, that argument of prosecuting attorney, threatening to indict jury for perjury if they did not convict,

was improper, calling for rebuke by court and special charge to disregard. *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

Where deceased's bloody clothing is admitted in evidence on a trial for homicide, it should not be used in the argument to inflame the minds of the jury. *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616.

That the county attorney in a larceny case, referring to defendant, said, "He is no account trifling negro," and asked the jury if they would like to credit him with \$20 did not constitute reversible error. *Watkins v. State*, 84 Cr. R. 412, 207 S. W. 926.

Inflammatory argument of prosecuting attorney, in a prosecution for assault to murder, not based upon evidence, held error. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

Argument of the prosecutor that deceased's family had been ruined and his wife and children forced into another state, held not of such inflammatory nature as to require or justify a reversal. *Gillespie v. State*, 85 Cr. R. 4, 210 S. W. 967.

Statements in argument of prosecuting attorney on trial of negro for killing a white man, as to negro murderers and rapists, matters not in evidence, condemned, as tending to impair fairness of trial. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

In a prosecution for murder, statements to the effect that the children of deceased were entitled to sympathy held not to call for a reversal. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

In statutory rape case, statement by attorney for the prosecution in his argument to the jury, "If this had been your baby, they would not be trying J. (defendant), they would be trying you for taking your shotgun and killing him, and the jury would be writing a verdict of 'not guilty' in large letters," held not within the scope of legitimate debate. *Carter v. State*, 87 Cr. R. 299, 221 S. W. 603.

Prosecuting attorney's apostrophe to the various members of deceased's family who were present contributing to the sympathetic effect of his closing address, calculated to arouse the jury's sympathy, is improper in a murder trial. *Lasater v. State* (Cr. App.) 227 S. W. 949.

In a prosecution for wife murder, the opening argument of the special prosecutor for the state, "and by imagination transplant yourselves with the bloody hammer and the whisp of mother's hair, and standing at the lonely grave of this mother write your verdict," though somewhat fervid, was not clearly calculated to prejudice defendant's rights. *Pounds v. State* (Cr. App.) 230 S. W. 683.

25. — **Enforcement of law.**—Argument that plea for suspended sentence should not be considered, as it would encourage others to commit crime, was improper, though it did not require reversal. *Williams v. State*, 82 Cr. R. 48, 198 S. W. 316.

Statements of prosecuting attorney, in argument, that if the jury turn defendant loose they might as well do away with law books, jail, and court, and throw away their money paid in taxes for expenses of court, are obnoxious to fair trial. *Garrett v. State*, 83 Cr. R. 364, 203 S. W. 598.

Argument of state's attorney in closing, "if this case does not furnish grounds for a conviction the door of the grand jury should be closed, the sheriff should retire, and the district judge resign," is not of a character to receive sanction of an appellate court. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In prosecution for assault to murder, it was improper for prosecuting attorney in his argument to state that "you ought to convict this defendant; \* \* \* the time has come \* \* \* when the citizens will rise up and say, 'We won't have our citizens butchered.'" *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

26. — **Effect of acquittal.**—In a prosecution for assault to murder, argument of prosecuting attorney, "Gentlemen of the jury, if you suspend this man's sentence, and let him go out, he may kill you or me," was improper. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

In a prosecution for seduction, argument of private prosecuting counsel, urging as a reason for conviction that prosecutrix's father and brother had not killed defendant, and that in case of acquittal they would be justified in doing so, held improper. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

29. **Abusive language.**—County attorney's argument calling attention to the class of witnesses defendant had placed on the stand, and naming one as "brought from the jail where he had been placed for pistol toting to testify on his behalf," was improper. *Barrett v. State*, 81 Cr. R. 496, 196 S. W. 824.

A special charge requested by defendant as to unwarranted language of county attorney in argument denouncing him a thief, as to which the court refused to take any action, should have been given. *Dodd v. State*, 82 Cr. R. 139, 198 S. W. 783.

In a prosecution for larceny, the state attorney's reference to appellant as a thief, "a two-legged wolf," and his asking the jury that if any one of them did not believe defendant guilty to stand on their heads, was undignified and improper. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

In trial for theft, district attorney's argument to the jury, repeatedly calling accused a thief, and stating the jury could tell by accused's looks that he was a thief and that he had lied, held reversible error as abusive and vilifying. *Thurman v. State*, 85 Cr. R. 276, 211 S. W. 785.

In prosecution for pander, remark by attorney for state in argument, "We want to get rid of such cattle as that," was improper. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

In prosecution for assault to murder, the county attorney should not have denounced defendant in argument as being "a cowardly cur"; comment of counsel should be confined to the record and legitimate deductions from the testimony. *Jupe v. State*, 86 Cr. R. 573, 217 S. W. 1041.

In prosecution for assault with intent to murder, county attorney's remarks that in his judgment no more brutal or dastardly attack had ever been made held no ground



for reversal, being merely a strong statement of his conclusion from the evidence. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

**30. Request for death penalty or refusal of suspended sentence.**—In prosecution for murder, statement of district attorney in argument that soon after he was elected he prosecuted a negro in another county, in which case the facts were similar to those in the present case, and that the jury assessed the death penalty, was erroneous. *Walker v. State*, 84 Cr. R. 136, 206 S. W. 96.

The argument of the county attorney that defendant, charged with assault to rape, should not be given a suspended sentence because he was guilty beyond question, was a man of mature age, and, if given a suspended sentence, might assault some other woman was not ground for reversal, where the evidence showed an assault with considerable violence and the exhibition of a pistol, and that he had been arrested for assault on another woman and accused of assaulting a third. *Shaw v. State*, 86 Cr. R. 520, 217 S. W. 942.

**31. Retaliatory remarks.**—Remarks of state's counsel, made in answer to argument of defendant's counsel, are not good grounds for reversal of conviction. *Johnson v. State*, 84 Cr. R. 566, 208 S. W. 931; *Hollingsworth v. State*, 82 Cr. R. 337, 199 S. W. 626; *Long v. State*, 82 Cr. R. 312, 200 S. W. 160; *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82; *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

In prosecution for incest with defendant's niece, his counsel's comment upon facts as proved held not invitation to state's counsel to discuss alleged letter from her to defendant, which was not in evidence. *Hollingsworth v. State*, 82 Cr. R. 337, 199 S. W. 626.

On murder trial, remark of counsel for state that he was not asking for defendant's conviction individually, but as the representative of law-abiding citizenship, held not prejudicial; it having been invited by statements of defendant's attorney. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In murder trial, where accused admitted killing and defendant's attorney had discussed law of circumstantial evidence, it was not error for state's attorney to state that defendant's counsel had stated rule of circumstantial evidence correctly, but that he should not have made argument because court had not charged on circumstantial evidence. *Id.*

In prosecution for wife desertion, where defendant's counsel urged jury not to assess fine which defendant's old father would have to pay, defendant cannot complain of argument of state's attorney urging jail penalty because fine would be paid by defendant's father. *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

In prosecution for burglary, district attorney's remark calling jury's attention to defendant's thievish appearance, asking jury to consider his appearance, etc., held not reversible error, having been occasioned by remarks of defendant's counsel. *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

In a prosecution for murder, argument by the district attorney that defendant's son had testified that defendant killed deceased did not constitute reversible error; it having been invited. *Curry v. State*, 85 Cr. R. 443, 213 S. W. 268.

Where state's counsel in his argument stated no facts outside of the record, and indulged in no personal abuse, accused cannot complain of statements which were but conclusions of the state's counsel combatting conclusions reached by counsel for the accused. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In homicide prosecution where defendant's counsel in closing argument several times stated to jury that he knew the defendant to be a good law-abiding man, that he knew deceased to be a bad and dangerous man, that he knew that deceased's killing of defendant's brother was a cold-blooded murder, and on the state's objection stated that "they don't want you to know the facts, they are not going to turn on the light," statements of prosecuting attorney in argument to jury that defendant's counsel should not have made such statements, and that such statements were not evidence, and that the defense should have put the defendant's reputation in issue instead of trying to testify to such matters in argument, held not ground for reversal. *Ray v. State* (Cr. App.) 225 S. W. 523.

In a prosecution for burglary at which a suit of clothes and some drugs were stolen, where defendant's counsel argued that defendant could not have sold the drugs and asked the jury what he would have wanted with them, the reply by state's counsel that he did not know whether defendant was an addict and may not have wanted to sell the drugs was not reversible error, though there was no testimony defendant was an addict or that the stolen drugs were narcotics. *Jones v. State* (Cr. App.) 229 S. W. 865.

In a prosecution for wife murder, argument of the district attorney that counsel for defendant, every lawyer in the courthouse, and his honor knew that until the defendant first put his character in issue the state could not prove a single scintilla as to his bad conduct, and that the argument of defendant's counsel was made to fool some juror with, held provoked by argument of defendant's counsel and in reply thereto. *Pounds v. State* (Cr. App.) 230 S. W. 683.

On a trial for murder, a remark of the state's attorney that a jury in the same county had assessed the death penalty against one conspiring to kill another exceeded the limits of proper argument, but did not call for reversal where it was in reply to argument of defendant's counsel that he would not be guilty of murder because he did not fire a shot, and he was given only a penalty of seven years; there being no request for charge to disregard the remarks. *Monday v. State* (Cr. App.) 232 S. W. 831.

**31½. Withdrawal or correction.**—A statement of the prosecuting attorney in his argument, to the effect that one of accused's attorneys went to the scene of the crime and got the parties to make certain tests, was not prejudicial to accused, where one of accused's attorneys objected for the reason that he was never at the place of the crime and state's attorney thereupon accepted his word and withdrew the statement. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

32. **Action by court.**—Improper argument of county attorney calling attention to fact that a witness for accused had been brought from jail to testify was not reversible, where the court sustained objection to it, and the prosecuting attorney promptly withdrew it. *Barrett v. State*, 81 Cr. R. 496, 196 S. W. 824.

Argument in which county attorney referred to defendant, his wife, son, and daughter-in-law as "him and his kind of cattle," held not reversible error, where court sustained objection, reprimanded county attorney, and told jury not to consider it. *Needham v. State*, 82 Cr. R. 78, 197 S. W. 988.

In prosecution for selling intoxicating liquors, statements in prosecuting attorney's opening argument referring to accused's reputation as a bootlegger, etc., held not to require reversal, where trial court instructed the jury to disregard remarks and lightest punishment was assessed. *Jeffries v. State*, 82 Cr. R. 42, 198 S. W. 778.

Any error in prosecuting attorney, referring, by inference in argument, to defendant as a bad man, when he had not put his reputation or character in issue, as to which court reprimanded and instructed, held immaterial. *Bivens v. State*, 82 Cr. R. 278, 198 S. W. 962.

In prosecution for giving intoxicating liquor to minor girl, it was reversible error for court not to admonish jury, where county attorney stated that defendant was indicted for rape; there being no evidence introduced to that effect. *Earnest v. State*, 83 Cr. R. 41, 201 S. W. 175.

In prosecution for assault to murder, resulting in conviction of aggravated assault if state was within rights in asking defendant whether he had been named as corespondent in assaulted person's divorce petition, court should have corrected injurious effect of question by withdrawing it on request. *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 897.

Improper argument of state's attorney held not so obviously prejudicial that its effect might not be withdrawn by a special charge; and, where trial court told jury not to consider other remarks by state's attorney and verbally reprimanded him, and withdrawal of remarks was not requested by a special charge, there was no reversible error. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

An argument of counsel may be withdrawn by special charges. *Id.*

Remark of state's counsel in murder trial that he was not asking for defendant's conviction personally, but as representative of law-abiding citizens, was not so improper as to render it incapable of withdrawal by special charge. *Borner v. State*, 83 Cr. R. 198, 204 S. W. 1003.

The court should promptly suppress illegitimate argument, based upon facts not introduced in evidence. *Cannon v. State*, 84 Cr. R. 479, 208 S. W. 660.

In a prosecution for theft, where defendant testified on cross-examination that he had not been indicted in another county, and there was no testimony of such an indictment, a statement by state's counsel in closing that defendant had been so indicted was unauthorized and prejudicial, and the court's instruction not to regard it did not cure the error. *Beach v. State*, 85 Cr. R. 64, 210 S. W. 540.

Argument of state's counsel as to relation between defendant, a negro, and boys who testified for him, not outside of the record, held not so prejudicial that they could not be withdrawn by special charges and not reversible error, where minimum penalty was imposed. *Marshall v. State*, 85 Cr. R. 131, 210 S. W. 798.

In homicide prosecution, prosecutor's statement during his argument that, "if the jury under the evidence in this case cannot convict the defendant, they might as well tear down the courthouse," and further statement that if defendant was convicted she would have the right to go to the Governor and ask him for a pardon, was not reversible error, where court instructed jury not to consider such statements. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

A statement by the district attorney that defendant was a burr-headed nigger held not prejudicial, the same having been withdrawn by the instructions of the court. *Adams v. State*, 86 Cr. R. 422, 216 S. W. 863.

In a prosecution for larceny from a wholesale grocery store, argument of the state's attorney, "The hour has struck for these thieves to be convicted to the penitentiary," held not so prejudicial as to justify reversal; the trial court having instructed the jury to disregard. *Marable v. State*, 87 Cr. R. 28, 219 S. W. 455.

The argument of counsel for the state that defendant killed an old man 61 years old with his leg shot off was not ground for reversal, though there was no evidence that deceased's leg was shot off, where there was evidence of his age, and that he limped and the court promptly told the jury to disregard the statement that his leg was shot off. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Improper argument of the prosecuting attorney, consisting of an impassioned appeal to convict defendant for reasons based on citizenship, is not reversible error, where the jury were charged to disregard the same, even though objections to the remarks were overruled. *Henderson v. State (Cr. App.)* 229 S. W. 535.

In a prosecution for murder, where the court instructed the jury not to consider the state's argument that the wife of deceased was a poor little poverty-stricken widow, and that no verdict rendered could restore deceased to life, etc., there was no error prejudicial to defendant. *Taylor v. State (Cr. App.)* 229 S. W. 552.

The harmful effect of information given the jury by innuendo and direct statement of state's counsel that accused was under indictment for theft of other automobiles than the one for which he was being prosecuted could not be counteracted by a special charge withdrawing it. *Hunt v. State (Cr. App.)* 230 S. W. 406.

Prosecuting attorney's statement to jury that "other juries have heretofore disbelieved such a defense as this defendant has interposed" held not ground for reversal, in view of written instructions that such argument was improper and should not be considered. *Seebold v. State (Cr. App.)* 232 S. W. 328.

In a prosecution for manslaughter, where the state's attorney, in argument to jury, told the jurors to consider the fact that defendant had asked for a suspended sentence

as affecting his guilt or innocence, court's refusal of request for instruction charging jurors not to consider such fact held error. *Parker v. State* (Cr. App.) 232 S. W. 497.

33. — **Erroneous instruction.**—Where the evidence connecting defendant with the murder was wholly circumstantial, an instruction that neither counsel had any right to discuss any fact or circumstance not in evidence, and that the jury should not be influenced by such discussion, was not equivalent to depriving defendant of the benefit of arguing and discussing the lack of guilty facts and circumstances. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

34. **Prejudice.**—In prosecution for murder, remark by district attorney while pointing to accused: "Look at his face. You have a right to look at his face. Gentlemen of the jury, that man is mad right now"—while improper, was not prejudicial error, in view of instruction to disregard it. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In a prosecution for assault to rape, a statement by prosecuting attorney: "It is a wonder to me he is sitting in this court house to-day." "If he had been a man of dark skin, he would not be here to-day"—was not prejudicial, where the court instructed the jury at defendant's request not to consider such remarks. *Beason v. State*, 84 Cr. R. 449, 208 S. W. 164.

Remarks and speeches of prosecuting attorney in argument held not to manifest that there was the fair trial guaranteed by the laws. *Newman v. State*, 85 Cr. R. 556, 213 S. W. 651.

In a prosecution for statutory rape, held that the conduct of the state's attorney in asking objectionable questions and in indulging in prejudicial argument was such as to deny defendant a fair trial and to necessitate reversal. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

In a prosecution for wife murder, closing argument of the district attorney, "has the defendant established to a reasonable and moral certainty that the deceased was killed by the jack," the claim of the state being that the killing was with a hammer by defendant and not by the kicking of the jack, held not prejudicial to defendant, in view of repeated instructions by the court as to the burden of proof, presumption of innocence, etc. *Pounds v. State* (Cr. App.) 230 S. W. 683.

Where defendant introduced an adjudication of insanity, but such judgment was void, the law under which it was passed having been declared unconstitutional, comments by the prosecutor on the invalidity of the judgment, if deemed improper, were not so obviously harmful that the error might not be counteracted by an instruction to disregard the same. *Barton v. State* (Cr. App.) 230 S. W. 989.

Though the evidence, as bearing on defendant's credibility, showed merely that he had been convicted of robbery, inaccurate statement of county attorney in argument that it showed he was convicted of robbery with firearms, having been promptly corrected, was not prejudicial. *Flores v. State* (Cr. App.) 231 S. W. 786.

The misquoting by one of the attorneys for the state of the testimony of a deceased witness where manifestly a mistake, and immediately corrected, is no ground for reversal; the jury being instructed to disregard it. *Russell v. State* (Cr. App.) 232 S. W. 309.

35. — **Cure by verdict.**—On a trial for murder, a remark of the state's attorney that a jury in the same county had assessed the death penalty against one conspiring to kill another exceeded the limits of proper argument, but did not call for reversal where it was in reply to argument of defendant's counsel that he would not be guilty of murder because he did not fire a shot, and he was given only a penalty of seven years; there being no request for charge to disregard the remarks. *Monday v. State* (Cr. App.) 232 S. W. 831.

37. **Necessity of objections or exceptions.**—If argument of the prosecutor was improper, objection should have been made to it in open court. *Gillespie v. State*, 85 Cr. R. 4, 210 S. W. 967.

38. **Necessity of request for charge.**—Unless remarks of counsel in argument are obviously of nature to impair rights of accused, they will not authorize reversal, though improper, in absence of special charge requesting their withdrawal. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003; *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939; *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772; *Barton v. State* (Cr. App.) 230 S. W. 989.

On trial for incest with defendant's daughter, remarks of district attorney concerning defendant held not such as could not have been cured, and hence defendant should have sought their withdrawal by a special charge. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

Where defendant's counsel privately stated to court that he excepted to remarks in argument of state's attorney, but did not request, verbally or in writing, that jury should be instructed not to consider such remarks, defendant cannot complain of them on appeal. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

Where the prosecution by an offer to admit a purported written statement of defendant's brother as to the homicide brought out the fact of the statement, and the attorney for the prosecution argued that the refusal of defendant to allow the same to be introduced warranted an inference that it was unfavorable, such argument was obviously so harmful that it would have been futile to withdraw it, so the fact that defendant, after his objection was overruled, did not request withdrawal of the same by special charge, was not a waiver of objection. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

In a misdemeanor case, special charges must be asked in writing directing the jury not to consider remarks made by prosecutor. *Lemcke v. State*, 86 Cr. R. 336, 217 S. W. 150.

Improper remark of counsel for state, referring to the testimony of an accomplice, "A grand jury of your county heard his statement, and upon his statement they have said he was guilty," held harmless, in the absence of a showing that accused endeavored to have a written special charge read to the jury withdrawing the remark; knowl-

edge that the witness testified before the grand jury being brought to the jury during the conduct of the trial in a legitimate manner. *Shaw v. State* (Cr. App.) 229 S. W. 509.

When an improper argument is used by the state, defendant can present to the trial court his request in writing that the jury be instructed that such argument in narrated respect is improper, and that the jury shall disregard it, which would present the matter in the Court of Criminal Appeals for review. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In a prosecution for having in possession intoxicating liquor not for medical, etc., purposes, in violation of the Dean Law, argument of state's counsel, when he had before him three bottles, two containing the liquor in question and one empty, also a funnel, "Look at that stuff, put a pistol beside it, then you would have a picture of unlawful weapons," held not so materially injurious to defendant as to require reversal in the absence of request for instruction that the jury do not consider it. *Rainey v. State* (Cr. App.) 231 S. W. 118.

#### Art. 726. [706] Defendant's right to sever on trial.

See *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Cited, *Jenkins v. State*, 30 Tex. App. 379, 17 S. W. 938.

In general.—Orders overruling one defendant's motion to sever from another, and granting latter's motion that the former be tried first, deprived first defendant of no right given by this article, and, there being no agreement between defendants as to order of trial, court, under art. 727, was authorized to direct it. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

#### Art. 727. [707] Same.

See *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Cited, *Parker v. State*, 24 Tex. App. 61, 5 S. W. 653.

In general.—Orders overruling one defendant's motion to sever from another, and granting latter's motion that the former be tried first, deprived first defendant of no right given by art. 726, entitling him to separate trial, and, there being no agreement between defendants as to order of trial, court, under this article, was authorized to direct it. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

Right to severance.—In view of Pen. Code, art. 91, and Code Cr. Proc. art. 791, defendant, charged by information with unlawful assembly, codefendants being charged therewith by separate informations, having complied with this article, in making his application for severance, trial court was without discretion to overrule it without sufficient reasons, shown in record. *Ligon v. State*, 82 Cr. R. 147, 198 S. W. 787.

The granting of motion for severance at a previous term was not res judicata, and the trial judge could grant a motion of the other defendant for severance and change the order of trial, especially where the second defendant was sick and could not be tried. *Young v. State*, 84 Cr. R. 232, 206 S. W. 529.

Where the cases of defendants indicted for same crime were pending in separate counties and different jurisdictions, the trial court did not err in overruling the application of one for a severance, since in such case the granting of the motion would have amounted to a continuance. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

#### Art. 728. [708] Order in which they will be tried, etc.

In general.—Where separate trials were ordered, it was not error to deny a motion that the defendant, who was sick in bed, be tried first, where to grant the motion would have required continuance. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

#### Art. 729. [709] May dismiss as to one who may be witness.

See *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

In general.—Where two men were indicted for arson, but the county attorney sought dismissal as to one defendant, the other could not complain that the failure to try the codefendant without immunity resulted in depriving him of his codefendant's testimony. *Johnson v. State*, 82 Cr. R. 82, 197 S. W. 995.

#### Art. 732. [712] In such case court may commit, when.

See *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

#### Art. 734. [714] The jury are judges of fact.

Cited in dissenting opinion, *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207; *McGlothlin v. State*, 82 Cr. R. 374, 198 S. W. 784, L. R. A. 1918C, 530; *Galaviz v. State*, 82 Cr. R. 377, 198 S. W. 946.

In general.—In prosecution for burglary, the jurors were the judges of the facts. *Connor v. State*, 85 Cr. R. 98, 210 S. W. 207.

The application of the law to the facts was for the jury. *Lucas v. State* (Cr. App.) 225 S. W. 257.

Questions of law and fact.—In a perjury prosecution, where there was evidence that there was somewhat of an understanding between defendant and certain witnesses that they should lie before the grand jury, it was error not to submit the question as to whether the witnesses were accomplices to the jury. *Melton v. State*, 81 Cr. R. 604, 197 S. W. 715.

Question of defendant's guilt, testimony being conflicting, was for jury. *McHam v. State*, 81 Cr. R. 623, 197 S. W. 873.

Wherever a plea of former jeopardy is interposed, and facts are introduced in its support, court should submit it to jury. *Villareal v. State*, 82 Cr. R. 327, 199 S. W. 642.

If there is issue as to whether defendants acted together as principals, court should

submit question to jury for their decision under appropriate instructions. *Bennett v. State*, 83 Cr. R. 268, 202 S. W. 730.

Where two persons were killed in one transaction, the fact that more than one shot was fired does not, as a matter of law, render it insusceptible of proof that both were killed by one act, in one case intentional and in the other accidental, since a series of shots may be fired with one volition. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

If there is some evidence which supports the theory of adequate cause, and that a killing was on account of passion arising therefrom, the court is not the judge of its possible truth, and should leave it to the jury. *Nelson v. State*, 84 Cr. R. 219, 206 S. W. 361.

If there is some evidence which supports the theory of adequate cause, and that a killing was on account of passion arising therefrom, the court is not the judge of its possible truth, and should leave it to the jury, submitting the issue of manslaughter in an instruction. *Id.*

In homicide prosecution, the truth or falsity of defendant's testimony raising issue of whether he acted under immediate influence of sudden passion is a question for the jury, under appropriate instructions, and not for the trial court. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

In murder trial the question whether accused intended to provoke deceased to assault him, and whether what accused did and said was reasonably calculated to so provoke deceased, held for the jury, despite accused's statement that he had no intention to kill or to provoke the difficulty with deceased. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

In murder trial the question whether accused's mind was in a condition rendering him incapable of cool reflection held for the jury. *Id.*

In a criminal prosecution, the matter of defendant's age, raised by his affidavit of juvenility, was for the court alone. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

In a homicide prosecution the question of sanity is one for the jury. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In a prosecution for murder committed by striking deceased with a stick, in which the indictment described the stick with unnecessary particularity, evidence held such that the identity of the stick and its dimensions as meeting those set out in the indictment were questions for the jury. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a prosecution for murder, question as to whether defendant's acts and statements were for purpose of provoking attack was for the jury. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

Whether the evidence of the accused be true or false is a question for the jury under proper instructions. *McCormick v. State*, 86 Cr. R. 366, 216 S. W. 871.

In a prosecution for murder, it was not error to submit to the jury question whether certain admissions by defendant, when brought from jail to execute his appearance bond, were made while he was under arrest, the jury to disregard such statements if they should find that he was under arrest, but to consider them if he was not then under arrest; the question being a close one as to the facts. *Jones v. State*, 86 Cr. R. 371, 216 S. W. 884.

In a prosecution for the illegal sale of intoxicating liquors, the credibility of the witnesses is for the jury. *Surginer v. State*, 86 Cr. R. 438, 217 S. W. 145.

In prosecution for murder, question of whether deceased's daughter, with whom defendant was at time of killing, had been kept away by defendant, and whether daughter was a probable witness, so as to constitute defendant a principal, held questions of fact for jury. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

In prosecution for murder, question of whether at the time of the killing by person other than defendant, defendant was doing his part in furtherance of a common design to murder held for the jury under the evidence. *Id.*

In the prosecution of a constable for embezzlement of funds given him by a third person to pay a fine to the justice of the peace for gambling, evidence that both the justice and defendant made collection of fines and costs, and that each had a claim against the other, held to create an issue of fact as to whether defendant had a right to retain any of the funds collected as an offset to funds in the hands of the justice belonging to the defendant. *Morrow v. State*, 87 Cr. R. 287, 220 S. W. 1098.

In a prosecution for rape of a woman claimed to be mentally unsound, the court should have submitted the question of insanity to the jury by appropriate instructions. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

In a prosecution for rape of a daughter under 18 years of age, held, that it was the duty of the trial court to submit the case to the jury. *Higgins v. State*, 87 Cr. R. 424, 223 S. W. 241.

In prosecution for placing poison in water with intent to injure another, whether defendant's wife was a conspirator, acting with defendant in an effort to kill such person, or seriously injure him by poisoning him, held a question for the jury, under instructions from the court. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

Whether mental condition exists, which will render a killing manslaughter, and whether causes in evidence are such as are calculated to produce such passion in the mind of an ordinary person, are questions of fact for the jury, and are not to be decided by the court. *Steen v. State* (Cr. App.) 225 S. W. 529.

In prosecution for assault with intent to commit robbery, in which defendant claimed that he was merely attempting to enforce payment of debt owed him by prosecuting witness, the question of whether defendant's claim was made in good faith or as a pretext to cover fraudulent intent held for the jury. *Barton v. State* (Cr. App.) 227 S. W. 317.

In prosecution of passenger for murder of street car conductor, in which it was claimed that the conductor had committed an assault on the passenger by pushing him off the car while it was in motion, and that such assault was sufficient to reduce the

crime to manslaughter, the question of whether the assault caused the passenger to suffer pain held for the jury. *Mickle v. State* (Cr. App.) 227 S. W. 491.

In prosecution of passenger for murder of conductor, in which it was claimed that conductor had pushed passenger off moving car, question of whether such assault produced in the passenger's mind a sudden passion of fear, rage, or resentment and rendered it incapable of cool reflection, and whether the passenger killed the conductor while under the influence of such sudden passion, held questions for the jury. *Id.*

In a prosecution for robbery, where the indictment laid ownership in one having custody of the property, the failure to submit the question of ownership held not error; the undisputed evidence establishing the same. *Guyon v. State* (Cr. App.) 230 S. W. 408.

In a prosecution for bigamy, whether at the time accused entered into the bigamous marriage he was under mistaken belief that his first wife had been divorced from him and whether in acting upon the mistake of fact he used proper care held a matter for the jury. *Busby v. State* (Cr. App.) 230 S. W. 419.

If there is evidence which, however weak or inconclusive it may seem to the court, tends to prove facts from which the jury may deduce a finding of manslaughter, it is error to fail to charge on it. *Lewis v. State* (Cr. App.) 231 S. W. 113.

In prosecution for unlawfully carrying a pistol, defended on the ground that defendant was a traveler at the time of his arrest, and as such entitled to carry a pistol, the question of whether defendant's journey had ceased, or had been deflected from, at the time of his arrest, held for the jury. *Witt v. State* (Cr. App.) 231 S. W. 395.

— **Admissibility of evidence.**—Whether a confession is voluntary is, on conflicting evidence, for jury for solution. *Williams v. State* (Cr. App.) 225 S. W. 177; *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853; *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

Where a confession was signed by defendant in presence of district attorney, only the question of its voluntary character was for the jury. *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

No error appears in admission of written confession on its face filling legal requirements, when the prosecuting attorney before whom it was made testified that proper legal warning was given, and that no promise or threat was made, and that the confession was freely and voluntarily made, especially where the court submitted to the jury the question whether the confession was freely and voluntarily made. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Where defendant whose statement is introduced in evidence presents evidence denying that he was warned it would be used against him, or denying its voluntary character, the question of the voluntary character of the statement must be submitted to the jury. *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308.

Where there is doubt as to whether victim at time of making dying declaration believed he was in danger of death in such manner as required by statute, the question should be submitted to the jury. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

In homicide prosecution, where defendant testified that he was induced to sign confession by sheriff's promise of release and immunity from prosecution, court, upon defendant's request, should have submitted question of whether confession was voluntary. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

What is an arrest or custody is a question of law, and under this article, the evidence being uncontroverted and raising no issue of fact, it is for the court to decide whether confession was made while accused was in the custody of an officer, relative to its admissibility under article §10. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

Where the single fact which would render a confession or declaration of one accused of robbery admissible was the identity of the property found by reason of a declaration or confession with that taken, it was the duty of the court to submit to the jury this question of fact and make the admissibility of the question depend on its solution by the jury; the identity of property found with that stolen being a controverted fact. *Hilliard v. State*, 87 Cr. R. 416, 222 S. W. 553.

**Review.**—Credibility of witnesses and weight to be given their testimony is for jury and conviction cannot be reversed because appellate court would have found differently from jury. *Johnson v. State*, 83 Cr. R. 61, 200 S. W. 832.

Issue as to sale of whisky in local option territory having been submitted to the jury in a charge not complained of, their finding upon conflicting evidence, approved by the trial court, will not be disturbed. *Jacobs v. State*, 84 Cr. R. 564, 208 S. W. 917.

### Art. 735. [715] Charge of court to the jury.

See *Benavides v. State*, 31 Cr. R. 173, 20 S. W. 369, 37 Am. St. Rep. 799; *White v. State*, 33 Cr. R. 94, 25 S. W. 290; *Flores v. State*, 86 Cr. R. 235, 216 S. W. 170; *Walker v. State* (Cr. App.) 229 S. W. 527.

#### 1. NECESSITY, NATURE, REQUISITES AND SUFFICIENCY OF CHARGE

½. **Construction of statute in general.**—Acts 35th Leg. c. 177 (Civ. St. art. 1974), does not amend procedure in criminal cases, which is embodied in Acts 33d Leg. c. 138 (Code Cr. Proc. arts. 735, 737, 737a, 743). *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

1. **Law applicable to case in general.**—A charge should not be given in a criminal case unless there is evidence to raise the issue submitted. *Merritt v. State*, 85 Cr. R. 565, 213 S. W. 941; *Green v. State*, 84 Cr. R. 162, 205 S. W. 988; *Barrett v. State*, 86 Cr. R. 101, 215 S. W. 858; *Grissom v. State*, 87 Cr. R. 465, 222 S. W. 237.

It is a duty of the trial court to charge on all the issues made by the testimony, no matter whether the same are raised by the testimony of the accused or some other witness. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175; *McCormick v. State*, 86 Cr. R. 366, 216 S. W. 871; *Thurogood v. State*, 87 Cr. R. 209, 220 S. W. 337

The charge must follow the allegations in the indictment and submit only for the consideration of the jury such allegations. *Miller v. State*, 81 Cr. R. 237, 195 S. W. 192.

An instruction to convict if defendant became unlawfully indebted to the bank of which he was president, without stating that he must have become indebted through a secret partnership alleged in the indictment, held erroneous. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

Whether or not the jury might believe the testimony of a defendant, he is entitled to have the case passed on the facts as shown, under appropriate instructions. *Collins v. State*, 82 Cr. R. 24, 198 S. W. 143.

Notwithstanding evidence was conflicting, where it was sufficient to raise an issue in state's behalf, it had a right and it was duty of court to submit such issue. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

The charge of the court must conform to the charges contained in the indictment. *Moore v. State*, 84 Cr. R. 256, 206 S. W. 683.

In view of presumption of innocence, evidence establishing facts which, if true, would mitigate or excuse assault to murder, required an instruction on the law applicable thereto, regardless of the source from which the evidence came, and notwithstanding it presented a defensive theory out of harmony with that advanced by defendant. *Knight v. State*, 84 Cr. R. 395, 207 S. W. 315.

It is error to charge on issue adverse to defendant, when issue is not suggested or raised by facts. *Cannon v. State*, 84 Cr. R. 504, 208 S. W. 339.

Refusal to charge on manslaughter cannot be justified on the ground that the defendant said he shot in self-defense, since defensive issues arise from the whole case and are not controlled by the evidence of accused. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In a criminal prosecution wherever the evidence presents an issue or theory favorable to the accused, the trial court should fairly and freely submit such issue for the consideration of the jury under appropriate instructions. *Jones v. State*, 86 Cr. R. 371, 216 S. W. 884.

In a case in which the evidence raises the defensive theory in an affirmative way, it is incumbent upon the court to so submit it. *Escobedo v. State* (Cr. App.) 225 S. W. 377.

The charge must always be conformed to the facts and issues arising in a particular case on trial. *Aycock v. State* (Cr. App.) 225 S. W. 1099.

In a prosecution for statutory rape, where prosecutrix testified positively to but one act of intercourse between defendant and herself at a fixed date, and defendant positively denied any such act at any time, the trial court did not err in not telling the jury they could not convict if the act took place before the law raising the age of consent to 18 years became effective, since there must be some substantial evidence calling for an instruction before it becomes the court's duty to instruct. *Brooks v. State* (Cr. App.) 227 S. W. 673.

In a prosecution for theft of an automobile, where identity of an automobile taken from accused's wife by the deputy sheriff and shipped into the state with the stolen car was vital to state's case, trial court was not warranted in refusing to read to the jury a special charge affirmatively presenting this phase of the law. *Hunt v. State* (Cr. App.) 230 S. W. 406.

All defenses clearly raised should be affirmatively submitted. *Horn v. State* (Cr. App.) 230 S. W. 693.

In a prosecution for murder, resulting in conviction of manslaughter, where the court charged submitting the issue of provoking the difficulty from the standpoint of the state, in connection therewith the converse of the charge on defendant's request should have been fully submitted. *Garner v. State* (Cr. App.) 231 S. W. 389.

In a prosecution for aggravated assault, it was not error for the main charge to fail to instruct on the law applicable to defendant's right to defend his daughter, where there was no evidence requiring such a charge. *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

The accused in a criminal case is entitled to have his theory presented pertinently, plainly, and affirmatively. *Smith v. State* (Cr. App.) 232 S. W. 811.

**4. Application of law to facts.**—See *Ice v. State*, 83 Cr. R. 509, 208 S. W. 343.

In prosecution of bank president for unlawfully borrowing money through a loan made to a firm of which he was a secret member, held error to instruct on the law of partnership without applying such law to the facts. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

Instructions of a court in criminal cases should not contain abstract propositions of law, as they might mislead. *Reagan v. State*, 84 Cr. R. 468, 208 S. W. 523.

**7. Definition of offense.**—An instruction that if defendant, by any means set out in statute on pandering, caused a certain woman to enter or remain in house where prostitution was encouraged or allowed, he would be guilty of pandering, is erroneous, where many means enumerated in statute were not charged nor proven. *Briscoe v. State*, 81 Cr. R. 419, 196 S. W. 183.

In prosecution for statutory rape, where the indictment charged that prosecutrix was under 15 years of age, a charge that "In so far as the charge in this case is concerned, rape is the carnal knowledge of a female under the age of 15 years, other than the wife of the person having such carnal knowledge" was not error, for if the case as pleaded in the indictment meets the requirements of the law a charge conforming thereto is also good. *Young v. State* (Cr. App.) 230 S. W. 414.

**8. Offenses or counts thereof alleged.**—State, through trial judge, having selected second count of indictment as that on which jury should pass, charge should have submitted issues under allegations of such count. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

9. **Definition or explanation of terms.**—Where count charging fornication while living together was abandoned, case being submitted only on count charging offense without living together, accused held not entitled to have term "living together" defined in charge. *Mosley v. State*, 82 Cr. R. 16, 198 S. W. 146.

In prosecution for sale of intoxicants in prohibition territory, held, that court's failure to define felony, in charging on jury's right to recommend suspended sentence, was not erroneous; proof showing defendant had never been convicted of felony. *Flores v. State*, 82 Cr. R. 107, 198 S. W. 575.

In prosecution for perjury, court on request should have given charge defining words "willfully" and "deliberately" in connection with perjury. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

In a prosecution for murder, an instruction as to malice aforethought was not erroneous in failing to define the terms "will in law justify, excuse or extenuate the homicide," and "without just cause or excuse." *McDougal v. State*, 84 Cr. R. 424, 208 S. W. 173.

In prosecution for burglary of barn in nighttime, indictment merely charging entry by breaking, trial court did not err in simply telling jury that, if defendant entered by force, he was guilty, omitting to define "breaking." *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

In a prosecution for wife desertion, the words "justification," "destitute," and "necessitous," used in the statute and the charge, did not require explanation or definition by the court. *Turner v. State*, 84 Cr. R. 605, 209 S. W. 406.

In a prosecution for obstructing a public road, the definition of "willful" by the court in his charge that by the term it was meant that defendant knew at the time of the alleged obstruction that the road was public, and that the obstruction was placed, if it was obstructed, with an evil intent, held sufficient. *Howard v. State*, 86 Cr. R. 288, 216 S. W. 168.

In prosecution for bigamy involving issue of whether defendant was married to alleged first wife, instruction that "agreement to become husband and wife may be expressed or implied," and that an "implied agreement" is one "where the conduct of the parties with reference to each other and the subject-matter is such as to induce the belief, if any, that they mutually intend to do that which their acts indicate they have done," held not misleading, in view of evidence and special charges given, notwithstanding use of term "implied agreement," such term as used merely denoting the character of evidence by which the agreement was to be established. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

In a prosecution for robbery, where the indictment alleged that the property stolen was money, and the evidence showed it was \$20, \$10, and \$5 bills, it was unnecessary for the court in its charge to define money for the term money must be presumed lawful money of the United States. *Guyon v. State* (Cr. App.) 230 S. W. 408.

In a prosecution for homicide, where it appeared that deceased objected to defendants' aiding their companion when he requested them to pull off the third person who was beating him, a requested special charge that, if deceased interfered, defendants were entitled to use such force as was necessary to prevent him from interfering with their aid, was misleading in not defining the term "interfering" particularly, where it did not appear whether the interference was merely verbal or not. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

12. **Presumptions, burden of proof and reasonable doubt.**—See notes under art. 785.

14. **Time and place of offense.**—In a prosecution for incest, refusal to amend an instruction authorizing conviction if act of intercourse took place "on or about the day alleged in the indictment," by stating the jury must believe the act to have occurred within three years anterior to filing of indictment, was error, where there was evidence of an act more than three years prior thereto. *Wingo v. State*, 85 Cr. R. 118, 210 S. W. 547.

In a prosecution for the theft of cattle, evidence that the cattle were pastured in the county in which the prosecution was begun and were thereafter traced to defendant's possession in another county, without any direct evidence of the taking of the cattle in the county of the prosecution, required the submission to the jury of the issue of venue. *Stiles v. State* (Cr. App.) 232 S. W. 805.

19. **Limitations.**—In a prosecution for violating local option law, where the defense of limitations was interposed, the court should have instructed that, if the liquor was obtained on the date claimed by defendant, they should acquit, or, if they had a reasonable doubt, they should acquit; it not being sufficient to charge with reference to limitations generally. *White v. State*, 83 Cr. R. 555, 204 S. W. 231.

20. **Insanity or intoxication.**—See notes under Pen. Code, arts. 39-41.

In a prosecution for manslaughter, it was not error, where the evidence failed to show that defendant had never been adjudged insane or that his insanity, if any, was permanent, to refuse to charge on the presumption of insanity at the time of the offense. *Holland v. State*, 84 Cr. R. 144, 206 S. W. 88.

In a criminal prosecution, where there was evidence that defendant was under the influence of intoxicating liquors, it was error to refuse to instruct following the statute (Pen. Code, art. 41), that, while intoxication or temporary insanity therefrom would not excuse the offense, it should be considered in mitigation of penalty. *Haag v. State*, 86 Cr. R. 604, 223 S. W. 472.

Where defendant pleaded guilty to assault with intent to murder, and no evidence was introduced at the hearing for assessment of penalty tending to show insanity at the time he committed the offense, it was not error for the trial court to refuse to submit that issue, though accused had some time subsequent to his plea of guilty filed with the clerk a written plea of insanity. *Taylor v. State* (Cr. App.) 227 S. W. 679.



22. **Alibi.**—On trial for theft of automobile, evidence held to justify instruction on alibi. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

In trial for assault to murder, evidence held to require instruction on alibi. *Soria v. State*, 83 Cr. R. 343, 203 S. W. 57.

An instruction on principals that: "If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense was actually committed or not"—was properly given, although defendant was attempting to prove an alibi. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

Where the state claimed that there was a conspiracy to rent an automobile and kill the chauffeur, testimony of accused that he accompanied the automobile party, and that the killing took place while he was at a house 100 yards away, the automobile having stopped, did not call for an instruction on the issue of alibi. *Id.*

In a prosecution for homicide, where the evidence was wholly circumstantial, and there was substantial evidence of alibi, and also to effect that others might well have killed deceased, the failure of the court to present to the jury such questions of defense, as well as its failure to instruct that, if the jury had a reasonable doubt on the evidence as to whether any other person than defendant killed deceased, they should acquit, was error. *James v. State*, 86 Cr. R. 107, 215 S. W. 459.

The mere fact that defendant denied her guilt of burglary of a county poor farm, and stated she was not at the farm after a certain date about a month before the alleged burglary, did not necessarily warrant a charge on alibi, where she did not attempt to state where she was on the date of the burglary, nor show such fact by any evidence. *Ripsey v. State*, 86 Cr. R. 539, 219 S. W. 463.

23. — **Sufficiency.**—In trial for assault to murder, instruction that, if evidence raises or leaves reasonable doubt as to accused's presence at scene of difficulty at time it occurred, to acquit defendant and say by verdict not guilty, was sufficient in form. *Soria v. State*, 83 Cr. R. 343, 203 S. W. 57.

In a seduction case, an instruction, "If you believe from the evidence that the offense charged was committed, and that the prosecutrix had sexual intercourse with some male person, or if you have reasonable doubt as to whether defendant was present at the time or not, you will give him the benefit of such doubt and find him not guilty," held sufficient to justify refusal of a special charge requested, which presented the law of alibi no more clearly than the given charge. *Hunt v. State*, 85 Cr. R. 622, 214 S. W. 983.

26. **Acts and declarations of conspirators and codefendants.**—If conspiracy is shown or defendants acted together, court is authorized to charge on that phase of law, though charge would be erroneous if such evidence was not in case. *Bennett v. State*, 83 Cr. R. 268, 202 S. W. 730.

In a prosecution for homicide committed as the result of an alleged conspiracy to assault deceased, it was error to fail to charge that acts and declarations of a conspirator in defendant's absence was inadmissible to establish a conspiracy. *Holland v. State*, 84 Cr. R. 144, 206 S. W. 88.

In a prosecution for manslaughter resulting from an alleged conspiracy to whip deceased, an instruction that the acts and declarations of conspirators could only be considered on the question of intent was improper, as being too restrictive. *Holland v. State*, 84 Cr. R. 154, 206 S. W. 89.

In a criminal case, where evidence of the acts or declarations of a coconspirator have been admitted and where the issue of conspiracy is contested, the court must affirmatively charge the jury that they must not consider, as against the accused, the acts or declarations of the alleged coconspirator, unless it be shown beyond a reasonable doubt that there was in fact a conspiracy, or an acting together of the parties in such criminal enterprise. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

27. **Accomplices and testimony thereof.**—See notes to art. 801, post.

28. **Admissions and confessions.**—See notes under art. 810, post.

29. **Purpose and effect of evidence.**—In prosecution for perjury, where state introduces proceedings in trial on which perjury was committed, if result of such trial was adverse to testimony of defendant charged with perjury, court must limit effect of evidence, otherwise such charge is unnecessary. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

In prosecution for wife murder, declarations of deceased showing her state of mind toward defendant are admissible, but the scope of such evidence should be limited to such purpose, and not used as proof of the facts stated. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

31. — **Limiting effect of impeaching evidence.**—An instruction that the fact that a witness was indicted could be considered alone upon the question of his credibility held sufficient to limit impeaching testimony. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

Court did not err in failing to limit in his charge to the jury testimony offered by accused to impeach a state witness. *Lowe v. State* (Cr. App.) 246 S. W. 674.

33. — **Limiting proof of other offense.**—In a prosecution for slander of a female, it is proper to admit testimony as to statements by accused at different times from that alleged, as tending to show that statement for which he is prosecuted was wantonly and maliciously made; but the court must instruct that jury cannot consider such evidence for any other purpose, and that it should not be considered at all unless it has been shown to the satisfaction of the jury beyond a reasonable doubt that such statements were in fact made. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

In prosecution for passing forged instruments, where there was evidence of collateral transactions in which defendant had passed similar forged instruments, instructions held to limit jury's consideration of such evidence to proof of forgery and guilty knowledge. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

An admission drawn from accused, in a prosecution for theft from the person, that he had been arrested for arson, was available only for impeaching purposes, and it was error for the court not to so instruct the jury. *Rosa v. State*, 86 Cr. R. 646, 218 S. W. 1056.

In prosecution for automobile theft, where there was testimony by police officers who had arrested defendant for theft of tool joints, after having driven to scene of crime in the stolen automobile, the testimony of such officers should be appropriately limited in the charge of the court. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

In a prosecution for theft of one head of cattle, if evidence is admitted that other stolen cattle were found in possession of the accused, aside from that alleged in the indictment, the court must not only limit the jury's consideration of such evidence to one of the well-settled exceptions to the rule concerning proof of commission of other crimes, but should also instruct the jury that they can consider same for no purpose, unless they believe beyond a reasonable doubt that such property was stolen within the definition of that term. *McClain v. State* (Cr. App.) 229 S. W. 550.

In a prosecution for theft of one head of cattle, if evidence is admitted that other stolen cattle were found in possession of the accused aside from that alleged in the indictment, the court must limit the jury's consideration of such evidence to one of the well-settled exceptions to the rule concerning proof of commission of other crimes. *Id.*

36. **Circumstantial evidence.**—Failure and refusal to charge on circumstantial evidence on trial for theft held error where there was no evidence other than circumstantial. *Henderson v. State*, 81 Cr. R. 620, 197 S. W. 869; *Johnson v. State*, 82 Cr. R. 585, 200 S. W. 522; *Smiley v. State*, 87 Cr. R. 528, 222 S. W. 1108.

Where evidence establishing defendant's guilt was circumstantial, it was necessary for court to give charge on subject. *Love v. State*, 82 Cr. R. 411, 199 S. W. 623; *Renfro v. State*, 82 Cr. R. 197, 198 S. W. 957; *Bell v. State*, 84 Cr. R. 197, 206 S. W. 516.

Court held justified in not charging law of circumstantial evidence. *Castoreno v. State*, 82 Cr. R. 592, 200 S. W. 401; *Ellis v. State*, 85 Cr. R. 529, 213 S. W. 264.

Evidence held to bring one accused of burglary in such juxtaposition to the offense as to render unnecessary instruction upon circumstantial evidence. *Soders v. State*, 81 Cr. R. 506, 195 S. W. 1146.

An instruction that if the jury believed a statement of accused they should acquit but that the falsity thereof need not be proven by positive testimony, but might be "shown to be false by circumstantial evidence," was not error. *Gold v. State*, 81 Cr. R. 611, 197 S. W. 1110.

Testimony on prosecution for theft from the person held to be equivalent to direct testimony of the taking, so that instruction on circumstantial evidence was not necessary. *Cleveland v. State*, 82 Cr. R. 439, 200 S. W. 152.

In prosecution for hog theft, evidence held to connect accused with offense as principal, so that it was not error to fail to instruct on law of circumstantial evidence. *Wilson v. State*, 83 Cr. R. 593, 204 S. W. 321.

In prosecution for selling intoxicants, where, to overcome testimony of purchaser and of defendant and his wife, and to establish sale, state relied on circumstances, and in reaching conclusion of guilt jury should have been guided by charge as to law of circumstantial evidence, refusal of the court to so instruct was error. *Canales v. State*, 84 Cr. R. 212, 206 S. W. 347.

In abortion case, where prosecuting witness testified fully to acts and conduct of both defendant and physician procured by defendant to perform abortion, court properly refused a special charge setting forth law of circumstantial evidence. *Hammett v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

In a murder trial, there being evidence that accused was driving the automobile from which his son shot deceased, but no evidence that accused said anything to his son, or did anything except drive the car at time of the killing, and the alleged fact that he advised or encouraged the killing resting only on inference from facts shown, it was accused's right to have the jury instructed on circumstantial evidence, that in applying such inferences the supporting facts must be consistent with each other, consistent with accused's guilt, inconsistent with his innocence, and inconsistent with any reasonable hypothesis save guilt, and to have the jury know that the trial judge recognized there was no direct evidence that accused either advised or encouraged the killing. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

Where the facts proven are in such close relation to the main fact as to make them equivalent to direct testimony, a charge on circumstantial evidence is unnecessary. *Id.*

There being, on prosecution for theft of a car, afterwards recovered from H., no direct testimony that it was the one testified to as having been sold by defendant to H., charge on circumstantial evidence should have been given. *Moore v. State*, 85 Cr. R. 573, 214 S. W. 347.

In a prosecution for embezzlement where there was direct evidence that accused received the money in his official capacity, but his conversion thereof was only shown by inferences from the accounts kept by him, it was error to refuse a requested charge on the question of conviction on circumstantial evidence alone. *Miller v. State* (Cr. App.) 225 S. W. 379.

In a prosecution for embezzlement of funds intrusted to defendant as cashier and bookkeeper, it was error to omit the charge on law of circumstantial evidence. *Miller v. State* (Cr. App.) 225 S. W. 382.

Where the facts showing the burglary were proven only by circumstances, and the identity of the accused was also dependent upon the same character of testimony, largely relating to the color of his clothes, it was reversible error not to submit the law of circumstantial evidence. *Moore v. State* (Cr. App.) 229 S. W. 508.

In a prosecution for homicide, where both of the defendants took part in the fatal killing, a charge on circumstantial evidence was unnecessary. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

38. — **Admissions and confessions by accused.**—Where an undisputed confession of defendant was in evidence, and his objections thereto on the ground that it was secured by improper methods were overruled, refusing a charge on circumstantial evidence was proper. *Johnson v. State*, 82 Cr. R. 82, 197 S. W. 995.

A charge on circumstantial evidence held required in burglary, where defendant confessed not that he broke G.'s store, but had his goods and got them from his store. *Winn v. State*, 82 Cr. R. 316, 198 S. W. 965.

Admissions, accompanied by explanatory statements, which were not specific admissions of taking of property charged to have been stolen, did not take case out of rule of circumstantial evidence. *Rollins v. State*, 83 Cr. R. 345, 203 S. W. 355.

In murder trial, charge on law of circumstantial evidence is required only where state relies on circumstantial evidence alone, and is not necessary where accused admits homicide. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

It is not error to refuse to submit the law of circumstantial evidence in a case where there is a confession of the accused, though testified to by one admitted to be an accomplice, such testimony taking the case out of the domain of circumstantial evidence. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

Where defendant admitted that he had sold prosecutor's wagon, but claimed a belief of ownership, a charge on circumstantial evidence was not necessary. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

The confession of defendant, testified to, being definite, no charge need be given on the law of circumstantial evidence. *Tillman v. State* (Cr. App.) 25 S. W. 165.

In a prosecution for larceny, where there was evidence that accused had admitted the taking of the property, a charge on circumstantial evidence was not required. *Miller v. State* (Cr. App.) 225 S. W. 232.

In a prosecution for theft, where defendant's confession contained definite and direct statements that he took the automobile alleged to be stolen and appropriated it to his own use, and the owner testified to facts showing a taking without his consent, the case could not be treated as one resting upon circumstantial evidence alone. *Escobedo v. State* (Cr. App.) 225 S. W. 377.

39. — **Evidence of eyewitnesses.**—In a prosecution for assault with intent to murder, a statement by the person assaulted that, after the gun was fired and he had been shot, he turned, looked, and recognized defendant's face by the flash of the gun, was insufficient to take the case out of the rule of circumstantial evidence, and hence defendant was entitled to an instruction thereon. *Henry v. State*, 87 Cr. R. 392, 221 S. W. 1083.

In a prosecution for murder, direct testimony, showing that defendant and his accomplices pursued, shot, and cut deceased, made it unnecessary to charge on circumstantial evidence; such being necessary only when the case depends wholly thereon. *Barnes v. State* (Cr. App.) 232 S. W. 312.

In a prosecution for embezzlement, where the evidence was direct and uncontradicted that defendant sold his principal's property and appropriated the money to his own use, no charge on circumstantial evidence was required. *Wray v. State* (Cr. App.) 232 S. W. 808.

Where there was direct and positive proof that defendant and his companions addressed provocative statements to deceased, and that he struck one of them, whereupon they all closed in upon him, and there was testimony that one of defendant's companions had an automatic pistol, and that an empty freshly exploded shell was picked up where the fight took place after it was over, that only one shot was fired, and that no other persons were engaged in the affair, the facts proved were in such close relation to the main fact as to who fired the fatal shot as to make them equivalent to direct testimony and to render a charge on circumstantial evidence unnecessary. *Monday v. State* (Cr. App.) 232 S. W. 831.

40. — **Testimony of accomplices.**—Where an accomplice gave direct testimony that accused was a conspirator in a plan to murder, and that he participated in the homicide, the court was not required to charge on the law of circumstantial evidence. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

44. — **Possession of property and explanation thereof.**—Possession of recently stolen property is but a circumstance, and involves a charge on the law of circumstantial evidence. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

In prosecution for cattle theft, where only defendant's connection with cattle after they were taken was proved by direct evidence, and his possession was explained, court should have charged on circumstantial evidence. *Rollins v. State*, 83 Cr. R. 345, 203 S. W. 355.

The possession of stolen property by defendant charged with having received it, with other facts, was a circumstance from which the inference of guilty knowledge on defendant's part might be drawn, but was merely an inference, and, when relied on for conviction, required a charge on the law of circumstantial evidence where demanded by defendant. *Grant v. State*, 87 Cr. R. 19, 218 S. W. 1062.

45. — **Sufficiency of charge.**—Charge on circumstantial evidence held sufficient, though terse. *Love v. State*, 82 Cr. R. 411, 199 S. W. 623.

Charge on circumstantial evidence which did not state that each circumstance necessary to conclusion of guilt must be proven by competent evidence was proper, in view of last paragraph. *Id.*

There being evidence that accused was driving automobile from which his son shot deceased, and the alleged fact that he advised killing resting only on inference, it was accused's right to have the jury instructed on circumstantial evidence, that in applying such inference the supporting facts must be consistent with each other, consistent with accused's guilt, inconsistent with innocence, and inconsistent with any reasonable hypothesis save guilt, and to have the jury know that the trial judge recognized there was no direct evidence that accused either advised or encouraged the killing. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

48. **Failure to call witness or produce evidence.**—See notes under art. 790, post.

49. **Co-defendants.**—Where two parties were separately indicted for the same offense but tried jointly, the court should have charged the law separately as to each case. *Mayzone v. State* (Cr. App.) 225 S. W. 55.

51. **Principals and accessories.**—See *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509; *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

Sufficiency of instructions, see notes under Pen. Code, art. 74.

Defendant's confession as to theft of automobile held to justify an instruction on the law of principals; it showing that some or all of the other participants were principals with defendant. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

Where evidence showed that accused raped the victim and held her while another raped her, accused's instruction that conviction could be had only for actual rape by personal intercourse, on theory that indictment would not support a conviction on the law of principals, was properly refused. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

If there is issue as to whether defendants acted together as principals, court should submit question to jury for their decision under appropriate instructions. *Bennett v. State*, 83 Cr. R. 268, 202 S. W. 730.

In prosecution for hog theft, evidence held to connect accused with offense as principal so that it was not error to fail to instruct as to distinction between accomplices and principals. *Wilson v. State*, 83 Cr. R. 593, 204 S. W. 321.

Where the state's theory was that defendant and one who was with him each shot deceased, a charge on the law of principals that, if defendant was present and urged his associate to kill deceased, he was guilty held improper. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

In prosecution for unlawful sale of intoxicating liquor, where defensive theory raised by evidence was that accused was not interested in sale, but acted solely for accommodation of purchaser, it was error for court, in addition to submission of such issue, to instruct on law of principals embodying substance of Pen. Code, art. 74. *Chance v. State*, 85 Cr. R. 62, 210 S. W. 208.

In a prosecution for the theft of an automobile subsequently recovered from a third party who claimed to have purchased it, evidence held to show that defendant assisted in the sale and was a principal, so as to justify the court in charging with reference to the law of principals. *Torrence v. State*, 85 Cr. R. 310, 212 S. W. 957.

In prosecution for murder where there was evidence of defendant's connection with the killing both before and after the commission of the crime, court properly gave instruction upon the law of principals. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

Where a witness testified to a joint robbery by himself and defendant, the court did not err in charging on the question of principals. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

In a prosecution for burglary, certain hams and sausage meats stolen having been found in defendant's possession, in view of testimony as to the presence of one other than defendant and his participation in whatever was done by her in connection with the burglary, the trial court properly submitted the law of principals as applied to such other defendant. *Rippey v. State*, 86 Cr. R. 539, 219 S. W. 463.

In a prosecution for burglary, in view of absence of showing of previous conspiracy to commit the burglary between defendant and a witness, and lack of testimony to connect the witness with the crime, trial court's charge on principals held improper. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

In a prosecution for homicide, where there was evidence that, during an altercation between accused and the husband of deceased, accused's son fired the shot that killed the deceased, court erred in refusing to instruct that, before the jury could render a verdict of guilty against accused, they must believe beyond a reasonable doubt that the shot which killed deceased was fired out of a gun in the hands of accused; no issue as to whether accused and son were acting together as principals being presented by the instructions given. *Rasberry v. State*, 88 Cr. R. 13, 224 S. W. 1093.

The facts justify a charge on the law of principals, on a prosecution for theft, there being evidence that H., in defendant's presence, took some money from a roll between the mattresses of his bed and gave it to defendant, that defendant returned with a woman, and, after they left, the roll was missing, that defendant then found and took H. to the woman's room, and she returned the money, and defendant confessed. *Tillman v. State* (Cr. App.) 225 S. W. 165.

In a prosecution for robbery, where it was the state's theory that defendant and several others were acting together, held that there was no error in charging on the law of principals. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

Where defendant was present when his son shot and killed deceased, held, under the evidence, that the state was entitled to have the law of principals submitted. *Henderson v. State* (Cr. App.) 229 S. W. 535.

52. **Grade or degree of offense.**—See notes under articles of Penal Code defining particular offenses.

In criminal prosecutions, where there are any circumstances that would mitigate or reduce the offense to a lower grade than that of which accused was convicted, he is entitled to the benefit of such circumstances under appropriate instructions from the court as to the law applicable thereto. *Jones v. State*, 86 Cr. R. 371, 216 S. W. 834.

66. **Self defense—Provoking difficulty.**—See Pen. Code, art. 1107, notes 12-17.

74. **Punishment.**—A charge was erroneous in predicating the authority to recommend suspension of sentence upon proof that defendant "merited it." *Morris v. State*, 82 Cr. R. 13, 198 S. W. 141.

Instruction as to amount of fine omitting the word "fine," in view of another instruction requiring the jury to fix the fine at not more than a certain sum, held not fundamental error. *Harper v. State*, 82 Cr. R. 149, 198 S. W. 786.

75. **Manner of arriving at verdict.**—Where a charge is given, cautioning the jury in a criminal case not to find their verdict by lot or chance, the jury should be admonished that they must first ascertain the fact that defendant is guilty. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

Instruction that the result of a former trial did not concern jurors, and was not to be mentioned or considered, held an appropriate precaution against misconduct of the jury. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

The practice in prosecution of giving an instruction warning the jury against finding a verdict by lot is proper. *Smith v. State* (Cr. App.) 230 S. W. 160.

77. **Time for giving instructions.**—In a verbal address, delivered while testing jurors for the week as to their qualifications, the court should not have discussed the question of reasonable doubt, and how from the viewpoint of the court it ought to be considered. *Redwine v. State*, 85 Cr. R. 437, 213 S. W. 636.

79. **Form and language in general.**—See *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

81. **Repetition.**—In a seduction case, it is unnecessary that the prosecutrix be corroborated as to every material fact, and it is not proper to single out isolated facts in the case, which are admissible in making out the state's case, and apply the law of accomplice testimony to each such bit of evidence. *Hunt v. State*, 85 Cr. R. 622, 214 S. W. 983.

In the absence of special reason therefor, in a prosecution for homicide, it was not essential that the doctrine of reasonable doubt be appended to each paragraph of the charge, where a correct instruction on the law of reasonable doubt was embraced in the charge. *Walker v. State* (Cr. App.) 227 S. W. 308.

83. **Confused or misleading instructions.**—In a prosecution for manslaughter alleged to have been committed following a conspiracy between three brothers to assault deceased, an instruction that if defendant's brother knew nothing of the difficulty between defendant and deceased, "and" knew nothing of any conspiracy, defendant should be acquitted, was erroneous, since he might have known of the difficulty, and still not entered into the conspiracy. *Holland v. State*, 84 Cr. R. 144, 206 S. W. 83.

84. **Inconsistent or contradictory instructions.**—Where accused requested instruction to acquit if he did not have specific intent to kill, it was proper to refuse instruction submitting manslaughter; the two instructions being contradictory. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

87. **Examination of charge by counsel and objections thereto.**—Where there were no exceptions reserved to charge at or before its reading to jury, refusal of two special charges requested cannot be reviewed. *Bega v. State*, 81 Cr. R. 635, 197 S. W. 1109.

Where accused failed to object to failure to charge on aggravated assault, and requested no special charge, but after all argument was concluded asked such a charge, it was properly refused. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

Where no exceptions were reserved to the charge before it was read to the jury, the allegation in the motion for new trial that the charge was erroneous cannot be considered. *Miller v. State*, 82 Cr. R. 536, 200 S. W. 398.

Under statute it is necessary to have exceptions to charge filed before it is read to jury, which cannot be done on motion for new trial unless matters complained of are of fundamental nature. *Wilson v. State*, 83 Cr. R. 593, 204 S. W. 321.

Where one indicted for murder makes no objection to submission of issue of manslaughter, he waives his right to complaint thereof on appeal. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

An exception to the charge because paragraph 4 was on the weight of the evidence is too general to be reviewed. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

Where no exception was taken to charge despite express provision of statute that if there is an objection which defendant desires to present on appeal he must make his objection known in writing before the charge is read to the jury, defendant cannot come before Court of Criminal Appeals for first time and attempt to argue incorrectness of charge. *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665.

Defendant cannot complain of charge, or of failure of the Court of Criminal Appeals to discuss it in its former opinion, where no exceptions were taken to it, or any other part of the charge, prior to reading to the jury. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

Where the court trying a prosecution for receiving stolen goods on written objection to certain portions of his charge by defendant's counsel eliminated such portions but did not after such material alteration submit charge to defendant's counsel before reading to jury, his failure so to submit charge was reversible error. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

In prosecution for assault to murder an officer, contention that the trial court erred in failing to limit purpose for which evidence was admitted of fact of defendant's indictment for offense for which he was arrested by assaulted officer because the indictment had been returned on the day on which the evidence was offered held not tenable. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

Errors in charges, not properly excepted to, will not be considered by the Court of Criminal Appeals, unless fundamental. *Flores v. State*, 86 Cr. R. 235, 216 S. W. 170.

On appeal in a criminal case, to authorize the consideration of objections to the charge, or the refusal of special charges, the record must disclose that the requirements of arts. 735, 737, 737a, and 743, providing for presentation of charges to the court, were fulfilled. *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172.

This article should not be given so technical a construction as to deny the right of review on appeal, where a substantial compliance is shown and its end practically accomplished. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

Defendant's exception to court's charge limiting testimony of certain witness, which

was sufficient to inform court of wherein defendant considered instruction faulty and to afford an opportunity to correct it, held sufficient. *Id.*

Where no exceptions were taken to charge in criminal case before argument as required by statute, such matters cannot be reviewed. *Watson v. State*, 87 Cr. R. 189, 220 S. W. 329.

An assignment of error to a charge of the court cannot be considered where no exception to the charge was taken before it was read to the jury, as required by statute, unless the error in charge was of a nature which would go to the very foundation of the conviction. *Bridges v. State*, 88 Cr. R. 61, 224 S. W. 1097.

An error of the court in charging the jury, not excepted to, will not be considered, unless it is of a fundamental nature, and goes to the basis of the case adversely to what the law is or ought to be. *Johnson v. State*, 88 Cr. R. 136, 224 S. W. 1103.

Court's charge, given at the state's request, will not be considered on appeal, where defendant did not object thereto in writing. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

In the absence of a showing either from statements connected with and part of the special charges as presented, or else in the bill of exceptions taken to their refusal, that such charges were presented to the trial court before argument, the rule which imputes correctness to the trial court's action until the opposite is shown compels the Court of Criminal Appeals to sustain action in refusing even a proper special charge as presented too late. *Berlew v. State (Cr. App.)* 225 S. W. 518.

Where objections are taken to the charge before being read to the jury, they must be verified in some way so as to inform the appellate court that such procedure actually occurred, and the fact that the caption of a paper purporting to contain such exceptions recites that it contains the objections presented before the charge was read is not a verification of the trial court of the fact of such presentation, and unless there be some such verification apparent on the paper, or by the bill of exceptions as the law directs, the appellate court cannot consider them. *Gibson v. State (Cr. App.)* 225 S. W. 538.

Before the appellate court can consider an objection to the court's charge, under *Vernon's Ann. Code Cr. Proc.* 1916, art. 735, it must have been made in writing and presented to the trial court before the charge was read to the jury. *Id.*

Before the appellate court can consider an objection to the court's charge, it must have been made in writing and presented to the trial court before the charge was read to the jury, and the record must affirmatively show such fact. *Id.*

Where the record did not show that any objections in writing were filed or exceptions taken to the charge before it was read to the jury, an alleged error not of a fundamental character cannot be reviewed though exceptions were subsequently presented and the matter called to the attention of the court on motion for new trial. *Castleberry v. State (Cr. App.)* 228 S. W. 216.

Unless objections are filed to the court's charge pointing out specific errors complained of, they cannot be considered on appeal. *Taylor v. State (Cr. App.)* 230 S. W. 176.

The court's charge will be presumed to have met defendant's approval, in absence of objection thereto or request for special instruction. *Hill v. State (Cr. App.)* 230 S. W. 1005.

## II. DISCUSSION OF FACTS, WEIGHT OF EVIDENCE, AND SUMMING UP TESTIMONY

**89. Weight of evidence in general.**—In prosecution of second husband for desertion of wife, it was error to instruct concerning former husband that presumption of death from seven years' absence was absolute, being on weight of evidence, and it is immaterial that under *Pen. Code*, art. 482, wife would be exempt from conviction of bigamy. *Barrios v. State*, 82 Cr. R. 548, 204 S. W. 326.

In prosecution of bank president for murder of state commissioner of banking, instruction that under facts commissioner had right under law to close bank and take charge of its affairs, held not charge on weight of evidence. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

Requested special charge that there was no evidence showing, or tending to show, that a witness for accused instigated or was connected with the homicide, if given, would have been a comment by the court on the weight to be given the facts. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349.

A special requested charge which was on weight of testimony was properly refused. *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

In a prosecution for conspiracy to commit murder, instruction on venue held erroneous as on the weight of the testimony. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

In prosecution for forgery, in which defendant was charged with having forged seller's name to order, instruction submitting the question whether defendant was authorized to act for seller held on the weight of the testimony. *Chadwick v. State (Cr. App.)* 232 S. W. 842.

**91. Comment on facts or evidence in general.**—The court's conduct, during a prosecution for murder, in examining one of the witnesses for the state and eliciting damaging testimony by reminding witness of the contents of a written statement witness had made, tending to lead jury to think court considered defendant guilty, was improper under the statute. *Anderson v. State*, 83 Cr. R. 261, 202 S. W. 944, L. R. A. 1918E, 658.

In prosecution for passing forged instrument, where there was evidence of a collateral transaction reproduced from testimony of a witness on a former trial, court's statement, upon defendant's request for instruction limiting effect of such testimony, that he had not limited the consideration of such testimony in such respect before, and that "I believe the jury understands the matter of all the checks about as clearly as I can make it," held not any unauthorized comment upon evidence, where it does not appear that jury was informed of the result of former trial. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

Where accused claimed he killed deceased while temporarily insane from using narcotics and intoxicants, the court's remark that he did not recollect testimony that accused had taken a fourth morphine tablet held not to infringe the statute forbidding the court to comment on the weight of the evidence. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

**93. Opinion or belief as to facts.**—In prosecution for abortion, trial court violated statute in expressing before jury opinion with reference to testimony of victim as to why she had procured certain money. *Earnest v. State*, 83 Cr. R. 257, 202 S. W. 739.

In a murder case, where defendant relied on self-defense and claimed that decedent was advancing toward him with a drawn knife, an instruction that decedent would be presumed to intend to inflict death or injury "(provided he used any such weapon or means)," objected to as indicating the court's opinion that decedent was not using a weapon, held not erroneous. *McDougal v. State*, 84 Cr. R. 424, 208 S. W. 173.

In a prosecution for cattle theft, it was error to instruct the jury not to find the verdict by lottery or chance, since the idea was conveyed that the verdict would be unfavorable to defendant. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

Verbal communications of court with jurors touching the case on trial, after the retirement of the jury, should be attempted only upon rare occasions and impelled by soundest reasons, and an effort should be made to avoid impressing jury that court entertains any impression of the case which he wishes them to know. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In prosecution for murder, defendant setting up that he acted in defense of his son, deceased having insulted the son and put his hand to his hip, when defendant struck and killed him with a breast yoke, it was improper to instruct on the law of excessive force; charge relating to an issue not raised by evidence, and calculated to impress jury with idea that, in the opinion of the court, force used was excessive. *Mitchell v. State*, 85 Cr. R. 25, 209 S. W. 743.

In homicide prosecution, where it was claimed defendant had shot deceased after deceased had abandoned the conflict, charge on provoking difficulty held objectionable, as suggesting that in the opinion of the court the defendant was wrong in the beginning, and that he invited contest with deceased in order to kill him, particularly where evidence as to who was aggressor in the beginning was conflicting. *Thompson v. State*, 85 Cr. R. 144, 210 S. W. 800.

In prosecution for theft, when evidence of defendant's possession of other recently stolen property appears in the record, it is court's duty to limit such testimony, and to point out specifically the evidence to be limited, without expressing opinion on weight of such evidence. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

Granting the declarations of deceased and other surrounding circumstances are sufficient to show defendant's presence when deceased drank the whisky alleged to have contained poison and caused death, defendant's guilty knowledge would be a jury question, and implication in the trial judge's instruction that, in his opinion there was evidence which, if believed, would support theory of conspiracy, was necessarily prejudicial and erroneous. *Baugus v. State*, 87 Cr. R. 551, 223 S. W. 224.

An instruction that a prosecution for theft may be maintained in the county in which the property was taken or into or through which it may have been carried is not an indication of the court's belief that accused actually took the property, and is not on the weight of evidence. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

In a prosecution for murder, instruction that the question of defendant's guilt must not be determined by lot or chance, and, in case of conviction, the punishment must not be determined in any such manner, held not error as conveying the impression the court was of the opinion defendant would be convicted. *Lewis v. State* (Cr. App.) 231 S. W. 113.

**94. Inferences from evidence.**—In a prosecution for seduction defendant's requested special charge that the fact of continuous association between him and the prosecutrix was not sufficient evidence to corroborate a promise of marriage held properly refused as on the weight of the evidence. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

In homicide prosecution involving issue of whether killing was in sudden passion reducing crime to manslaughter, requested instruction that there was evidence that the deceased had, prior to the homicide, killed defendant's brother and that jury could find from such killing that defendant at the time he killed deceased was in a state of mind incapable of cool reflection, held properly refused, where the killing of defendant's brother had taken place some years before the killing of deceased, and where defendant and deceased had met on several occasions during such time, since such instruction would have been a charge on the weight of evidence. *Ray v. State* (Cr. App.) 225 S. W. 528.

**96. — Possession of stolen property and explanation thereof.**—A charge requested by defendant to the effect that possession alone of recently stolen property was not sufficient to warrant a conviction was upon the weight of the testimony and was properly refused. *Stiles v. State* (Cr. App.) 232 S. W. 805.

**98. Assumption as to facts.**—The court could not assume, as a matter of law, that a witness who merely exchanged whisky and money between defendant and another was an accomplice to the sale, where the evidence thereof was doubtful. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

In a prosecution under a city ordinance it was erroneous for court in its instructions to state that ordinance had been passed, in absence of proof. *White v. State*, 82 Cr. R. 274, 198 S. W. 964.

It is never correct to assume a fact adversely to defendant in charging the law of the case. *Cannon v. State*, 84 Cr. R. 504, 208 S. W. 339.

In a prosecution for conspiracy to commit murder, instruction on venue held erroneous as assuming that, in an assault by defendant's coconspirators upon the husband of one of them against whom the alleged conspiracy to kill was directed, such

coconspirators were in the wrong and were not acting in self-defense. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

99. — **Admitted or uncontroverted facts.**—In prosecution for aggravated assault upon female, court may assume in its charge fact that defendant is adult male person and prosecutrix a female, unless evidence controverts issue. *Hopson v. State*, 84 Cr. R. 619, 209 S. W. 410.

It is proper for court to assume as true any fact which is not controverted. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

100. — **Facts established by testimony.**—Where accused claimed he killed deceased while temporarily insane from using narcotics and drinking whisky, the court's reference to tablets used by accused as morphine was not erroneous, in view of testimony by accused's wife that they were one-fourth grain morphine tablets. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

103. — **Truth or weight of evidence.**—In prosecution for cattle theft, charge on accomplice testimony held erroneous, as assuming defendant was guilty, if accomplice testimony was true. *Standfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

106. — **Intent.**—In prosecution for homicide, instruction, making it basis of manslaughter conviction if defendant went to scene of difficulty with the intent to whip or inflict injury upon deceased less than death, held erroneous as making unwarranted assumption of fact. *Marshall v. State*, 84 Cr. R. 201, 206 S. W. 356.

In a homicide prosecution, instruction on provoking the difficulty held erroneous, as assuming the fact that defendant did so for the purpose of killing or whipping deceased. *Redwine v. State*, 85 Cr. R. 437, 213 S. W. 636.

107. — **Time and place of offense.**—In prosecution for hog theft, charge with reference to theft in A. county, or within 400 yards of line, and bringing hogs into N. county, held erroneous as on weight of evidence. *Strickland v. State*, 81 Cr. R. 643, 197 S. W. 1104.

108. — **Facts connected with crime charged in general.**—In prosecution for incest, charge that if jury believed that parties were uncle and niece they would be within statute was not erroneous as assuming facts. *Griffin v. State*, 83 Cr. R. 137, 202 S. W. 87.

Where defendant and his witness both denied that they had been living together as husband and wife, and the matter there ended, an instruction that the jury might consider such fact for the purpose of attacking credibility of the testimony of witness was erroneous, as assuming that they had been living together. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

In prosecution for homicide, defendant's request to charge that each juror must place himself in defendant's position, and determine from all facts, as they appeared to defendant, whether or not his apprehension of death or serious injury was reasonable, held properly refused as on weight of evidence, as assuming defendant had fear of death or injury. *Alsop v. State*, 95 Cr. R. 36, 210 S. W. 195.

A special requested instruction relating to alibi in a prosecution for seduction held on the weight of the evidence, as assuming as a fact that accused's evidence tended to show him at another place than that of the commission of the offense when the same was committed. *Hunt v. State*, 85 Cr. R. 622, 214 S. W. 983.

109. — **Character of article used in committing offense.**—In a prosecution for placing poison in water with the intent to injure and kill another, instruction, charging jury to acquit defendant if it believed or had reasonable doubt that some person other than defendant "mixed and mingled the noxious potion and substance, if any, with water," held not objectionable, as against contention that it was on the weight of the evidence, and assumed that the substance found in the water was poison. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

In a prosecution for homicide, the court properly refused defendant's requested special charge that if deceased was advancing or about to advance upon defendant with a hammer, the law presumed deceased intended to kill defendant, or to inflict some serious bodily injury, etc.; the request improperly assuming the hammer was that character of instrument upon which the law bases the intent of the person using it. *Mason v. State* (Cr. App.) 228 S. W. 952.

110. — **Commission of offense.**—In prosecution for theft of a cow, where defendant claimed the animal as his own and the only issue was ownership, a charge on possession of recently stolen property and consequent explanation was erroneous, as assuming that animal had been stolen and that an explanation of defendant's possession had been given. *Cannon v. State*, 84 Cr. R. 504, 208 S. W. 339.

112. — **Commission of other or related offense.**—Where state relied for conviction on sale of intoxicating liquor in October, instruction that evidence of sales by defendant in November, December, and January could be considered as tending to show system was erroneous as being on weight of evidence. *Gustamente v. State*, 81 Cr. R. 640, 197 S. W. 998.

Where defendant and his associate, both Texas rangers, in attempting to enter a building where they suspected gambling was in progress, shot and killed one of the occupants, an instruction which referred to burglary of the building was erroneous; there being no evidence that defendant or his associate had any intention of burglarizing the premises. *Bloxom v. State*, 86 Cr. R. 562, 218 S. W. 1063.

116. **Comments on conduct or character of accused.**—In negligent homicide case, where it appeared that defendant was intoxicated and had received two blows on the head, an instruction that danger from use of pistol would have been known to defendant, if he had exercised ordinary prudence, held on weight of evidence. *Haynes v. State*, 84 Cr. R. 6, 204 S. W. 430.

118. **Directing verdict or declaring law if jury believe the evidence.**—In a prosecution for murder, instruction applying the doctrine of principals, and directing jury to



convict if they believed from evidence that certain facts were true, held a charge on the weight of the evidence. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241.

119. **Directing verdict, or declaring law if certain facts are found.**—A charge, if defendant did "make an assault upon said L. \* \* \* with the intent \* \* \* to ravish \* \* \* her \* \* \* you will find the defendant guilty," was not on weight of evidence. *Reese v. State*, 83 Cr. R. 394, 203 S. W. 769.

123. **Purpose and effect of evidence—Impeaching evidence.**—Evidence which is competent for impeachment only may properly be limited, but court in so doing should observe the legal restrictions against charging on the weight of the evidence and against misleading the jury by erroneous construction. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

Where testimony contradicted witness, presenting a conflict for the solution of the jury, instruction authorizing jury to consider such testimony only in so far as it affected the testimony of such witness was error; such testimony not having impeached witness. *Id.*

124. — **Evidence of other acts or offenses.**—Charge as to testimony by defense witness that evidence of his previous indictment, trial, and acquittal for the same killing "was admitted \* \* \* for the sole purpose of affecting the credibility of the witness, \* \* \* and you shall consider it for no other purpose," was erroneous, as a charge upon weight of evidence. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

In prosecution for cattle theft, instruction limiting jury's consideration of evidence as to other recently stolen cattle found with the cattle charged to have been stolen held not on weight of evidence. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93

In prosecution for theft wherein the state put in evidence of extraneous offenses to connect defendant with the offense and to show his purpose in being connected with it, a charge that jury might consider evidence of the theft of other property at same time and place, to establish the identity in developing the res geste of alleged offense or to prove defendant's guilt by circumstances connected with the theft or to show his intent as to property charged to have been stolen, was erroneous, as being on the weight of the evidence. *Davis v. State*, 87 Cr. R. 425, 222 S. W. 236.

126. **Documentary evidence.**—Where the state introduced the motor license transferred by defendant when he sold the car alleged to have been stolen and thereby entitled defendant to a charge on the purchase of the car by him as shown by the license, a requested charge that the jury must accept as true the statements contained in the license, unless the evidence showed them to be untrue beyond a reasonable doubt, and that the testimony of an accomplice alone was insufficient to disprove those statements, was properly refused as on the weight of the evidence. *Hunt v. State* (Cr. App.) 230 S. W. 406.

134. **Corroboration of witness.**—In a prosecution for seduction, defendant's requested special charge that the fact of continuous association between him and the prosecutrix was not sufficient evidence to corroborate a promise of marriage held properly refused as on the weight of the evidence, and not presenting a correct proposition of law. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

147. **Degree of crime.**—In prosecution for murder, an instruction that the killing would not be manslaughter if it was done from hatred or revenge, or by previous design, and not on account of insulting conduct towards defendant's wife, was erroneous as being on the weight of the evidence. (Per Davidson, P. J.) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

In prosecution for aggravated assault, instruction that, if the jury believed defendant was guilty of an assault but had reasonable doubt whether the assault was aggravated, it should acquit of aggravated assault and convict of simple assault, held not objectionable as on the weight of the evidence or as requiring the jury to convict. *Mathis v. State*, 84 Cr. R. 347, 206 S. W. 528.

151. **Self defense.**—In prosecution for homicide, instruction that, if defendant went to scene to provoke difficulty with deceased, he lost right of self-defense, etc., held charge on weight of evidence as assuming proposition adverse to defendant. *Marshall v. State*, 84 Cr. R. 201, 206 S. W. 356.

### III. CONSTRUCTION AND OPERATION OF CHARGE

154. **Construction and effect of charge as a whole.**—The charge must be construed as a whole. *Anderson v. State*, 86 Cr. R. 207, 217 S. W. 390; *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101; *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

All parts of a charge must be looked to in an effort to arrive at the correct decision as to whether a particular portion is erroneous. *Mobley v. State* (Cr. App.) 232 S. W. 531; *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

Construed in connection with remainder of the charge, one paragraph held not erroneous as making defendant's right of self-defense depend not upon his acts, but upon his unexecuted intentions. *Raspberry v. State*, 84 Cr. R. 393, 208 S. W. 168.

Error cannot be predicated on a phrase taken from a paragraph of the charge which as a whole is correct. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

In a prosecution for manslaughter by the killing of defendant's paramour, instruction on manslaughter, in view of entire charge, held not erroneous, as on the weight of evidence and assuming that defendant did the killing, a disputed issue. *Mobley v. State* (Cr. App.) 232 S. W. 531.

155. **Correction of instructions, and error in instructions cured by other instructions given.**—In trial for murder, a charge on self-defense, objectionable as submitting the issue of actual danger alone, was cured in a special charge at defendant's request fairly submitting the law of apparent danger. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

Where the court properly defined and explained what acts establish provoking the difficulty, and further gave accused's requested charge submitting the converse there-

of, according to his defensive theory, the original charge was not defective in failing to submit such theory. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

In prosecution for larceny from person, special charges, given at defendant's request, held to cure error by implication in charge that if jury believed person robbed dropped money on floor, and it was picked up by one other than defendant, they should acquit. *Bassett v. State*, 83 Cr. R. 479, 204 S. W. 112.

Where a requested charge substantially covering defendant's theory was given, it would cure the omission in the main charge. (Per Gaines, Special Judge.) *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

In prosecution for wife desertion, defendant introducing evidence to meet contention that he was not justified, special charge at request of state submitting issue of ratification of marriage void for duress, held erroneous, as withdrawing issue of justification from jury. *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

While it might be proper to charge that jury should not regard a plea for suspended sentence as evidence of guilt, it was not fatal to refuse to so charge, where court instructed that, if jury convicted defendant, they could then consider question of a suspended sentence. *Campbell v. State*, 84 Cr. R. 89, 206 S. W. 348.

In a prosecution for murder, an instruction objected to as shifting to defendant the burden of proving that his intent in provoking the difficulty was to inflict on deceased some lower degree of injury than death or serious bodily harm, held not to require reversal in view of other instructions and of the evidence. *McDougal v. State*, 84 Cr. R. 424, 208 S. W. 173.

An exception to the court's charge on manslaughter as allowing the jury to consider only the provocation arising at the time cannot be sustained, where the court further charged that, in determining the adequacy of the provocation, the jury should consider all the evidence in determining the condition of the defendant's mind. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

Error of charge, authorizing conviction on accomplice testimony if it was believed and was corroborated by testimony tending to connect defendant with the offense, is not available, another charge correcting its defect of not also stating that it was necessary that accomplice testimony in connection with the other evidence should show defendant's guilt beyond a reasonable doubt, being given at defendant's request. *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653.

A charge on manslaughter was not unduly restrictive of accused's right of self-defense where the reference in such charge to self-defense was not an attempt to define the law of self-defense, but to direct the jury's attention to the fact that they should keep the law and facts as to self-defense in mind for accused's benefit, and the law of self-defense was fully given in other paragraphs of the charge. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

Where defendant, who was present when his son killed deceased, was charged with murder, an instruction that, if defendant and his son had entered into an agreement to kill deceased, and agreed to act together in so doing, and had previously formed a design in which the minds of the two united and concurred in the common intent to take the life of deceased, and in pursuance of said common intent of both, defendant, acting in conjunction with his son, took the life of deceased, then he was guilty of murder, is not erroneous, but any possible error was cured by a special charge that defendant could not be a principal in the killing unless he knew his son's intent to unlawfully kill and, knowing such intent, aided, etc. *Henderson v. State* (Cr. App.) 229 S. W. 535.

Where defendant, convicted of aggravated assault, was not content to rest his case upon an exception to the general charge for not submitting self-defense, and corrected the error by requesting a special charge thereon, which was given, he is without well-grounded complaint. *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

#### Art. 736. [716] Charge shall not discuss the facts, etc.

See notes under art. 735; *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816; *Flores v. State*, 86 Cr. R. 235, 216 S. W. 170.

Cited, *Green v. State*, 32 Cr. R. 298, 22 S. W. 1094.

#### Art. 737. [717] Either party may ask written instructions.

See *Surrell v. State*, 29 Tex. App. 321, 15 S. W. 816; *Flores v. State*, 86 Cr. R. 235, 216 S. W. 170; *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172.

1. In general.—A request in a homicide case to instruct the jury to acquit if they believed appellant's mind incapable of cool reflection, and that he killed deceased in a sudden passion, and that such state of mind was caused by deceased, could have reference only to the defense of insanity, and could not be considered a request to charge on the issue of manslaughter. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

2. Application of amendatory act.—Acts 35th Leg. c. 177 (Civ. St. art. 1974), does not amend procedure in criminal cases which is embodied in Code Cr. Proc. arts. 735, 737, 737a, 743. *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

3. Necessity for request.—In misdemeanor case, ordinarily a defective charge, where no special charge is requested, is not reversible error; but where charge is affirmatively wrong, and exception is properly taken and shown by proper bill, though no special charge is requested, Court of Criminal Appeals cannot hold there is no reversible error. *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

Failure to charge on aggravated assault in a prosecution for assault to murder is not reversible error, in the absence of requested instructions. *Patten v. State*, 84 Cr. R. 584, 209 S. W. 664.

Failure to charge on aggravated assault in a prosecution for assault to murder is not reversible error, in the absence of requested instructions or exceptions. *Id.*

In prosecution as delinquent child through guilt of aggravated assault, it was not fundamental error that trial court submitted issue of aggravated assault without de-

fining off-nse or telling jury its elements, or what was necessary to constitute aggravated assault. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

In a prosecution for assault to rape, resulting in conviction of aggravated assault, where the facts called for no charge on simple assault and defendant did not request one, there was no error in failing to give such a charge, though defendant was a minor. *Hand v. State* (Cr. App.) 227 S. W. 194.

An objection upon defendant's appeal from a conviction of murder that the court erred in not submitting the issue of manslaughter on the ground of deceased's insulting conduct toward defendant's female relative is not available where defendant's counsel requested no special charges thereon. *Prestidge v. State* (Cr. App.) 228 S. W. 217.

The court trying a homicide case would not be justified, unless fortified with a request or an equivalent exception, in departing from the approved practice in framing his charge of embracing a qualifying instruction that if the jury believed beyond a reasonable doubt accused was guilty of some grade of culpable homicide, but had a reasonable doubt as to whether it was murder or some lower grade of the offense, no conviction can be had of the higher grade. *Moore v. State* (Cr. App.) 228 S. W. 218.

Failure to charge as to accomplice testimony is not reversible error, unless there is an exception to the instructions given for such failure, or there is a refusal of a special charge submitting such issue, and the matter cannot be raised upon motion for new trial or appeal for the first time. *Joiner v. State* (Cr. App.) 232 S. W. 333.

4. — **Definitions.**—In a homicide case, if the court's charge on manslaughter, in defining adequate cause as being such as "would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection," was insufficient, in that the evidence showed accused to be subject to epileptic fits and nervous and irritable, he should have offered some other definition. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

5. — **Defenses.**—An objection upon defendant's appeal from a conviction of murder that the court erred in not submitting the issue of manslaughter on the ground of deceased's insulting conduct toward defendant's female relative is not available where defendant's counsel requested no special charges thereon and reserved no exceptions to failure to so instruct. *Prestidge v. State* (Cr. App.) 228 S. W. 217.

In a prosecution for homicide committed on one who defendant believed had maligned his sister, in the absence of requested special charge presenting manslaughter defensively in connection with the charge of murder, instruction on manslaughter that if the jury believed from the evidence beyond a reasonable doubt that defendant was laboring under such a degree of anger, rage, etc., as to render his mind incapable of cool reflection, produced by information as to decedent's improper proposals to defendant's sister, etc., the killing was manslaughter, held not error. *Moore v. State* (Cr. App.) 228 S. W. 218.

6. — **Admissibility and effect of evidence.**—Witnesses who procured the sale of whisky to a soldier to secure evidence against defendant are not accomplices as a matter of law, and the necessity for corroboration of their testimony cannot be considered on appeal, in the absence of a requested charge or exception to the charge given; the error not being fundamental within arts. 735, 737, 737a, 743. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804.

Failure to charge on circumstantial evidence is not reversible error, where no objection is taken to the court's charge, nor a special instruction presented. *Charles v. State*, 85 Cr. R. 534, 213 S. W. 266.

If a phase of the argument of opposing counsel, in the opinion of counsel for defendant, required an additional charge from the court on circumstantial evidence, a request for it should have been made. *Canales v. State*, 86 Cr. R. 142, 215 S. W. 964.

In a prosecution for burglary, where the testimony of the examining magistrate as a witness made an issue of fact as to whether defendant had been properly warned before he made a statement, counsel for defendant should have requested an instruction that, if the jury believed the witness had informed defendant the statement could be used either for or against him, they could not consider the statement for any purpose; but, no such request having been made, there was no error in the failure so to instruct. *Garcia v. State* (Cr. App.) 228 S. W. 938.

7. — **Limiting evidence to purpose.**—In prosecution for attempt to rape defendant's daughter, where there was evidence of threats made by daughter during the assault to tell of other treatment by defendant admitted as part of *res gestæ* as evidence of resistance, defendant to protect himself against inference of other assaults from evidence of such threats should have requested instruction limiting jury's consideration of the evidence to its legitimate purpose. *Hensley v. State*, 85 Cr. R. 260, 211 S. W. 590.

In prosecution of an accomplice where evidence proving principal guilty is introduced as a part of the case against accomplice, the accomplice should ask to have such evidence limited to its proper use if he desires to have its use so limited. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

An accused cannot complain that admission of testimony would affect the character of the accused if the evidence is, otherwise admissible, but accused has the right to request a charge limiting the purpose for which same is admitted, if such be the probable or possible result of the testimony. *Lowe v. State* (Cr. App.) 226 S. W. 674.

Failure of the court to limit in his main charge testimony offered by accused to impeach a state witness, if such a limitation were proper, was not error, where such main charge was not excepted to, and no special charge was asked presenting the issue. *Lowe v. State* (Cr. App.) 226 S. W. 674.

8. — **Fuller instructions.**—In trial for cattle theft, instruction on reasonable doubt held sufficient, where accused did not present special charge embodying matter in different language. *Simpson v. State*, 81 Cr. R. 389, 196 S. W. 835.

In prosecution for seduction, embodiment of law of corroboration in general way in charge was sufficient, in absence of request for additional instructions. *Haney v. State*, 81 Cr. R. 651, 197 S. W. 1102.

In a murder case, where self-defense was set up, it was not error to fail to give a specific instruction, calling attention to evidence relating to the character of deceased as a violent and dangerous man, where other instructions were broad enough to include evidence of character, and if specific reference was desired, it was incumbent on defendant to seek it by special charge. *McDougal v. State*, 84 Cr. R. 424, 208 S. W. 173.

In absence of demand for more specific instruction, a charge that testimony of the injured female in a seduction prosecution must be corroborated is sufficient. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

In a prosecution for homicide, issue of manslaughter as raised by the evidence held sufficiently presented by the court's instruction, particularly in view of the absence of requested instructions. *Walker v. State* (Cr. App.) 227 S. W. 308.

In so far as an issue of manslaughter was raised upon a general proposition of the existence of facts and circumstances which would arouse a man of ordinary temper to that degree of anger, rage, or sudden resentment or terror as to render him incapable of cool reflection was submitted to the jury, if appellant defendant desired a more specific instruction thereon, his failure to request it precludes his objection. *Prestidge v. State* (Cr. App.) 228 S. W. 217.

If defendant was not satisfied with a paragraph of the court's charge, a special instruction should have been asked by him. *Taylor v. State* (Cr. App.) 229 S. W. 552.

11. **Time for request.**—The refusal of an instruction, though correct, is not ground for reversal, unless the record discloses facts showing its presentation before the main charge was read, though in the record the charge states that it was requested and closes with its refusal. *Harper v. State*, 86 Cr. R. 446, 217 S. W. 703.

Where special charges on manslaughter and suspended sentence were asked, but it does not appear when they were presented to the court, acting upon the presumption that the trial court followed the law, the appellate court must uphold the action of the trial court in refusing such charges, for the reason that they came too late, if for no other reason. *Grissom v. State*, 87 Cr. R. 465, 222 S. W. 237.

Refusal of requested instructions will not be considered on appeal, in absence of record showing when special charges were presented to the court, whether before the main charge was read or afterwards, or whether before the argument was begun or concluded. *Lucas v. State* (Cr. App.) 225 S. W. 257.

Where it does not appear from the record whether the special charges were presented and refused before the main charge was read to the jury, supposed errors in the refusal of such charges cannot be considered by the Court of Criminal Appeals. *Berlew v. State* (Cr. App.) 225 S. W. 518.

13. **Erroneous requests.**—The court's refusal to give a special charge requested by defendant that the jury be instructed not to consider the evidence of force, or that there was blood or wounds on the 15 year old injured female, was proper where the indictment contained counts charging rape both statutory and by force. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

In a prosecution for assault with intent to murder, defendant's requested special charge, "If you find as a fact or believe from the evidence that the defendant T. at the time of and during the commission of the alleged assault did not act with malice aforethought, and that the acts alleged to have been committed by him were not preconceived or studied purposely to so act, and were not performed in a manner showing a heart fatally bent on mischief, then, if you so find, you will disregard the charge of intent to murder, and only consider this case from the standpoint of the defendant's guilt or innocence of the charge of aggravated assault," imposed an unnecessary burden on the accused, as it required the jury to believe affirmatively that he did not act with malice aforethought, and that his acts were not preconceived, and its refusal was not error. *Freddy v. State* (Cr. App.) 229 S. W. 533.

14. — **Applicability to evidence.**—The court is not required to submit a theory of any case unless there is evidence in the case raising such issue. *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327; *Bega v. State*, 81 Cr. R. 635, 197 S. W. 1109.

In prosecution for burglary, charge held properly refused as inapplicable to facts. *Bega v. State*, 81 Cr. R. 635, 197 S. W. 1109.

In prosecution for pandering, held, as main charge failed to present theory raised by defendant's evidence, court's refusal of charge presenting such theory was error. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

In a murder case, a charge which is merely an abstract statement of the law of circumstantial evidence, without any application or attempted application to the facts, is properly refused. *Ellis v. State*, 85 Cr. R. 529, 213 S. W. 264.

In a criminal prosecution, the matter of defendant's age raised by his affidavit of juvenility being for the court alone, and it was proper to refuse to tell the jury they could not convict if they believed him under 14 years of age at the time of the alleged offense, where there was no question as to his being of sufficient age to make him legally responsible. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

In a homicide case, where defendant's testimony tended to show that he shot in self-defense, and manslaughter was brought in issue by testimony indicating that defendant was the aggressor, defendant cannot complain, where the court correctly charged on his right of self-defense, that it did not specifically mention that he had the right to shoot, from the viewpoint of manslaughter, if he suffered pain, etc., on being shot, for such an instruction would have been an undue limitation on the right of self-defense. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

In prosecution for placing poison in water with intent to injure and kill another, where there was evidence making it a question for the jury as to whether defendant's wife had conspired with him in an effort to kill or injure such other person, court properly refused to instruct jury not to consider evidence as to threats against such person made by defendant's wife. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

In a prosecution for being interested in a gaming house, where there was no tes-

timony offered as to the general reputation of the place, the trial court properly refused to give defendant's requested special charges that, while general reputation might be admissible to show the character of the place, it could not be used to establish defendant's connection therewith. *Watson v. State* (Cr. App.) 225 S. W. 753.

In every criminal case it is necessary that a demand for the submission of an issue be based on facts in evidence whose legitimate effect would be to raise such issue. *Walker v. State* (Cr. App.) 229 S. W. 527.

In a prosecution for manslaughter through killing of defendant's paramour, special charges, requested by defendant, that if he fired the shot, and did not intend to kill deceased, and that if he shot her accidentally, he was not guilty, were properly refused, where they were covered by the main charge, and where there was no suggestion in the evidence supporting the theory of a shot fired by defendant without intent to strike deceased. *Mobley v. State* (Cr. App.) 232 S. W. 531.

15. — **Singling out evidence.**—In a prosecution for playing at cards at a place other than a private residence, an instruction that, "You are instructed as to what is legal and competent evidence as given in the court's general charge that it means evidence of fact, and not of circumstance, and unless you believe beyond a reasonable doubt that it has been proved by a preponderance of the evidence that defendant was guilty as charged, \* \* \* you will find him not guilty," held properly refused, as in the nature of a bill of exceptions to evidence. *Maguire v. State* (Cr. App.) 226 S. W. 683.

In a prosecution for playing at cards in a place other than a private residence, an instruction that statements by defendant when in custody of an officer are not admissible unless he is properly warned that they might be used as evidence against him, held properly refused, as in the nature of an objection to evidence. *Id.*

16. — **Weight of evidence.**—In a prosecution for murder, it was not error to refuse a charge on the weight of the evidence which assumed that the killing was done by a companion. *Barnes v. State* (Cr. App.) 232 S. W. 312.

17. **Modification of requests.**—In a prosecution for robbery where the evidence tended to show that defendant put the owner of the stolen property in fear, and that the owner delivered the property to him, it was proper to add to a requested special charge that if the property was taken with the consent of the owner the jury should acquit, that if the owner would not have delivered except that he was placed in fear, the taking would be without his consent. *Horn v. State* (Cr. App.) 230 S. W. 693.

18. **Repetition of charge.**—See *Hardin v. State*, 85 Cr. R. 220, 211 S. W. 233, 4 A. L. R. 1308; *Hollman v. State*, 85 Cr. R. 371, 212 S. W. 663.

It was not error to refuse a requested special charge substantially covered by main charge. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195; *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096; *McHam v. State*, 81 Cr. R. 623, 197 S. W. 873; *Parker v. State*, 83 Cr. R. 81, 200 S. W. 1083; *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771; *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343; *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926; *Brown v. State*, 85 Cr. R. 618, 215 S. W. 97; *McCormick v. State*, 86 Cr. R. 366, 216 S. W. 871; *Erwin v. State*, 87 Cr. R. 71, 219 S. W. 827; *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579; *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 463; *Gibson v. State* (Cr. App.) 225 S. W. 538; *Castleberry v. State* (Cr. App.) 228 S. W. 216; *Scott v. State* (Cr. App.) 228 S. W. 1099; *Henderson v. State* (Cr. App.) 229 S. W. 535.

Where the court submitted the unlimited right of self-defense, unqualified by the question of provoking the difficulty, it was not error to refuse the special requested charge on accused's right to arm himself and seek the deceased for an explanation. *Smith v. State*, 81 Cr. R. 363, 195 S. W. 590; *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319; *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554; *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261; *Pollard v. State* (Cr. App.) 225 S. W. 56.

Where a general instruction that the burden was upon the state to show defendant guilty beyond a reasonable doubt was embraced in the general charge, and the jury were instructed fully on the law of threats, requested instructions which were no more than substantial repetitions of the main charge on such matters were properly refused. *Boaz v. State* (Cr. App.) 231 S. W. 790; *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

In prosecution for slander, requested special charge calling jury's attention particularly to words used in information which are alleged to have imputed want of chastity to a female, and advising jury that the interpretation and meaning of these words is for them, should have been given, notwithstanding general charge submitting meaning of language. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

A special charge on the subject of alibi was properly refused, where the issue was fairly submitted in the main charge. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

Where court charged that, although it was found that defendant was engaged in the business of unlawfully selling intoxicants, he should be acquitted unless it was found that he made two sales to parties named in indictment, it was not error to refuse special charge that state must prove two sales as alleged. *Head v. State*, 82 Cr. R. 211, 198 S. W. 581.

Where court's general charge covered law of reasonable doubt, there was no error in refusing special requested charge to effect that jury must believe beyond reasonable doubt that two sales of liquor were made as charged in indictment. *Id.*

An instruction on self-defense held erroneously refused, where instructions given did not cover all the theories brought out by the evidence. *Hays v. State*, 82 Cr. R. 427, 199 S. W. 621.

In perjury trial, refusal of special charge to acquit if finding that accused because of intoxication was unable to remember the facts as to transactions testified to before grand jury, on which testimony the prosecution was based, was not error, where the court elsewhere covered the matter. *Timmins v. State*, 82 Cr. R. 263, 199 S. W. 1106.

Requested instruction that to convict of murder defendant must be proved to have had the specific intent to kill was fully covered by general instruction that the jury must be satisfied beyond a reasonable doubt that defendant was actuated by malice

aforethought, and with specific intent to kill. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

In prosecution for assault on rape, court's charge on aggravated assault held sufficient, rendering it unnecessary to give special requested charge upon that subject. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In a homicide case, assumption in special charge as to interference by deceased in an attempted reconciliation between defendant and his wife held not warranted, further than as submitted in the main charge. *Roach v. State*, 84 Cr. R. 471, 208 S. W. 520.

In a prosecution for theft of grain, where defendant's possession was explained only by his borrowing money from witness to buy the grain, and defendant requested a special charge relating to explanation, given instructions that if the jury believed defendant was not present and did not break into the house, but subsequently received the property or they had reasonable doubt as to his presence, or believed that defendant did not buy the grain, they could not convict, held to sufficiently present defendant's rights. *Vaughn v. State*, 84 Cr. R. 483, 208 S. W. 527.

Charges already given should not be repeated. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

Instruction that if it reasonably appeared to defendant from his standpoint that deceased was about to take his life, or do him serious injury, he was justified in the killing, taken in connection with main charge on self-defense, held to sufficiently instruct jury to view situation from defendant's standpoint, so as to justify refusal of a special charge. *Id.*

In a seduction case, an instruction, "If you believe from the evidence that the offense charged was committed, and that the prosecutrix had sexual intercourse with some male person, or if you have reasonable doubt as to whether defendant was present at the time or not, you will give him the benefit of such doubt and find him not guilty," held sufficient to justify refusal of a special charge requested, which presented the law of alibi no more clearly than the given charge. *Hunt v. State*, 85 Cr. R. 622, 214 S. W. 983.

In a prosecution for murder there was no need for special charges telling the jury that they could consider the weakened condition of accused's mind in deciding whether to him the danger of death or serious bodily injury was real or apparent, the court having instructed that defendant be discharged if the conduct of the deceased produced in accused's mind a reasonable apprehension of fear of death or serious bodily injury, viewed from accused's standpoint alone. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

In a criminal trial, it is not error to refuse defendant's instructions on circumstantial evidence, which matter was covered by the main charge. (Per *Prendergast, J.*) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

In a prosecution for an assault upon a woman, an instruction that before they could convict the jury must believe that the assault was committed "as alleged in the indictment" was sufficient, and justified refusal of requested charges thereon. *Poldrack v. State*, 86 Cr. R. 272, 216 S. W. 170.

Where the main charge, together with the several special charges given at request of defendant, appellant, fully and fairly submitted the issues involved, there was no error in refusing other special charges requested by defendant. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

In murder prosecution, where state did not rely upon evidence of defendant's admission to show that defendant had killed deceased, there being other circumstances to connect defendant with the killing, and court instructed jury on law of self-defense on apparent danger and threats and gave specific instruction covering the defense's theory suggested in the exculpatory statements connected with the admission introduced by the state, court's refusal to instruct that burden was upon the state to disprove exculpatory statements contained in such admission excusing homicide on grounds of self-defense held not error. *Pickens v. State*, 86 Cr. R. 657, 218 S. W. 755.

An exception to the charge because it failed to limit certain testimony to proof of intent cannot be sustained where the court gave a special requested charge restricting the effect of the testimony more than defendant was entitled to ask. *Russell v. State*, 86 Cr. R. 587, 219 S. W. 835.

In a prosecution for transporting liquor into state on defendant's person, instruction presenting defendant's theory he had found liquor and was taking it to police station, that if his explanation was reasonable and true or a reasonable doubt existed on the issue to acquit him held proper and to obviate need of special charges requested. *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

In a prosecution for larceny, the charge that if the jury found accused bought the wagon from another than prosecutor, or believed it was included in goods sold to him, or if the jury entertained a reasonable doubt of such matters, they should acquit, sufficiently presented the defense of belief of ownership, so that requested charges thereon were properly refused. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

On a trial for pursuing the business of selling intoxicating liquors, an instruction that it was not sufficient that defendant had liquor in his possession when arrested, and that he made several sporadic sales, but that he must sell it as a business proposition or as his principal business, was properly refused where the court charged that it must be shown that such occupation or business occupied a part of his time and attention as a business or calling pursued for the purpose of profit or gain, as this was a sufficient and correct statement of the law. *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

Where the court gave a charge not restrictive of defendant's perfect right of self-defense and also a charge on communicated threats, requested charges, singling out various matters in evidence and instructing as to their effect, were not called for. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

In a prosecution for homicide, the trial court in the main charge having instructed that defendant was in no event bound to retreat in order to avoid the necessity of kill-

ing deceased, it was not incumbent upon him to repeat it in a special charge. *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261.

There was no error in refusing special charges on self-defense which merely embraced, in varying phraseology, the same subject-matter covered by the main charge and other special charges given. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

In prosecution for murder, refusal of special charge that defendant could not be convicted of murder, if he had not intended to shoot or kill deceased, held proper, in view of instructions given fully covering such subject. *Haynes v. State*, 88 Cr. R. 42, 224 S. W. 1100.

In a prosecution for forgery of the name of another to a check, the trial court having submitted the case fully and fairly and told the jury that unless they believed beyond a reasonable doubt that defendant made the check in question they should find him not guilty, special charges, in substance that it must be shown that defendant himself wrote the check in question, and that his execution of it must be shown in some other way than by comparison of handwriting, etc., were properly refused defendant. *Bird v. State* (Cr. App.) 225 S. W. 749.

In prosecution for murder committed by throwing an empty quart bottle at deceased, where the court in applying the law to the facts used the expression, "deadly weapon" in both the murder and manslaughter paragraphs in his charge, but nowhere defined what constituted a deadly weapon, refusal of requested instruction that the bottle was not itself an instrument likely to produce death, on the ground that it was covered by the general charge, held error. *Tolston v. State* (Cr. App.) 225 S. W. 1098.

It was not error in a robbery case to refuse a requested charge as to intent, where such matter was sufficiently covered by the charge given. *Flores v. State* (Cr. App.) 227 S. W. 320.

In prosecution for statutory rape, where the court pointedly told the jury that if they found from the evidence that defendant was not present at the place and date fixed, but was at another place, they should acquit, defendant's special charge that if the jury found that the intercourse, if any, between appellant and prosecutrix took place some 20 days previous to that date, they should acquit, was unnecessary. *Brooks v. State* (Cr. App.) 227 S. W. 673.

On a trial for stealing an automobile which defendant claimed he was hired by T. to drive, requested charges as to defendant's intent at the time the car was taken, his belief that it belonged to T., and that a fraudulent intent formed subsequent to the taking would not make him guilty of theft, held sufficiently covered by the main charge. *Clowers v. State* (Cr. App.) 228 S. W. 226.

In a prosecution for forgery, the refusal of a requested instruction that, if the defendant did not know the checks received from another and which he passed were forged, he would not be guilty, held not reversible error where the proposition in a negative way was in substance embraced in the main charge. *Gumpert v. State* (Cr. App.) 229 S. W. 329.

In a prosecution for forgery and for passing a forged instrument, refusal of a special instruction that the jury should acquit unless they believed beyond a reasonable doubt that defendant intended to injure the party whose name was signed to the instrument held not error where the requested charge was not materially different from that given by the court in its main charge. *Id.*

In a prosecution for aggravated assault, where the defendant claimed to have shot prosecuting witness in defense of his brother, a special charge submitting the issue of defense of the brother in a definite and affirmative way should have been given, though the court, in a general way, in his main charge on self-defense, applied it to the defense of the brother. *Carson v. State* (Cr. App.) 230 S. W. 997.

In a prosecution for unlawfully carrying a pistol, where the court directed the jury not to consider the testimony of the state's witnesses as to what they thought with reference to the intentions of defendant on occasions when he placed the pistol against the side or breast of a witness, this sufficiently covered the proper portion of defendant's requested charge that the jury should not regard testimony of state's witnesses that defendant placed the pistol against the side or breast of one of them, and what he said in that connection, or regard the testimony of the witnesses as to what they thought of his intentions. *Dodaro v. State* (Cr. App.) 231 S. W. 394.

In prosecution for homicide, it was not error to refuse a requested instruction that jury should place themselves as nearly as they could in the place of defendant at time of homicide, and view all facts as they appeared to him, from his viewpoint, and not as they appear to jury now, where the court had instructed on the right to defend from apparent danger. *Boaz v. State* (Cr. App.) 231 S. W. 790.

In prosecution for murder, where the jury was instructed that the defendant had a right to use any means at his command to protect himself from deceased, who had threatened his life, and that he was not bound to retreat, it was not error to fail to repeat the instruction at the request of the defendant, in reference to instruction on the law of communicated threats. *Id.*

Where, in prosecution for murder, the jury were instructed upon self-defense against apparent, as well as real, danger, and upon defendant's right to act upon a demonstration by deceased manifesting an intent to carry out a threat, it was not incumbent upon court to instruct that defendant had right to defend himself in anticipation of an attack by deceased, particularly where it was instructed that defendant had right to seek deceased, and in doing so to arm himself. *Id.*

Refusal of a requested charge covering defendant's claim that he did not participate in the robbery was not error, being substantially covered by a charge that, if defendant was engaged in gambling at the place of the robbery, and a dispute arose, and subsequently some other person committed the crime, in which defendant did not participate, he would not be guilty. *Hardy v. State* (Cr. App.) 231 S. W. 1097.

In a prosecution for receiving stolen goods, a requested special charge that defend-

ant could not be convicted unless he knew the goods were stolen when he received them was properly refused, where it was given almost word for word in the main charge. *Kluting v. State* (Cr. App.) 232 S. W. 305.

In a prosecution for murder, a charge that defendant could only be tried on the motive actuating him, and that he was not bound by the motive, intent, or acts of his associates, unless he knew and agreed to the same, was covered by the main charge that if the jury believed beyond a reasonable doubt that either of them killed deceased, though defendant was present, it should still find him not guilty, unless he knew of their unlawful intent, and aided or encouraged them. *Barnes v. State* (Cr. App.) 232 S. W. 312.

In a prosecution for maiming, where the court charged on aggravated assault, and instructed the jury to acquit if they had reasonable doubt as to whether defendant's act was done willfully and maliciously, there was no error in refusing a charge that if defendant called off prosecuting witness with no intent to maim him, and a fight resulted, he was not guilty. *Keith v. State* (Cr. App.) 232 S. W. 321.

In prosecution for automobile theft in which defendant was indicted as a principal, refusal of requested charges on the law of principals held not error, in view of charge given by court. *Seebold v. State* (Cr. App.) 232 S. W. 328.

In a prosecution for manslaughter through killing of defendant's paramour, special charges, requested by defendant, that if he fired the shot, and did not intend to kill deceased, and that if he shot her accidentally, he was not guilty, were properly refused, where they were covered by the main charge, and where there was no suggestion in the evidence supporting the theory of a shot fired by defendant without intent to strike deceased. *Mobley v. State* (Cr. App.) 232 S. W. 531.

In a prosecution for homicide, a requested charge on self-defense against apparent danger was practically covered by the charge on threats, which was combined with a charge on threatened attack, and told the jury the matter must be viewed from defendant's standpoint. *Jones v. State* (Cr. App.) 232 S. W. 847.

**19. Repetition of special requests already given.**—Refusal of requested charge covered by other charge given was not error. *Moore v. State* (Cr. App.) 226 S. W. 415; *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

In prosecution for murder, where court's charge on self-defense, together with defendant's special charge, which court gave, correctly presented and applied such question to evidence, it was unnecessary to give any other of defendant's special charges on subject. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

The refusal of a requested charge that, if defendant shot to stop or scare a stranger he had just seen at his house, he should be acquitted, was not error, where defendant did not claim he shot merely to scare, and the court at defendant's request, authorized acquittal if the jury found defendant called on the intruder to stop, and that his pistol was accidentally discharged. *Jacobs v. State*, 85 Cr. R. 505, 213 S. W. 628.

In prosecution for theft of a hog, in which defendant claimed ownership of the hog, refusal of requested instruction that, "If you have a reasonable doubt in your minds, arising from the evidence, that the defendant knew the hog described in the indictment was not his hog, you should acquit him," held proper, in view of given instruction that, "Although the jury may believe from the evidence that the hog belonged to S. [prosecuting witness], yet if the jury believe (or have a reasonable doubt in the matter) that defendant took the hog, honestly believing at the time of the taking that it was his own hog, then in that event the essential element of fraudulent intent would be lacking, and defendant should be acquitted." *Hill v. State* (Cr. App.) 230 S. W. 1005.

In a prosecution for aggravated assault, where in a special charge the law of self-defense was given without any limitation, and from the evidence no need appears for a charge on defendant's right to arm himself either to protect himself or his daughter, it was not error to refuse his charge that one may arm himself on his own premises, and in case of real or apparent danger to himself or some of his family may use such arms. *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

### Art. 737a. Correction of charge after objections thereto; no further charge after argument begins, except, etc.; review.

See *Grider v. State*, 82 Cr. R. 124, 198 S. W. 579; *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

**In general.**—Acts 35th Leg., c. 177, Vernon's Ann. Civ. St. Supp. 1918, art. 1974, does not amend procedure in criminal cases which is embodied in c. 138, Code Cr. Proc., arts. 735, 737, 737a, 743, and special charges refused and not brought up for review by bills of exceptions cannot be considered. *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

Where the court trying a prosecution for receiving stolen goods on written objection to certain portions of his charge by defendant's counsel eliminated such portions but did not after such material alteration submit charge to defendant's counsel before reading to jury, his failure so to submit charge was reversible error. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

**Time for reading.**—Where accused failed to object to failure to charge on aggravated assault, and requested no special charge until after state's final argument was concluded, such request was properly refused. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

In a prosecution for cattle theft, where the court, on retirement of jury without request, no improper argument having been made or additional evidence given, verbally instructed them not to discuss the fact that defendant did not testify, nor to arrive at the verdict by chance, such instruction constituted reversible error. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

**Improper argument.**—In a misdemeanor case, special charges must be asked in writing directing the jury not to consider remarks made by prosecutor. *Lemcke v. State*, 86 Cr. R. 386, 217 S. W. 150.



When an improper argument is used by the state, defendant can present to the trial court his request in writing that the jury be instructed that such argument in narrated respects is improper, and that the jury shall disregard it, which would present the matter in the Court of Criminal Appeals for review in a proper case, defendant not being entitled to additional charges, after or during argument, to settle differences as to construction of the language or effect of the allegations made by state's counsel. *Taylor v. State* (Cr. App.) 229 S. W. 552.

**Review.**—To review denial of a special charge the record should show that it was presented to the trial judge before the main charge was read, that an exception was reserved to its refusal, and either in the bill of exceptions or the motion for new trial there should be given the reasons appearing in the record why instruction should have been given. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

On appeal in a criminal case, to authorize the consideration of objections to the charge, or the refusal of special charges, the record must disclose that the requirements of arts. 735, 737, 737a, and 743, providing for presentation of charges to the court, were fulfilled. *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172.

Refusal of requested instructions will not be considered on appeal, in absence of record showing when special charges were presented to the court, whether before the main charge was read or afterwards, or whether before the argument was begun or concluded. *Lucas v. State* (Cr. App.) 225 S. W. 207.

### Art. 738. [718] Charges shall be certified by judge.

See *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

**In general.**—Instructions offered and refused at a trial which results in a mistrial, but which are not presented or called to the attention of the court at the next trial, are waived, and constitute no part of the record, as this section relates to charges given or refused on the particular trial only. *Bracken v. State*, 29 Tex. App. 362, 16 S. W. 192.

Statute is mandatory that charges given in criminal cases be certified. *Payne v. State*, 83 Cr. R. 287, 202 S. W. 958.

### Art. 739. [719] No charge in misdemeanor, except, etc.

See *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

**Necessity of request.**—Trial courts are not required to charge the jury in misdemeanor cases, except upon request of one or both sides of the cause; and even then they can be required only to give, with or without modification, or to refuse, such charges as are requested in writing. The refusal of special charges does not impose upon the court the duty of giving an independent charge. *Sparks v. State*, 23 Tex. App. 447, 5 S. W. 135.

In the absence of request, a written charge is unnecessary in a prosecution for a misdemeanor. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

In misdemeanor cases, omissions in the charge should be supplied by requested charges. *Cross v. State*, 85 Cr. R. 430, 213 S. W. 638.

A charge is not required in a misdemeanor case unless requested. *Stroud v. State* (Cr. App.) 225 S. W. 256.

**Necessity of request to raise question on appeal.**—Omissions in the charge in a misdemeanor case cannot be reviewed in the absence of the refusal of a request to correct them. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

In prosecutions for misdemeanor, errors in the charge, unless fundamental, must not only be excepted to, but special charges correctly presenting the matters complained of must be presented, and refusal excepted to and brought to the Court of Criminal Appeals by proper bills of exception. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

A conviction of misdemeanor theft as principal, where the evidence showed guilt as accomplice, is not reversible where there was no exception to the charge for failure to define principals and no special instruction presented embodying such definition, though such conviction would be reversed if it were a felony. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

In a misdemeanor case, to warrant review, it was necessary that defendant take exception to an erroneous charge and ask a corrective charge. *Hand v. State* (Cr. App.) 227 S. W. 194.

### Art. 740. [720] No verbal charge, except, etc.

See *Boattenhamer v. State*, 84 Cr. R. 210, 206 S. W. 344.

**Oral charges.**—In murder trial, verbal instruction that jury must consider case solely on evidence, and disregard arguments not based thereon, was not error, in absence of request for written instruction. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In a prosecution for cattle theft, where the court, on retirement of jury, without request, no improper argument having been made or additional evidence given, verbally instructed them not to discuss the fact that defendant did not testify, nor to arrive at the verdict by chance, such instruction, being verbal, constituted reversible error, in view of arts. 735, 737a, 738, 740. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

Verbal communications of court with jurors touching the case on trial, after the retirement of the jury, should be attempted only upon rare occasions and impelled by soundest reasons, and an effort should be made to avoid impressing jury that court entertains any impression of the case which he wishes them to know. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

The scope of testimony cannot be controlled by verbal instructions, statute requiring charges to the jury to be written. *Bloxom v. State*, 86 Cr. R. 562, 218 S. W. 1068.

### Art. 743. [723] Judgment not to be reversed unless error prejudicial, etc.

See *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292; *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986; *Rosa v. State*, 86 Cr. R. 646, 218 S. W. 1056.

Cited, *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718; *Lowe v. State (Cr. App.)* 226 S. W. 674.

#### II. HARMLESS ERROR

4. **Decisions under former statute.**—Code Crim. Proc. 1879, art. 685, which provides that a conviction in a criminal cause will be reversed for any erroneous instruction if excepted to at the time of the trial, applies only to instructions that are prejudicial to defendant, and not to those which are harmless, or beneficial to him. *Green v. State*, 32 Cr. R. 298, 22 S. W. 1094.

##### (A) Instructions Given

5. **In general.**—Error in an instruction in a case wherein accused was convicted required a reversal, where it was speculative as to what the verdict would have been under a correct instruction. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

Error of the charge in reversing the rule as to burden of proof is emphasized by the fact that it is a case of circumstantial evidence, and that there was no charge on that phase of the law. *Claunch v. State*, 82 Cr. R. 114, 198 S. W. 307.

In proceeding under juvenile delinquent law, inaccurate charge as to time for which the delinquent might be committed, which was in defendant's favor, held to present no error. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

In a prosecution for incest, error in permitting the jury to determine whether prosecutrix was an accomplice was necessarily prejudicial, where court instructed that, if the jury found her to be an accomplice, corroboration was necessary to sustain the conviction; there not being sufficient facts to comply with the law requiring corroboration. *Bohannon v. State*, 84 Cr. R. 8, 204 S. W. 1165.

7. **Errors in form.**—In a prosecution for homicide committed on one who defendant claims he thought had maligned his sister, charge of the court substantially presenting the issues made by the record, though not as aptly framed as it might have been held harmless to defendant. *Moore v. State (Cr. App.)* 228 S. W. 218.

8. **Invited error.**—In a prosecution for homicide, where defendant, a striker, killed a guard, defendant cannot complain that the main charge failed to treat his right to picket, etc., where his request dealing with the subject was given. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

An instruction substantially the same as a special charge requested by defendant, if erroneous, was invited error. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

9. **Clerical errors.**—On trial in January, 1917, instruction giving date of alleged assault as June, 1917, instead of June, 1916, held not reversible error. *Clayton v. State*, 81 Cr. R. 385, 197 S. W. 591.

15. **Inapplicability to evidence—Instruction not supported by evidence.**—Limitation of right of self-defense by a charge on provoking the difficulty without evidence to justify it is prejudicial error. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513; *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 897; *Carter v. State*, 87 Cr. R. 200, 220 S. W. 335.

Even though a charge be not called for by the facts, there will be no reversal for giving it unless it appear that in some way harm might have resulted therefrom. *Flores v. State (Cr. App.)* 231 S. W. 786.

19. **Errors harmless under the evidence.**—In a prosecution for selling liquors in dry territory an instruction that conviction could be had upon proving sale to any one of the four named in the indictment, though error, was not ground for reversal, where the evidence clearly proved sale to all four. *Price v. State*, 83 Cr. R. 323, 202 S. W. 948.

In prosecution for receiving or concealing stolen goods, in absence of evidence that defendant's acquisition of property was for innocent purpose or under such circumstances as to raise doubt of his guilty intent, failure to insert "fraudulently" in portion of charge applying law to facts was not reversible error. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

In a prosecution for burglary, exceptions to a charge based upon the submission of want of consent of the occupant are not tenable, where it is affirmatively shown that the property was taken without consent. *Carneal v. State*, 86 Cr. R. 274, 216 S. W. 626.

In prosecution for a crime actually committed by another, the giving of an incorrect charge on the law of principals is not reversible error, if the unquestioned proof shows that accused was a principal under any phase of the statute defining principals, but mere proof that accused was present at time of commission of crime is not sufficient to render such charge harmless. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

Error in omitting from a charge that it was sufficient if the jury found the prosecutrix was the same person mentioned in the indictment, the restriction that the names should be idem sonans was not reversible error, where the names were idem sonans and the certainty of the person intended was clear. *Davis v. State*, 88 Cr. R. 7, 224 S. W. 510.

Testimony by defendant, which showed that he had arrested and disarmed deceased before the shooting, and that, after he forbade deceased to enter jail, where he might procure a pistol, deceased made a motion toward accused as if to attack him, does not show justification for killing deceased in self-defense, even if the arrest were lawful, so that error in instruction on the right of perfect self-defense was not prejudicial to accused; error, if any, being in defendant's favor. *Rutland v. State*, 88 Cr. R. 114, 224 S. W. 1088.

In a prosecution for homicide, where the evidence did not raise the issue of perfect self-defense and the instruction on manslaughter was not objected to, the failure of the court in his charge on threats to include the right to act on information of threats.

which were not in fact made, was not prejudicial to accused, and where a charge requested by him, which was given, contained the same omission. *Id.*

In a prosecution for statutory rape, where it conclusively appeared that the girl was under the then existing age of consent at the time of the alleged intercourse, instructions which were erroneous in applying the subsequent and increased age to the offense were harmless. *Jackson v. State*, 88 Cr. R. 225, 224 S. W. 1110.

In prosecution for bigamy involving the issue of whether defendant was married to alleged first wife, objections to court's charge in reference to common-law marriage held harmless, in view of sufficiency of evidence to prove a statutory marriage. *Ahlberg v. State*, 88 Cr. R. 173, 225 S. W. 253.

Where no phase of the law of self-defense was suggested by the facts, accused could not complain that the instruction upon self-defense as given applied to actual danger alone, and that the court failed, upon request, to embody the law of apparent danger. *Surges v. State* (Cr. App.) 225 S. W. 1103.

In a prosecution for assault to rape, resulting in conviction of aggravated assault where there was testimony without contradiction that defendant placed his hands on prosecutrix's limbs without her consent, omission of the court to tell the jury that they must believe the assault was with an instrument or means which could inflict disgrace, within Pen. Code, art. 1022, subd. 6, held harmless to defendant; such an assault as defendant committed being uniformly held to be with such means and instrument. *Hand v. State* (Cr. App.) 227 S. W. 194.

**20. Error favorable to accused.**—In prosecution for murder, where, if defendant's theory was believed, offense was manslaughter, instruction to acquit if theory was believed was erroneous in accused's favor, and no ground for reversal. *Davis v. State*, 81 Cr. R. 450, 196 S. W. 520.

In a homicide case wherein accused relied upon Pen. Code, art. 1132, subd. 4, and article 1133, reducing the offense to manslaughter when it happens on the first meeting after the use of insulting words to a female relation held not reversible error to give a general charge on manslaughter, and then call the jury's attention to insulting conduct as adequate cause; the charge being favorable to defendant. *Bibb v. State*, 86 Cr. R. 112, 215 S. W. 312.

In a prosecution for burglary, where the burglar was tracked to defendant's house and stolen property found therein, an instruction to acquit if the jury had a reasonable doubt whether the offense was committed by a relative living in defendant's house was favorable to defendant, since they might have acted jointly. *Russell v. State*, 86 Cr. R. 587, 219 S. W. 835.

In a prosecution for homicide, where defendant struck deceased with a club and killed him, a paragraph of the main charge stating that the instrument should be considered in judging the intent of the party offending, and if it was one not likely to produce death it is not to be presumed that death was designed, was not objectionable on the theory that the court in that connection should have given Pen. Code art. 1149, it appearing that the court gave a special charge in which that article was copied, as well as other special charges that the instrument used, a piece of wood, was not per se a deadly weapon, and that, if the jury had a reasonable doubt whether defendant had the specific intent to kill, he should be convicted only of aggravated assault, unless acquitted on the ground of self-defense, the charges as a whole being sufficiently favorable to defendant, and in some particulars unduly favorable. *Hoover v. State* (Cr. App.) 230 S. W. 982.

**23. — Submission of lesser offense.**—In a prosecution for aggravated assault by an adult male upon a child, the submission of simple assault is favorable to accused, and he cannot complain thereof on appeal. *Anderson v. State* (Cr. App.) 226 S. W. 414.

**29. Effect of verdict.**—In homicide prosecution, instruction authorizing conviction of aggravated assault when testimony raised self-defense and justification was harmless, where defendant was not convicted of aggravated assault. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

In a prosecution for maiming, the rejection by the jury of defendant's theory of self-defense did not cure the error committed in failing to charge as to the effect of communicated threats made by the injured party followed by an overt act at the time of the assault. *Keith v. State* (Cr. App.) 232 S. W. 321.

**30. — Conviction of lesser offense.**—In prosecution for assault to commit rape, error in submitting the law of attempt to commit rape was harmless, where the jury acquitted accused of both offenses and convicted of aggravated assault. *Miller v. State*, 84 Cr. R. 168, 206 S. W. 524.

Exceptions to a charge on aggravated assault will not be considered, where the jury acquitted of that offense and convicted of simple assault. *Mathis v. State*, 84 Cr. R. 347, 206 S. W. 528.

In homicide prosecution alleged errors in charging as to what facts would reduce an unlawful killing from murder to manslaughter was harmless where defendant was convicted of manslaughter. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

In homicide prosecution, court's error in limiting jury's consideration to what occurred on day of homicide upon question of whether there was sufficient cause to reduce the homicide to manslaughter was harmless, where defendant was convicted of only manslaughter and given the lowest punishment therefor. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

The fact that one charged with murder is found guilty of manslaughter does not show that the court erred in submitting the law of murder to the jury. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

The jury having found defendant guilty only of manslaughter and assessed the lowest punishment, giving of instruction on murder was harmless. *Baker v. State*, 87 Cr. R. 305, 221 S. W. 607.

Where accused was indicted for assault to murder, but was convicted only of an aggravated assault, he was acquitted of the charge of assault to murder, and cannot complain of the court's charge on that offense. *Wheeler v. State*, 87 Cr. R. 646, 224 S. W. 782.

Where defendant was convicted only of manslaughter, he cannot complain that the charge on manslaughter was too restrictive. *Hoover v. State* (Cr. App.) 230 S. W. 982.

Errors in charge as to matters relating to the law of murder and the law of manslaughter are immaterial on appeal, where defendant was convicted of manslaughter and her punishment fixed at the minimum allowed by statute. *Shields v. State* (Cr. App.) 231 S. W. 779.

31. — **Punishment.**—Although a charge was erroneous regarding recommendations for suspension of sentence, it was harmless where the sentence assessed was beyond the limit touched by art. 865d, relating to suspended sentences. *Morris v. State*, 82 Cr. R. 13, 198 S. W. 141.

An erroneous charge in a prosecution for manslaughter could not have been harmless, assuming defendant to be guilty of manslaughter, where the punishment assessed exceeded the minimum. *Nalls v. State*, 87 Cr. R. 83, 219 S. W. 473.

Where defendants' punishment was fixed at imprisonment for a term less than would under the old law have applied to murder in the first degree, the failure of the charge to define express malice which distinguishes murder in the first degree from that of the second is immaterial; the degrees in murder having been abolished. *Pinkerton v. State* (Cr. App.) 232 S. W. 827.

43. **Cure by other instructions.**—In a prosecution for manslaughter, instruction on manslaughter, if erroneous as on the weight of the evidence and assuming that defendant did the killing, a disputed issue was harmless, where the remainder of the charge plainly negated the fact inferred, and the error was not reversible, within this article. *Mobley v. State* (Cr. App.) 232 S. W. 531.

(B) *Failure on Refusal to Give Instructions*

44. **In general.**—See *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344; *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

Failure to instruct that defendant should be acquitted of unlawfully borrowing money from a state bank of which he was president, though his secret membership in a firm, unless the partnership existed as alleged, held fatal error where the evidence as to the existence of the partnership was conflicting. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

Where alleged accomplice's testimony was merely cumulative, a reversal will not be had upon court's failure to instruct on subject of accomplice testimony. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

In prosecution for engaging in business of unlawful sale of intoxicating liquor, where evidence of reputation was admitted, error in failing to confine it to issue of suspended sentence was prejudicial. *McGary v. State*, 82 Cr. R. 54, 198 S. W. 574.

In a prosecution for unlawfully selling liquor, where the district attorney remarked that the evidence showed that defendant was "running a disorderly house, a place where you could take lewd women and drink beer," refusal to instruct the jury to disregard the argument, if error, held harmless where jury assessed lowest punishment. *Le Gois v. State*, 83 Cr. R. 460, 204 S. W. 320.

In homicide prosecution, court's failure to charge on assault to murder was harmless, where defendant was convicted of manslaughter, since jury by such conviction showed its disagreement with theory that there was malice aforethought, which is an essential element of assault to murder. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

Whenever the state's reliance is upon circumstantial evidence alone, it is incumbent upon the court to instruct as to the rules of circumstantial evidence, and such instruction is not discretionary. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

In prosecution for having sold meat of hog that had died otherwise than by slaughter, refusal to instruct on law of accomplice testimony, single sale proved having been by testimony of one whom jury could find to have been an accomplice, held important enough to require reversal. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

Where the court charged on manslaughter that if defendant was laboring under such a degree of anger, etc., as to render his mind incapable of cool reflection produced by any or all of the acts or words of deceased, or both, or by such words or acts in connection with all other facts and circumstances proved, and if such acts, words, and conduct alone or in connection with other facts and circumstances constituted adequate cause, etc., a requested charge on cooling time between a conversation and the killing would have been to defendant's disadvantage as limiting the scope of the inquiry permitted by the charge given. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

The exclusion of evidence of defendant's intoxication, admissible under Pen. Code, art. 41, in mitigation of punishment, and refusal to instruct thereon, was not harmless error. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

Where testimony of an accomplice is not favorable to the state, it is not error to fail or to refuse to charge on such testimony. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

In the absence of matters in the record to the contrary, the presumption in favor of the correctness of the court's ruling in failing to charge on the law of accomplice testimony and circumstantial evidence prevails. *Bolton v. State* (Cr. App.) 227 S. W. 326.

It cannot be said that failure of trial judge to charge on the law of accomplice's testimony was not calculated to injure rights of one convicted of the sale of intoxicating liquor under the Dean Prohibition Law, in that accused made a confession which was introduced in evidence; there being no evidence other than that of accomplices to show that there had been any sale of liquor, except the confession. *Robert v. State* (Cr. App.) 228 S. W. 230.

In a prosecution for forgery, the refusal of a requested instruction that, if the defendant did not know the checks received from another and which he passed were forged, he would not be guilty, held not reversible error, where the proposition in a negative way was in substance embraced in the main charge, and where the refusal was not calculated to injure the defendant. *Gumpert v. State* (Cr. App.) 229 S. W. 329.

Unless it affirmatively appears in the bill of exceptions that carrying of a pistol by defendant charged with murder was for a purpose or under circumstances permitted by law, the presumption in the Court of Criminal Appeals would be in favor of the correctness of the ruling of the trial court in refusing a charge that defendant had a right to carry the pistol. *Taylor v. State* (Cr. App.) 229 S. W. 532.

In a prosecution for the unlawful sale of intoxicating liquor, the testimony of the purchaser, an accomplice, being essential to sustain the state's case, error in refusing defendant's requested charge defining an accomplice and instructing that the purchaser was such, and that his testimony uncorroborated could not form the basis of conviction, requires reversal of judgment of conviction. *Chandler v. State* (Cr. App.) 230 S. W. 1002.

### III. OBJECTIONS AND EXCEPTIONS

#### *Decisions prior to act of 1897*

**45. Necessity of exception.**—An alleged error in refusing a special charge will not be reviewed in the absence of a bill of exceptions. *Screws v. State* (Cr. App.) 23 S. W. 796.

#### *(C) Decisions under Act of 1913*

**61. Applicability of act.**—Acts 35th Leg. c. 177 (Civ. St., art. 1974), does not amend procedure in criminal cases which is embodied in Acts 33d Leg. c. 138 (Code Cr. Proc. 1916, arts. 735, 737, 737a, 743). *Barrios v. State*, 33 Cr. R. 548, 204 S. W. 326.

On appeal in a criminal case, to authorize the consideration of objections to the charge, or the refusal of special charges, the record must disclose that the requirements of arts. 735, 737, 737a, and 743, providing for presentation of charges to the court, were fulfilled. *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172.

**62. Objections and exceptions.**—A bill of exceptions is necessary to enable the appellate court to review objections to the charge. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844; *Wallace v. State* (Cr. App.) 200 S. W. 1088; *Spohn v. State*, 33 Cr. R. 219, 202 S. W. 732; *Richardson v. State*, 84 Cr. R. 38, 204 S. W. 638; *Nicolatte v. State*, 85 Cr. R. 245, 211 S. W. 456; *Thompson v. State* (Cr. App.) 228 S. W. 224.

A charge not fundamentally defective will not be considered on appeal, where no exception was taken, and it was attacked for first time in motion for new trial. *Wright v. State*, 83 Cr. R. 559, 204 S. W. 767; *Grissom v. State*, 87 Cr. R. 465, 222 S. W. 237; *Tamaya v. State* (Cr. App.) 230 S. W. 146; *Boaz v. State* (Cr. App.) 231 S. W. 790.

Objections to charge in court below were necessary for review on appeal. *Davis v. State*, 81 Cr. R. 450, 196 S. W. 520.

Where complaints of charge and refusals of requests are not covered by bills of exceptions, and, in absence of statement of facts, charge is applicable to state of facts that may have arisen under evidence, as set forth in allegations and indictment, conviction will be affirmed. *Smith v. State*, 81 Cr. R. 538, 196 S. W. 952.

Where evidence as to insanity was very meager in prosecution for assault with intent to murder, and no exception was taken to omission to charge on that phase of case, there was no reversible error. *Parsons v. State*, 81 Cr. R. 654, 197 S. W. 997.

In prosecution for cow theft, punishment prescribed by Pen. Code, art. 1354, being imprisonment for not more than four years, court's charge, unobjected to on trial, authorizing imprisonment for not more than five years, held not reversible error. *Grider v. State*, 82 Cr. R. 124, 198 S. W. 579.

Objection that there was a conflict in the instructions held not available where no bill of exceptions was taken. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

In prosecution for wife's desertion, where husband claims wife had another husband living, evidence being conflicting, it was affirmative error to charge that presumption of death after seven years' absence was absolute, and exception to such charge was reviewable, although no bill of exceptions was reserved to refusal of special correcting charge. *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

It is error of a fundamental nature to authorize a conviction for any other offense than that charged, whether there was an exception reserved or not to the action of the court in so charging. *Moore v. State*, 84 Cr. R. 256, 206 S. W. 683.

Submitting the issue of manslaughter in a homicide case, although not warranted by the facts, is not error of which appellant can complain in the absence of an exception to the charge. *Love v. State*, 85 Cr. R. 30, 209 S. W. 660.

Failure to charge on aggravated assault in a prosecution for assault to murder is not reversible error, in the absence of requested instructions or exceptions. *Patten v. State*, 84 Cr. R. 534, 209 S. W. 664.

Lack of timely exception to failure to charge law of accomplice testimony does not prevent reversal for failure of evidence to corroborate accomplices, a point which can be raised whether charge was given or not. *Pitts v. State*, 85 Cr. R. 14, 210 S. W. 199.

Witnesses who procured the sale of whisky to a soldier to secure evidence against defendant are not accomplices as a matter of law, and the necessity for corroboration of their testimony cannot be considered on appeal, in the absence of a requested charge or exception to the charge given; the error not being fundamental. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804.

Failure to charge on circumstantial evidence is not reversible error, where no objection is taken to the court's charge, nor a special instruction presented. *Charles v. State*, 85 Cr. R. 534, 213 S. W. 266.

In a prosecution for homicide, where no exception was taken by defendant to a charge on his right to seek deceased in a peaceable manner to require an explanation

of his drilling on land claimed to be in defendant's possession and to arm himself, no error was presented. *Barklay v. State*, 85 Cr. R. 512, 213 S. W. 642.

In a prosecution for cutting fences, misdirection of the jury as to the punishment to be awarded, resulting in infliction of a penalty of two years, greater than the minimum of one year fixed by law, held fundamental error, reviewable despite the absence of proper exception to the charge. *Flores v. State*, 86 Cr. R. 235, 216 S. W. 170.

Where there was no exception to the court's charge, a claim of failure to submit the proposition, in a homicide case, in reference to self-defense, that the occurrence must be viewed from defendants' standpoint, cannot be considered on appeal. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

In a prosecution for attempting to pass a forged instrument, any error of the court in charging the jury that the testimony of a witness upon whom defendant also attempted to pass the forged instrument was admitted before them only for what they might consider it to be worth upon the issue of the fraudulent intent of defendant, if erroneous by reason of being upon the weight of the evidence, was not so fundamental as to require the court to reverse, in the absence of an exception. *Johnson v. State*, 88 Cr. R. 136, 224 S. W. 1103.

Where not a single bill of exceptions was reserved by defendant to the court's failure to instruct the jury that certain witnesses were accomplices, the Court of Criminal Appeals is forced to conclude that the refusal of such charges was acceptable to defendant as was the refusal of the court to correct his main charge. *Berlew v. State* (Cr. App.) 225 S. W. 518.

Failure of the court to limit in his main charge testimony offered by accused to impeach a state witness, if such a limitation were proper, was not error, where such main charge was not excepted to, and no special charge was asked presenting the issue. *Lowe v. State* (Cr. App.) 226 S. W. 674.

Failure to charge as to accomplice testimony is not reversible error, unless there is an exception to the instructions given for such failure, or there is a refusal of a special charge submitting such issue, and the matter cannot be raised upon motion for new trial or appeal for the first time. *Joiner v. State* (Cr. App.) 232 S. W. 333.

The court cannot, on appeal from a conviction of homicide, review the trial court's charge on threats of which no complaint was made. *Jones v. State* (Cr. App.) 232 S. W. 847.

63. — **Requests.**—An omission to charge is not subject to review in the absence of exception or proffered special charge at the time of trial. *Merka v. State*, 82 Cr. R. 550, 199 S. W. 1123.

In prosecution for murder with a weapon not per se deadly, failure to charge that intent to kill could not be presumed from the use of the weapon was an omission not reviewable in the absence of specific exception or of request for and refusal of the charge. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

In misdemeanor case, refusal of requested charge on circumstantial evidence cannot be reviewed, where there was no exception to given charge for omission to charge on circumstantial evidence. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

Special charges refused, and not brought up for review by bills of exceptions, cannot be considered. *Barrios v. State*, 83 Cr. R. 548, 204 S. W. 326.

In absence of bill of exceptions reserved to failure to give charge not showing from contents or anything connected with it whether it was presented to court before or after main charge or after case was concluded, Court of Criminal Appeals cannot consider action of trial court. *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665.

Refusal of requested instructions must be presented to appellate court for review by bill of exceptions. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

In a prosecution for unlawfully selling intoxicating liquor, where no exception was taken to the action of the trial court in failing to charge as to accomplices, and no special charge was asked presenting such issue, such failure was not reversible error. *Byrd v. State* (Cr. App.) 231 S. W. 399.

64. **Time for objections and exceptions.**—See art. 735, note 87.

Under the statute the court's charge must be excepted to in due time, so that the supposed errors which are pointed out may be corrected and the cost and delays of appeal lessened, and failure to do so except in due time cures all errors in the charge not fundamental. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

65. — **Motion for new trial.**—The charge and judgment showing that, before receiving the plea of guilty, on which defendant was convicted, he was admonished of the consequences of his plea, as required by art. 565, and defendant having merely filed a motion for new trial, alleging the judgment and verdict were contrary to the law and evidence, there is nothing to review. *Kimball v. State*, 84 Cr. R. 161, 205 S. W. 989.

Where no instruction was asked, and no exception to the failure of the trial court to charge the law of accomplice testimony was taken, except in the motion for new trial, it came too late under the statute. *Pitts v. State*, 85 Cr. R. 14, 210 S. W. 199.

Where no exceptions were taken to the charge, and there were no bills of exception to the introduction of any evidence, questions raised by the motion for new trial, presenting error in the charge or the reception of evidence, cannot be reviewed. *Tamaya v. State* (Cr. App.) 230 S. W. 146.

66. **Sufficiency of objections and exceptions.**—Where it does not appear from defendant's requested special charge, or from the bill of exceptions taken to its refusal, whether it was presented or refused before or subsequent to reading of charge to jury, Court of Criminal Appeals cannot consider the matter. *Alsup v. State*, 85 Cr. R. 36, 210 S. W. 195; *Lee v. State*, 83 Cr. R. 532, 204 S. W. 110; *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765; *Green v. State*, 84 Cr. R. 162, 205 S. W. 988.

It is essential that a bill of exceptions specifically show testimony of witness claimed to be an accomplice, upon which subject a requested instruction was refused. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

In prosecution for assault with intent to murder, objection that court failed to charge Pen. Code, arts. 1147, 1149, as to means used and influence of sudden passion, held sufficient to present question of sufficiency of charge given. *Garrett v. State*, 82 Cr. R. 64, 198 S. W. 308.

Bill of exceptions complaining of court's charge presents nothing for review, where there was no statement of facts showing evidence upon which charge was based. *Pritchard v. State*, 82 Cr. R. 219, 199 S. W. 292.

Objection that instruction on principals conflicted with charge on alibi held not available where only objection was that no charge on principals was authorized. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

Bill of exceptions to giving instruction that if defendant did not voluntarily make confession, or if the jury had reasonable doubt whether he made it voluntarily, it could not be considered, as qualified by the court "that no exception was made to this charge at the time, and no special charge was asked, and the charge is all right anyhow," shows no error. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Mention of failure to charge on manslaughter contained in the brief, but not in the bill of exceptions and reference thereto in the objections to court's charge was too general to be considered. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

Bills of exception, merely stating that defendant asked certain charges, which were refused not showing by charges or bill why they should have been given, and not stating any evidence to show that charges were applicable to evidence, were indefinite. *Lee v. State*, 83 Cr. R. 532, 204 S. W. 110.

The objection to the court's charge for failure to submit the issue of manslaughter, "because the issue was properly raised by the testimony adduced on the trial," is too general to present any error. *Thomas v. State*, 84 Cr. R. 330, 206 S. W. 846.

Exceptions to court's charge held sufficient to require consideration, on appeal, of whether court erred in charging on possession of recently stolen property and consequent explanation where only issue was ownership of the property. *Cannon v. State*, 84 Cr. R. 504, 208 S. W. 339.

In the absence of any statement of the grounds upon which defendant regarded his requested charge applicable, embraced within the exception to its refusal or the motion for new trial, the matter is not so presented as to demand attention on appeal. *Vaughn v. State*, 84 Cr. R. 483, 208 S. W. 527.

Exception of appellant from conviction of cattle theft to paragraph of charge complained of as assuming that appellant was guilty, if accomplice testimony was true, held sufficiently specific in pointing out error complained of. *Standfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

An exception to the charge because paragraph 4 was on the weight of the evidence is too general to be reviewed. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

In a prosecution for cattle theft, an exception to the court's refusal to charge, as requested, that the jury might acquit if they believed the animal stolen to be the property of defendant or one of his family, or if defendant believed himself or a member of his family the owner, held sufficient to call the court's attention to the error. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

A bill of exception complaining of refusal of court to give certain special charges will not be considered, where it fails to show whether charges were asked before argument began, or after it ended, or at what step of proceeding. *Taylor v. State*, 85 Cr. R. 101, 210 S. W. 539.

The ground of exception that the court did not allow defendant sufficient time to review a charge after it was written and before being read to the jury, reciting that the charge was handed to defendant's counsel at 11 o'clock in the evening, and that they were given until 8:45 the next morning to examine it, held insufficient, as too general. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

The appellate court will not search the entire record, to ascertain if a bill of exceptions is well founded, and a bill to the court's charge, stating no grounds of exception and no facts, is insufficient. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

Where the various exceptions of defendant to the court's charge, certified as a bill of exceptions, showing presentation and action upon them in due time, are in separate paragraphs, each paragraph being specific and complying with statute, the fact that all are contained in one paper, the subdivisions being segregated and numbered, each sufficient to advise the trial court and the Court of Criminal Appeals of the complaint directed at the charge and the refusal of a special charge, does not vitiate the exception nor warrant the court in ignoring it. *Clark v. State*, 86 Cr. R. 585, 218 S. W. 366.

Exceptions to failure to charge on alibi cannot avail; the bill not showing the evidence required such charge, and there being no authenticated statement of facts. *Pilgrim v. State*, 87 Cr. R. 6, 219 S. W. 451.

Exception to court's charge on self-defense that "because said charge fails to instruct the jury fully and as they should be instructed, with reference to the law on self-defense, the evidence in said cause adduced before the jury having shown that the issue of self-defense is the principal issue in said case," held too general for consideration on appeal. *Lucas v. State* (Cr. App.) 225 S. W. 257.

Where objections are taken to the charge before being read to the jury, they must be verified in some way so as to inform the appellate court that such procedure actually occurred, and the fact that the caption of a paper purporting to contain such exceptions recites that it contains the objections presented before the charge was read is not a verification of the trial court of the fact of such presentation, and unless there be some such verification apparent on the paper, or by the bill of exceptions as the law directs, the appellate court cannot consider them. *Gibson v. State* (Cr. App.) 225 S. W. 538.

Where record contains what purports to be exceptions to the court's charge, but the same are marked by the trial court "Overruled," and there does not appear anywhere a showing that such objections were properly presented to the trial court before he read

his charge to the jury, they cannot be considered. *Gibbs v. State* (Cr. App.) 227 S. W. 1107.

Though the bill of exceptions stated that defendant excepted at trial to a portion of the charge, yet, as it nowhere appeared in the record that the exception was presented in writing or that an objection was made in writing, objections to the charge cannot be reviewed; for, when exceptions are taken to the charge before being read to the jury, they must be verified in some way as to inform the appellate court such procedure actually occurred. *Castleberry v. State* (Cr. App.) 228 S. W. 216.

**67. Misdemeanors.**—In misdemeanor cases main charge, if erroneous, must be excepted in order to get a review of an accurate special charge presented and refused. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

In prosecutions for misdemeanor, errors in the charge, unless fundamental, must be brought to the Court of Criminal Appeals by proper bills of exception. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

### Art. 744. [724] Bill of exceptions.

See *Rust v. State*, 31 Cr. R. 75, 19 S. W. 763.

**1. Rulings which may be made subject of bill of exceptions.**—A bill of exceptions to the trial court's action in modifying a bill prepared by accused is permissible if it clearly presents the original bill, the trial court's objectionable action, and reasons why deemed objectionable, and was presented to, and approved by the trial court or by bystanders cognizant of the facts. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

Where, after disposition of the case and overruling of motion for new trial, the trial judge inserted in the record affidavits of absent witnesses without reopening the case or notifying defendant, such affidavits being inserted by so-called bills of exception, they may not be considered by the appellate court. *Bosley v. State*, 86 Cr. R. 619, 218 S. W. 750.

**2. Necessity of bill of exceptions.**—Where there is neither a statement of facts nor bill of exceptions and nothing presented which can be reviewed in the absence of these, a conviction will be affirmed. *Newton v. State* (Cr. App.) 199 S. W. 467; *Wallace v. State* (Cr. App.) 197 S. W. 869; *Moye v. State* (Cr. App.) 198 S. W. 961; *Oliver v. State* (Cr. App.) 199 S. W. 466; *Casey v. State* (Cr. App.) 203 S. W. 901; *Sweeney v. State*, 84 Cr. R. 58, 205 S. W. 335; *Linthecum v. State*, 85 Cr. R. 247, 211 S. W. 456; *Wall v. State* (Cr. App.) 215 S. W. 300; *Bradley v. State* (Cr. App.) 221 S. W. 1086; *Ramirez v. State* (Cr. App.) 222 S. W. 1106; *Bailey v. State* (Cr. App.) 225 S. W. 515 (three cases); *Petty v. State* (Cr. App.) 225 S. W. 1098; *Dyer v. State* (Cr. App.) 229 S. W. 326; *Franklin v. State* (Cr. App.) 231 S. W. 392; *Perkins v. State* (Cr. App.) 232 S. W. 821.

In the absence of bill of exceptions and statement of facts, judgment will be affirmed, the indictment being sufficient, and no fundamental error appearing. *Fovella v. State*, 85 Cr. R. 97, 210 S. W. 207; *Hamilton v. State* (Cr. App.) 198 S. W. 291; *Rodgers v. State*, 82 Cr. R. 143, 198 S. W. 574; *Martinez v. State*, 82 Cr. R. 404, 199 S. W. 629; *Burkhardt v. State* (Cr. App.) 200 S. W. 840; *Price v. State*, 83 Cr. R. 300, 202 S. W. 948; *Miller v. State* (Cr. App.) 204 S. W. 334; *Amason v. State* (Cr. App.) 208 S. W. 917; *Meyer v. State*, 85 Cr. R. 168, 212 S. W. 504; *Dixon v. State*, 86 Cr. R. 406, 216 S. W. 1097; *White v. State*, 86 Cr. R. 420, 217 S. W. 389; *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326; *Eddleman v. State* (Cr. App.) 230 S. W. 421; *Smith v. State* (Cr. App.) 231 S. W. 1096.

Grounds of motion for new trial cannot be reviewed in the absence of facts and bill of exceptions. *Brady v. State*, 84 Cr. R. 172, 206 S. W. 527; *Jackson v. State*, 84 Cr. R. 181, 206 S. W. 192; *Lucas v. State*, 86 Cr. R. 144, 215 S. W. 299; *Dixon v. State*, 86 Cr. R. 406, 216 S. W. 1097; *Tamaya v. State* (Cr. App.) 230 S. W. 146.

Bills of exceptions as required under this article, were necessary for review of instructions on appeal. *Davis v. State*, 81 Cr. R. 450, 196 S. W. 520.

On appeal from conviction for arson with lowest penalty assessed, nothing is presented for review in absence of statement of facts or bill of exceptions. *Peace v. State* (Cr. App.) 196 S. W. 952.

Accused held entitled to reversal of conviction for petty theft, where without his fault he was deprived of a statement of facts and bills of exception. *Ward v. State*, 82 Cr. R. 386, 200 S. W. 378.

It is only through bills of exception, and the statement of facts when new trial is refused, that the court is apprised of occurrences at the trial, and, in view of art. 938, court can consider as ground for reversal only matters presented for review as so required. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

In absence of a bill of exceptions, no alleged errors in the admission or rejection of evidence, the charge, or the argument of the counsel can be reviewed. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

The assignments of error in a criminal prosecution should be brought up by bills of exception, verified by the trial court or proved up by bystanders. *Perez v. State*, 84 Cr. R. 184, 206 S. W. 192.

A record which does not contain a statement of facts or bill of exceptions cannot be considered on appeal. *Jones v. State* (Cr. App.) 213 S. W. 671.

In the absence of bills of exceptions and statement of facts, the Court of Criminal Appeals must presume the rulings of the trial court on the admission and exclusion of evidence to have been correct. *Williams v. State* (Cr. App.) 226 S. W. 411.

Where defendant charged with unlawfully selling intoxicating liquor pleaded guilty, and his punishment was fixed at the minimum penalty for such offense, the Court of Criminal Appeals will not consider his appeal, in absence of statement of facts or bills of exceptions, but will affirm the judgment. *Armstrong v. State* (Cr. App.) 227 S. W. 322.

Where the record contains no statement of facts, and the only bills of exceptions



appearing are not signed or approved, and an examination of the indictment and charges show no error, and there is no error complained of in the motion for new trial which can be considered in the condition of the record, the judgment must be affirmed. *Marshall v. State* (Cr. App.) 227 S. W. 1103.

Where there is no statement of facts or bills of exceptions in the record, the evidence will be presumed to have been sufficient to authorize the verdict of conviction. *Sessums v. State* (Cr. App.) 228 S. W. 224.

Neither motion for new trial, statement of facts, nor bills of exceptions are necessary to give jurisdiction of appeal from conviction for robbery. *Connell v. State* (Cr. App.) 229 S. W. 502.

On appeal in a criminal case, objections are considered only as made and shown by the bill of exceptions. *Shaw v. State* (Cr. App.) 229 S. W. 509.

5. — **Denial of continuance.**—Refusal of continuance will not be reviewed in absence of bill of exceptions. *Lewis v. State*, 83 Cr. R. 159, 202 S. W. 86; *Spurlock v. State*, 81 Cr. R. 626, 197 S. W. 873; *Cooper v. State*, 81 Cr. R. 639, 197 S. W. 1106; *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953; *Tucker v. State*, 84 Cr. R. 332, 206 S. W. 943; *Nicolatte v. State*, 85 Cr. R. 245, 211 S. W. 456; *Bargas v. State*, 86 Cr. R. 231, 216 S. W. 173.

There was no error shown in refusal of continuance because of the absence of an alibi witness for whom no process had issued, where no bill of exceptions was reserved to the overruling of the application. *Jones v. State*, 86 Cr. R. 261, 216 S. W. 183.

Where no bill of exceptions was reserved complaining of the overruling of a motion for continuance, and disclosing the reasons upon which the action was based, the question cannot be reviewed. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

6. — **Proof of venue.**—See notes to art. 938.

Although under art. 938, question of venue of crime shall not be considered unless it became question on trial, and is brought up by bill of exceptions, where venue was one of contested issues and remained a part and parcel of main trial, it is not necessary to reserve bill of exceptions. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

7. — **Rulings and objections respecting jurors.**—Affidavit to the effect that defendant, a Mexican in locality where there were many qualified Mexicans, was tried and indicted only by Americans in violation of Const. U. S. Amends. 14 and 15, in absence of any showing in the record that it was presented to court or that evidence was received, cannot be noticed on appeal. *Carillo v. State*, 81 Cr. R. 636, 197 S. W. 998.

Where there was a motion to quash the venire on the grounds that a jury commissioner was not a freeholder in the county and that the commissioners were not residents of different portions of the county, and there is no statement of facts or bills of exception, and no exception was reserved, and the grounds are not verified or established by evidence, so far as shown by the record, conviction will be affirmed. *Bowen v. State*, 87 Cr. R. 657, 224 S. W. 776.

9. — **Rulings respecting indictment, information or complaint.**—In a prosecution for swindling through obtaining drafts by false pretenses, the fact that the mortgage given by defendant to the injured party mentioned a note as secured by the mortgage, which note was described as due November 20, 1920, while the indictment, after setting out the mortgage, further alleged that defendant executed a note, also set out in the indictment, the due date of which was November 20, 1919, held not fundamental error. *Escue v. State* (Cr. App.) 227 S. W. 483.

10. — **Conduct of trial in general.**—Matters relating to manner of trial, including those pertaining to selection of jury or argument of counsel, are not reversible on appeal, unless verified by bill of exceptions, though defendant was without counsel in court below. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833; *Harper v. State*, 86 Cr. R. 446, 217 S. W. 703; *Jones v. State*, 88 Cr. R. 30, 224 S. W. 888.

In the absence of bill of exceptions it will be presumed that there were no irregularities in the trial. *Wims v. State*, 85 Cr. R. 657, 215 S. W. 304; *Stroud v. State* (Cr. App.) 225 S. W. 256; *Connell v. State* (Cr. App.) 229 S. W. 502.

12. — **Misconduct of prosecuting attorney.**—Alleged improper argument of state's counsel, not verified by bill of exceptions or certified by the trial judge, cannot be reviewed. *Hunt v. State*, 83 Cr. R. 7, 200 S. W. 1090; *Shields v. State* (Cr. App.) 231 S. W. 779.

In prosecution for murder, statement by assistant prosecuting attorney commenting on failure of defendant to deny that he signed confession will not be reviewed in absence of bill of exceptions. *Lewis v. State*, 83 Cr. R. 159, 202 S. W. 86.

Alleged misconduct occurring while a witness was testifying will not be considered by Court of Criminal Appeals unless presented by bill of exceptions. *Cates v. State* (Cr. App.) 227 S. W. 953.

14. — **Misconduct of jury.**—To review question of misconduct of jury in hearing evidence from one or more of the jurors not introduced during trial, set up as ground for new trial, it is necessary that such evidence as was introduced should be perpetuated either in statement of facts or a bill of exceptions, reciting facts, approved by judge and filed during term. *Lopez v. State*, 84 Cr. R. 422, 208 S. W. 167.

Complaints of misconduct of the jury, which are not supported in the record by bills of exception setting forth such matters, cannot be considered on appeal. *Shields v. State* (Cr. App.) 231 S. W. 779.

15. — **Rulings on evidence.**—Rulings on evidence cannot be reviewed in absence of bill of exceptions and statement of facts. *Spurlock v. State*, 81 Cr. R. 626, 197 S. W. 873; *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292; *Pritchard v. State*, 82 Cr. R. 219, 199 S. W. 292; *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665; *Surginer v. State*, 86 Cr. R. 438, 217 S. W. 145; *Wallace v. State*, 87 Cr. R. 527, 222 S. W. 1104; *Holloway v. State*, 88 Cr. R. 126, 224 S. W. 1102.

Questions and answers set out in motion for new trial and not verified by the trial court held not reviewable without a statement of facts or bill of exceptions. *Ramirez v. State*, 81 Cr. R. 367, 195 S. W. 599.

Introduction of testimony charged to have been illegal are matters which could be brought before Court of Appeals only by bill of exceptions. *Daumery v. State*, 82 Cr. R. 231, 199 S. W. 291.

An objection to a question to a defendant on cross-examination as to whether he had not broken jail and ran away that he was in jail for robbing a party other than the one he was being tried for robbing was a mere statement of the ground of objection, and should have been verified. *Hicks v. State*, 82 Cr. R. 254, 199 S. W. 487.

That the merits of admission of evidence of another crime may be reviewed, the state of the evidence affecting its admissibility must be shown by statement of facts or bill of exceptions. *Lozano v. State*, 83 Cr. R. 597, 204 S. W. 323.

In prosecution for murder, defended on ground of insulting conduct to accused's wife, where witness testified that the wife had secured a divorce, objection to such evidence in that it was in a county other than that of her residence, so that the divorce would have been invalid, not verified as required, was insufficient. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

Where there is no evidence in the record and no bill of exceptions reserved in a prosecution for assault with intent to murder, the appellate court cannot review the proposition that the verdict of the jury was contrary to law and the evidence, in that the court erred in permitting a witness to state that defendant, previous to the assault, had cut his wife. *Johnson v. State*, 84 Cr. R. 474, 208 S. W. 520.

Where the fact that a witness was permitted to state what defendant told him while under arrest was set forth only in defendant's motion for new trial, and no bill of exceptions was preserved in regard thereto, it cannot be considered on appeal. *Drawhorn v. State*, 84 Cr. R. 600, 209 S. W. 415.

If defendant desired to object to introduction of testimony, it was his duty to have excepted to such action, and to have embodied exception in bill approved and filed within 30 days after adjournment of court, or else to have brought before Court of Criminal Appeals, in a legal way, some sufficient excuse. *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665.

One dissatisfied with the rulings of the court in a criminal case as to the receipt or rejection of evidence must, to obtain review, bring the matter before the Court of Criminal Appeals in a bill of exceptions, certified in the manner provided by law, and it is not sufficient to complain of the court's rulings on motion for new trial. *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172.

Necessity for bill of exceptions, to action of trial court in admitting evidence, as a predicate for review, exists though examination of record on appeal shows that on proper objection reception of testimony would have been error; there being a presumption that matters not complained of in a bill of exceptions are waived unless fundamental error. *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

In prosecution of defendant indicted as an accomplice, where declarations of principal are admitted to prove principal's guilt as a part of the case against defendant, an objection to the use of such evidence to prove defendant guilty must be brought to appellate court by exception and bill. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

In prosecution of defendant indicted as an accomplice, where declarations of principal are admitted to prove principal's guilt as a part of the case against defendant, an objection to the use of such evidence to prove defendant guilty must be properly raised and presented to the trial court. *Id.*

A complaint that the court committed error in admitting statement of accused made while he was under arrest was too indefinitely presented for consideration, where the testimony was not specified nor the circumstances attending its admission stated, and record failed to disclose that accused presented a bill of exceptions to the court's ruling in admitting the testimony. *Holland v. State*, 88 Cr. R. 46, 224 S. W. 1088.

Complaint that accused was compelled to answer questions on certain subject cannot be considered on appeal, where the questions are not set out in the bill of exceptions. *Lowe v. State* (Cr. App.) 226 S. W. 674.

Appellate court cannot review a contention that state on cross-examination of wife of one of the defendants went farther than the direct examination would permit, where such matter is not brought forward by bills of exception; such matters not being fundamental error that may be raised at any time or in any way. *Taylor v. State* (Cr. App.) 230 S. W. 176.

There being legal evidence adduced on trial sufficient to sustain the conviction appealed from, the Court of Criminal Appeals would not be authorized to overturn the judgment, even though it found hearsay testimony in the record, in the absence of a bill of exceptions complaining of the court's ruling in admitting it. *Crisp v. State* (Cr. App.) 231 S. W. 392.

16. — **Verdict contrary to law and evidence.**—In absence of a statement of facts or bill of exceptions containing the testimony, appellate court cannot pass upon the complaint in the motion for new trial that the judgment is contrary to the law and the evidence. *Garcia v. State* (Cr. App.) 217 S. W. 943; *Lewis v. State* (Cr. App.) 203 S. W. 767; *Green v. State*, 84 Cr. R. 485, 208 S. W. 514; *Christopher v. State* (Cr. App.) 210 S. W. 799; *Starnes v. State*, 86 Cr. R. 145, 215 S. W. 302; *Walker v. State* (Cr. App.) 217 S. W. 939; *Jones v. State*, 88 Cr. R. 30, 224 S. W. 888; *Stroud v. State* (Cr. App.) 225 S. W. 256.

Motion for new trial having raised questions of insufficiency of evidence and refusal of instructions, there is nothing to review, where evidence is not in record and no bill of exceptions was reserved. *Ramsey v. State* (Cr. App.) 197 S. W. 869.

Where the record on appeal from conviction of burglary is without bill of exceptions or exceptions to the charge of court, the court is limited to the question made by the

motion for new trial, that the evidence is insufficient. *Richardson v. State*, 84 Cr. R. 38, 204 S. W. 638.

Where there are no bills of exceptions complaining of any action of the trial court, its officers or the jury that rendered the verdict, or any statement of facts embodying the evidence, it will be presumed that proceedings in homicide case were regular, and that evidence justified a conviction and sentence of death assessed. *Jones v. State*, 84 Cr. R. 471, 208 S. W. 523.

16½. — **Defective verdict.**—This article does not, in view of art. 773, making it the duty of the jury to refuse to receive a defective verdict, make failure to object to a defective verdict a waiver of such defect. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

The objection that the verdict does not support the judgment is fundamental in view of art. 837, subd. 9, and article 853, and can be raised for first time on appeal without bill of exceptions. *Id.*

19. — **Evidence heard and proceedings had on motion for new trial.**—Where defendant's motion for new trial was overruled after hearing the evidence thereon, and such evidence was not presented by any bill of exceptions, error in the court's action was not shown. *Drawhorn v. State*, 84 Cr. R. 600, 209 S. W. 415; *Epperson v. State*, 82 Cr. R. 245, 199 S. W. 478; *Lewis v. State*, 82 Cr. R. 285, 199 S. W. 1091; *Pace v. State*, 83 Cr. R. 368, 203 S. W. 595; *Glascocoe v. State*, 85 Cr. R. 234, 210 S. W. 956; *Ross v. State*, 85 Cr. R. 340, 212 S. W. 167; *Salazar v. State* (Cr. App.) 225 S. W. 528; *Payne v. State* (Cr. App.) 232 S. W. 802; *Cone v. State* (Cr. App.) 232 S. W. 816.

In absence of bill of exceptions, grounds of motion for new trial cannot be considered. *Spohn v. State*, 83 Cr. R. 219, 202 S. W. 732; *Spurlock v. State*, 81 Cr. R. 626, 197 S. W. 873; *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014; *Young v. State* (Cr. App.) 202 S. W. 509; *Brown v. State* (Cr. App.) 219 S. W. 825.

Evidence heard on any motion of accused will not be considered unless preserved either by bill of exceptions or a statement of facts approved and filed during term time. *Reyes v. State*, 81 Cr. R. 588, 196 S. W. 532.

Where there is nothing in motion for new trial that can be considered in absence of facts and bills of exception, the judgment will be affirmed. *Avery v. State*, 83 Cr. R. 80, 200 S. W. 832.

Matters of fact set up in motion for new trial which are not verified by bill of exceptions or statement of evidence filed during term cannot be reviewed. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

That bill of exceptions is reserved to overruling of motion for new trial and embodies the motion does not authorize court to consider matters thereunder, except in cases where proof is heard as to allegations of fact, and such evidence is embodied in bill of exceptions with motion for new trial. *Id.*

Where evidence on hearing of motion for new trial was not preserved by bill of exceptions or statement of facts, it must be assumed that conclusions of trial judge that facts aliunde the record set up in motion were not sustained by evidence were correct. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

Court of Criminal Appeals is not in position to pass on correctness of ruling of trial court in denying defendant's motion for new trial based in part on newly discovered evidence, where evidence which influenced action of court is not preserved by bill of exceptions or statement of facts; presumption being that, if affidavits attached to motion were used in evidence, they were met by controverting facts supporting court's action. *Mitchell v. State*, 85 Cr. R. 25, 209 S. W. 743.

Where evidence heard upon motion for new trial is not presented by statement of facts or bill of exceptions filed during the term, but it appears the court heard evidence in overruling the motion, the presumption is indulged on appeal that the facts heard justified the conclusion reached. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

20. **Substitutes for bill of exceptions.**—Arts. 744, 844, and other statutes providing the requisites of bills of exceptions and statements of facts, constitute the statutory means in criminal cases for bringing questions before the appellate court for review, and a motion for a new trial is unnecessary, except as to questions not raised by bills of exceptions or statement of facts. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

This court cannot refer to statements of facts to supply omissions of fact in bills of exception. *Smith v. State*, 82 Cr. R. 153, 198 S. W. 298.

Although appellant on motion for new trial complained of overruling of his motion for continuance, where he took no bill to court's action, the ruling cannot be reviewed. *Morse v. State*, 83 Cr. R. 153, 201 S. W. 1158.

A bill of exceptions reserved to action of court in overruling motion for new trial setting out an application for a continuance does not add any strength to it, where there was no exception to the overruling of the application. *Mason v. State*, 83 Cr. R. 528, 204 S. W. 331.

A purported transcript of what occurred on the trial as shown by the stenographer's notes and certified to by the stenographer, but not presented to or approved by the judge, cannot be considered; since to constitute a bill of exceptions it must be first approved by the court certifying its correctness, and must be filed, either in term time or within such time as may be authorized by law. *Bargas v. State*, 86 Cr. R. 231, 216 S. W. 173.

On appeal from a conviction of manslaughter, the reversal of the judgment on the ground that evidence of corrupt acts of defendant's relatives, who were not witnesses, was improperly admitted, held not objectionable as a decision on deductions from matters appearing from the statement of facts, and not the bills of exceptions, and so the decision was not open to attack on the ground that it violated this article. *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474.

A bill of exceptions to overruling of a motion for new trial will not suffice to bring up for review trial proceedings to which exceptions should have been taken at time of their occurrence. *Watson v. State*, 87 Cr. R. 189, 220 S. W. 329.

A bill of exceptions is necessary to a review of court's refusal to grant a motion for

a continuance, and a recital of exception taken in the order overruling such motion will not take the place of a bill of exceptions. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

A motion for new trial will not take the place of a bill of exceptions. *Holloway v. State*, 88 Cr. R. 126, 224 S. W. 1102.

Overruling of an application for continuance, not perpetuated by bill of exceptions, cannot be considered further than as shown by a motion for a new trial and state's controversion. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

Questions presented in an amended motion for new trial, after conviction of forgery, referring to bills of exceptions as having been taken during the trial, cannot be reviewed, where the record does not contain the bills of exception. *Begonia v. State* (Cr. App.) 226 S. W. 405.

Matters appearing in motion for new trial not presented by bills of exceptions will not be considered on appeal. *Reid v. State* (Cr. App.) 226 S. W. 408.

In a prosecution for manslaughter, though a bill of exceptions to certain testimony elicited by the state from a defense witness on cross-examination was insufficient, and failed to state the facts and circumstances surrounding the giving of the evidence, the Court of Criminal Appeals properly looked to the statement of facts to further investigate the matter. *Mobley v. State* (Cr. App.) 232 S. W. 531.

21. **Form, requisites, and sufficiency of bill.**—A bill of exceptions must be complete within itself, and exhibit such facts as will show the error complained of. *Rippey v. State*, 86 Cr. R. 539, 219 S. W. 463; *Vann v. State*, 84 Cr. R. 97, 206 S. W. 80; *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535; *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544; *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 359; *Plummer v. State*, 86 Cr. R. 487, 218 S. W. 499; *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

Where bill of exception does not show evidence on which court overruled motion for new trial, the evidence will be presumed, on appeal, to have been sufficient to have sustained such ruling. *Mills v. State*, 83 Cr. R. 515, 204 S. W. 642; *Green v. State*, 84 Cr. R. 162, 205 S. W. 988.

A bill of exceptions held too uncertain and vague for consideration. *McCoy v. State*, 81 Cr. R. 518, 196 S. W. 543.

Where record contains no statement of facts proved and no evidence, and bills of exception and grounds for motion for new trial cannot be intelligently revised, conviction will be affirmed. *Burrage v. State*, 81 Cr. R. 638, 197 S. W. 997.

Where the bill of exceptions showed that testimony was heard in passing on a motion for new trial for misconduct of the jury, but the record did not set it out, the denial of new trial will not be reviewed. *Martin v. State*, 82 Cr. R. 269, 198 S. W. 149.

This court cannot presume that objections in bills of exception are statements of fact. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298.

There is a presumption that lower court ruled correctly, and bills of exception must negative this and show material error. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

A bill of exceptions complaining of a number of things which occurred on trial as being said by state's counsel and court, will not be considered, where it is so general that court is unable to tell from the language what bill was intended to refer to. *Gilbert v. State*, 84 Cr. R. 616, 209 S. W. 658.

Where neither of appellant's two bills of exceptions set out fact showing error in ruling of trial court, the same cannot be considered on appeal. *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749.

The utmost legal effect that can be given bills of exceptions which are not in themselves sufficient to show not only the objection, but also the facts showing the propriety of such objection, is to consider them in the light of general demurrers. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

A bill of exceptions, stating that appellant objected to fact that prosecutrix held her baby while testifying, etc., but stating no ground of objection nor any of the attendant facts, nor how the matter was presented, cannot be considered, because not stating the facts necessary to enable the court to review it intelligently. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

The mere statement of the grounds of objections in a bill of exceptions is not a certificate of the judge that the facts stated are true, and defendant must incorporate sufficient evidence in the bill, to verify the truth of the objections. *Quinney v. State*, 86 Cr. R. 353, 216 S. W. 852.

Grounds of objection in bill of exceptions will not take place of the necessary statement of facts to show that objection is well taken. *Dollar v. State*, 86 Cr. R. 333, 216 S. W. 1087.

Bills of exceptions should be sufficient to disclose the error complained of without the aid of the statement of facts, but, where the record contains a statement of facts, the bill should not be construed so strictly as to defeat the purpose of the law requiring bills of exceptions, in view of Rev. St. art. 2059, providing that no form shall be required, and art. 2060, authorizing a reference to the statement of facts. *Plummer v. State*, 86 Cr. R. 487, 218 S. W. 499.

A statement of the reason for objecting to court's ruling does not comply with Civ. St. art. 2059, providing that the objection to the rule shall be stated with such circumstances, or so much of the evidence as may be necessary to explain it, and no more, and the whole as briefly as possible, but the facts showing the relation of the ruling to the case must be stated in a manner to disclose that they are facts certified to by the trial judge. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

Appellate court may refuse consideration of a bill of exceptions where the statement of exceptions does not set forth the ground thereof. *Gibson v. State* (Cr. App.) 225 S. W. 538.

Bills of exception which do not comply with the rule may not be considered by the Court of Criminal Appeals. *Crisp v. State* (Cr. App.) 231 S. W. 392.

It is not the duty nor does the law require the Court of Criminal Appeals to search

through the record in order to determine whether or not a matter complained of in an insufficient bill presents error, as the bill must within itself show error on the part of the trial court, and must sufficiently set out the proceedings and attendant circumstances to enable the court to know certainly that an error was committed, and ordinarily the statement of facts will not be looked to in aid of a defective bill unless the trial court refers to it in his explanation. *Smith v. State* (Cr. App.) 232 S. W. 497.

The statement of grounds of objection by appellant is not tantamount to a showing that such grounds are in fact proved, and the facts must appear in the bill of exceptions, which show the error complained of, it not being enough for the defendant to say that he objects because a statement was made out of his presence, at a time when the party making the same was across the street, and that appellant did not hear it; this being merely a statement of his objections. *Fowler v. State* (Cr. App.) 232 S. W. 515.

22. — **Excuse for defects.**—Court's failure to limit testimony is not available on appeal, where no exception was taken to court's failure to so do, even though defendant was unlearned in the law, was not represented by an attorney, and did not know how to take advantage of the situation by excepting. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

24. — **Rulings respecting jurors.**—Bill of exceptions to refusal to allow certain questions to a juror on his voir dire examination is inoperative; it not showing he served. *Bartlett v. State*, 82 Cr. R. 468, 200 S. W. 339.

Bill of exceptions to exclusion of question to veniremen not showing it would have elicited an answer disqualifying them is insufficient. *Id.*

Bill reciting merely that juror had admitted saying before trial that accused "had killed a good boy in another county and sworn lies to get out of it" presents no error, since it fails to show that such fact was not known to accused before the jury was accepted. *Adler v. State*, 83 Cr. R. 72, 201 S. W. 177.

In a prosecution for murder, denial of defendant's motion to quash the venire on various grounds held not to present error or require revision in view of the bill of exceptions merely repeating some of the grounds of the motion, but containing no facts and not showing what evidence was introduced in regard to the matter and in qualification thereto by the court. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

25. — **Denial of continuance or postponement.**—A bill of exceptions to the refusal of the trial court to postpone or continue the case, because of the absence of a witness named, presents no error where the record contains no application for such continuance, and no order overruling the same, and the bill sets up nothing that appellant expects to prove by the witness, and nothing with regard to the diligence used to obtain his presence at the trial. *Lemcke v. State*, 86 Cr. R. 386, 217 S. W. 150.

26. — **Putting witnesses under the rule.**—A bill of exceptions, stating that a witness who was under the rule was permitted to testify after violating the rule, was incomplete, where the nature of the evidence given by the witness was not disclosed by the bill. *Patterson v. State*, 85 Cr. R. 643, 215 S. W. 308; *Wagley v. State*, 87 Cr. R. 504, 224 S. W. 687.

Where accused on appeal complained that court abused its discretion in permitting a witness to testify who had remained in the courtroom after the rule had been called for, the burden was on him to reveal in his bill of exceptions circumstances from which an abuse would appear. *Shamblin v. State*, 88 Cr. R. 589, 228 S. W. 241.

28. — **Misconduct of prosecuting attorney.**—Bill of exceptions complaining of reference of county attorney to former trial, held insufficient as containing no statement of facts but simply grounds of objection. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298.

Exception complaining that prosecutor referred to accused as "bootlegger" held, in view of qualification of bill of exceptions, not to show error. *Smith v. State*, 82 Cr. R. 283, 199 S. W. 466.

Bill of exceptions complaining that county attorney in opening argument said he would rely on testimony of certain named witnesses without discussing the testimony or the law, and after defendant's attorney concluded his argument the county attorney made an original argument discussing all the facts and the law, but not showing what the concluding argument of the county attorney was, shows no error. *Cagle v. State*, 82 Cr. R. 347, 200 S. W. 153.

Bill of exceptions as to counsel's remarks with reference to accused's failure to place witnesses on stand to prove good reputation was too indefinite; it not stating facts, or whether reputation was an issue. *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953.

A bill of exceptions complaining of a number of things which occurred on trial as being said by state's counsel will not be considered, where it is so general that court is unable to tell from the language what bill was intended to refer to. *Gilbert v. State*, 84 Cr. R. 616, 209 S. W. 658.

Where bill of exceptions shows objections to argument of counsel as commenting on failure of accused to testify, but does not show as a fact that accused did not testify, it is insufficient, as grounds of objections are not statement of facts. *Quinney v. State*, 86 Cr. R. 358, 216 S. W. 882.

Bills of exceptions, complaining that remarks by counsel were unsupported by the evidence, must show that there was no evidence which justified the remarks, and are insufficient, where the statements of counsel were not verified, otherwise than by statement of court that he instructed jury not to consider the remarks; the mere objection that the testimony did not justify the remarks not being sufficient. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

No indirect reference by state's counsel in argument to defendant's failure to testify is shown by bill of exceptions, reciting that said counsel, after stating that H. testified to a confession by defendant, continued: "No one has denied this. Now, how are you \* \* \* going to say H., is not telling the truth"—it not affirmatively

showing that defendant did not testify, nor negating the fact that there were others present. *Tillman v. State* (Cr. App.) 225 S. W. 165.

A bill of exceptions, complaining of improper argument by prosecuting attorney, should disclose, not only the argument that is complained of, but such pertinent facts as may be necessary to enable the court to determine whether the error has been committed, and, if so, whether it is such as authorizes a reversal of the case. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

A bill of exceptions must make reasonably apparent the error complained of, and if the objection be to counsel's argument, the bill should affirmatively show that it is not in answer to something said by counsel for the accused, or was not based on some evidence, and that it was the statement of some matter hurtful to the accused, and not properly before the jury, or for some reason inflammatory or abusive and calculated to injure accused. *Fowler v. State* (Cr. App.) 232 S. W. 515.

29. — **Rulings on evidence.**—See *Gibson v. State* (Cr. App.) 225 S. W. 538.

A bill of exception to the admission of evidence to require consideration must show what the action of the court was, the subject of it, and its relation to the case. *Marshall v. State*, 85 Cr. R. 131, 210 S. W. 798; *Williams v. State*, 81 Cr. R. 416, 195 S. W. 860; *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298; *Wheat v. State*, 82 Cr. R. 441, 199 S. W. 620; *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014; *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583; *Rainey v. State* (Cr. App.) 231 S. W. 118.

Unless bills of exceptions to the admission of evidence show what the answers of witnesses were, the appellate court will not understand that answers were made. *Lane v. State* (Cr. App.) 229 S. W. 547; *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326; *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162; *Lowe v. State* (Cr. App.) 226 S. W. 674.

The grounds of an objection to evidence should be stated in a bill of exceptions to its admission, in order to present error for review. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240; *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292; *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222; *Lane v. State* (Cr. App.) 229 S. W. 547.

Bills of exceptions complaining of action of court in not permitting witnesses to answer certain questions cannot be considered where they failed to show what the answers would have been. *Smith v. State* (Cr. App.) 232 S. W. 497; *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298; *Knight v. State*, 87 Cr. R. 134, 220 S. W. 333; *Perea v. State* (Cr. App.) 227 S. W. 305.

On appeal from conviction for rape, bill of exceptions urging that statement of prosecutrix after offense was not part of *res gestæ*, held insufficient, it not excluding idea that statement was sufficiently close to bring it within rule. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298.

Bill of exceptions reciting that state asked witness, "What did you do?" and court remarked if it was something about examination, it would be admissible, held too indefinite, not showing what matter related to, or how question came to be asked. *Id.*

Bills of exceptions to admission of prohibition election orders, which did not set out or state orders, or show any election contest proceedings, present no error. *Jeffries v. State*, 82 Cr. R. 42, 198 S. W. 778.

Bill of exceptions should show that declarations of conspirator after the crime were properly admitted to meet evidence of declarations inconsistent with his testimony; and mere statement in bill that he had made contradictory statements, is not enough. *Black v. State*, 82 Cr. R. 358, 198 S. W. 959.

Bill of exceptions objecting to cross-examination as to how many times he had been charged with theft, no direct examination with reference thereto, etc., held not sufficiently specific. *Wheat v. State*, 82 Cr. R. 441, 199 S. W. 620.

Bills of exceptions merely setting out the questions objected to, the answers, and defendant's objections were insufficient to require consideration. *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

Bill of exceptions to admission of testimony on cross-examination is insufficient, not disclosing that it was not proper cross-examination from what witness had testified on direct, or that it injured defendant. *Long v. State*, 82 Cr. R. 312, 200 S. W. 160.

Bill of exceptions to admission of accused's written statement is insufficient if it fails to disclose what the statement was. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

If witness was incompetent as having been in penitentiary, failure of defendant's bill of exceptions to show witness gave material testimony against him renders it impossible to determine supposed error was harmful. *Marshall v. State*, 82 Cr. R. 623, 200 S. W. 836.

Bill of exceptions to admission of physician's testimony as to what accused said very soon after the murder, on ground that he was then under arrest, qualified by judge's statement that he was not then under arrest, and contradicted by accused's own testimony, showed no error. *Phillips v. State*, 83 Cr. R. 133, 201 S. W. 989.

In prosecution for incest, bill of exceptions reciting that court permitted witness to testify that defendant had always been called a certain person's son was insufficient, as too indefinite. *Griffin v. State*, 83 Cr. R. 157, 202 S. W. 87.

In prosecution for incest, bill of exception reciting that witness was asked if it was not practice for children to adopt name of their stepfather, and that he would have answered in negative, was too indefinite for consideration. *Id.*

In prosecution for incest, bill of exception that witness had testified that her daughter disappeared in certain county and could not be found was insufficient as being too indefinite. *Id.*

A bill of exceptions not stating object and purpose of testimony sought to be introduced is not entitled to consideration. *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953.

In bill reciting that testimony of a prior shooting was objected to upon ground that it occurred four or five years prior to shooting in instant case, ground of objection was not a statement of fact, but a reason for objection. *Id.*

The legal presumption is in favor of the trial court's ruling as to admissibility of ev-

idence, and accused must, by the facts in his bill of exceptions, overcome such presumption. *Brown v. State*, 83 Cr. R. 451, 203 S. W. 898.

Defendant's bill of exceptions to refusal to exclude testimony, merely showing objection to question which elicited testimony, sustaining of objection, and denial of motion to exclude, was too indefinite for consideration. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

Defendant's bill of exceptions reciting that while a witness was testifying defendant's counsel propounded to him a question set out, to which objection was sustained, was too meager. *Id.*

A bill in a rape case complaining that on cross-examination defendant was asked if his wife did not slap a couple of little girls on the street because of his improper conduct towards them, that he objected because it was immaterial, irrelevant, and calculated only to prejudice his rights, and the objection was overruled, was too meager to require that it be passed on. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

Where indictment charged a sale of liquor "on or about" a certain date, and testimony was admitted as to two sales, and bill of exceptions to admission of evidence of one sale, as approved by judge, showed defendant was only tried for one offense, the bill showed no error. *Porter v. State*, 84 Cr. R. 164, 205 S. W. 985.

Bill of exceptions from which it could not be ascertained whether statement of physician was inadmissible held not to show error. *Vann v. State*, 84 Cr. R. 97, 206 S. W. 80.

Bill of exceptions to admission of evidence failing to show an objection to the answer of the witness and from which it cannot be determined that any of his objections to the question were good presents no error. *Id.*

The qualification of a witness is a matter for the court, and defendant's bill of exceptions that a nonexpert witness was allowed to testify to course of bullets in deceased's body should contain sufficient verified facts to negative the presumption in favor of the court's ruling. *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

A bill of exceptions to the admission of testimony in a murder case, which fails to comply with any of the rules prescribing the requisites of such an appeal, will not be considered. *Lowe v. State*, 84 Cr. R. 236, 206 S. W. 519.

Bills of exceptions reciting that defendant objected to question asked him on the ground that it was immaterial and irrelevant and could only be used for purpose of inflaming minds of jury, that objection was overruled, and that defendant excepted, are insufficient. *McClendon v. State*, 84 Cr. R. 259, 206 S. W. 686.

Bills of exception, complaining of the rejection of evidence, held too defective for consideration. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

Bill of exceptions to refusal to permit state's witness to answer certain question on cross-examination held indefinite, not showing in what connection testimony came, or why defendant was seeking to introduce it. *Lopez v. State*, 84 Cr. R. 422, 208 S. W. 167.

Where appellant's bills of exceptions are not full enough to show any error in the introduction of testimony, they cannot properly be considered under court rules. *Ice v. State*, 84 Cr. R. 418, 208 S. W. 345.

Bill of exceptions in case depending on circumstantial evidence, not disclosing the relation of the facts, to which they refer, to other facts in the case, nor negating their relevancy as links in a chain of circumstantial evidence, show no error in admission of evidence of finding after the homicide in defendant's place of business of a shotgun indicating recent discharge. *Haley v. State*, 84 Cr. R. 629, 3 A. L. R. 779, 209 S. W. 675.

A bill of exceptions, containing an objection that evidence that defendant bought whisky a year before the alleged sale of a less quantity was too remote, was insufficient to show error, where the bill did not show the date of the sale sought to be proved by the state. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

An objection in a bill of exceptions that certain evidence was prejudicial is too general for consideration, when followed by no statement showing how or in what manner it was prejudicial. *Id.*

An objection in a bill of exception that certain evidence objected to was not admissible under the issues is too general for consideration, where the bill does not show what the issues in the case were. *Id.*

A bill of exceptions complaining of testimony, that property defendant was charged with having stolen was identified by owner at a certain time and place, in that such identification was out of hearing and presence of accused, will not be considered, where there is nothing in the bill which negatives fact of accused's presence at such identification. *Taylor v. State*, 85 Cr. R. 101, 210 S. W. 539.

Bill of exceptions, consisting of questions and answers, followed by statement that evidence was objected to because irrelevant, immaterial, incompetent, and prejudicial, where no surrounding facts are stated, and no reason given why the evidence is irrelevant, etc., will not be considered. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

Bill of exceptions, quoting from a hypothetical case stated to expert witness, and stating that it was objected to because it did not conform to the statutes of Texas, nor to rules of courts, without specifying the particular statute or rule violated, is insufficient. *Id.*

Bill of exceptions to cross-examination as to witness' examination before the grand jury, objected to on ground that defendant was not present and that such evidence was not binding upon her, is insufficient. *Id.*

Bill of exceptions setting out numerous questions and answers with general objection to the whole, or a general motion to exclude all the testimony of witness, not specifying any fact or facts making the evidence inadmissible, will not be considered. *Id.*

Bill of exceptions objecting to testimony upon ground that the proper predicate had not been laid, not containing statement of any fact showing why such evidence is objectionable, was insufficient. *Id.*

In prosecution for keeping disorderly house, where defendant, on cross-examination of a witness for the state, who had been called to testify to reputation of defendant's house, elicited that another witness "took his name," bill complaining of testimony on

redirect examination that he had signed a petition held not to show error, where nature of petition was not shown by bill, and where it appears that witness had given no material testimony for either party. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

Where the evidence set out in a bill of exceptions showed that a confession admitted on behalf of the state was a mere oral statement, not reduced to writing and signed in the presence of two disinterested witnesses, the bill was not defective in failing to suggest or raise the question that the statement was not written. *Bonatz v. State*, 85 Cr. R. 292, 212 S. W. 494.

Defendant should, on objection to question to his witness being sustained as calling for self-serving declarations, be allowed to incorporate the excluded testimony. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

On appeal in criminal case, court will affirm, although error is assigned in the admission of evidence, where from the meager contents of the bills and the record it is unable to decide whether or not the evidence was proper to be introduced; the admissibility of the evidence depending upon facts and circumstances. *Anaya v. State*, 85 Cr. R. 647, 215 S. W. 302.

In a prosecution for murder, bills of exceptions to testimony that witness smelled whisky on appellant's breath on the day of the homicide, objected to as immaterial, irrelevant, and highly inflammatory, held to present nothing showing injury; since bill of exceptions must not only state the ground of objection, but make apparent the injury claimed. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

In a prosecution for theft, a bill of exceptions against the admission of testimony claimed to have been in the nature of a confession made while under arrest, unaccompanied by the statutory formalities, which fails to show that defendant was under arrest at the time, and does not sufficiently show the surrounding facts to advise the Court of Criminal Appeals of the materiality of the evidence sought to be excluded, presents no error. *Petterson v. State*, 86 Cr. R. 265, 216 S. W. 186.

A bill of exceptions, complaining that prosecutrix in the statutory rape case was allowed to answer questions as to the relations between herself and defendant at a previous time, held insufficient to present the complaint that the state was allowed to introduce evidence of criminal acts barred by limitations not showing what was the answer of the prosecutrix. *Lucas v. State*, 86 Cr. R. 439, 216 S. W. 396.

A bill of exceptions complaining of the exclusion of the question asked by defendant does not show harmful error where the bill stated that, had the witness been permitted to testify, the answer would have been in the negative, and hence not in favor of defendant. *Jackson v. State*, 86 Cr. R. 329, 216 S. W. 866.

A bill of exceptions complaining of the refusal of the court in prosecution for theft of hogs to permit witness to answer a question framed to show that the witness to whom defendant sold hogs failed to deliver them to claimant because of the uncertain description given of them by claimant is insufficient where it does not disclose what objection was made by the state or point out the materiality or relevancy of the inquiry. *Id.*

Ruling of trial court in admitting testimony is presumed to have been correct; bill of exceptions being too meager to give any adequate information upon which to base a ruling adverse to that of trial court. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

Where a bill of exceptions consists of a large number of questions and answers, to all of which a general objection was made, and the questions and answers, anterior to one seeking to connect defendant with the illegal sale of intoxicating liquors inquired about, were but preliminary, the bill should be considered as presenting the latter objection to prosecuting witness' testimony of a sale of whisky by one other than defendant. *Surginer v. State*, 86 Cr. R. 438, 217 S. W. 145.

In a prosecution for theft of a purse, complaint cannot be made of the refusal to hear evidence that accused had issued a subpoena for a person described as C. on the ground that the latter was the offender and had admitted the fact to accused's wife, and that he desired to prove that he had a subpoena issued in order to corroborate his wife's testimony, which was not objected to by the state, where, as presented, the record leaves the inference that the proof desired would have disclosed a self-serving act on the part of the appellant; there being evidence that C. was an accomplice or co-principal, and there being no effort to show in the bill that the subpoena was directed to the place of residence of C., nor the date of its execution. *Rogers v. State*, 86 Cr. R. 418, 217 S. W. 148.

In a prosecution for murder, bill of exceptions to admission of evidence that a witness took a searchlight and went to the scene of the homicide an hour or two after and made diligent search, but failed to find any stick or other weapon, presented no matter of possible injury, in absence of other facts set out in the bill, since if such matter was not material, facts showing lack of materiality should be stated. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

Bills of exceptions, disclosing that the only character of objection made is that the evidence is immaterial, irrelevant, and prejudicial, will not be considered, because such objections are too indefinite, and require an inspection of the entire statement of facts and record. *Id.*

Bill of exceptions containing a continuous narration of the exceptions taken to the testimony of five different witnesses is multifarious, and appellate court may decline to consider it. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

A bill of exceptions complaining of the introduction of testimony should not ordinarily set out the objectionable testimony in the form of questions and answers, and such mode of preparing bill of exceptions should be resorted to only when the character of the testimony is such that it is deemed necessary to reproduce it in that form in order to correctly present it. *Williams v. State*, 86 Cr. R. 626, 219 S. W. 829.

The practice of reproducing in bill of exceptions the testimony of a witness in question and answer form is to be avoided, except when such a reproduction is necessary to explain the meaning, notwithstanding Civ. St. art. 2059, requiring bill of excep-



tions to state the objection to the ruling or the action of the court with such circumstances, or so much of the evidence as may be necessary to explain it, and no more, and the whole as briefly as possible. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

In homicide prosecution, bill of exceptions complaining of sheriff's testimony that he found no weapon on the body of the deceased at the time that he reached the scene of the homicide, without showing at what time he reached the body, held not to present error. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

A bill of exceptions, reciting, "Whereupon defendant then and there objected to the introduction of anything that defendant may have said to the witness, and to any statement that is claimed Mr. Woods may have made in that barber shop at any time after Mr. Lloyd went to the door of the barber shop," is too general; no ground of objection whatever being stated. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

A bill of exceptions reciting that a witness was testifying that he lived about one-half mile from the place where deceased was killed, and that he had not heard a gun "over there" before he left for C. and that on cross-examination district attorney asked witness if he could hear a gun from where deceased was killed to C., did not show any injury to defendant; the answer of the witness not being stated. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

A bill, reciting that the state "sought to bring out by B. matters concerning some cotton that deceased claimed to have lost some 10 months before the killing, and deceased claimed that defendant was implicated in getting the cotton," and that the witness was permitted to testify to a conversation he had with defendant with reference to the matter, did not show that the admission of such testimony was error; it not appearing what the conversation was. *Id.*

A bill in a homicide case, reciting that a state's witness was asked "concerning a matter of the deceased losing some seed cotton some 10 months before the killing, the deceased having charged defendant with the theft of the seed," was insufficient to present the matter for consideration, the bill not stating defendant's objection, the answer to the question, nor any of the facts and circumstances that would show whether the matter was material or not. *Id.*

A bill of exceptions, so indefinite that it cannot be fully understood what was its purpose and to which part of the testimony set out, part of which, at least, was admissible, objection was urged, will not avail. *Mayer v. State*, 87 Cr. R. 512, 222 S. W. 571.

Viewed in the light of testimony in the statement of facts held that the record, fairly construed, did not bear the interpretation that, as complained in bill of exceptions, the opinion of witness was taken as evidence. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

Where defendant on cross-examination of prosecuting witness asked whether or not witness had not formerly testified as to a certain matter, no complaint can be made of refusal of court to permit an answer, where evidence was not offered to prove the former testimony, purpose being to attack the credibility of the witness, especially where the intended introduction of the impeaching evidence was dependent on the witness answering, "No," and a bill reciting that defendant expected to offer the evidence, not stating what the testimony would have been nor how it would have been dependent upon affirmative or negative answer, presented no error. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

Bill of exceptions containing objection and exception to all of the testimony of certain witness was properly overruled, where a part of such testimony was competent and material. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

A bill of exceptions complaining of admission of evidence which discloses that a great part of testimony set out is material, and that it contains pertinent evidence, is not sufficient to present any matter for review. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

Bills of exceptions, complaining of the reproduction of the testimony of a witness on the ground that a proper predicate had not been laid, without stating the facts with reference to the predicate, held insufficient to present error; the appellate court having no right to go to the statement of facts. *Revels v. State*, 88 Cr. R. 36, 224 S. W. 689.

A bill of exceptions to the exclusion by the court of a question asked a witness for the state to lay a foundation for impeachment, which was excluded by the court because the statement was immaterial, is too indefinite for consideration where the bill does not show how the matter came up, or explain its relation to the case and to the testimony, and where the evidence is not before the appellate court, the matter will not be reviewed. *Wheeler v. State*, 87 Cr. R. 646, 224 S. W. 782.

In a homicide case, a bill that the court erred in not permitting accused to ask a witness on cross-examination, "Well, how'd you come to get that stick?" to which the witness would have answered that accused had told him when he received it that deceased had assaulted the wife of accused with it, did not show error, where it did not show that the declaration would have come within the rule of *res gestæ*. *Allen v. State*, 88 Cr. R. 32, 224 S. W. 891.

A bill of exceptions in a forgery case, complaining that court erred in sustaining an objection to a question as to whether a certain person was honest, held too indefinite for revision, not stating what the witness would have answered. *Johnson v. State*, 88 Cr. R. 136, 224 S. W. 1103.

In homicide prosecution bill of exceptions, complaining of court's refusal to permit witnesses to answer certain questions without stating the answer witness would have made, or what was to have been proved by the witness, held too indefinite for consideration. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

The court's ruling admitting defendant's confession, must be presumed correct; the bill of exceptions not showing conditions rendering it inadmissible. *Tillman v. State* (Cr. App.) 225 S. W. 165.

A bill of exceptions to the overruling of an objection to a question as leading must exclude all facts which would render such a question proper, and is insufficient where the statement that the witness was not unfriendly or hostile to the state was made merely by way of objection to the question, and not as a statement of fact in the bill of exceptions. *Williams v. State* (Cr. App.) 225 S. W. 173.

Bill of exceptions, complaining of admission of dying declaration for insufficiency of predicate, not stating that it contains all of the predicate upon which declaration was admitted, was defective, it being necessary for such bill to contain, and state that it does contain, all the predicate. *Hill v. State* (Cr. App.) 225 S. W. 521.

Where defense was insanity, a bill complaining that court would not permit defendant to show that defendant and a cousin who was insane were very much alike in general build, disposition, and character held too indefinite to be considered. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

In a prosecution for assault with a knife, reversible error was not shown in permitting a doctor to testify that if the knife had cut the jugular vein the assaulted party would have bled to death unless relief had come; it not being stated in the bill how such matter related to the facts of the case, especially where the description of the knife was not shown. *Id.*

A bill of exceptions consisting of 15 pages of questions and answers interspersed with some 14 or 15 objections, many of the questions and answers apparently being admissible and no objection being made thereto, concluding with a statement of exceptions without any specified grounds, held not to be considered because too general, and because containing a large amount of matter that was admissible, and consisting of questions and answers of the witness, which is not in conformity with the rule. *Gibson v. State* (Cr. App.) 225 S. W. 538.

On appeal from conviction of forgery, in the absence of bill of exceptions reserving and presenting the facts, question whether a strip of paper on which defendant had written certain names was inadmissible because at the time he was under arrest and unwarned is not before the Court of Criminal Appeals in such a way as calls for review; it being necessary to bring up by exceptions facts sustaining contentions as to inadmissibility of evidence. *Bird v. State* (Cr. App.) 225 S. W. 749.

In a prosecution for highway robbery, where it was the state's theory that defendant and a certain woman were acting together, and defendant testified that he had not known her before the crime, whereupon the prosecuting attorney asked, "If she says you did, she is mistaken?" a bill, complaining of such remark, failed to show prejudice, where it did not disclose whether such woman had or had not made the statement referred to, and it was not otherwise disclosed in what manner the remark of the prosecuting attorney might have prejudiced the accused. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

A bill of exceptions in a prosecution for highway robbery, complaining of proof by the state that a codefendant had been convicted and sent to the penitentiary for the crime of highway robbery, did not show error, where it did not appear that the conviction of the codefendant grew out of the same transaction as that involving the accused. *Id.*

A bill of exceptions complaining that accused was required to answer the question, "I will ask you if it is not true that it was discussed in that conversation (having reference to a conversation inquired about by the state) that you had been gambling and had repeatedly given checks and turned them down, and when that was found out you got mad at them too," did not show error, where it did not state what answer accused made, nor presented the connection or setting of the question. *Lowe v. State* (Cr. App.) 226 S. W. 674.

Where, over objection that it was immaterial, irrelevant, and prejudicial, the state, in a prosecution for violating the Dean Law, was allowed to ask whether defendant had not previously been indicted for violation of the liquor laws, and there was no statement in the bill of exceptions showing that the indictments were for felonies, the ruling must be deemed correct, for, if the bill of exceptions does not show affirmatively that evidence is not admissible, the presumption is necessarily in favor of the correctness of the trial court's ruling. *Russell v. State* (Cr. App.) 228 S. W. 948.

In a prosecution for assault with intent to murder, a bill of exceptions reciting that, over objection that it was immaterial, irrelevant, and prejudicial, it was brought out on cross-examination that defendant some time before the difficulty was in company with a negro under indictment for swindling, but that the negro was not a party to the difficulty or connected with it, does not show that the ruling was wrong and harmful, though the statement of facts disclosed that the testimony was not used; for the mere fact that the negro was not present at the difficulty did not negative the presumption in favor of the trial court's ruling that it was material to determine where defendant was at the time and place mentioned. *Mucker v. State* (Cr. App.) 229 S. W. 328.

Where a bill of exceptions showed that, after stating that he worked at H., accused was asked if he had seen C. or B. since this trouble, but did not show that the question was answered, or what the answer would have been, and that district attorney then asked if accused did not know as a fact that they were down there, and that he answered "he heard that they were down there," no ground of objection to the last question appearing, the bill indicated no error. *Lane v. State* (Cr. App.) 229 S. W. 547.

Bill of exceptions showing that accused, after stating that he stayed at his mother's a certain length of time, on cross-examination was compelled to answer the question, "Then where did you go?" to which he answered that he went to work for the G. Company near H., held not to show error; the only objection being that the evidence was immaterial and irrelevant. *Id.*

A bill of exceptions showing that sheriff was testifying in rebuttal for state and said that on Sunday after the homicide he found a bullet in a rafter in the east end

of the house, to which an objection was made that it was not in rebuttal and was too remote, did not show error, where no facts were stated therein from which it could be determined whether the evidence was in rebuttal or too remote. *Id.*

Bill of exceptions complaining of court's refusal to permit witness to answer certain question without stating the ground of objection, the pertinency of the inquiry, the answer witness would have given, nor other facts enabling the appellate court to pass intelligently upon the matter, held insufficient. *Hill v. State* (Cr. App.) 230 S. W. 1005.

Where it appeared from the bill of exceptions that excluded evidence proffered by defendant was both relevant and material, it was not necessary that the bill expressly so state; a reasonable and substantial compliance with the law concerning bills of exceptions being sufficient. *Williams v. State* (Cr. App.) 231 S. W. 110.

The weight of a ruling, denying defendant the right to prove exculpatory statements made by him in connection with inculpatory statements brought out by the state, cannot be appraised on appeal, when the bill of exceptions does not show what declarations were excluded. *Id.*

In a prosecution for theft of seed cotton, bill of exceptions to the admission of evidence, reciting that defendant objected to the answer of a witness to the question when he had his cotton weighed how much did he have, unless he weighed the cotton himself, as it would be hearsay, stating that the objection was overruled by the court, and not undertaking to show what the answer of the witness was, or whether he ever answered the question at all, did not comply with the rule, and it was also incomplete in that it did not state the connection in which the question was asked, nor the relevancy of it to the issue involved in the case. *Crisp v. State* (Cr. App.) 231 S. W. 392.

A bill in a homicide case showing that witness was asked if she ever heard deceased make any "threats relative to whether or not she had attempted or would attempt to take the life of appellant," to which she replied, "Well, at one time when she was talking of him she says she started to kill him once, and she wished to God she had," and that answer was objected to by the state and withdrawn by the court, did not show error, where it was absolutely silent as to why such testimony was admissible. *Smith v. State* (Cr. App.) 232 S. W. 497.

In a prosecution for murder of mother-in-law, who had prevailed upon defendant's wife to leave him, a bill of exceptions showing that defendant offered to testify as to preparation he and his wife had made in expectation of the birth of a baby, in the way of clothing, baby carriages, etc., to show the condition of defendant's mind when deceased told him his wife could not go back to him, and that the state objected to his going into details, but did not object to his stating that preparations had been made, and that counsel thereupon stated that "they wanted it all or none," and that the objection was sustained, did not show error, where it did not disclose what defendant would have testified. *Id.*

On appeal from a conviction for burglary, the burden was on appellant to show by his bill of exceptions that testimony of the arresting officer as to the discovery of the stolen property and appellant's confession while under arrest was not admissible as *res gestæ*. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

30. — **Rulings relating to instructions.**—See note 66 under art. 743.

31. — **Misconduct of jury.**—Alleged error in declining to grant a new trial because of misconduct of jury after having taken evidence upon motion must be presented to appellate court by bill of exceptions containing the facts and evidence. *Glascoe v. State*, 85 Cr. R. 234, 210 S. W. 956.

32. **Allowance of time to prepare bill of exceptions.**—Under Vernon's Ann. Code Cr. Proc. 1916, arts. 744, 845, where time for filing bills of exception as extended had expired before last order extending time, bills filed within period allowed by last order cannot be considered. *Parker v. State*, 83 Cr. R. 81, 200 S. W. 1083.

33. **Approval and signature of judge.**—A bill of exceptions prepared by defendant but not approved by the trial judge or verified by bystanders cannot be considered. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292; *Deando v. State* (Cr. App.) 196 S. W. 540; *Haverbekken v. State*, 82 Cr. R. 633, 200 S. W. 524; *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953; *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

A purported transcript of what occurred on the trial as shown by the stenographer's notes and certified to by the stenographer, but not presented to or approved by the judge, cannot be considered. *Bargas v. State*, 86 Cr. R. 231, 216 S. W. 173.

Where there was no bill of exceptions relating to the matter, a paper purporting to contain exceptions to ruling of court on objection to the charge, not having the approval of the trial court but being marked, "refused," cannot be considered on the ground that it was indorsed "refused" by mistake. *Gibson v. State* (Cr. App.) 225 S. W. 538.

A bill reciting that exception was reserved to the remark of counsel, and that appellant asked court to instruct jury to disregard it, will be considered on appeal, although the presiding judge marked it "Refused," the bill being filed by the clerk and certified by him as a part of the record and bearing evidence of having been presented to the trial judge, and he having indorsed thereon no reasons for his refusal to allow it, or filed any bill in lieu of it. *Shaw v. State* (Cr. App.) 229 S. W. 509.

Where a transcript is not certified to by the clerk and the bills of exceptions are not approved by the judge, and the statement of facts is neither signed by the attorneys nor the judge, an appeal must be dismissed without passing upon the merits, under Code Cr. Proc. 1911, art. 929; Rev. St. 1911, art. 2114. *Ray v. State* (Cr. App.) 231 S. W. 396.

34. — **Mode and sufficiency of approval.**—Where the trial court approved defendant's bill of exceptions to certain testimony with the statement, "Objection made, but no exception taken," followed by his signature and the usual language in approval

of the bill, the Court of Criminal Appeals must consider such bill as approved; if in fact no bill of exceptions was taken, the trial court should have refused to approve the bill. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

It is in serious doubt whether the court intended to approve exceptions where the exceptions and special charges are all included in the same document indorsed "refused" by the court. *Howard v. State*, 86 Cr. R. 288, 216 S. W. 168.

**35. — Qualification or correction by court.**—Where appellant accepts a bill of exceptions as qualified by the court, he is bound thereby. *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536; *Russell v. State* (Cr. App.) 206 S. W. 79; *Wrenn v. State*, 84 Cr. R. 146, 206 S. W. 94; *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528; *Beasley v. State* (Cr. App.) 225 S. W. 748; *Jones v. State* (Cr. App.) 229 S. W. 865.

When accused excepted to the qualification of a bill of exceptions, and requested another bill, finally prepared by the court, it was incumbent upon him, if such bill was not correct, to interpose objection, prepare another bill, and prove it up by bystanders. *Clay v. State*, 81 Cr. R. 293, 195 S. W. 600.

Court's finding, qualifying the bill, on matter of comment on defendant's failure to testify, that such comment did not occur, is not conclusive on Court of Criminal Appeals, but will not be disturbed, where all jurors except one testified there was no such comment. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

Where a bill of exceptions is qualified, the qualification controls, and the two together control the statement of facts, where there is a conflict between the bill and the evidence. *Fults v. State*, 83 Cr. R. 602, 204 S. W. 108.

When bill of exceptions is found in record with qualification by the trial court, consent of appellant to such qualification is presumed in absence of objection and exception to the qualification authenticated and brought up in record. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

When a bill appears in the record qualified over appellant's objection, qualification may be disregarded and bill considered approved as prepared by appellant, and, if qualification is in substance a rewriting of bill, it may be treated as the court's bill. *Id.*

The court cannot without appellant's consent qualify a bill prepared by him. *Id.*

A trial court cannot approve a bill of exceptions tendered by counsel in a criminal case with any qualifications not agreed to by counsel; the proper practice being to mark the bill refused, return it to counsel, and prepare and file what the court deems a sufficient bill. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

If bills of exception were merely marked "Refused" by the trial court, without explanation or qualification, under circumstances fairly calling for a bill prepared by the trial court, or else for explanation, the Court of Criminal Appeals will regard the refusal as purely arbitrary; but where qualifications or explanations are appended to the bills, and no exceptions taken, the court will be governed in its consideration of the matters by such explanations. *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

The trial judge had no right to qualify appellant's bill of exceptions over appellant's objections, and, if bill of exceptions was not acceptable to the judge, he should have followed statutory procedure. *Moore v. State* (Cr. App.) 226 S. W. 415.

The Court of Criminal Appeals will consider the lower court's explanation in approving a bill of exceptions as correct, unless in some legitimate way appellant then made his objection to such explanation, or shows that he was deprived of his right or opportunity to do so. *Perea v. State* (Cr. App.) 227 S. W. 305.

Where counsel for accused refused to agree to the qualifications of his bills by the trial judge, but, after the trial judge had marked them refused, had them filed by the clerk, whereupon the judge again inserted the qualifications and had the bills refiled, accused is not entitled to have the bills considered either as they were originally drawn, or as qualified, under Civ. St. arts. 2063-2067, made applicable to criminal prosecutions by this article. *Jones v. State* (Cr. App.) 229 S. W. 865.

Where the defendant refused to accept the qualifications of the judge to his bills of exceptions which practically amounted to new bills, and the judge stated that he did not make out and file other bills, but adopted those corrected and explained as the bills he approved, those bills can be treated as bills prepared in lieu of refused bills. *Hunt v. State* (Cr. App.) 229 S. W. 869.

**36. — Preparation of bill by judge.**—It is duty of appellant to prepare his bill of exception, and then it is duty of the judge to allow appellant's bill of exceptions or to file in lieu thereof a bill prepared by him. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

Where the record recited that the trial court refused defendant's bill of exceptions and then prepared and filed a new one, it being the duty of the court to file and present a correct bill of exceptions, in the absence of same in the record the refused bill will be considered as though approved and filed. *Drawhorn v. State*, 84 Cr. R. 600, 209 S. W. 415.

Where a bill of exceptions is prepared by accused and presented to the trial judge in time, it is his duty, if he disagrees with its correctness, to file with it a bill which presents the true record, and, where the trial judge fails to adopt such procedure and files a bill marked "refused," the accused is entitled to either have the bill considered, or to have a reversal because it is denied him. *Rosa v. State*, 86 Cr. R. 646, 218 S. W. 1056.

**38. — Conclusiveness and effect of approved bill.**—Incorporation in bill of exception of grounds of objection is not a certificate of the judge that the facts which form the basis of the objection are true, merely showing that such an objection was made. *Gonzales v. State* (Cr. App.) 226 S. W. 405; *Quinney v. State*, 86 Cr. R. 358, 216 S. W. 882.

Where there is a conflict between the bill of exceptions and the statement of facts, the court on appeal will treat the bill as correctly reflecting the record. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

Where the bill of exceptions sets forth remarks of the district attorney as to defendant's failure to procure witnesses to prove his reputation, but also sets forth a statement of the district attorney denying making such remarks and stating fully what was said by him, there was no reversible error shown. *Drawhorn v. State*, 84 Cr. R. 600, 209 S. W. 415.

Where bill of exceptions complaining of remarks of prosecuting attorney contained approval and explanation by court setting forth entirely different statement than appellant claimed, and no bill of exceptions was taken by appellant to the bill as approved and explained, the court on appeal will accept the court's statement in the approval as correct. *Glascoc v. State*, 85 Cr. R. 234, 210 S. W. 956.

Where bills of exception have merely been marked refused, and so appear in the record, the Court of Criminal Appeals may consider affidavits, but not so when such affidavits are only in contradiction of explanation or qualification of such bills. *Wilson v. State*, 81 Cr. R. 625, 224 S. W. 772.

Where the trial court, refusing to approve a bill of exception, states he does not remember the transaction, the Court of Criminal Appeals will accept the statement. *Id.*

Trial court's approval of bill of exceptions, reciting that defendant's statement introduced by state in evidence was objected to because defendant did not have sufficient intelligence to understand the statement, held not approval of existence of facts stated therein, but a mere statement by court that such were the grounds of objection urged. *Lucas v. State* (Cr. App.) 225 S. W. 257.

Where the defendant refused to accept the bills of exceptions as qualified by the court and thereafter ascertained that the qualified bills had been filed, his proper course was to move to withdraw them from the files, with a request to cancel the qualifications and mark them refused, and a further request that the judge prepare bills in lieu thereof, and then, if the judge declined to do so, defendant could have resorted to proper bystanders' bills or have shown by affidavits that he had been denied his bills. *Hunt v. State* (Cr. App.) 229 S. W. 869.

A defendant who accepts a bill of exceptions prepared by the court is bound thereby. *Eason v. State* (Cr. App.) 232 S. W. 300.

Where defendant appellant claimed he had not been served with a correct copy of the indictment filed, the copy not appearing to have been signed by the foreman of the grand jury, and his bill of exceptions not stating that the original indictment was so signed, but such copy of the indictment was certified by the clerk as a true copy, the Court of Criminal Appeals will not go beyond the bill in finding whether the recitals in it were true or not. *Searcy v. State* (Cr. App.) 232 S. W. 319.

**39. Proof by by-standers.**—A defendant and his attorneys are not such "bystanders" as the law contemplates, so that bills of exceptions verified by them are not entitled to considerations as bystanders' bills. *Hunt v. State* (Cr. App.) 229 S. W. 869; *Walker v. State* (Cr. App.) 227 S. W. 308.

Trial court, in homicide case, probably abused its discretion in requiring accused's counsel to whisper his objections regarding prosecuting attorney's misconduct, since Const. art. 1, § 10, guarantees a speedy public trial and right to be heard by counsel, and a bystanders' bill of exceptions could not be made, pursuant to Rev. St. arts. 2066, 2067, in case court and attorneys failed to agree upon objections or ruling so made. *Weige v. State*, 81 Cr. R. 476, 196 S. W. 524.

Appellant, to controvert bill of exceptions prepared by trial judge, has the right to file a bill verified by bystanders. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

Bystanders' bill of exceptions to court's qualifications of the bill of exceptions, filed after the trial, is in time, under Civ. St. art. 2067, allowing such a bill if appellant is dissatisfied with that filed by the judge. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

The Court of Criminal Appeals is not authorized to consider exception attempted to be preserved by bystanders' bill, where the affidavit to such bill is signed by two persons instead of three as required by statute. *Gillespie v. State*, 85 Cr. R. 4, 210 S. W. 967.

A trial court cannot approve a bill of exceptions tendered by counsel in a criminal case with any qualifications not agreed to by counsel; the proper practice being to mark the bill refused, return it to counsel, and prepare and file what the court deems a sufficient bill, and counsel may then have his bill authenticated by bystanders. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

Where the trial court refuses to permit appellant's counsel to show in his bill of exceptions what certain rejected evidence was, appellant has a right to offer to the court his bill showing such rejected testimony, and upon the court's refusal thereof to have the same proved up by bystanders as provided by law. *Knigt v. State*, 87 Cr. R. 134, 220 S. W. 333.

Objections to remarks of the district attorney during his argument should have been taken by exception at the time, and not by subsequently offering on motion for new trial to introduce evidence of bystanders as to such argument. *Bridges v. State*, 83 Cr. R. 61, 224 S. W. 1097.

**41. Filing of bill of exceptions.**—A bill of exception in the record cannot be considered; there being a failure to show its filing. *Bartlett v. State*, 82 Cr. R. 468, 200 S. W. 839.

Where exceptions of defendant to refusal to give requested instruction were presented to court, and became papers of case at time, and were deposited with papers and clerk, there was sufficient filing, and order instructing clerk to place file mark on them as of date of filing was not filing back. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

If there is any contest insisted upon in Court of Criminal Appeals as to filing bill of exceptions, real condition of things should be made to appear by proper order of trial court. *Id.*

Where requested instructions refused by trial court are shown to have been indorsed by him as refused on particular day at time of trial, Court of Criminal Appeals will take date as correct, and fact of clerk's having failed to put file mark on them at that time does not affect legality of filing of exceptions. *Id.*

Bills of exception, not filed by the clerk of the trial court, will not be reviewed. *Roach v. State*, 84 Cr. R. 471, 208 S. W. 520.

Where the bills of exceptions tendered by accused are refused and returned to him or to his counsel, he ought not to file or attempt to file them with the clerk, but should rely upon the judge preparing proper bills in lieu thereof. *Jones v. State* (Cr. App.) 229 S. W. 865.

Bills of exceptions which have been refused by the trial judge can only be considered on appeal when the record shows they were filed by the trial judge's orders, or where the record is silent with reference to the filing and the court of appeals presumes that the clerk would not have filed the bill except by order of the judge. *Id.*

**43. Necessity of objection, exception, or other presentation in trial court in general.**—Defendant held not wanting in diligence to maintain rights on trial in relation to admission of testimony as to general reputation for veracity without being allowed to interrogate witnesses as to whether they were testifying from general reputation or particular knowledge. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

Where contention that insanity of juror rendered verdict void was not raised below it will not be considered. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

Insanity, or such mental condition as shows nonresponsibility for crime, first presented by affidavit on motion for rehearing cannot be considered by Court of Criminal Appeals. *Avery v. State*, 83 Cr. R. 80, 200 S. W. 832.

Allowing state's attorney to put on deceased's coat and have colleague take accused's position where no objection was made at the time, was not error. *Russell v. State* (Cr. App.) 206 S. W. 79.

In view of this article, independently of art. 634, no review of an order for change of venue can lawfully be made on appeal unless it is shown that defendant objected below. *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

Though it affirmatively appears from order that trial judge changed venue without believing fair trial could not be had in county, Court of Criminal Appeals has no jurisdiction to review matter, unless it appears defendant excepted to order; otherwise the presumption he acquiesced prevails. *Id.*

Failure to swear a deputy sheriff sent out after talesmen, is an irregularity which must be excepted to at the time, and cannot be presented for the first time in a motion for a new trial. *Knight v. State*, 87 Cr. R. 134, 220 S. W. 333.

In prosecution of defendant indicted as an accomplice, where declarations of principal are admitted to prove principal's guilt as a part of the case against defendant, an objection to the use of such evidence to prove defendant guilty must be properly raised and presented to the trial court, and brought to appellate court by exception and bill, in order to be considered by appellate court. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

The Court of Criminal Appeals is called on to pass on the correctness of the ruling of the trial court on evidence, and his ruling must be invoked on the admission of evidence. *Holloway v. State*, 88 Cr. R. 126, 224 S. W. 1102.

If defendant felt that the state made an improper statement of its case in the beginning, he should have objected thereto at such time, and there is no rule authorizing the granting of his subsequent request to question the jury, or for the discharge of any juror who might be willing to state that he had concluded from the opening statement that accused was guilty. *Brooks v. State* (Cr. App.) 227 S. W. 673.

In a prosecution for homicide, where, after the court informed the venire from which a jury was to be drawn that the suspended sentence law was much abused, etc., defendant was given the right to challenge for cause any juror who said he had a prejudice against such law, and no motion was made to quash the panel on account of the lecture, the act of the court, while improper, is not reversible error. *Eason v. State* (Cr. App.) 232 S. W. 300.

**46. Objection or exception to preserve grounds for new trial.**—Where defendant, charged with murder, lost testimony of desired witness, because witness was indicted for complicity in same offense, but defendant did not move for postponement on ground of surprise, under art. 616, he could not for first time set up matter in his motion for new trial. Defendant should have moved for postponement, and then have demanded witness' trial first. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

## Art. 745. [725] Jury in felony case shall not separate until, unless, etc.

**Consent of defendant.**—A judgment of conviction of a felony cannot stand where the court below with the consent of the accused permitted the jury to separate and go to their respective homes and spend the night, none of them being accompanied by an officer. *Dibbles v. State* (Cr. App.) 231 S. W. 768

**What constitutes separation.**—That one juror went to bed in a room over the room in which the jury deliberated, leaving the others in the lower story would not, where he had no communication with outsiders, and was not outside the building in which the jury was confined, disclose such separation as would justify reversal under the statute. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349

Where, while leaving courthouse at night, a juror went down a stairway by mistake, but immediately retrned and rejoined the other jurors in response to prosecuting attorney's direction, there was no misconduct of the jury nor such forbidden separation as is embraced by this article. *Lowe v. State* (Cr. App.) 226 S. W. 674.

**Prejudice in general.**—Where it appears that a temporary separation of one juror from his fellows could not have affected verdict or impartiality of trial, reversal is not authorized. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

In a prosecution for assault on murder, state's evidence held sufficient to show that a separation of the jury caused by one juror going upstairs in an elevator in company with a district judge could not reasonably have resulted in injury to defendant. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

Separation of the jury being forbidden by the statute, when it occurs the burden is on the state to show no injury reasonably could have resulted to defendant. *Id.*

**Separation before being sworn.**—It is not erroneous, in the absence of any other showing, to allow jurors chosen, but not sworn, to separate, or that such jurors separate of their own accord, or that the court does not instruct them; this article relating only to "after the jury has been sworn and impaneled." *Coffey v. State*, 82 Cr. R. 57, 198 S. W. 326.

— **Capital case.**—In a prosecution for murder resulting in conviction of manslaughter, where, after ten jurors were selected, impaneled, and sworn, one of them was permitted by the court, without consent of defendant or his counsel, and without being accompanied by an officer, to go to his home, about a mile distant, where a member of his family was sick, and there remain away from the courthouse, separated from the other members of the jury, for about an hour, such action was error, necessitating reversal as in violation of the mandatory provisions of the statute. *Garner v. State* (Cr. App.) 231 S. W. 389.

#### Art. 746. [726] In misdemeanor case jury may separate.

In general.—In a prosecution for keeping a disorderly house, it was not error to allow the jury to separate pending the trial. *Stewart v. State* (Cr. App.) 23 S. W. 683.

#### Art. 748. [728] No person shall be with jury or permitted to converse with them.

**Construction and operation in general.**—This article carrying into effect the provisions of Const. art. 1, § 15, is mandatory, and in a misdemeanor case permits the jury to converse with another person only when allowed to separate by the court but not about the case, and in a felony case does not permit a juror to converse with any person on any subject except by permission. *Mann v. State*, 84 Cr. R. 109, 204 S. W. 434.

This article should be strictly enforced. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

**Prohibited conversations.**—That father of complaining witness talked with officer in charge of jury while jury was in room is not alone sufficient to warrant reversal. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

That an old man who inadvertently entered the jury box, and upon learning he was out of place, excused himself and left, did not show injurious conversation by members of jury with an outsider. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

Questions by state's attorney to jury after it had come into court with a request that some of the testimony be read held not such a conversation with jury as is inhibited by the statute. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

Communications with jurors, except within statutory limitation, are improper, and should not be permitted. *Lowe v. State* (Cr. App.) 226 S. W. 674.

Discussions between deputy sheriffs and jurors as to what is being considered by the jury, or as to who on the jury stands for this or the other side, are not proper. *Golden v. State* (Cr. App.) 232 S. W. 813.

**Consent of defendant.**—That after the jury had been impaneled one of the jurors, whose wife was sick, was, with permission of the court and consent of defendant and one of his attorneys, allowed to communicate with his family, held without injury to accused. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349.

**Prejudice.**—Where it is claimed in a criminal trial that the jury has violated this article, the burden is on the state to show by testimony other than that of the jurors that no injury has occurred. *Mann v. State*, 84 Cr. R. 109, 204 S. W. 434.

Conversation of juror with another person without court's permission, will be presumed upon conviction to have been injurious to defendant, but such presumption can be overcome, burden being upon the state to satisfy court that no injury has resulted. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

Receipt by a juror of information that members of his family were sick will not authorize a reversal of a judgment of conviction, where the facts reject any presumption of injury obtaining by reason of his conversing with outsiders. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

#### Art. 749. [729] Punishment for violation of preceding article.

**Persons punishable.**—Juror and person with whom he converses without court's permission, in violation of art. 748, is guilty of contempt under this article. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

#### Art. 751. [731] Jury may take all papers in the case.

In general.—This article is not mandatory, and it is not error for the trial judge not to send out an alleged forged instrument when not called for by the jury. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

Unless it is made to appear that articles which are in evidence and taken to the jury room were used by the jury in any different manner than accorded with the testimony, or that some new fact hurtful to accused was thereby discovered, the matter will not be revised on appeal. *Smith v. State* (Cr. App.) 232 S. W. 497.

**Evidence.**—Permitting the jury to take in their retirement a door introduced in evidence was not error. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor not for medicinal, etc., purposes, equipment found on defendant's premises being admissible, the court properly allowed it to remain in the courtroom until the case was concluded; after it had been properly offered in evidence, the jury, had they desired, would have had the right to take the equipment to the jury room for further examination during deliberations. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

**Art. 753. [733] Jury may communicate with the court.**

Cited, *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717.

**In general.**—Verbal communications of court with jurors touching the case on trial, after the retirement of the jury, should be attempted only upon rare occasions and impelled by soundest reasons, and an effort should be made to avoid impressing jury that court entertains any impression of the case which he wishes them to know. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

**Art. 754. [734] Jury may ask further instruction.**

See *Willis v. State*, 24 Tex. App. 586, 6 S. W. 857.  
Cited, *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717.

**Art. 755. [735] Jury may have witness re-examined, when.**

Cited, *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717

**Art. 756. [736] Defendant shall be present, when.**

Cited, *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153; *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717.

**Art. 759. [739] Disagreement of jury.**

**Coercion of verdict.**—It was error for the court, when the jury reported that it stood 11 to 1, but could not agree, to say: "Gentlemen. it seems that you are practically agreed. I will have to send you out again, and I would not be authorized under the law to discharge you just yet." *Hughes v. State*, 81 Cr. R. 526, 197 S. W. 215.

In a prosecution for violation of the local option law, where the court erroneously excluded testimony offered to show motive of the state's witness, defendant should have been granted a new trial, where it further appeared that the jury, upon inquiry by the judge as to whether they had reached a verdict, assumed that if verdict was not shortly reached they would be confined over Sunday, and that the jury rendered a verdict of guilty within a few hours, although at the time of the inquiry a majority were in favor of acquittal. *West v. State*, 86 Cr. R. 296, 216 S. W. 186.

Where jury agreed as to defendant's guilt soon after retirement but for more than 32 hours disagreed as to whether they should give defendant the benefit of suspended sentence, the action of the court in sending for jury and instructing them that the trial of cases was expensive, that he could not see why jurors could not agree, in asking the two jurors who had not found the evidence clear enough to agree to a conviction without suspended sentence, if they thought they could ever agree to a verdict, and in stating that jury should retire and try to get a verdict and that it was the court's desire that they get a verdict, held ground for reversal upon appeal from judgment of conviction without recommendation of suspended sentence, since such two jurors might have construed the court's remarks as evidencing a desire on the part of the court that they should agree to what the others had agreed on. *Golden v. State* (Cr. App.) 232 S. W. 813.

CHAPTER SIX

OF THE VERDICT

<p>Art. 763. Definition of "verdict." 767. When jury have agreed, etc. 770. Verdict must be general. 771. In offenses of different degrees. 772. Offenses consisting of degrees.</p>	<p>Art. 773. Informal verdict may be corrected. 774. Where jury refuse to have verdict corrected. 782. Conviction of lower, acquittal of higher offense.</p>
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**Article 763. [743] Definition of "verdict."**

**Nature and requisites of verdict—Mistakes of grammar and spelling.**—In prosecution of person named Missouri Lee for illegally selling liquor, verdict spelling defendant's given name as "Mururee," and the word "assess" as "assee," to which no objection was taken when verdict was rendered and received, did not invalidate conviction. *Lee v. State*, 83 Cr. R. 532, 204 S. W. 110.

**Responsiveness to issues.**—A conviction cannot be authorized for an offense not set forth in the indictment. *Moore v. State*, 84 Cr. R. 256, 206 S. W. 683.

The jury are presumed to have expressed their finding with reference to the charge of the court, unless in their verdict they state something which shows that such was not the intention. *Lewis v. State*, 86 Cr. R. 135, 217 S. W. 695.

**Different counts.**—Where an indictment charges theft of an automobile in one count, and receiving the automobile as stolen property in another count, a verdict, finding defendant guilty on both counts is improper; it being impossible for defendant guilty of



receiving a stolen automobile, to have stolen it himself, and such verdict will not support a judgment of conviction for the theft. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

**Sufficiency of writing.**—A verdict written with a lead-pencil is sufficient. *Ellis v. State*, 30 Tex. App. 601, 18 S. W. 139.

**Impeachment of verdict.**—It would be against public policy to permit impeachment of a verdict by testimony that after agreeing to the verdict a juror desired to retract. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

### Art. 767. [747] When jury have agreed, etc.

**Length of deliberations.**—In a trial for murder the fact that the jury brought in a conviction in about 20 minutes would not authorize a reversal. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

### Art. 770. [750] Verdict must be general.

**3. Requisites and sufficiency of verdict in general.**—It is the duty of the courts to give the language used in a verdict every reasonable intendment in upholding the same. *Lewis v. State*, 86 Cr. R. 135, 217 S. W. 695.

Where information against defendant as a delinquent child made four specifications of delinquency, of which three were submitted and general verdict rendered, verdict should be referred to any charge correctly pleaded and submitted to jury, if supported by evidence. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

**4. — Verdicts held sufficient.**—In prosecution for cattle theft resulting in verdict of guilty, jury's failure to find defendant not guilty of receiving stolen property, as court had instructed at defendant's request, held not erroneous, in view of their subsequent finding to that effect pursuant to court's repeated instruction and their verdict of not guilty. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

**12. Finding of guilt—Different counts.**—Where one of several counts in an information is invalid for not being supported by the complaint and the evidence tends to support the offense attempted to be charged in such count, and there is a general verdict, a conviction will be set aside. *Reynolds v. State*, 82 Cr. R. 326, 198 S. W. 958.

Where an indictment charges theft in one count, and receiving stolen property in another, a general verdict of guilty will support a judgment of guilty under either count. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

Where jury convicted under two counts for keeping a disorderly house, but imposed one penalty only, the conviction will be sustained if the evidence was sufficient as to either or both. *Claunch v. State*, 83 Cr. R. 378, 204 S. W. 436.

Where there was a general verdict of guilty, without special reference to either of two counts of an indictment, the court on appeal may apply the verdict to either of the two counts. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

Where indictment was in two counts, one charging theft, and the other receiving and concealing the property, and a general verdict of guilty was returned, and the trial court properly applied the verdict to the count charging theft, and rendered judgment accordingly. *McCormick v. State*, 86 Cr. R. 366, 216 S. W. 871.

Where the indictment contains two counts, and there is a general verdict of guilty, the verdict applies to either of the counts, and, if one is defective the verdict will be upheld under the other. *Escue v. State* (Cr. App.) 227 S. W. 483.

**15. Assessment of punishment—Province of jury.**—Juvenile delinquent law, fixing maximum and minimum punishment and giving right to trial by jury, requires that jury shall fix punishment, and commitment by the court was unauthorized and void. *Ex parte Pruitt*, 82 Cr. R. 394, 200 S. W. 392; *Ex parte McLoud*, 82 Cr. R. 299, 200 S. W. 394.

In prosecution for murder, fixing penalty was matter for jury; this court having no power or authority to fix penalty. *Tiger v. State*, 81 Cr. R. 614, 197 S. W. 716.

In a prosecution for aggravated assault, under Pen. Code 1911, art. 1024, fixing punishment at not less than \$25 nor more than \$1,000, or by imprisonment in the county jail for not less than one month or more than two years, or by both fine and imprisonment, the extent of the punishment where guilt is established rests in the discretion of the jury, unless the jury is waived, as it may be in misdemeanor cases, in which case it is in the discretion of the trial judge, and the appellate court will not review the exercise of such discretion. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

**18. — Excessiveness of punishment.**—That this court might have rendered a more merciful verdict would not alone authorize it to set aside the verdict. *Davis v. State*, 81 Cr. R. 450, 196 S. W. 520.

Punishment for offense of assault to murder was within exclusive province of jury, and, in absence of error or evidence tending to show verdict was result of and enhanced by passion and prejudice, it will not be disturbed on appeal solely on account of extent of punishment. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

Assessing punishment being in the discretion of the jury, a verdict within the limits of the statute is rarely set aside as excessive. *Jones v. State*, 83 Cr. R. 444, 203 S. W. 1101.

### Art. 771. [751] When offense of different degree is charged.

See *Hand v. State* (Cr. App.) 227 S. W. 194.

**Offenses for which conviction may be had.**—An indictment charging assault with intent to rape includes, though not describing the means used to commit the lesser offense, a charge of aggravated assault. *Cirul v. State*, 83 Cr. R. 8, 200 S. W. 1088.

Where one charged with murder failed to complain at trial of charge on manslaughter, conviction of manslaughter will not be reversed. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

In view of Pen. Code, arts. 1433, 1434, 1435, and 1439, if a conspiracy was to kill another, it was included within conspiracy to commit murder. *King v. State*, 86 Cr. R. 407, 216 S. W. 1091.

**Specifying grade or degree of offense.**—Where information charged only aggravated assault, but upon the trial the evidence was such as to present the theory of both aggravated assault and simple assault, and the court instructed the jury upon the law of both offenses, a verdict, "We, the jury, find the defendant guilty as charged in the information, and assess his punishment at a fine of \$25," was not indefinite or defective. *Lewis v. State*, 86 Cr. R. 135, 217 S. W. 695.

The decision of the degree of offense is for the jury. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

### Art. 772. [752] Offenses consisting of degrees.

See *Lewis v. State*, 86 Cr. R. 135, 217 S. W. 695.

**Subdivision 1.**—A conviction of aggravated assault and battery may be had under an indictment for murder in the second degree, which charges defendant with killing the deceased "by striking, beating, bruising, and wounding him with a stick," independently of the provision, that murder shall include all assaults. *Bean v. State*, 25 Tex. App. 346, 8 S. W. 278.

Where one charged with murder failed to complain at trial of charge on manslaughter, conviction of manslaughter will not be reversed. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

One can be convicted of an assault to murder under an indictment charging murder. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

**Subdivision 2.**—An indictment charging assault with intent to rape includes, though not describing the means used to commit the lesser offense, a charge of aggravated assault. *Cirul v. State*, 83 Cr. R. 8, 200 S. W. 1088.

The offense of assault with intent to rape includes aggravated assault. *Miller v. State*, 84 Cr. R. 168, 206 S. W. 524.

Defendant under 21 years of age, indicted for assault with intent to rape, could be convicted of an aggravated assault on the female denounced by Ann. Pen. Code, art. 1022, subd. 6; the proof showing indecent familiarity with the person of the female against her will and without her consent. *Hand v. State* (Cr. App.) 227 S. W. 194.

**Subdivision 13.**—Where act is done with intent to commit crime, and tending, but failing, to effect commission, it is attempt to commit ultimate crime. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

### Art. 773. [753] Informal verdict may be corrected.

**Matters which may be corrected.**—The jury cannot be recalled, after they have been discharged, to substitute a valid for an invalid verdict. *Ellis v. State*, 27 Tex. App. 190, 11 S. W. 111.

Verdict finding defendant guilty on first count of indictment, where such count had not been submitted, held properly sent back for correction, by substitution of the word "second" for "first." *Barnes v. State*, 83 Cr. R. 207, 202 S. W. 949.

In prosecution for unlawfully carrying a pistol, court did not err in permitting jury in open court, when returning the verdict, to correct it by inserting words "as charged in the indictment." *Lewis v. State*, 84 Cr. R. 499, 208 S. W. 516.

**Review.**—Art. 744, making necessary a bill of exception to any decision, opinion, order, or charge that is to be reviewed on appeal, not applying to the form or substance of a verdict, does not, in view of this article, make failure to object to a defective verdict a waiver of such defect. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

### Art. 774. [754] If jury refuse to have verdict corrected.

Cited, *Barnes v. State*, 83 Cr. R. 207, 202 S. W. 949.

### Art. 782. [762] Conviction of lower is acquittal of higher offense.

**Conviction of lower as acquittal of higher offense.**—Where accused was tried under counts for rape and incest, and both were submitted to the jury, which affirmatively found the defendant guilty of rape, there was an acquittal on the charge of incest. *Mizell v. State*, 83 Cr. R. 305, 203 S. W. 49.

In a prosecution for murder committed February 8, 1911, at which time murder was divided into two degrees, where a trial in 1911 resulted in a hung jury, but a subsequent trial resulted in a conviction of murder in the second degree, the acquittal of murder in the first degree by conviction in the second degree did not, on a subsequent trial, preclude a trial for murder, and require a trial for manslaughter only. *Beaupre v. State* (Cr. App.) 206 S. W. 517.

Previous conviction of manslaughter invalid because the verdict was rendered by a jury not sworn as required by law, cannot avail defendant to escape subsequent conviction of murder on the claim, in support of plea of former acquittal, that when one is tried under an indictment including several degrees of an offense, conviction of a smaller, as of manslaughter, operates as acquittal of a higher degree, as of murder. *Huey v. State* (Cr. App.) 227 S. W. 186.

## CHAPTER SEVEN

### OF EVIDENCE IN CRIMINAL ACTIONS

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| <p><b>1. GENERAL RULES</b></p> <p>Art. 783. Rules of common law govern, except, etc.</p> <p>784. Rules of statute shall govern, when.</p> <p>785. Presumption of innocence; reasonable doubt.</p> <p>786. Jury are the judges of the facts.</p> <p>787. Judge shall not discuss evidence.</p> <p><b>2. OF PERSONS WHO MAY TESTIFY</b></p> <p>788. Persons incompetent to testify.</p> <p>789. Female alleged to be seduced.</p> <p>790. Defendant may testify.</p> <p>791. Principals, accomplices, and accessories.</p> <p>792. Court may interrogate witnesses touching competency.</p> <p>794. Husband and wife shall not testify as to, etc.</p> <p>795. Same subject.</p> <p>797. Joint defendant may testify, when.</p> <p>801. Testimony of accomplice.</p> | <p><b>3. EVIDENCE AS TO PARTICULAR OFFENSES</b></p> <p>Art. 806. Perjury and false swearing.</p> <p><b>4. OF DYING DECLARATIONS AND OF CONFESSIONS OF THE DEFENDANT</b></p> <p>808. Dying declarations evidence, when.</p> <p>809. Confession of defendant.</p> <p>810. When confession shall not be used.</p> <p><b>5. MISCELLANEOUS PROVISIONS</b></p> <p>811. When part of an act, declaration, etc., is given in evidence.</p> <p>814. Evidence of handwriting by comparison.</p> <p>815. Party may attack testimony of his own witness, etc.</p> <p>816. Interpreter shall be sworn to interpret, when.</p> |
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#### 1. GENERAL RULES

##### Article 783. [763] Rules of common law shall govern, except, etc.

Cited, *Carroll v. State*, 32 Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786; *Williams v. State*, 82 Cr. R. 48, 198 S. W. 316.

**4. Judicial notice—In general.**—The courts know as a matter of history of current events attending the recent trouble between the United States and Mexico wherein a column of troops under Gen. Pershing invaded that country and incidental fights and battles occurred in connection with the invasion. *Arce v. State*, 83 Cr. R. 292, 202 S. W. 951, L. R. A. 1918E, 358.

It is a matter for judicial cognizance and knowledge that the battle at San Ygnacio which occurred during the recent trouble between this country and Mexico was never disavowed by the Mexican de facto government. *Id.*

**5. — Matters of common knowledge.**—It is matter of common knowledge that, in storing and handling cotton seed and sorghum seed, the fact that the two kinds have become in some degree intermingled would not be a peculiarity or distinguishing feature establishing the identity of seed from one bale of cotton from seed from another. *Williams v. State*, 84 Cr. R. 461, 208 S. W. 522.

It is well known that the characters of the men who frequent places where intoxicating liquor may be easily obtained and drinks are dispensed is not expected to be of the best weight. *Surginer v. State*, 86 Cr. R. 438, 217 S. W. 145.

**6. — Geographical facts.**—The court judicially knows that the city of Dallas is in Dallas county by reason of the statute, which fixes that place as the location of the Court of Civil Appeals. *Sherman v. State*, 83 Cr. R. 205, 202 S. W. 93.

Where proof shows the violation of the local option liquor law in Waco, the court will take judicial knowledge that Waco is in McLennan county. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

As affecting the materiality of newly discovered evidence of defendant's presence in one town on the day of an alleged theft in another, the court judicially knows the distance, and that defendant's presence in both towns on that day was possible. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

The Court of Criminal Appeals will take judicial notice that Desote is not the county seat of Eastland county, Tex. *Searcy v. State* (Cr. App.) 232 S. W. 799.

**8. — Laws and ordinances.**—Courts do not take judicial knowledge of the holding and results of elections of putting in force local option laws in a given territory. *Cline v. State* (Cr. App.) 227 S. W. 668; *Lagow v. State*, 81 Cr. R. 460, 197 S. W. 217.

The courts cannot take judicial notice that any city has any given ordinance. *White v. State*, 82 Cr. R. 274, 198 S. W. 964.

Under Charter of Ft. Worth, c. 11, § 6, the Court of Criminal Appeals is authorized to take judicial cognizance of the terms of chapter 3, § 3, authorizing policemen to make arrests without warrant on representation by a credible person that a felony has been committed, etc. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

Courts have no judicial knowledge of the existence of city ordinances nor their terms, and where they enter into a transaction, proof of them is essential. *Terretto v. State*, 86 Cr. R. 188, 215 S. W. 329.

Courts will take judicial cognizance of a proclamation of the Governor given under Acts 35th Leg. (1917) c. 60, § 7 (Civ. St. art. 7314e), but will not take judicial cognizance of the fact that a local option election has been held under such section, or that such law is in force in any particular territory. *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340.

9. — **Organization and terms of courts and judicial proceedings.**—Where defendant attacked an indictment for statutory rape on the ground that it was returned by the grand jury of Smith county, but charged that the offense was committed in Wood county, the courts will take judicial notice that the two counties are in the same judicial district, and that art. 254, allowing such a prosecution to be commenced and carried on in any county of the judicial district in which the offense was committed, was applicable. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

The court judicially knows that El Paso is a large city situated on the border of the state, and that veniremen in such county are not listed by jury commissioners, but are listed by drawing from a wheel the names of taxpayers, under art. 660. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

A Court of Criminal Appeals will take judicial notice that when an indictment was returned one who was later appointed as district judge was then district attorney. *Strahan v. State*, 87 Cr. R. 324, 221 S. W. 976.

The Court of Criminal Appeals has judicial knowledge that a particular person was not a judge of a given district. *Dawes v. State*, 87 Cr. R. 452, 222 S. W. 560.

The Court of Criminal Appeals judicially knows there are two district criminal courts in Dallas county, and that in the designation of only one does the number "2" occur. *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202.

10. — **Public officers.**—Courts will take judicial cognizance of a proclamation of the Governor given under Acts 35th Leg. (1917) c. 60, § 7 (Civ. St. art. 7314e). *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340; *Mulkey v. State*, 83 Cr. R. 1, 201 S. W. 991.

Proof of violation of proclamation of Governor defining quarantine areas, etc., which did not purport to show that regulations had been prescribed by live stock sanitary commission, held not sufficient to support conviction of violation of rules and regulations of commission; for court cannot take judicial notice that rules proclaimed were those of commission. *Mulkey v. State*, 83 Cr. R. 1, 201 S. W. 991.

11. — **Intoxicating beverages.**—In a prosecution for the unlawful manufacturing of intoxicating liquors, where defendant admitted that he made whisky, further proof was not required to show that the whisky was intoxicating. *Coats v. State*, 86 Cr. R. 234, 215 S. W. 856; *Grandberry v. State*, 86 Cr. R. 232, 216 S. W. 164.

The court will take judicial notice that whisky is intoxicating. *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359.

13. **Presumptions.**—Presumptions cannot form the basis of other presumptions. *Wilkie v. State*, 83 Cr. R. 490, 203 S. W. 1091; *Davidson v. State*, 84 Cr. R. 433, 208 S. W. 664.

That free dipping vats have not been provided by the county does not excuse an owner of cattle from refusing to obey the tick eradication statute; the presumption being that the commission would refuse to order cattle dipped in any vat where exorbitant charges were attempted. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

The Court of Criminal Appeals cannot assume from mere identity of names that the maker of a complaint for adultery was the same person as the woman named in the complaint as the adulteress, to sustain defendant's contention that such woman was an accomplice, and therefore not a credible person within art. 479. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

Since it is the duty of the clerk of court to have the affidavit required by art. 824, preliminary to issuing commission to take deposition, the presumption obtains prima facie at least that the affidavit was present before the commission was issued. *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

If property be taken in such a manner as to make it reasonably appear that all was taken at or about the same time and place, and the proof shows that defendant took a part of it, it will be presumed that he took all of such property. *Bride v. State*, 86 Cr. R. 535, 218 S. W. 762.

In the state of Texas chastity is presumed. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

The presumptions are in favor of the validity of a judgment convicting relator of juvenile delinquency in a collateral proceeding by habeas corpus. *Guinn v. State* (Cr. App.) 228 S. W. 233.

Injury from a given act will not be presumed unless the proof is such as to make apparent such fact. *Walden v. State* (Cr. App.) 232 S. W. 523.

14. **Relevancy of evidence—In general.**—To meet testimony of defendant that deceased cursed and swore at him, testimony that deceased had year before joined church, and had not sworn since, is inadmissible. *Huey v. State*, 81 Cr. R. 554, 197 S. W. 202.

Testimony of merchant, father of deceased, as to details of business transactions with defendant's father, held inadmissible. *Wallace v. State*, 82 Cr. R. 588, 200 S. W. 407.

That defendant's bill at decedent's father's store was unsatisfied at time of trial, and that deceased's lodge dues were paid by member of his family after he was stabbed held inadmissible. *Id.*

In prosecution for defendant for assault with intent to murder his son-in-law, evidence that victim had married defendant's daughter to avoid a prosecution for seduction and that he had undertaken to produce an abortion upon her held admissible as explanatory of a conversation between defendant and victim just preceding difficulty. *Bolin v. State*, 83 Cr. R. 590, 204 S. W. 335.

In prosecution for murder, testimony of witness present at shooting that after he had gone for help he became scared to go back, was inadmissible as immaterial, irrelevant, and prejudicial. *Walker v. State*, 84 Cr. R. 136, 206 S. W. 96.

In a prosecution for violation of the law prohibiting the sale of intoxicating liquors in prohibition territory, evidence as to the number of defendant's family held immaterial. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

Evidence that the sheriff and constable brutally beat defendant's cook in an endeavor to make her testify against defendant, and that she was placed in jail without

process, is admissible to show how the witness was treated and the attempt to force her to make statements which she said were untrue. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

In homicide prosecution, evidence that witness was present at the examining trial was not objectionable. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

In a larceny prosecution, that an officer identified the purse stolen as the purse identified by a witness, when as a matter of fact such purse was not identified, does not render such evidence inadmissible. *Charles v. State*, 85 Cr. R. 534, 213 S. W. 266.

In a prosecution for aggravated assault, evidence of prosecuting witness' good reputation is not admissible unless such reputation has been attacked. *Knight v. State*, 87 Cr. R. 134, 220 S. W. 333.

16. — **Time and place of criminal act.**—In a prosecution for violating local option law, testimony as to a conversation with defendant tending to prove that the transaction took place on a certain date is material on the question of limitations. *White v. State*, 83 Cr. R. 555, 204 S. W. 231.

17. — **Evidence creating prejudice against accused.**—Wife of deceased, who did not see the difficulty, but only heard a remark of deceased, should not have been allowed to testify that she was confined in bed with an infant, as it could serve only to influence the jury from sympathy; she and deceased being white, and defendant a negro. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353,

18. — **Circumstantial evidence.**—See *Williams v. State*, 86 Cr. R. 640, 218 S. W. 750; *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

That defendant in homicide case had knowledge that deceased was nearly blind may be shown from circumstances. *Clayton v. State*, 83 Cr. R. 57, 201 S. W. 172.

Admissions, accompanied by explanatory statements, which were not specific admissions of taking of property charged to have been stolen, did not take case out of rule of circumstantial evidence. *Rollins v. State*, 83 Cr. R. 345, 203 S. W. 355.

In prosecution for theft of cattle from father and son, father being dead at time of trial, his want of consent to taking could be proved by circumstantial evidence. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

To render evidence admissible in a case depending on circumstantial evidence, it is enough that it tends to prove the issue or constitute a link in the chain of proof, though standing alone it might not justify a verdict; and in such cases incidents may be legitimate evidence, which would be deemed irrelevant in a case depending on direct testimony. *Haley v. State*, 84 Cr. R. 629, 209 S. W. 675, 3 A. L. R. 779.

In prosecution for receiving stolen sheep, state's dependence being on circumstances alone, it was permissible for defendant to introduce every relevant circumstance from which a conclusion could be drawn, favorable to his innocence. *Wilson v. State*, 85 Cr. R. 94, 210 S. W. 542.

Evidence in proof of a conspiracy to commit crime will generally, from the nature of the case, be circumstantial. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

Where positive and direct evidence is attainable, it is not permissible for the state to resort to circumstances to verify or prove a fact. *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

When the actual killing is done by another, the mere presence of accused does not deprive him of the privilege of having his criminal connection with the offense determined by the rule of circumstantial evidence. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

Under the rule that circumstances are admissible which tend to prove the issue, and incidents are legitimate which would be irrelevant depending upon direct testimony, and that circumstances may be established where they tend to make the proposition more or less probable, in a murder trial where there was evidence that deceased was killed in an automobile in such manner that his hair and blood probably have been upon it, and that the hair and blood found on a certain car at a garage two days after the killing were similar to that found upon the objects with the body of deceased, it was proper for the state to trace the car by evidence from the time it was found with blood on it back to the time it left the garage before the homicide in a different condition, without proof that an individual in whose possession it was shown to be during such time was a coconspirator with accused. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Proof of conspiracy as basis for admission of evidence of acts and declarations of coconspirators, see *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

19. — **Allibi.**—Where defendant claimed that he was some miles from the place of the killing at such a time that it would have been impossible for him to have fired the fatal shot, testimony by one who saw defendant as to the time it would have taken to have ridden from the place of the killing to the point where defendant was seen is admissible. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

20. — **Incriminating others.**—See *Curry v. State*, 85 Cr. R. 443, 213 S. W. 268; *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106; *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

One accused of crime may show that another person committed the offense with which he is charged, where the guilt of such other would be consistent with the innocence of accused, but the proof must be by competent evidence. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241; *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Where identity of offender is in issue or his connection with offense controverted, it is generally permissible to introduce evidence of acts and declarations of third parties which tend to show that they and not accused committed offense. *Chenault v. State*, 83 Cr. R. 104, 201 S. W. 657; *Jackson v. Same*, 83 Cr. R. 106, 83 Cr. R. 653.

In a prosecution for the sale of intoxicants in violation of the local option prohibition law, where there were two sales of the same whisky, one by defendant to a stool pigeon, and one by the stool pigeon to the officer who employed him, evidence that

the stool pigeon had been indicted for making the sale to the officer, and convicted on his plea of guilty, held inadmissible, not being a relevant or material fact on the issues on trial. *Canales v. State*, 86 Cr. R. 142, 215 S. W. 964.

Where circumstantial evidence is relied on to prove the guilt of defendant, he may introduce evidence tending to show that another having motive to commit the offense was in such proximity that he might have been the author. *Kelley v. State*, 86 Cr. R. 281, 216 S. W. 188.

In a prosecution for theft of turkeys, evidence that a witness for the state made an effort to induce the owners to forego a prosecution and offered to pay them for the turkeys was admissible as tending to exculpate defendant and to emphasize the suspicion cast by circumstances upon him. *Mandosa v. State* (Cr. App.) 225 S. W. 169.

It is in all cases proper to prove by competent evidence that the offense was committed by a person other than the accused. *Id.*

**22. Transactions to which accused is not a party—Evidence held inadmissible.**—See *Standifer v. State*, 85 Cr. R. 394, 212 S. W. 954.

In a prosecution for murder committed after a quarrel between defendant and deceased over a statement made by deceased that defendant had been out in a pasture with a woman, evidence that such woman was not present at the trial, although the state had applied for process for her appearance, and the return of the officer that she could not be found, was wrongly admitted, where no effort was made to connect defendant with the witness' failure to appear. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

In prosecution for the illegal sale of intoxicating liquors in local option territory, testimony of prosecuting witness that another had sold him whisky at defendant's place of business was inadmissible, where it was not shown that defendant was present when such sale was made, nor that he authorized or knew of the same, and where such sale is not the basis of present prosecution. *Surginer v. State*, 86 Cr. R. 438, 217 S. W. 145.

Mere corruptive or compromising efforts, words, or acts of friends or relatives, attempted in behalf of accused, whose own connection therewith does not appear, are not admissible against him. *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474.

In a prosecution for homicide, it was not permissible to show the manner in which the body of deceased was buried, or that he was a pauper, buried at the expense of the county, and that he was wrapped in a bloody sheet and buried without clothes on; accused not being present when any of such things occurred. *Gusters v. State*, 87 Cr. R. 181, 220 S. W. 92.

In a prosecution for homicide, it would not be proper for the state to show that there had been six murders in the county within six months and four within four miles of the courthouse. *Id.*

In a prosecution for receiving and concealing stolen property, it was improper to permit the alleged thief to testify over objection that he had broken into other stores than the one from which the goods in question were taken, where accused was not connected with such other thefts and did not contend that the property in question was not stolen by the alleged thief. *Joiner v. State* (Cr. App.) 232 S. W. 333.

It is not proper in a criminal prosecution to permit the admission of evidence of acts of persons other than the accused not in the presence or hearing of the accused. *Id.*

**23. — Evidence held admissible.**—In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of P., a prostitute, that she went to house in question and registered and occupied a room therein for the purpose of prostitution was admissible, though defendant was not present in the lobby of the house when P. entered and defendant's husband assigned P. a room. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

**24. — Indictment, acquittal or conviction of third persons.**—It is not proper in a prosecution for highway robbery to permit the state to prove that a codefendant has been convicted and sent to the penitentiary for highway robbery. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

In a prosecution for receiving stolen goods, where the state proved the theft of the goods from the railroad warehouse by the party alleged in the indictment, defendant could not offer evidence of conviction of railroad employees for embezzlement arising out of the same transaction, where such employees were not witnesses in the case. *Kluting v. State* (Cr. App.) 232 S. W. 305.

**26. Conduct of accused subsequent to offense.**—In the prosecution of a state bank president for unlawfully becoming indebted to the bank by being a member of a partnership which borrowed money from the bank in the name of two others, it was error to admit evidence of transactions after the alleged offense tending to show a partnership at that time. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

In prosecution for swindling, where bankruptcy schedule by defendant, made after alleged swindling, was introduced, objection that the debts therein were contracted after the alleged swindling held sufficient to render the schedule inadmissible. *Whitehead v. State*, 81 Cr. R. 278, 196 S. W. 851.

**27. — Flight or resisting arrest.**—Where one went to a picnic with several others, and several persons were robbed by members of the party at about the same time, and defendant was arrested for one of the robberies and broke jail and fled, evidence of such flight was admissible on a prosecution for robbing one of the other persons. *Hicks v. State*, 82 Cr. R. 254, 199 S. W. 487.

Testimony of witnesses who claimed that when they went to arrest defendant they saw him at distance and called to him is not subject to objection that there was no proof that defendant heard them; there being evidence that defendant was within hearing distance, and that he was aware that burglary had been discovered. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

In prosecution for perjury committed on writ of habeas corpus for bail in a homicide case, evidence as to defendant's evasion of process to bring him in as witness on trial for homicide was not admissible against him on theory he was fugitive. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

In a prosecution for the larceny of an automobile, evidence that defendant, while in custody under a charge in the county court for taking the car broke jail and fled, was admissible in the district court; the cases not being separate or distinct, but involving the same act and the same facts. *Torrence v. State*, 85 Cr. R. 310, 212 S. W. 957.

Where, in a prosecution for theft of a hog, officers who were searching his premises found the alleged stolen hogs and arrested defendant, evidence that defendant fired at the officers when an attempt was made to search him was admissible. *Griffin v. State*, 87 Cr. R. 194, 220 S. W. 330.

In a prosecution for assault with intent to murder, evidence that defendant, who had accompanied the person assaulted to the hospital, refused to wait until a third party could take him home in his automobile, but returned home immediately, held inadmissible to show flight. *Henry v. State*, 87 Cr. R. 392, 221 S. W. 1083.

Proof that defendant failed to appear in accord with a bail bond or recognizance is admissible against him. *Cook v. State* (Cr. App.) 228 S. W. 213.

**29. — Suppression or fabrication of evidence.**—In prosecution for passing forged instruments, that defendant, after being indicted, attempted at night to get into the courthouse to gain access to the papers involved was admissible, and the details were admissible on the question of whether his intent was simply to inspect the documents or to destroy evidence. *Fry v. State*, 83 Cr. R. 500, 203 S. W. 1096.

Testimony of woman who accompanied defendant after shooting as to conversation with him held admissible as tending to show that defendant was trying to "fix" her so that she would testify in his behalf to what was not true. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In a homicide case, it was error to permit the sheriff to testify that certain women desired as witnesses had disappeared, and to show in connection with his testimony subpoenas for them, together with the sheriff's return thereon stating that they could not be found, where there was nothing to show that accused had been instrumental in causing their disappearance. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

In murder prosecution, where defendant's claim that the killing occurred during second interview with deceased as to a second act of misconduct of deceased toward defendant's wife was denied by prosecution, evidence of a statement of witness to defendant, following first misconduct of deceased and prior to second misconduct, that defendant had lost his right to act when he first met deceased after receiving information as to first misconduct, was admissible to show motive for fabrication of evidence as to the second interview. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

In murder prosecution, where witnesses to the killing were on terms of friendly intimacy with defendant until about two months after the killing, when they began to talk to different parties about defendant's guilty connection with the killing, and were shortly thereafter murdered, evidence tending to show that defendant killed such witnesses to suppress their testimony held admissible. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

No inference unfavorable to accused can be drawn on the failure to produce evidence, where the evidence was available to the state, and it would have been to the state's interest to produce it if it had been favorable to the state. *Davis v. State* (Cr. App.) 231 S. W. 784.

**30. — Suborning or interfering with witnesses.**—In a prosecution for manufacturing intoxicants in violation of the Dean Law, testimony that defendant stated he would kill any one who informed on him is admissible. *Russell v. State* (Cr. App.) 228 S. W. 948.

**31. Matters explanatory of facts in evidence or inferences therefrom.**—Where county attorney testifies for the state that prosecution was begun by accused against deceased, and that prosecution was dismissed, accused should be permitted to prove by the county attorney the ground on which he dismissed the prosecution. *Parker v. State*, 81 Cr. R. 397, 196 S. W. 537.

In prosecution for attempt to induce another to commit perjury, any testimony offered by defendant to meet that introduced by state, combating or explaining, favorably to defendant, testimony introduced by state, should be admitted. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

Evidence tending to rebut state's theory that accused and his witness separated pursuant to conspiracy, whereby he was to assault another, held improperly rejected. *Yancy v. State*, 82 Cr. R. 276, 199 S. W. 470.

In a prosecution for abandonment of wife and child, where evidence as to details of offers to support was excluded on objection afterwards withdrawn without knowledge of accused, who did not again offer it and the court charged that the jury might consider such offers on the question of intent, as the evidence was relevant and the jury could not determine the good faith of the offers or their weight, it was cause for reversal. *Trial v. State*, 84 Cr. R. 16, 205 S. W. 343, 725.

Where one side presents an issue and evidence in support thereof, the other side may explain such evidence. *Lasater v. State* (Cr. App.) 227 S. W. 949.

In a prosecution for unlawfully carrying a pistol, where the court permitted the state to prove by witness that he was struck by the pistol on the head and rendered unconscious, and was also struck with a crutch in the hands of a person accompanying the defendant, it should have permitted the accused to prove how the difficulty in which the blows were struck came about, and that it was because of an insulting letter which accused's companion claimed that the witness had written to his daughter. *Barnett v. State* (Cr. App.) 229 S. W. 519.

**32. Character or reputation of accused.**—Where defendant placed his general reputation as a peaceable, law-abiding man in issue, it was error to ask witnesses if they

did not know that defendant shot three times at one of his own sons, in the absence of evidence that defendant did do so. *Henley v. State*, 81 Cr. R. 221, 195 S. W. 197.

Where contradictions with reference to defendant's statements as to the burglaries and his connection with them as shown by alleged confessions all out of court, were used against him, evidence of his reputation for veracity was admissible. *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853.

In prosecution for murder, defendant having placed his character as a peaceable, law-abiding man in issue, it was error to permit question of witness whether he had heard that defendant drew a long knife and tried to cut throat of a certain man, in the absence of evidence that defendant did do so. *Henley v. State*, 81 Cr. R. 221, 195 S. W. 197.

Opinions of state's witnesses, and their testimony as to defendant's general reputation for truth and veracity, based largely on their individual ideas of defendant, held improperly received. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

Though defendant had put his reputation in evidence as a law-abiding citizen, objection to evidence of the state that 15 or 20 years before the homicide defendant was given to fighting and was regarded "as a holy terror" should have been sustained; the interregnum between defendant's fighting capacity as a youngster and the time of the killing being too remote. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

In a prosecution for pursuing the occupation of a retail liquor dealer in a county where the sale was forbidden, where defendant did not put in issue his reputation, evidence as to his bad reputation as a seller of intoxicating liquors is inadmissible. *Alexander v. State*, 86 Cr. R. 606, 218 S. W. 752.

Where a defendant seeks to prove a good reputation as a peaceable, law-abiding citizen, the state may prove his bad reputation, and, if defendant becomes a witness, he puts in issue his reputation for truth and veracity, while, if he moves for a suspended sentence, he opens generally the issue of his reputation. *Id.*

In homicide prosecution, testimony as to a mass meeting to run deceased out of the country because he was a lawbreaker would have been admissible upon showing that participants were in such a proximity to the homicide as to afford them opportunity to have committed it, but in absence of such showing should have been rejected, unless admissible as bearing upon the motive or animus in the case. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In criminal prosecution, where defendant did not put in issue his character and reputation, the state cannot draw such matters in issue. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

It is a rule of practice in all cases to allow the accused to prove his general good character in the community in which he lives as a peaceable law-abiding citizen. *Fred- dy v. State* (Cr. App.) 229 S. W. 533.

In a prosecution for burglary, testimony offered by defendant to prove that his general reputation for honesty and fair dealing was good was admissible. *Williams v. State* (Cr. App.) 230 S. W. 156.

In prosecution for statutory rape, where accused did not testify as a witness, his reputation for truth and veracity did not become an issue. *Young v. State* (Cr. App.) 230 S. W. 414.

33. — **Evidence of particular acts.**—Proof that defendant registered in town under alias and claimed to be deaf-mute, introduced in connection with identity as having been in vicinity of crime at time, was not within law prohibiting attack on character of defendant by state. *McGarry v. State*, 82 Cr. R. 597, 200 S. W. 527.

34. **Materiality or competency of evidence.**—It is not ground of objection to admission of testimony that witness had previously testified differently. *Long v. State*, 82 Cr. R. 312, 200 S. W. 160.

In prosecution of a school teacher for aggravated assault on a pupil, the accused may testify as to intent with which whipping was given, but his statement will not be conclusive against other evidence tending to contradict it. *Harris v. State*, 83 Cr. R. 468, 203 S. W. 1089; *Gibson v. State*, 83 Cr. R. 215, 203 S. W. 1091.

In a prosecution for aggravated assault, based on the ground that the person assaulted was a decrepit person, and that defendant was of robust health and strength, where defendant testified in his own behalf that he suffered a great deal from rheumatism, causing him to limp, and that he was not in robust health, the state might properly show that witnesses with opportunity to know had not seen him limp. *Hahn v. State*, 87 Cr. R. 22, 218 S. W. 1058.

Where defendant, in payment of automobile tires, gave a check which he signed with the name J. I. B., the cashier of the bank on which the check was drawn may testify, without having the bank books present, that no such person as J. I. B. had an account at the bank at the time in question. *Moore v. State*, 87 Cr. R. 77, 219 S. W. 1097.

In a prosecution for aggravated assault, evidence as to prosecuting witness' reputation is admissible only if it is that of his general reputation. *Knight v. State*, 87 Cr. R. 134, 220 S. W. 333.

In homicide prosecution, the fact that defendant's son, on going to the scene of the homicide, kissed defendant, was not relevant. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

In a prosecution for embezzlement, the trial court did not err in permitting an express agent to testify that he had failed to find in his office any stubs showing remittances by defendant; the testimony not being affirmative, but negative. *Grice v. State* (Cr. App.) 225 S. W. 172.

In prosecution for forgery, persons so situated that they probably would know purported signer of instrument may testify as to the absence of knowledge of, or acquaintance with, purported signer. *Mettall v. State* (Cr. App.) 232 S. W. 315.

35. — **Remoteness.**—See *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163; *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.



There is no hard and fast rule fixing a given number of years beyond which an event becomes too remote to have weight in testimony, the application of the rule of remoteness being affected by the facts of the particular case. *Lasater v. State* (Cr. App.) 227 S. W. 949.

36. — **Experiments.**—In homicide case, question being whether deceased was close to defendant when shot, evidence of experiments on behalf of state in which white paper was used to find distance at which a pistol fired would cause powder burns, was improperly admitted, where evidence showed that the deceased wore dark clothes at time he was shot, and there was no evidence that effect of powder on cloth would be similar to that on paper. *Reagan v. State*, 84 Cr. R. 468, 208 S. W. 523.

In homicide prosecution, where witness had testified on the examining trial to have seen killing from her yard, and where defendant had testified that after such testimony he went to place of killing, and from such place could not observe premises of such witness except top of house, evidence of a test made by another witness under the direction of such eyewitness, made at same time of day as the killing, and that by such test witness was able to see place of killing from eyewitness' yard, was admissible. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

In murder prosecution, evidence of experiment on body of deceased, to determine whether blows on his face could have been made with a pistol, held improper. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

In homicide case, where deputy sheriff was killed in jail, and certain witnesses testified that at the time of the shooting they crawled under their bunks, testimony of sheriff that he went into the cells and placed himself both on and under said bunks in about the positions testified to by the witnesses, and that from each of said bunks he could see the place where the struggle occurred, and where deceased was shot, was not objectionable, as an opinion of the witness, no question being raised as to the correctness of the positions taken by the sheriff in his experiments. *Israel v. State* (Cr. App.) 230 S. W. 984.

37. — **Admissibility by reason of admission of other evidence.**—Where prosecuting witness, whose testimony alone made state's case, testified that feeling between him and defendant was good, and that they had had no altercation since date of offense, it was reversible error to exclude testimony to contrary. *Baldwin v. State*, 82 Cr. R. 243, 199 S. W. 468.

In prosecution for murder, admitting testimony that defendant exhibited his pistols was not error, where he testified to his habit of carrying arms. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

Where one silently permits objectionable matters to be introduced against him, he may not be heard to complain because he is not also permitted to violate the rules of evidence by further investigation of such objectionable matter. *Glascoe v. State*, 85 Cr. R. 234, 210 S. W. 956.

In homicide prosecution, evidence that deceased, prior to his death, knowing that he could not live, told witness "about the condition of his wife. He told me a few things. He wanted me to look after his family"—was admissible as tending to show deceased's mental condition at time of making statement and to rebut defendant's contention that he did not know what he was talking about at such time. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

Where defendant's brother saw the homicide, and defendant testified on cross-examination that he didn't care if his brother was a witness, for, if he told the truth, it would not injure his case, but that the brother was crazy about half the time, such testimony did not warrant the introduction of a written statement by defendant's brother. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

The state, claiming killing of white landlord by negro renter, in the rented field, on the afternoon after trouble between the parties the night before, when the negro was ordered to leave the place, was deliberate, and bringing out the fact of defendant's absence from the field in the forenoon, and his return thereto with his gun, he to meet this could show, not only that in the forenoon he went to town to consult with white friends as to what he should do, but that they advised him he had a right to remain with his crop. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

38. — **View.**—In a prosecution for homicide, it was error to permit jurors to visit the scene of the homicide and view the ground, its location and environments, where none of them were placed upon the stand to disclose what they ascertained. *Lovett v. State*, 87 Cr. R. 548, 223 S. W. 210.

39. **Res gestæ.**—**Admissibility of declarations in general.**—In prosecution for simple assault, testimony as to cursing and name calling held admissible as part of res gestæ. *McHam v. State*, 81 Cr. R. 623, 197 S. W. 873.

In a prosecution for murder of the paramour of accused's wife in her presence, an exclamation, "Oh Daddy! Why did you do it?" was not admissible as part of the res gestæ, where not identified except as being a woman's voice and coming from the direction where the killing occurred. (Per Davidson, P. J.) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

Where defendant was present when his son met deceased on the highway and shot him, a statement, made by the son, who after the killing got in his father's car and drove approximately 200 yards before meeting the witness, that they had killed deceased, was admissible as part of the res gestæ. *Henderson v. State* (Cr. App.) 229 S. W. 535.

In a prosecution of a landlord for murder of his tenant, testimony that after the shooting the wife of the murdered man said to defendant, "You have killed my darling and have left me all alone with nothing but three little orphan children," etc., held admissible as reflecting the wife's knowledge that defendant had shot her husband; the whole matter being so close to the time of shooting as to make it res gestæ. *Taylor v. State* (Cr. App.) 229 S. W. 552.

40. — **Accompanying and surrounding circumstances.**—On trial for remaining in room where game was being played with dice, evidence as to time defendant left the room held admissible as *res gestæ*. *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

In a rape case, an exclamation, "My God," made by defendant when witnesses broke into room where he had the girl, was admissible as *res gestæ*. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

In a prosecution for assault upon wife with a knife, evidence that defendant and wife ran out of the house, when he again tried to cut her, was admissible as a part of the *res gestæ* of the fight or a continuation of it. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

In a prosecution for being interested in a gaming house, testimony of a raiding officer that when he arrested defendant the next day he found a pistol on him was inadmissible, not being part of the facts necessary to develop the *res gestæ*, and not tending to connect defendant with the offense charged against him, nor to shed light on his intent or identity. *Watson v. State* (Cr. App.) 225 S. W. 753.

Evidence of the finding at the place of the homicide and immediately thereafter of a weapon is admissible as part of the *res gestæ*. *Flores v. State* (Cr. App.) 231 S. W. 786.

Where as part of the same transaction two Mexicans in a boarding car were assaulted and robbed, and one of them escaped to an adjacent car containing more Mexicans, which was later robbed, evidence in prosecution for the latter robbery that one of the two Mexicans in a bloody and bruised condition came to second car was admissible, being part of a continuous transaction in which defendant and his companions were acting together. *Hardy v. State* (Cr. App.) 231 S. W. 1097.

42. — **Acts and statements of accused prior to offense.**—In prosecution for selling intoxicating liquor, where witness went twice to defendant before getting liquor, statement of defendant the first time that whisky would be \$1.26 a pint was admissible as part of *res gestæ*. *Berry v. State*, 93 Cr. R. 210, 203 S. W. 901.

Statements of defendant to his wife when, just after trouble with deceased the night before the homicide, he came home excited and agitated, and told of the occurrence, are within the rule of *res gestæ*. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

43. — **Acts and statements while committing offense.**—In a prosecution for aggravated assault where the state showed that defendant and another went to the place of business of the complaining witness, that defendant stated to his companion he was the man, and that they followed him to the back of the store, where the assault occurred, etc., it was improper to exclude testimony that defendant's companion charged the complaining witness with writing an insulting letter to his daughter and demanded such practice cease, etc.; for such evidence was part of the *res gestæ*. *Barnett v. State* (Cr. App.) 230 S. W. 144.

44. — **Acts and statements of accused subsequent to offense.**—Testimony of statements made by accused during the night after he had killed his father is not admissible as *res gestæ*. *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595.

In prosecution for assault to murder, where defendant denied he was shooting at the alleged assaulted party, what was said immediately after the shooting between the two was admissible as a part of the *res gestæ*. *Covington v. State*, 83 Cr. R. 22, 201 S. W. 179.

In a prosecution for violating local option law, it was error to exclude testimony as to a conversation with defendant tending to prove that whisky alleged to have been sold by defendant was loaned, since such evidence was part of the *res gestæ*. *White v. State*, 83 Cr. R. 555, 204 S. W. 231.

Where immediately after defendant and W. pursued and shot one of escorts of two women they pursued and caught women, the woman caught by W. was properly permitted, in relating what occurred immediately after killing, to relate her conversation with W.; it being part of *res gestæ*. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

Killing having taken place at 10 o'clock at night, a statement by defendant to officers to whom he surrendered at 5 o'clock next morning that man whom he had shot fired first was no part of *res gestæ* and properly excluded as self-serving. *Id.*

In prosecution for assault with intent to murder, testimony of third person that accused's mother, shortly after the offense, stated that accused had told her that he did not intend to live with his wife, the assaulted party, and that accused's mother asked the wife to say that the shooting was an accident, was not admissible as *res gestæ*, but was hearsay. *Mitchell v. State*, 84 Cr. R. 36, 204 S. W. 767.

In prosecution for murder, evidence as to statements of accused to a neighbor as to reason for shooting was not admissible as part of *res gestæ*, where evidence did not show how soon after shooting statements were made, and where accused, in making the statements, did not appear to be excited or agitated. *Houseton v. State*, 83 Cr. R. 453, 204 S. W. 1007.

In a prosecution for assault to murder a police officer having defendant in custody, testimony of another officer that when he pulled defendant from the car in which he was riding with the assaulted officer he asked him what he shot the latter for, and defendant told him "the damn policeman had tried to shoot him," was admissible as *res gestæ*. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

Where an officer heard the shooting and ran at once to the scene, getting there a moment or two after it occurred, statements then made by the accused were admissible as a part of the *res gestæ* in a prosecution for murder. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

*Res gestæ* statements of accused are admissible, regardless of whether or not the accused was under arrest when making them. *Id.*

Statement of accused in prosecution for assault with intent to kill, made after accused went one or two miles to his home, and after the officers who were notified went to the premises, was not admissible as *res gestæ*. *Freddy v. State* (Cr. App.) 229 S. W. 533.

In prosecution for automobile theft, exclusion of declarations made by defendant to an officer in explanation of his possession of the stolen automobile about an hour after his arrest in possession thereof held proper, since such evidence would have been self-serving and hearsay and not a part of the *res gestæ*; sufficient time having elapsed since his arrest to permit him to reflect and fabricate an explanation. *Seebold v. State* (Cr. App.) 232 S. W. 328.

45. — **Other offenses part of same transaction.**—In prosecution for burglary of store, where upon same trip and at about same time defendant entered another store, it was competent for state to trace defendant to develop as part of *res gestæ* things done while on expedition, although it disclosed another offense. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

In prosecution for assault to murder, that after assaulted person had received injuries, and had fallen, his brother engaged in encounter with defendant, during which defendant's brother entered and stabbed assaulted person's brother, was admissible as *res gestæ*. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

Where defendant pleaded former jeopardy, in that in killing deceased he had accidentally killed his own wife, of whose murder he was acquitted, proof of the homicide of his wife, which was a part of the *res gestæ*, was essential under the plea, and not to be excluded under the rule rejecting evidence of other crimes. *Spannell v. State*, 83 Cr. R. 418, 203 S. W. 357, 2 A. L. R. 593.

Requested charge to disregard defendant's rudely displaying pistol in dance hall was properly refused, although defendant was not charged with rudely displaying pistol; evidence being part of *res gestæ* of his carrying pistol as charged. *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765.

In prosecution for cattle theft, where the stolen cattle had been found in a pasture, the owner of which had been accused with defendant of stealing the cattle, evidence that other recently stolen cattle were found with the cattle alleged to have been stolen was admissible to develop *res gestæ*. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

In a prosecution for aggravated assault on a female child by fondling her person, evidence that defendant had exhibited obscene pictures to prosecutrix at the time of the offense held admissible, as showing intent and as a part of the *res gestæ*. *Sine v. State*, 86 Cr. R. 221, 215 S. W. 967.

In a prosecution for unlawfully carrying a pistol, the court did not err in permitting the state to prove, by a witness that he was struck with the pistol on the head and rendered unconscious, and was also struck with a crutch in the hands of a person accompanying defendant, where the only time the state undertook to prove accused to be in possession of the pistol was during the difficulty in which such blows were struck, and it was all one transaction. *Barnett v. State* (Cr. App.) 229 S. W. 519.

In a prosecution for theft of an automobile, the theft by defendant of other automobiles can only be shown by the state where it appears in developing the *res gestæ*, becomes necessary to connect the defendant with the case on trial, or shows intent if that is an issue. *Hunt v. State* (Cr. App.) 229 S. W. 869.

In a prosecution for theft of an automobile, the theft by defendant of other automobiles can be shown by the state where it appears in developing the *res gestæ*. *Id.*

In a prosecution for robbery, testimony that defendant pointed a pistol at a witness while a companion took the witness' money is admissible, over objection that it was a new and distinct offense, for it was *res gestæ*, being part of the general transaction. *Hardy v. State* (Cr. App.) 231 S. W. 1097.

In a prosecution for robbery, where it appeared that defendant, with others, went to a car containing Mexicans and assaulted one of them, and then went to another car, where the robbery was committed, evidence as to the condition of the Mexican in the first car held admissible as *res gestæ*. *Searcy v. State* (Cr. App.) 232 S. W. 799.

46. — **Declarations of injured person in general.**—In prosecution of bank president for having murdered state commissioner of banking, statements by commissioner immediately after being shot, and also later, made to physicians called to attend him, were admissible as *res gestæ*. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In prosecution for assault with intent to rape defendant's daughter, daughter's testimony that just before defendant ceased his attack she said, "If you don't stop treating me like you are, I am going to tell the way you always treated me ever since I was little," was admissible as part of *res gestæ*. *Hensley v. State*, 85 Cr. R. 260, 211 S. W. 590.

In prosecution for assault with intent to rape daughter, evidence, of witness who saw defendant push daughter back on the bed, that daughter said at such time, "Papa, if you don't quit that I will tell something on you that will cause my brother to kill you," was admissible as part of *res gestæ*. *Id.*

47. — **Declarations of injured person before and at time of offense.**—In rape case, witnesses could testify that they heard the girl, who was locked in defendant's room, cry out: "Don't do that! let me alone! I will tell mama. I want to go home." *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

In a murder trial, where the evidence was circumstantial and the state's theory was that defendant had met deceased, who was pregnant by him, by appointment, killed her, and had thrown her body in a river, statements by deceased to her mother, while packing her clothes and dressing preparatory to and about two hours before leaving home on the night of her disappearance, that she was going to meet defendant by appointment, that he would take her away on a train, was *res gestæ* admissible to explain her disappearance. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

48. — **Acts and statements of injured person after the offense—Evidence held admissible.**—Statements of assaulted person within 10 or 15 minutes after assault, while still bleeding from her wounds and trying to wash the blood from her face, held *res gestæ*. *Nedham v. State*, 82 Cr. R. 78, 197 S. W. 988.

Where a shooting occurred 300 yards from witness, and he started in that direction,

and met deceased running toward him badly shot, and witness took him to his house nearby and laid him on the bed, statements of the deceased are admissible as *res gestæ*. *Hammonds v. State*, 82 Cr. R. 387, 198 S. W. 944; *Hokes v. Same*, 82 Cr. R. 271, 82 Cr. R. 945.

In prosecution for murder, statements by deceased to his wife after he was wounded, incriminating defendant, held *res gestæ*. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

In a prosecution for the murder of defendant's wife, evidence that, when defendant approached her after the infliction of the injury from which she died, she pushed him away and frowned at him, was admissible as *res gestæ*. *Beaupre v. State* (Cr. App.) 206 S. W. 517.

In a prosecution for statutory rape, evidence that prosecutrix just after the alleged offense told the witness what occurred, is admissible as part of the *res gestæ*. *McIntosh v. State*, 85 Cr. R. 417, 213 S. W. 659.

A statement by deceased five minutes after the shooting that it was a person other than defendant who shot him was admissible as *res gestæ*. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

Where defendant's sister and another negro woman engaged in a fight, and, the sister being victorious, the other negress left the place of the fight and went to a store where her husband had sought to call up officers, and, being unable to secure officers, the vanquished negress and her husband started to the house of a white man, and when they came near the point of the fight where defendant was still maintaining his ground, the vanquished negress told her husband that he had a pistol, and the two made a detour in the field, held that, as the statement was made less than an hour after the fight evidence thereof was admissible, as part of the *res gestæ*, though the statement was made out of the hearing of defendant. *Williams v. State*, 86 Cr. R. 626, 219 S. W. 829.

In a prosecution for murder, a statement of deceased, made almost immediately after the firing of the shot, to the effect that accused had shot him for nothing, was admissible as part of the *res gestæ*. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

A statement made by decedent immediately after defendant shot him, showing his recognition of the defendant as the party who fired the shot, was admissible as *res gestæ*. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

In prosecution for murder, testimony of witnesses who had found deceased, as to statements made by him from half an hour to an hour and a half after difficulty, incriminating defendant, held admissible as part of *res gestæ*. *Bell v. State*, 88 Cr. R. 64, 224 S. W. 1108.

On appeal from a conviction for burglary, it may be inferred from an expression in the bill of exceptions that defendant was hauling off the property on his bicycle when arrested, that the arresting officer's testimony that defendant, immediately after his arrest, was in possession of part of the stolen property, and that he learned from him the location of the bicycle and found tied to it a box containing another article stolen, was *res gestæ*, though it did not appear that defendant was with the officer at the time. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

49. — Evidence held inadmissible.—Conversations to which deceased was a party, which took place after he had reached his home, he having dropped into a saloon on his way there from scene of the affray, etc., were not *res gestæ*. *Wallace v. State*, 82 Cr. R. 588, 200 S. W. 407.

In prosecution for murder, deceased's statement to his wife after the affray that defendant was to blame, was inadmissible. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

A statement of deceased that he was glad that the officers got the right man, made when an officer said that he had "arrested the right man," was not admissible as a dying declaration, nor as *res gestæ*. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

In a prosecution for assault to rape, it was error to permit prosecutrix to testify over objection that subsequently defendant came to her mother's house, and she hid from him because of fear; such testimony not being *res gestæ*, nor otherwise shown admissible. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

50. — Acts and statements of third persons.—On trial for remaining in room where game was being played with dice, evidence that others present were playing on the floor, and that some one was heard to say that he would shoot so much, held admissible as *res gestæ*. *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

In a prosecution for murder, testimony of a witness as to what deceased's father said, about 60 yards from the killing, while a fight was going on, to the effect that they were killing his boy, was admissible as *res gestæ*. *Lowe v. State*, 83 Cr. R. 134, 201 S. W. 986.

In prosecution for aggravated assault, testimony held admissible as showing acts and declarations of persons present and participating in difficulty, on ground of *res gestæ*. *Bennett v. State*, 83 Cr. R. 268, 202 S. W. 730.

In a prosecution for theft of a pocketbook found by defendant, where defendant claimed she had given the pocketbook to another who claimed it, evidence of a witness that about an hour after it was lost and found she heard such other person say defendant had given him the pocketbook was inadmissible as *res gestæ*. *Greenwood v. State*, 84 Cr. R. 548, 203 S. W. 662.

In a prosecution for theft of a purse from the person of the complaining witness at a stock show, testimony of the complaining witness that her attention was called to the fact that some one was taking her purse, and that she and her informant looked for the party, but, failing to find him, waited for him at the gate, where defendant was identified, was admissible as part of the *res gestæ*. *Rogers v. State*, 86 Cr. R. 418, 217 S. W. 148.

Where defendant accompanied by two other strikers went to a point where persons in the master's employment were at work, and as result of a difficulty killed a guard, testimony by a police officer that when he arrived at the scene he arrested one of de-

defendant's companions, who had the big end of a billiard cue in his hand, was admissible as part of the *res gestæ*, despite defendant's contention that he and his companions went to scene of homicide for purpose of peacefully picketing, and that they were assaulted; the state being entitled to introduce contradicting evidence that defendant's companions attacked person working with bludgeons. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

In a prosecution for the theft of grain by one of those engaged in hauling it to the elevator, the warehousemen can testify that others hauling the grain to the warehouse stated it belonged to prosecuting witness, who had telephoned the warehousemen the grain was coming, since such statements were part of the *res gestæ* of the connection of those parties with the wheat which they were then hauling. *Davis v. State* (Cr. App.) 231 S. W. 784.

51. Evidence of other offenses—In general.—In prosecution for sending anonymous letter reflecting on chastity and good reputation of recipient, another anonymous letter alleged to have been written by defendant and received by the same person, was admissible in evidence. *Rudy v. State*, 81 Cr. R. 272, 195 S. W. 187.

In a prosecution for pandering, where state claims that defendant connived at his wife's illicit intercourse, evidence is admissible on its behalf that, several years before events on which indictment is based, she had intercourse with men without defendant's knowledge, though he was jealous on account of attentions he observed paid her by other men. *Briscoe v. State*, 81 Cr. R. 419, 196 S. W. 183.

Where, on prosecution for robbery, there was some evidence which had effect or might have had effect of leading jury to believe the defendant was under indictment for murder, and this affected the verdict, conviction will be reversed where the evidence is very weak. *Easley v. State*, 82 Cr. R. 238, 199 S. W. 476.

In proceeding under juvenile delinquent law, testimony of sheriff that he had had defendant in jail several times for petit theft, and that he did not know when cases were tried, or know that he ever stole anything, was inadmissible to prove state's main case against him. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

Testimony that accused has been convicted of a similar offense is admissible only when defendant is a witness and when the conviction is both one importing moral turpitude and so recent it is presumed to still affect his character. *Mann v. State*, 84 Cr. R. 109, 204 S. W. 434.

To justify admission of evidence of another crime, as within the exception to the rule excluding evidence of other crimes, its commission must be proved; and if the evidence merely casts suspicion, it should be rejected. *Haley v. State*, 84 Cr. R. 629, 209 S. W. 675, 3 A. L. R. 779.

In prosecution for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of D. that in May of the previous year she was staying at the McIntosh Hotel, and that defendant and her husband were in charge there, held not subject to objection that it was too remote. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

In prosecution of a restaurant keeper for failure to provide women employes with suitable seats when not engaged in active duties, evidence that defendant had paid a fine for selling rotten meat held inadmissible. *Glanges v. State*, 87 Cr. R. 158, 220 S. W. 95.

Proof of a separate and distinct criminal act similar to that involved in the prosecution sometimes becomes admissible in evidence to controvert some defensive theory advanced by the accused, but such evidence is to be received only when brought clearly within some defined exception to the rule excluding it. *Higgins v. State*, 87 Cr. R. 424, 222 S. W. 241.

Evidence of other offenses committed by defendant is excluded; proof of them being tolerated only when within some exception to the general rule. *Payne v. State* (Cr. App.) 232 S. W. 802.

Where the state showed that defendant carried a pistol on Saturday and Sunday, but elected to rely on the Sunday carrying, and it appeared that on Sunday defendant went into a restaurant and he placed the pistol on a stool beside him, evidence that on the previous Saturday defendant had made a demonstration with the pistol against one who worked in the restaurant, threatening to kill him, was admissible as tending to show that defendant was carrying a complete pistol on Sunday; it being defendant's claim that the pistol lacked a cylinder. *Smith v. State* (Cr. App.) 232 S. W. 811.

52. — In prosecutions for homicide.—Where defendant had given deceased checks which were not on his body when found and a check was found torn up, checks which brought up an issue as to forgery held admissible. *Dozier v. State*, 82 Cr. R. 321, 199 S. W. 287.

In prosecution for murder of husband of defendant's former sweetheart, evidence that defendant, after the marriage of both, had professed love for such sweetheart, etc., and had poisoned his own wife, held admissible to show system. *Haley v. State*, 87 Cr. R. 519, 223 S. W. 202.

In prosecution for homicide evidence of prior wanton cutting of buggy tires of deceased by defendant was admissible to show ill will and as bearing on self-defense. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

Testimony as to the killing of a companion of the deceased at about the same time and place held admissible. *Perea v. State* (Cr. App.) 227 S. W. 305.

53. — In prosecutions for forgery.—It was proper to admit evidence that accused, a superintendent of schools, on being called to a bank, separated checks drawn on school fund, putting genuine ones in one pile, and ones on which names of payees had been forged in another pile, and that the check, the basis of prosecution, was among the bad checks, and that accused stated that he did not understand why he had made such a fool of himself. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

In a prosecution for unlawfully attempting to pass a forged instrument, it was competent for the state to prove that defendant attempted to pass a forged instrument on other persons, as tending to show the intent, where an innocent purpose was claimed, or there was doubt as to the innocence of the act about which the complaint is made. *Johnson v. State*, 88 Cr. R. 136, 224 S. W. 1103.

54. — **In prosecution for embezzlement or theft.**—In cattle theft prosecution, where accused acknowledged butchering animal, but claimed ignorance of its theft, testimony of accomplice that he and accused had stolen and butchered other cattle was admissible to show intent and system or course of dealings. *Simpson v. State*, 81 Cr. R. 389, 196 S. W. 835.

In prosecution for cattle theft, admission of testimony that accused gave a minor whisky, for purpose of identifying occasion of a conversation, was error, since it concerned independent, unrelated offense. *Williams v. State*, 82 Cr. R. 48, 198 S. W. 316.

In theft prosecution, admitting testimony regarding previous convictions of accused constitutes reversible error, where accused did not testify. *Taylor v. State*, 82 Cr. R. 210, 199 S. W. 289.

In prosecution for theft of automobile, where defendant's participation in theft and disposition of car was squarely in issue, evidence of other auto thefts in which defendant's accomplice testified defendant participated was inadmissible. *Moore v. State*, 83 Cr. R. 319, 203 S. W. 767.

In prosecution for theft of and alteration of brand on cow, where cow was claimed to be defendant's own property and only issue was ownership, evidence of another cow found at same time with brand claimed to have been altered was admissible. (Per *Morrow and Prendergast, JJ.*) *Cannon v. State*, 84 Cr. R. 504, 208 S. W. 339.

In prosecution for cattle theft where the stolen cattle had been found in a pasture, the owner of which had been accused with defendant of stealing the cattle, evidence that other recently stolen cattle were found in such pasture with the cattle alleged to have been stolen was admissible to rebut testimony that all the cattle in the pasture had been raised by owner of pasture. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

In a prosecution for theft, a prior indictment of defendant for burglary of the house from which the stolen goods were taken, to which he had pleaded guilty, held admissible. *Brown v. State*, 86 Cr. R. 8, 215 S. W. 323.

When defendant in a prosecution for theft of sheep depends upon an honest claim of right to the alleged stolen sheep, or a mistake of fact as to their identity, the state may prove other thefts, or the possession of other stolen property at or about the time alleged, as affecting the intent with which the alleged stolen sheep were taken. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

The securing of whisky by defendant, bell boy in an hotel, for H., a guest, held admissible for prosecution for theft of money from H.'s room, even if constituting another offense, as so intimately connected with the transaction as to be part of it. *Tillman v. State* (Cr. App.) 225 S. W. 165.

In a prosecution for embezzlement, evidence of other transactions of a similar nature is admissible to prove intent and guilty knowledge. *Miller v. State* (Cr. App.) 225 S. W. 379.

Evidence of other thefts may properly be admitted in a prosecution for receiving property under a theory of conspiracy, but such evidence held inadmissible under the record, to show theft. *Kolb v. State* (Cr. App.) 228 S. W. 210.

In a prosecution for larceny, evidence that property taken at the same time as that which defendant was charged with taking was found in his possession is admissible. *Castleberry v. State* (Cr. App.) 228 S. W. 216.

In a prosecution for cattle theft, it was error to permit proof of theft of other cattle from prosecuting witness, where such cattle were not found in the possession of the accused, or bore any brands claimed by him, or were found in any pastures controlled by him, where proof of the guilty connection of accused with the taking rested almost, if not entirely, on the fact of possession by him of cattle recently stolen. *McClain v. State* (Cr. App.) 229 S. W. 550.

In a prosecution for theft of an automobile, the theft by defendant of other automobiles can only be shown by the state where it shows intent if that is an issue. *Hunt v. State* (Cr. App.) 229 S. W. 869.

In a prosecution for the theft of a hog, evidence of other thefts of hogs at about the same time and place were admissible to identify the animal in question and to show fraudulent intent. *Stone v. State* (Cr. App.) 232 S. W. 818.

55. — **Violations of liquor laws.**—District attorney can ask a witness, who testified that he bought liquor from defendant, when, where, and how many times he bought it, where the times fixed were within three years next preceding filing of indictment for engaging in business of selling liquor, as prescribed by Pen. Code, art. 591. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

Where defendant was charged with sale of intoxicating liquor in October, proof of sales in November, December, and January, held inadmissible. *Gustamente v. State*, 81 Cr. R. 640, 197 S. W. 998.

In a prosecution for the unlawful sale of intoxicating liquors, evidence that accused had in his possession equipment for making such liquors tends to establish his guilt of an extraneous crime, relevant under none of the rules relating to such evidence, so that its admission in evidence was prejudicial error. *Venn v. State* (Cr. App.) 232 S. W. 822.

56. — **In prosecutions for burglary.**—In a burglary case, it was not error to permit the owner of the house to show where he found the property taken from his house; such testimony not tending to show a separate and distinct crime or transaction, there being nothing in the evidence to suggest more than one burglary, or tending to raise the question of the connection of any one therewith save accused and those indicted with him. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624.

On a trial for burglary, where there was evidence that two ropes were taken from the burglarized house, and evidence of the stealing of a horse of a third person was admitted without objection, the refusal of a special charge telling the jury not to consider the testimony relative to the taking of such horse was not error especially as the taking of the horse may have been corroborative, as tending to show that the burglary was committed to get ropes with which to ride or lead the horse. *Barrientas v. State* (Cr. App.) 230 S. W. 418.

57. — **In prosecution for rape and incest.**—In a prosecution for incest at a certain time and place, evidence of intercourse at other times held admissible. *Bradshaw v. State*, 82 Cr. R. 351, 198 S. W. 942.

On trial for incest, refusal to exclude evidence of acts of intercourse on dates other than that charged held not error. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

In prosecution for rape, evidence of other acts of intercourse in another county was admissible, though defendant denied act of intercourse for which he was being tried. *Villafranco v. State*, 84 Cr. R. 195, 206 S. W. 357.

In an incest prosecution, evidence of an act of sexual intercourse occurring more than three years prior to filing indictment, and barred from prosecution by limitation, was admissible; the defendant having testified and denied the offense and having introduced testimony controverting prosecutrix's testimony. *Wingo v. State*, 85 Cr. R. 118, 210 S. W. 547.

In a prosecution for incest, an instruction that the jury might consider other acts of intercourse between defendant and prosecutrix as evidence corroborating prosecutrix was erroneous. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

In prosecution for rape of girl 12 or 13 years of age, evidence that defendant had had intercourse with 16 year old sister of prosecutrix, who had testified to being a common prostitute, held prejudicial error. *Smith v. State*, 86 Cr. R. 455, 217 S. W. 154.

In a prosecution for incest, where defendant offered no evidence, etc., controverting the prosecutrix's testimony as to one act of intercourse, evidence of other acts was inadmissible. *Lawrence v. State*, 87 Cr. R. 61, 216 S. W. 460.

In prosecution for rape on child under age of consent, where defendant testified he had had child since she was small, that he knew no reason why she should state facts harmful to him, and admitted efforts to have intercourse with her, her testimony that at other times and places than those charged defendant had had intercourse with her was admissible. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

In a prosecution for rape on July 2d, evidence that defendant made an indecent assault upon another female on September 7th was not admissible as rebuttal of defendant's evidence that upon July 2d he was suffering with ailments which rendered it improbable that he would have a desire to commit such an offense; there being no evidence to show that such ailment continued until September 7th. *Higgins v. State*, 87 Cr. R. 424, 222 S. W. 241.

In prosecution for rape, evidence that on day following perpetration of crime defendant had threatened, with gun in his hands, to kill prosecutrix if she told what had occurred, held admissible as against objection that it related to a separate crime. *Pierce v. State*, 87 Cr. R. 379, 222 S. W. 565.

In prosecution for rape on daughter, where defense was that at time he was charged to have had intercourse with daughter he was merely examining her to ascertain if she had had intercourse with other men, evidence as to another prior act of intercourse on such daughter held admissible. *Id.*

In prosecution of father for rape committed upon his daughter, under 15, evidence of prior acts of intercourse, between the parties held inadmissible. *Greer v. State*, 87 Cr. R. 432, 222 S. W. 986.

In a prosecution for incest, evidence of other incestuous acts was inadmissible on the direct examination of the accomplice victim before there had been any denial of the incestuous relation or a cross-examination of such a character as to make other acts admissible. *Wingo v. State* (Cr. App.) 229 S. W. 858.

In a prosecution for statutory rape under Pen. Code, art. 1063, it was incompetent to introduce in evidence circumstances showing that defendant had been guilty of illicit intercourse with his wife prior to their marriage, since it tended to prove a different offense and was calculated to prejudice the rights of the defendant. *Norman v. State* (Cr. App.) 230 S. W. 991.

58. — **In prosecutions for assault.**—In a prosecution for aggravated assault, committed on a female child by fondling her person, evidence of similar offenses against other children is inadmissible, in the absence of circumstances bringing it within the exceptions to the rule excluding extraneous crimes. *Sine v. State*, 86 Cr. R. 221, 215 S. W. 967.

In prosecution of father for aggravated assault on seven year old son, in which the state elected to base prosecution on an assault claimed to have been made on one date in preference to that made on another, and in which the father denied having struck or kicked the son on the first date, so that there was no issue as to whether he intended to hurt the son, evidence as to father's striking boy on such other date held inadmissible. *Walden v. State* (Cr. App.) 232 S. W. 523.

59. — **Evidence relevant to offense and also showing another offense.**—When one crime becomes a part of the *res gestæ* of another, or tends to shed light on the intent or to connect the accused with the offense for which he is on trial, proof of the other crime is admissible. *Perea v. State* (Cr. App.) 227 S. W. 305.

60. — **Other offenses to prove identity.**—In prosecution for robbery from the person, evidence regarding another similar robbery on the same night held inadmissible for purpose of identification of accused. *Lancaster v. State*, 82 Cr. R. 473, 200 S. W. 167, 3 A. L. R. 1533.

In prosecution for larceny of automobile, other indictments and verdict of jury in another case were not introducible on question of defendant's identity. *Moore v. State*, 83 Cr. R. 319, 203 S. W. 767.

In a prosecution for being interested in a gaming house, testimony of a raiding officer that when he arrested defendant the next day he found a pistol on him was inadmissible, not being part of the facts necessary to develop the *res gestæ*, and not tending to connect defendant with the offense charged against him, nor to shed light on his intent or identity. *Watson v. State* (Cr. App.) 225 S. W. 753.

When one crime tends to connect the accused with the offense for which he is on trial, proof of the other crime is admissible. *Perea v. State* (Cr. App.) 227 S. W. 305.

In a prosecution for accomplice to theft, court did not err in admitting testimony for the purpose of identifying defendant, showing that after the alleged conspiracy and theft accused was arrested in another state in company with the same conspirators charged with the offense in question, and was acting with them in endeavoring to perpetrate a similar fraud, using the same means, including a pocketbook and papers, and in deceiving the prosecuting witness. *Gerber v. State* (Cr. App.) 232 S. W. 334.

**61. — Acts showing knowledge.**—All of the confession of defendant charged with having received or concealed stolen goods bearing on other matters than those charged in indictment should be limited to question of guilty knowledge. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

In prosecution for passing forged instrument where defense was that instrument passed was genuine, evidence of any number of collateral transactions in which defendant passed other instruments shown to be forgeries held admissible as bearing upon issue of forgery and guilty knowledge, though such transactions cover a period of time and were not coincident with transaction involved in particular case. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

Evidence that, at about the time of the alleged receiving of stolen property, claimed to have been received innocently, defendant had received from the thief a stolen kodak, which was found in defendant's trunk, possession of which he denied, was admissible on the question of guilty knowledge. *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653.

In a prosecution for embezzlement evidence of other transactions of a similar nature is admissible to prove guilty knowledge. *Miller v. State* (Cr. App.) 225 S. W. 379.

**62. — Acts showing intent, malice, or motive.**—In prosecution for receiving stolen goods, where the state relied on circumstantial evidence, held that it could show the fact of several burglaries in the vicinity and about the time of the offense alleged, in so far as accused had been identified with the possession of goods then stolen, for the purpose of showing criminal intent. *Wool v. State*, 83 Cr. R. 121, 201 S. W. 1006.

In prosecution for passing forged instrument, where the evidence, circumstantial or direct, shows *prima facie* that collateral instruments passed by accused were forgeries, such collateral instruments are admissible to show intent or guilty knowledge. *Fry v. State*, 83 Cr. R. 500, 203 S. W. 1096.

The state's theory being that defendant, desiring to continue, unobstructed, his illicit relations with deceased's wife, formed a plan to remove the obstacle, his own wife and deceased, evidence that he murdered his wife, if sufficiently cogent, is admissible. *Haley v. State*, 84 Cr. R. 629, 209 S. W. 675, 3 A. L. R. 779.

The confession of defendant charged with having received or concealed stolen goods bearing on other matters than those charged in indictment, if defendant claims that his acquisition of the property was other than with guilty intent, may be considered by the jury as bearing on the question. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

In a prosecution for slander of a female, it is proper to admit testimony as to statements by accused at different times from that alleged, as tending to show that statement for which he is prosecuted was wantonly and maliciously made; but the court must instruct that jury cannot consider such evidence for any other purpose, and that it should not be considered at all unless it has been shown to the satisfaction of the jury beyond a reasonable doubt that such statements were in fact made. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

Where prosecuting witness in an altercation slapped defendant, and defendant said he had told witness that if any one placed his hand upon him in anger he would kill him, and that witness should get his gun and be ready, as defendant was going to get his and kill witness, evidence of prosecuting witness and another that defendant had told him that years before he had told a certain man that if he whipped defendant he would kill him, and that such man did whip defendant, and that he afterwards killed him, was admissible on question whether threat was seriously made. *Bonneau v. State*, 85 Cr. R. 434, 213 S. W. 272.

In prosecution for cattle theft where the stolen cattle had been found in a pasture, the owner of which had been accused with defendant of stealing the cattle, evidence that other recently stolen cattle were found with the cattle alleged to have been stolen, was admissible to show intent. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

In prosecution for cattle theft, where the stolen cattle had been found in a pasture, the owner of which had been accused with defendant of stealing the cattle, evidence that other recently stolen cattle were found with the cattle alleged to have been stolen was admissible to show lack of innocent connection on part of defendant with cattle alleged to have been stolen; also to show intent, or develop *res gestæ*, or prove legitimate chain of circumstances affecting defendant's guilt. *Id.*

In a prosecution for aggravated assault on a female child by fondling her person, evidence that defendant had exhibited obscene pictures to prosecutrix at the time of the offense held admissible as showing intent. *Sine v. State*, 86 Cr. R. 221, 215 S. W. 967.

In a prosecution for swindling, where it appeared that defendant, in payment of automobile tires, gave a worthless check signed by J. I. B., evidence that at about the same time he gave two other worthless checks, one of which he signed with the name



of J. I. B., and the other with a different name, is admissible on the question of intent. *Moore v. State*, 87 Cr. R. 77, 219 S. W. 1097.

Evidence of trouble the day before, between the party assaulted and defendant, claimed to have committed the assault, is admissible to show malice and motive. *Mayes v. State*, 87 Cr. R. 512, 222 S. W. 571.

In a prosecution for being interested in a gaming house, testimony of a raiding officer that when he arrested defendant the next day he found a pistol on him was inadmissible, not being part of the facts necessary to develop the *res gestæ*, and not tending to connect defendant with the offense charged against him, nor to shed light on his intent or identity. *Watson v. State* (Cr. App.) 225 S. W. 753.

When one crime tends to, shed light on the intent, proof of the other crime is admissible. *Perea v. State* (Cr. App.) 227 S. W. 305.

In a prosecution for slander in making statements imputing a want of chastity, evidence that on a different occasion defendant told witness "that F. and Mrs. R. would not marry as long as they could live together and sleep together and have intercourse without marrying, and that Mrs. R. didn't have shame enough to pull her shades down," held admissible when limited to show defendant's intent in making the slanderous statement forming the basis of the prosecution. *Jones v. State* (Cr. App.) 232 S. W. 304.

In a prosecution for receiving goods known to have been stolen, where the defendant denied that the goods were brought to him by the thief in accordance with a previous understanding, and denied guilty knowledge, evidence of defendant's possession of other stolen property was competent to show his intent and guilty knowledge. *Kluting v. State* (Cr. App.) 232 S. W. 305.

In a prosecution for the theft of a hog, where the defense was an innocent connection with the pig and the denial of any fraudulent intent, and a belief that the pig was one bought by him from another, and defendant's wife had testified that the two shoats were brought to and placed by the defendant at the same time, the fact of defendant's possession of the alleged stolen property, and also his possession at the same time of other stolen property, would be admissible, the latter as rebutting his claim of possession in good faith, so it was not error to admit testimony that the other pig belonged to a party other than defendant. *Stone v. State* (Cr. App.) 232 S. W. 818.

In prosecution for forgery, involving the issue of whether the name defendant was charged with having forged was his true name, testimony regarding similar transactions with others, in which defendant represented that his name was another name than that charged to have been forged, held admissible to show intent and system. *Chadwick v. State* (Cr. App.) 232 S. W. 842.

63. — **Acts of series showing system or habit.**—Evidence as to other forgeries held properly admitted where limited by court's charge to show a course of conduct. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

In prosecution for receiving stolen goods, where accused relied on the theory of purchase in good faith, the state should have been permitted to show a long course of dealing with one accustomed to burglarize stores, by which accused purchased such stolen goods, on the theory that a series of acts of the nature of that involved in the offense charged may be proved to determine intent. (Per Morrow, J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

As characterizing the acts and conduct complained of as constituting the particular offense, prior acts, though occurring outside the jurisdiction, are admissible on prosecution for vagrancy. *Cox v. State*, 84 Cr. R. 49, 205 S. W. 131.

In prosecution of defendant as an accomplice to the theft of an automobile, it was error to admit testimony, that the principal committed the theft of perhaps as many as three additional autos at intervals covering several months, and that three of these reached defendant, on the theory of showing systematic thefts. *Cone v. State*, 86 Cr. R. 291, 216 S. W. 190.

In a prosecution for robbery, evidence of defendant's other criminal acts and the obtaining of money by false pretenses and fraudulent devices after the robbery charged was inadmissible to show system and methods. *Cano v. State* (Cr. App.) 225 S. W. 1097.

In a prosecution for theft of an automobile, the theft by defendant of other automobiles can only be shown by the state where it appears in developing the *res gestæ*, becomes necessary to connect the defendant with the case on trial, shows intent if that is an issue or tends to show a system as distinguished from systematic crimes; and evidence of other thefts is not admissible without one of those elements, though such thefts were committed in pursuance of the same conspiracy under which the theft in the case on trial occurred. *Hunt v. State* (Cr. App.) 229 S. W. 869.

In a prosecution for robbery, where defendant was not charged with robbery by firearms, testimony of the arresting officer that defendant was armed with an automatic pistol at the time of arrest the night after the robbery was inadmissible, as it did not tend to connect defendant with the offense charged, shed no light on his intent or identity in connection therewith, and had no bearing on showing system. *Stanchel v. State* (Cr. App.) 231 S. W. 120.

In prosecution for forgery, involving the issue of whether the name defendant was charged with having forged was his true name, testimony regarding similar transactions with others, in which defendant represented that his name was another name than that charged to have been forged, held admissible to show intent and system. *Chadwick v. State* (Cr. App.) 232 S. W. 842.

65. **Best and secondary evidence.**—Necessity of objection, see note 172, post.

A slip of paper made from data found upon cards or tags, originally attached to automobile tires, which defendant had received in exchange for casings which were the fruits of the burglary, was secondary evidence. *Williams v. State*, 84 Cr. R. 524, 205 S. W. 924.

66. — **Judicial proceedings and records.**—In a prosecution for perjury, alleged to have been committed before the grand jury, where the grand jury did not have a full

written record of the testimony, it was proper to permit a grand juror to testify to defendant's oral testimony in full, particularly where there was no claimed conflict between the testimony so given and the part written. *Ice v. State*, 84 Cr. R. 418, 208 S. W. 345.

Court did not err in refusing to allow accused to prove by a county attorney whether prosecutrix had made certain statements on examining trial, examination being had from written document purporting to be examining trial testimony, document itself being best evidence of its contents. *Hammett v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

Court was within its discretion in overruling objection that testimony of grand juror as to incriminating statements of accused was not the best evidence, where two witnesses swore that statement of accused was not reduced to writing and another witness thought it was but was not certain. *Webb v. State*, 86 Cr. R. 337, 216 S. W. 865.

Where accused seeks the benefit of the suspended sentence act, it is not necessary that the fact that he had never been convicted of a felony be proved by the record, since a record may be the best evidence of an affirmative fact but is not required to negative the existence of a given fact. *Rogers v. State* (Cr. App.) 225 S. W. 57.

67. — **Official records.**—The fact that a witness was a deputy district clerk at the time of a certain criminal prosecution could be established by oral testimony of such witness and that of district clerk under whom he worked without introducing records of appointment. *Roberts v. State*, 83 Cr. R. 511, 204 S. W. 866.

In a prosecution for violating the tick eradication statute, it was error to permit the county judge orally to testify as to the fact of the publication of the result of the election for taking up the work of tick eradication, in the absence of a showing that such proof was necessary because of the loss or destruction of the certificate provided for by section 7 of the act (Civ. St. art. 7314e). *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

In a prosecution for violating the tick eradication statute, evidence as to what the order by the live stock sanitary commission, directing the defendant to dip his cattle contained, was inadmissible: the order itself being the best evidence. *Id.*

In prosecution for embezzlement of funds of a company, proof of the company's incorporation could be by oral testimony. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

68. — **Corporate and other unofficial records.**—Deposit slips which were in fact original entries of deposit in a bank were best evidence of deposit. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

In prosecution for receiving goods stolen from a railroad, a carbon copy of an expense bill relating to the goods was not incompetent as secondary evidence, where it was shown that no original expense bill was ever made out and delivered by the railroad company, but that in the ordinary course of business two original bills were made out, one of which was kept by the railroad and the other delivered to the consignees, and that in the case of the stolen goods no duplicate bill was delivered to the consignees because the property was stolen prior to its delivery. *Kluting v. State* (Cr. App.) 232 S. W. 305.

70. — **Conveyances, contracts and other instruments.**—Where a witness for the state, in a prosecution for the theft of and receiving and concealing of certain stolen automobile casings, gave from memory the serial number of one of said casings, the fact that there was a list, invoice, or written memorandum containing said numbers did not make his statement secondary evidence, he having merely stated his knowledge of a fact. *Fallon v. State* (Cr. App.) 230 S. W. 170.

71. — **Books of account.**—In prosecution of agent for embezzlement by failing to remit proceeds collected for principal, principal's employé who had charge of the keeping of its books was not competent to state his conclusions touching the contents of the book in the absence of the production of the books and the verification by him of their correctness, by testifying that the account of particular sale had not been collected. *Herberg v. State*, 87 Cr. R. 439, 222 S. W. 559.

72. — **Letters and telegrams.**—In prosecution for murder, secondary evidence of the contents of a letter written by another to defendant's wife at his request, and which was then in the possession of defendant's attorney, was inadmissible; a sufficient predicate for the admission of such evidence not having been laid. *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

73. — **Admissibility of secondary evidence.**—An examined verbatim copy of an internal revenue license for selling intoxicants having been proven completely was properly admitted in evidence. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

A slip of paper made from data found upon cards or tags originally attached to automobile tires, which defendant had received in exchange for casings which were the fruits of the burglary, was secondary evidence, and inadmissible without proper predicate. *Williams v. State*, 84 Cr. R. 524, 208 S. W. 924.

Evidence of witness with reference to slip of paper made from data found upon cards which had been originally attached to automobile tires received for casings procured by burglary held not sufficiently specific to show admissibility, even if loss of cards had been fully accounted for. *Id.*

Incorporation of a national bank may be shown by oral testimony, where the charter has been lost or mislaid. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

Where original articles of incorporation of national bank were lost, a certified copy of amended articles was admissible in evidence, if not sufficient proof of incorporation. *Id.*

In a prosecution for murder, showing that all of the records and documents of the local exemption board had been boxed up and sent to Washington, D. C., by order of the War Department, was sufficient to admit oral testimony of the clerk of the local exemption board as to the classification of defendant under the selective draft, when offered by the state. *James v. State* (Cr. App.) 228 S. W. 941.

**75. Demonstrative evidence.**—Documents found in defendant's wallet comprising certificates that J. J. Wilson (not defendant's name, but name under which he registered at hotel in vicinity of burglary charged) was a deaf mute, and worthy of assistance, and data connected therewith, were improperly received. *McGarry v. State*, 82 Cr. R. 597, 200 S. W. 527.

Tracks corresponding to those of defendant on trial for burglary may be shown. *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735.

In prosecution for assault on murder brother of assaulted person was improperly permitted to take off coat and exhibit it to jury, indicating where it was cut and blood which resulted from wounds he received from defendant's brother. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

No question being raised but that at the time of the homicide defendant also inflicted knife wounds on the back of witness, permitting their exhibition to the jury, there being no purpose which it could serve, except to inflame the minds of the jury, was error. *Newman v. State*, 85 Cr. R. 556, 213 S. W. 651.

In a prosecution for seduction, the child of defendant and prosecutrix cannot properly be introduced in evidence. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

In a prosecution for rape, where there was uncontroverted evidence that prosecutrix's hand was cut by a knife in the struggle between her and her assailant, and there was no issue but that it bled profusely on her nightgown and bedclothing, the bloody nightgown and bedclothes were inadmissible as tending to inflame the minds of the jury and to prejudice the rights of defendant, a negro. *Grace v. State* (Cr. App.) 225 S. W. 751.

In a homicide case, where it was important to know whether deceased was shot in front or from the back, an apron worn by her at the time of the killing, disclosing powder burns in the back, was admissible, even though there were blood stains upon it. *Smith v. State* (Cr. App.) 232 S. W. 497.

In a prosecution for robbery of Mexicans, where it appeared that defendant, with others, had assaulted one of the Mexicans, it was not error to permit such Mexican to exhibit to the jury the scars on his head. *Searcy v. State* (Cr. App.) 232 S. W. 799.

**76. — Matters explanatory of offense.**—That condition of a screen door through which defendant fired was the same when it was introduced in evidence as at time of homicide held sufficiently shown. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

In a prosecution for assault with intent to rob, where the indictment included a charge on aggravated assault, the exhibition to the jury of the wounds received by the prosecuting witness in the encounter held not reversible error, since the character of the wounds received might have enabled the jury to decide the issue of aggravated assault. *Smiley v. State*, 87 Cr. R. 528, 222 S. W. 1108.

**77. — Articles used in committing offense.**—See *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

The pocket knife by which homicide was occasioned was properly admitted in evidence in view of Pen. Code, art. 1147, making it incumbent on state where instrument is not per se deadly to prove that by using it accused intended to slay deceased. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009; *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84.

In a prosecution for homicide where accused claimed that he shot in self-defense when deceased was advancing on him with a knife, it was not error to admit the knife in evidence to show that it was in a badly crippled condition. *Briscoe v. State*, 87 Cr. R. 375, 222 S. W. 249.

In a prosecution for wife murder, the trial court properly permitted a witness to testify as to the finding and taking possession of a hammer in defendant's barn some 24 hours after the injury was inflicted on deceased, and in describing the condition of the hammer with reference to blood and hair upon it, etc., the proof as to the character of the wounds on deceased's head and as to finding the hammer in the barn being sufficient predicate for such testimony as well as for the hammer itself to go before the jury. *Pounds v. State* (Cr. App.) 230 S. W. 683.

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor, not for medicinal, etc., purposes, five-gallon jugs found on defendant's premises when other liquor equipment was discovered by the officers were admissible in evidence as tending to show defendant had been operating the equipment. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

In a prosecution for manufacturing intoxicating liquor, six five-gallon jugs found with other liquor equipment on defendant's premises would be admissible in evidence as tending to show preparation of a container for the liquor when made. *Id.*

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor not for medicinal, etc., purposes, such equipment was admissible in evidence, though the officers were not armed with a search warrant at the time they discovered and took possession of it. *Id.*

**78. — Articles subject of or connected with offense.**—It is only permissible to introduce garments worn by one who has received injuries, when the evidence serves to illustrate or solve some question in controversy. *White v. State*, 83 Cr. R. 252, 202 S. W. 737; *Huey v. State*, 81 Cr. R. 554, 197 S. W. 202; *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616.

There being no question on the location of deceased's wound, his bloody clothing is not admissible thereon. *Huey v. State*, 81 Cr. R. 554, 197 S. W. 202; *Dozier v. State*, 82 Cr. R. 321, 199 S. W. 287.

The clothing of deceased may be admitted in evidence in a prosecution for murder when serving useful purposes in elucidation of disputed facts. *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

Exhibiting deceased's bloody clothing to witnesses, who were examined concerning the clothing, held error, though they were not directly introduced in evidence. *Dozier v. State*, 82 Cr. R. 321, 199 S. W. 287.

Where there was evidence that there was little or no blood in the room where the state claimed the stabbing took place, deceased's bloody clothing held admissible as tending to show that same absorbed the blood. *Dugan v. State*, 82 Cr. R. 422, 199 S. W. 616.

In prosecution for violation of Local Option Law, admission over objection of supposed bottle of whisky turned over to deputy sheriff by state's witness, where evidence as to identification of bottle as that purchased was not clear, was error. *Sullivan v. State*, 83 Cr. R. 477, 204 S. W. 1169.

In prosecution for murder, coat supposed to have been worn by deceased when shot was properly exhibited to jury as bearing on location of parties, wounds, etc.; there being little, if any, blood on it. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In prosecution for murder, deceased's bloody coat, containing knife slash, held admissible, to show relative positions of deceased and accused, in view of conflicting testimony on such issue. *Russell v. State* (Cr. App.) 206 S. W. 79.

In a murder trial it was not error to allow the introduction of clothing, worn by deceased during the time of the homicide, to show by the location of shot holes the position of deceased at the time he was shot, whether facing defendant or not, as bearing on the question of self-defense. *Bryant v. State*, 84 Cr. R. 343, 207 S. W. 930.

In homicide prosecution where body of deceased had not been found until after the body itself was beyond identification, the clothing found, together with bones, hair, etc., near spot where confessed accomplice claimed to have hidden body, was admissible for purpose of identification. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

In homicide prosecution the clothes worn by deceased at time of killing were admissible on issue of whether deceased was shot from ambush from the side, as claimed by the state, or while he and defendant were facing each other after an unexpected meeting, as claimed by defendant. *Pickens v. State*, 86 Cr. R. 657, 218 S. W. 755.

In a prosecution for homicide where the testimony by witnesses for the state and those for the defense were conflicting as to the attitude of the parties toward each other when shots were fired, it was not error to admit in evidence clothing worn by deceased at the time of the shooting. *Briscoe v. State*, 87 Cr. R. 375, 222 S. W. 249.

In a prosecution for robbery, the exhibition to the jury of a pocketbook belonging to the injured party and a pistol and certain playing cards found on the scene of the robbery was not erroneous; they being circumstances available to the state in connection with testimony showing their relation to the transactions. *Williams v. State* (Cr. App.) 231 S. W. 110.

In a prosecution for homicide, the garments of deceased showing the course of the bullet were admissible. *Russell v. State* (Cr. App.) 232 S. W. 309.

In a prosecution for murder of mother-in-law, where defendant testified that he and deceased were facing each other all the time a pistol was being fired, that she was endeavoring to secure the pistol, and had hold of the barrel while he was holding the handle, and that she was holding the gun all the time, and that the firing was accidental, testimony as to location of the powder burns on the apron worn by the deceased, and the apron itself showing the location of the powder burns, were all admissible on the disputed point as to whether deceased had been shot several times in the back. *Smith v. State* (Cr. App.) 232 S. W. 497.

**80. Admissions by accused.**—The declaration of defendant, claiming it was a colored woman and not a white woman that he had pushed into a gully at time in question, was admissible in a prosecution for rape. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

In a trial for adultery, evidence given by defendant in a divorce action, over his indicated objection to incriminating himself where he was compelled by the court, without warning as to his rights, to admit the adultery, is not admissible. *Mathis v. State*, 84 Cr. R. 514, 209 S. W. 150.

It was proper to admit evidence that accused, a superintendent of schools, on being called to a bank, separated checks drawn on school fund, putting genuine ones in one pile and ones on which names of payees had been forged in another pile, and that the check, the basis of prosecution, was among bad checks, and that accused stated that he did not understand why he had made such a fool of himself, and such evidence was not inadmissible as tending to show other separate and distinct transactions. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

Evidence as to statements made by accused when he was not in custody or under restraint or arrest was properly admitted. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

In a prosecution for the embezzlement by defendant, local manager, of property of a company, held there was no error in admitting in evidence defendant's admission, as to shortage made to general manager of the company while an inventory was being taken of the company's stock. *Landis v. State*, 85 Cr. R. 331, 214 S. W. 827.

Evidence of prosecutrix that defendant, who had adopted her, told her her age, was admissible, as a statement against defendant's interest. *Wooldridge v. State*, 86 Cr. R. 348, 217 S. W. 143.

In a prosecution for the theft of an automobile, evidence of statement made by one defendant in a conversation with the owner when they offered to pay for the machine, wherein such defendant stated that he was out on suspended sentence and did not desire to get an additional term, held admissible as an admission, and the statement that such defendant was out on suspended sentence was not a conclusion, but admissible as a part of a conversation brought out by defendant. *Young v. State*, 87 Cr. R. 27, 218 S. W. 1063.

The court erred in permitting the sheriff to testify that he obtained a pistol from the home of accused's father and exhibited it to accused, and that he admitted that it was the pistol used in the robbery, the accused then being under arrest, unwarned, declaration not being reduced to writing, and pistol not being found by reason of the declaration. *Hilliard v. State*, 87 Cr. R. 416, 222 S. W. 553.

In prosecution for bigamy, involving issue of whether defendant was married to alleged first wife, admission of defendant that he was married prior to alleged bigamous marriage held competent evidence against him. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

In a prosecution for having in possession intoxicating liquor not for medical, etc. purposes, in violation of the Dean Act, testimony as to defendant's conversation with the sheriff after his arrest, and defendant's making bond, in which defendant stated, in response to what was said by the sheriff, that he did not deny having liquor in his possession, but made his mistake by being caught with it, held admissible as bearing on the question that the liquor was possessed for an unlawful purpose, as was his statement that he drank too much. *Rainey v. State* (Cr. App.) 231 S. W. 118.

81. — **Acquiescence or silence.**—Where remark was made in defendant's presence which he understood and which called for reply, his silence or acquiescence may be shown if he was not under arrest. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

In prosecution for bigamy involving issue of whether defendant had been married to alleged first wife, witnesses who testified that defendant and alleged wife had lived together and held themselves out as husband and wife, and that defendant described her as his wife in introducing her to his friends, were properly permitted to testify that they had never heard defendant disclaim the relationship. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

82. — **Negotiations for compromise.**—In prosecution for selling intoxicating liquor in violation of statute, evidence that accused told witness, a grand juror, he had sold beer and would plead guilty if witness would aid him in getting suspended sentence, held not admissible, as being compromise proposition. *Goss v. State*, 83 Cr. R. 349, 202 S. W. 956.

85. **Declarations by accused.**—Statements of defendant to arresting officer are properly admitted over defendant's mere objection that they were made after his arrest; the officer testifying they were made before he had stated he intended to arrest. *Hollis v. State*, 83 Cr. R. 612, 204 S. W. 432.

In a prosecution for manufacturing intoxicants in violation of the Dean Law, it was permissible for the state to ask defendant if he had not stated that if the officers let him alone he would be able to pay his debts, and, on defendant's qualified denial, to prove such statement. *Russell v. State* (Cr. App.) 228 S. W. 948.

86. — **Self-serving declarations.**—Self-serving statements are inadmissible. *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595.

Letter written by defendant after he knew he was suspected and while he was engaged in flight was inadmissible. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

In prosecution for passing forged instrument, which defendant claimed he received as compensation for his sale of leasehold, evidence that he told third person that he had sold lease was properly excluded. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

In prosecution for selling intoxicating liquors, declarations of defendant that he had emptied whisky out of bottle, and that it contained cider when sold, were inadmissible. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

Refusal to permit defendant to develop from the evidence conversations between him and his attorney was proper. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In criminal prosecution, evidence that defendant had told third party during conversation that the officers had told deceased to kill him, and that third party was going to get defendant into trouble, was inadmissible, where offered as independent testimony and not as part of any conversation drawn out by state. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In a prosecution for murder it was not error to refuse to receive appellant's proof that on a different occasion, and some time subsequent to that on which defendant had uttered a threat against deceased, the defendant said to a third party deceased cursing him hurt the deceased worse than defendant. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

One being prosecuted for homicide cannot rebut evidence of threats or malice, or show who was the aggressor in the fatal encounter, by proof that he had previously stated to officers that he owed deceased no ill will and would have been friends with him if deceased would permit him to be so, and that he would like to have deceased put under a peace bond; such statements being self-serving, and unaccompanied by any acts of which they would be explanatory. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

In a prosecution for murder, exclusion of evidence that accused prior to the homicide had told witness that he believed presence of witness with accused kept deceased and another from killing him on one occasion, that such parties had threatened his life, and that he was afraid to have lights in his house at night, or to sit by an open window, was not error; the time of such statements not being shown. *Hardy v. State*, 86 Cr. R. 515, 217 S. W. 939, 8 A. L. R. 1357.

In prosecution for assault to murder defendant's creditor, whom he cut with a borrowed pocketknife, where statement of blacksmith proved that short time after assaulted person demanded payment of his debt from defendant, latter was seen in blacksmith's shop, sharpening his knife on a whetrock, testimony of blacksmith on cross-examination by defendant that at the time he told the blacksmith, if his creditor would give him a little time, he would pay what he owed held inadmissible as self-serving. *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554.

Where, after the shooting, defendant left the scene of difficulty, going to his parents' home, some miles distant, defendant explained his flight by testimony that his mother was ill, testimony that he told the friend who was carrying him away that he would allow the friend to surrender him and collect the reward was properly rejected as a self-serving declaration. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

A statement made by defendant to his first wife after the alleged bigamous marriage was a mere self-serving declaration and inadmissible. *Burgess v. State* (Cr. App.) 225 S. W. 182.

In a prosecution for assault with intent to murder, no error was presented in the rejection of the statement made by accused to officers when they arrested him, where offered on behalf of the defense. *Freddy v. State* (Cr. App.) 229 S. W. 533.

87. — **Explanatory declarations.**—Whole of defendant's statement to officer, who came with search warrant to his house looking for stolen hogs, explanatory of defendant's possession, was admissible, state having introduced part of it, and part should not have been excluded on ground it was self-serving. *Grace v. State*, 83 Cr. R. 442, 203 S. W. 896.

In prosecution for automobile theft, exclusion of declarations made by defendant to an officer in explanation of his possession of the stolen automobile about an hour after his arrest in possession thereof held proper, since such evidence would have been self-serving and hearsay and not a part of the *res gestæ*; sufficient time having elapsed since his arrest to permit him to reflect and fabricate an explanation. *Seebold v. State* (Cr. App.) 232 S. W. 328.

88. **Declarations by person injured.**—In a prosecution for rape, evidence that, at a time remote from that of intercourse, prosecutrix, in absence of defendant, showed witness place where intercourse took place, and told him what occurred there, was of a hearsay nature, and inadmissible. *Villafranco v. State*, 84 Cr. R. 195, 206 S. W. 357.

Conversation had by defendant's wife with police officers, when she went to have defendant arrested for assault, and testified to by her, being in his absence, were inadmissible. *Hays v. State*, 84 Cr. R. 349, 206 S. W. 941.

Where defendant prosecuted for murder pleaded self-defense and claimed that deceased had come to the place in question to carry out a threat to kill defendant before sundown, testimony of the wife of deceased, explaining her husband's presence by detailing his intention, undisclosed to defendant, to meet witness at that place for the purpose of accompanying her home, was inadmissible. *Standifer v. State*, 85 Cr. R. 394, 212 S. W. 954.

In homicide prosecution, testimony of declarations by deceased that others than defendant were hostile toward deceased held properly rejected. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In prosecution for wife murder, declarations of deceased showing her state of mind toward defendant are admissible, but the scope of such evidence should be limited to such purpose, and not used as proof of the facts stated. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

In a prosecution for murder, testimony of decedent's wife that she asked him whether, if he was called on to go, was he ready, and he said he was, was inadmissible. *Wade v. State* (Cr. App.) 227 S. W. 489.

In a prosecution for homicide, testimony of a gunsmith as to what transpired between him and deceased in their conversation about decedent's gun, left with the smith for repairs, etc., held inadmissible. *Carlile v. State* (Cr. App.) 232 S. W. 822.

90. **Declarations of third persons—Declarations in accused's absence.**—T. cannot testify to occurrences at and before homicide on strength of what W. told T. after homicide and in defendant's absence. *Huey v. State*, 81 Cr. R. 554, 197 S. W. 202.

In a murder trial, evidence that defendant's brother-in-law stated that the watch of the deceased could be obtained by the sheriff if the latter would go down to a negro's house is inadmissible; the conversations being between third persons not in the presence of the defendant. *Finks v. State*, 84 Cr. R. 536, 209 S. W. 154.

In a prosecution for assault with intent to murder, statements by the wife of the person assaulted that she advised her husband not to leave home that night, that her former husband had dropped dead while away from home, and that her son also had died suddenly from a hemorrhage while away from home, held inadmissible. *Henry v. State*, 87 Cr. R. 392, 221 S. W. 1083.

In prosecution for theft of cotton seed, testimony of the brother of the person who drove defendant in an automobile to his home the night of the alleged theft as to a statement by third person on a material matter, made out of the presence and hearing of defendant, was inadmissible. *Campbell v. State*, 88 Cr. R. 24, 24 S. W. 899.

In a homicide case, rejection of statement of accused's wife concerning shooting was not error, where, so far as was disclosed, the wife was a bystander, not participating in the shooting, and it was not shown that the statement was made in the presence of appellant, nor how near same occurred in point of time to the shooting. *Lowe v. State* (Cr. App.) 226 S. W. 674.

91. — **Declarations to or by officer.**—One under arrest is not bound by anything the sheriff may have said in his presence. *Bouldin v. State*, 87 Cr. R. 419, 222 S. W. 555.

92. — **Declarations inculcating accused.**—Prosecution for murder, where actual witnesses to the homicide had been on terms of intimacy with defendant until about two months after the killing, when they began making damaging declarations against accused, and were almost immediately thereafter found murdered, declarations of such witnesses as to defendant's guilty connection with the killing held admissible to prove motive, in support of contention that defendant killed the witnesses to suppress their testimony. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

93. — **Declarations to accused.**—Where the evidence justified conclusion that the abuse of defendant's friend at a hotel furnished motive for the homicide, and it appeared that deceased participated in the difficulty at the hotel, proof of details of encounter at hotel, as well as a conversation had by defendant with his friend, in which the latter gave a detailed account of the occurrence, was relevant. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In a prosecution for murder, evidence as to what was said by defendant and his brother just after the killing was not inadmissible, where it appeared that defendant and his brother were together, and the remarks complained of were between the two. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

94. — **Corroborative or impeaching statements.**—In a prosecution for theft of a calf which was traced to defendant's possession, where defendant claimed to have bought the animal from another, who was a witness for the state and denied any connection with the animal, a declaration by the witness that he was about to get in trouble over a calf and desired his employer to state the animal had been in employer's pasture for some months was admissible on behalf of defendant as tending to show the witness' guilt. *Stilas v. State* (Cr. App.) 232 S. W. 805.

96. — **Declarations in accused's presence.**—Where defendant and another agreed to phone for a certain purpose, and when the other, who put in the call, was unsuccessful in persuading parties, defendant continued conversation in substance the same, what the other said in the conversation was admissible. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In homicide prosecution, where, during the evening before the killing, accused's sister had threatened to shoot deceased, and accused, in answer, had said, "Never mind; that is my affair, and I will see to it," the statements by the sister are admissible. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

Testimony that the night before the killing, when the three were together, witness told defendant he understood he had got a gun with which to kill deceased and witness, was admissible. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

In a prosecution for theft from the person of the complaining witness at a stock show, the complaining witness, after stating that her attention was called to the fact that some one was taking her purse, and that she and her informant looked for the party, but, failing to find him, waited for him at the gate, was properly permitted to testify that defendant was then identified by her informant; the identification being a matter which occurred in the presence of the accused. *Rogers v. State*, 86 Cr. R. 418, 217 S. W. 148.

97. **Hearsay in general.**—Testimony as to rate of speed of one alleged to be unlawfully speeding with an automobile is not rendered hearsay by reliance upon a speedometer. *White v. State*, 82 Cr. R. 274, 198 S. W. 964.

In perjury prosecution, refusal to permit accused to ask certain grand jurors on cross-examination if district attorney had not informed them that, if they would rescind action against one charged with another offense, he would testify against accused, was not error; the excluded evidence being hearsay. *Timmins v. State*, 82 Cr. R. 263, 188 S. W. 1106.

A Mexican, who could not understand English, could not testify as to what was said by accused in English at a certain place, where he only knew what was said by information he received from others in his company. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

It is competent for accused to prove that another committed the offense, when such proof would be inconsistent with the guilt of accused, but such proof must be by legal evidence, and not the unsworn declaration of another. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Where a state's theory that the homicide was the consummation of a conspiracy to which accused and one C. were parties was supported by accused's confession and other evidence, evidence showing that an automobile was hired by C. and was in his possession and returned by him, its condition, when returned, that it had on it human hair and blood similar to that found near the body of deceased was not objectionable as hearsay. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

In a prosecution for murder, it was not error to refuse to receive appellant's proof that on a different occasion, and some time subsequent to that on which defendant had uttered a threat against deceased, the defendant said to a third party deceased cursing him hurt the deceased worse than defendant; such evidence being hearsay and self-serving. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a criminal case, the court should exclude all hearsay testimony upon objection of defendant. *Hill v. State*, 85 Cr. R. 645, 215 S. W. 309.

In prosecution for vagrancy, testimony of officers who made the arrest that on the evening of the arrest certain parties called up and said that there was a great noise and disturbance at the house where accused was later arrested, and that the people were coming and going, white and black, etc., was not admissible, being hearsay. *Id.*

In prosecution for vagrancy, where witness for state testified that defendant told him he was working for M., testimony that M. told such witness that accused was not working for him was hearsay and inadmissible. *Id.*

In homicide prosecution where state relies upon circumstantial evidence to prove that defendant committed the crime, testimony tending to show that other persons who were near at hand at the time of the homicide had a motive to destroy the life of deceased is admissible, but must be legal evidence and not the hearsay declarations of the deceased or others, unless they amount to a confession of guilt. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

Statements to a justice of the peace by prosecutrix and third persons as to the condition of the prosecutrix, as a result of which the justice took action, when made out of defendant's presence, are hearsay and incompetent. *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

Where on cross-examination of an accomplice in a prosecution for homicide witness was asked whether he had not been told that deceased was a "hoodoo negro," the court properly sustained state's objection that it was hearsay. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

In prosecution for wife murder on theory that defendant killed deceased for her money, testimony of witness boarding at the same place as defendant and deceased, that she seldom saw them take a meal together, held competent as against contention that it was hearsay. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

In homicide prosecution where defendant testified on cross-examination that he had been indicted for theft from an express company and testified on redirect examination that he had been acquitted by the verdict of the jury, exclusion of his testimony that the express company had compromised his claim for unjust prosecution held proper; such evidence being hearsay. *Ray v. State* (Cr. App.) 225 S. W. 523.

In prosecution for assault with intent to kill, prosecuting witness' testimony that he went to the scene of the shooting on information that accused desired to see him there is inadmissible, because hearsay, especially where the defense is an alibi. *Beasley v. State* (Cr. App.) 225 S. W. 748.

In a prosecution for bigamy where appellant claimed and testified that at the time of the second marriage he believed that a decree of divorce had been entered dissolving the former marriage, court erred in excluding under the hearsay rule testimony of defendant's sister that she had related to defendant that she had had a conversation with a lawyer whom defendant had employed to bring suit for divorce, and that such lawyer had told her that the divorce had been granted, being original testimony going to show the information upon which defendant acted in entering into the second marriage. *Busby v. State* (Cr. App.) 230 S. W. 419.

The cross-examination of prosecuting witness by accused eliciting testimony that the witness first said accused was not the one who participated in the robbery, but that later he knew him, is insufficient to render admissible hearsay testimony by the sheriff that, when accused was brought before the prosecuting witness, the interpreter stated that the witness had said accused was the man who hit him. *Turner v. State* (Cr. App.) 232 S. W. 801.

98. — Evidence as to fact of making declaration.—See *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

In prosecution for theft of hog, question to father of prosecuting witness as to whether prosecuting witness had ever told him that third party had told prosecuting witness where hogs were on its face called for hearsay testimony. *Hill v. State* (Cr. App.) 230 S. W. 1005.

99. — Statements of witnesses or of persons available as witnesses.—In prosecution for illegal sale of intoxicating liquors, a witness could not testify that another witness in defendant's absence told him that he bought whisky from defendant. *Shepherd v. State*, 81 Cr. R. 522, 196 S. W. 541.

In prosecution for selling intoxicants, testimony, by state's witness, county attorney, and deputy sheriff, that when state's witness swore to complaint, he made to attorney and sheriff substantially same statements as to purchasing liquor from defendant that he testified to on stand, was hearsay. *Reed v. State*, 82 Cr. R. 657, 200 S. W. 843.

In prosecution for rape, question addressed to physician whether the victim had told him that her hymen had been ruptured by a prior operation was properly excluded, being hearsay; for the victim should have been asked directly as to such fact. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

In a prosecution for rape, evidence that at a time remote from that of intercourse prosecutrix, in absence of defendant, showed witness place where intercourse took place, and told what occurred there, was of a hearsay nature, in no way corroborative of the girl's testimony, and inadmissible. *Villafranco v. State*, 84 Cr. R. 195, 206 S. W. 357.

Testimony that state's witness, an accomplice, had stated he and not defendant had committed the burglary charged was hearsay. *McNew v. State*, 84 Cr. R. 594, 208 S. W. 528.

In a prosecution for incest, where it was necessary that the testimony of the prosecuting witness be corroborated, her testimony given before the grand jury was hearsay and inadmissible. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

Evidence of a witness that M., in attendance upon the trial, had told the witness that defendant had admitted to M. that he (defendant) had killed deceased, was hearsay and inadmissible. *Burkhalter v. State*, 85 Cr. R. 232, 212 S. W. 163.

The offer of defendant to prove that one witness had told another witness that defendant's brother, who was under arrest, was not present at the time of the homicide, was properly rejected under the rule against hearsay and against impeachment of a witness upon a collateral issue. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a murder prosecution, evidence that a third person had claimed that decedent had tried to waylay and kill him held properly rejected as hearsay; such person being present and available as a witness. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a murder prosecution, a declaration by decedent's wife made some time before his death that she had left home because of mistreatment by her husband was properly rejected under the hearsay rule; her testimony being available. *Id.*

100. — Statements of persons deceased or not available as witnesses.—See *Jamés v. State*, 86 Cr. R. 598, 219 S. W. 202.

Conversations between deceased and father or mother, after he went home after he had been stabbed, as to who had done stabbing, were inadmissible as hearsay. *Wallace v. State*, 82 Cr. R. 533, 200 S. W. 407.

In prosecution of a wife for killing her husband, evidence for defendant of an attorney for the deceased husband as to what decedent told him preparatory to bringing suit for divorce against defendant, being explanatory of the details under which defendant had received a pistol shot wound, as she claimed, from decedent, while living with him some time before the homicide, held inadmissible as hearsay. *Ott v. State*, 87 Cr. R. 382, 222 S. W. 261.



102. — **Oral statements incriminating accused.**—Testimony of witnesses, having heard men say they had had intercourse with defendant, tried on a charge of being a prostitute, was hearsay. *Woods v. State*, 81 Cr. R. 403, 195 S. W. 858.

In a prosecution for murder, testimony of deceased's wife that, on the day of the killing, an eyewitness told her that defendant had killed her husband and "that we tried to get him not to do it," held hearsay and improperly admitted. *Anderson v. State*, 83 Cr. R. 261, 202 S. W. 944, L. R. A. 1918E, 658.

In a prosecution for unlawfully selling intoxicating liquors, evidence of a witness that he was present when the person to whom the liquor was alleged to have been sold pointed out defendant as the man who sold him the liquor held objectionable, as hearsay. *Byrd v. State* (Cr. App.) 231 S. W. 399.

In a prosecution for robbery of a Mexican, where accused, shortly after he was arrested, was taken before the Mexican for identification, testimony by the sheriff that at the time the interpreter stated that the Mexican identified accused was hearsay and inadmissible. *Turner v. State* (Cr. App.) 232 S. W. 801.

104. — **Conversations.**—A conversation between witnesses relating to defendant's guilt, but not had in his presence, was inadmissible. *Dover v. State*, 81 Cr. R. 545, 197 S. W. 192.

In prosecution for receiving stolen goods, testimony of the sheriff of another county, who arrested the actual thief, as to what the thief said, was inadmissible as hearsay, under an indictment alleging that the thief was to the grand jurors unknown. (Per Davidson, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

In prosecution for murder of deputy sheriff while preventing accused's escape, evidence of third person who had conversation with sheriff over the telephone at the request of deceased about the propriety of arresting accused was inadmissible as hearsay. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

Refusal to permit defendant to develop from the evidence conversations between him and his attorney was proper, the evidence being obnoxious to the hearsay rule, as well as self-serving. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In homicide prosecution, evidence that defendant had told third party during a conversation that the officers had told deceased to kill him, and that third party was going to get defendant into trouble, was inadmissible, where offered as independent testimony and not as part of any conversation drawn out by state, being hearsay. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In a murder trial, a conversation between a witness and another out of the presence and hearing of the defendant was inadmissible as hearsay. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

In prosecution for burglary, defended on ground of alibi, where certain witness had testified for defendant on such issue, the admission of testimony as to conversation with such witness, mother, in the absence of such witness and the defendant, tending to impeach the testimony of such witness, was reversible error; testimony of such conversation being hearsay. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

In a prosecution for cow theft, where defendant who had sold his grandmother's cow during her absence claimed to have acted on the belief that she had authorized him to so do, testimony as to a conversation with the grandmother on her return, in which she demanded the cow instead of the pay therefor, held inadmissible, being hearsay. *Powell v. State* (Cr. App.) 227 S. W. 188.

In a prosecution for robbery, testimony of a witness as to a conversation between himself and the person robbed, in defendant's absence, to the effect that the person robbed recognized defendant as one of the guilty parties, held hearsay and inadmissible. *Buddy v. State* (Cr. App.) 227 S. W. 323.

105. — **Written statements.**—A letter from defendant's companion to his father, stating that defendant stayed in F. county until a certain date, held hearsay, and incompetent to show defendant's absence from another county. *Hensley v. State*, 81 Cr. R. 620, 197 S. W. 869.

In a prosecution for embezzlement from fraternal order, evidence of the minutes of the order showing accused's expulsion and that an offer of reward for his arrest was made held inadmissible as hearsay. *Green v. State*, 82 Cr. R. 420, 199 S. W. 622.

It was improper for the state to offer a purported written statement by defendant's brother who saw the homicide for such statement was hearsay. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

It was improper for the state to offer a purported written statement by defendant's brother, who saw the homicide, for such statement was hearsay, as was the fact that the brother had made a statement. *Id.*

A proclamation of a Governor, under Civ. St. art. 7314e, relating to tick eradication, is not evidence that a local option was ever in fact held, but mere hearsay. *Felchack v. State*, 87 Cr. R. 207, 220 S. W. 340.

In prosecution of wife desertion under Pen. Code arts. 640a-640f, a letter addressed to husband held inadmissible as hearsay in absence of a showing that the husband induced its writing, or acted upon it or adopted it. *Terrell v. State* (Cr. App.) 228 S. W. 240.

106. **Evidence founded on hearsay.**—In prosecution for slander of a female, where her chastity was in issue, testimony that, "One of her girls was sickly, and they were very poor, and I heard her spoken of quite frequently as being a hard working woman," is inadmissible on direct examination. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

In a prosecution for negligent homicide, court properly refused to allow witness to testify that he considered the defendant a cautious man, being merely hearsay opinion of witness. *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

In a homicide case, it was error to permit an officer as witness for the state to give the reasons why he discharged from custody persons whom he arrested prior to the arrest of accused; such being matters with which accused had no concern, and the rea-

sons operating upon the mind of the officers being impressions he received from hearsay statements. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

In homicide prosecution, where witness, who had described certain tracks near the scene of the homicide, testified on cross-examination that he went to the scene of the homicide with another witness, that such witness had told him where defendant was during the difficulty, and that he had gone into the field from which the shot was fired and examined the tracks at the solicitation of other witness, a motion to exclude the testimony of direct examination, because of such disclosure on cross-examination, was properly overruled. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

107. — **Matters provable by reputation.**—In prosecution for pursuing business of selling intoxicating liquors, evidence of accused's bad reputation for being bootlegger was inadmissible to prove his guilt, though admissible on issue of suspended sentence. *McGary v. State*, 82 Cr. R. 54, 198 S. W. 574.

In prosecution for murder, general reputation as to illicit relations of accused and deceased's wife was not admissible, though the relations might be otherwise proved. *Sheely v. State*, 83 Cr. R. 127, 201 S. W. 1012.

In a prosecution for keeping a gaming house, evidence that people told witness that it was defendant's gaming house was not admissible to prove control and ownership. *Bell v. State*, 84 Cr. R. 197, 206 S. W. 516.

In prosecution for murder, in which it was claimed that deceased had caused trouble between defendant and his wife, evidence as to duration of time deceased had been visiting improperly at defendant's home could not be proved by common reputation. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

108. — **Evidence as to age.**—In a prosecution for statutory rape, evidence by prosecuting witness that her mother two years before told her age, and from such fact she knew her age to be under fifteen, was admissible. *Mireles v. State*, 83 Cr. R. 608, 204 S. W. 861.

Prosecutrix, who stated that all she knew of her age she got from her adopting parent, the defendant, who had told her that she was 1½ years of age when adopted, could testify that she was 13 years old at time of alleged rape. *Wooldridge v. State*, 86 Cr. R. 348, 217 S. W. 143.

In prosecution for statutory rape, even if witnesses as to prosecutrix's age had no knowledge thereof, except as derived from her own statement, they could testify thereto; the weight of such testimony being for the jury. *Young v. State* (Cr. App.) 230 S. W. 414.

109. **Acts and declarations of conspirators in general.**—Statements of another prior to commission of offense are admissible, where made under circumstances tending to show he and defendant were coconspirators. *Cannon v. State*, 83 Cr. R. 154, 202 S. W. 83.

In a homicide case, remarks made by deceased and defendant's brother were admissible on the theory of conspiracy, where defendant was sufficiently close to justify inference that he heard remarks; such remarks provoking the difficulty in which the homicide took place, notwithstanding defendant did not hear all that was said, it appearing that he adopted his brother's quarrel and acted with him in pressing it. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

Where state's theory that the homicide was the consummation of a conspiracy to which accused and one C. were parties was supported by accused's confession and other evidence, evidence showing that an automobile was hired by C. and was in his possession and returned by him, its condition when returned, that it had on it human hair and blood similar to that found near the body of deceased was not objectionable as hearsay; the rule that where issue of conspiracy is raised by the evidence the acts of coconspirators in furtherance of the common design or in which they are found in possession of the instruments used in the crime are admissible against accused, though he was not present when the acts were done, applying to circumstantial as well as to direct evidence. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

One who enters any conspiracy at any stage of its progress adopts all that has gone before, and makes himself a party thereto, and to what comes after, and his acts and declarations are admissible in evidence. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

A husband and wife may conspire together to commit an offense, so that the acts and declarations of one not on trial may be admissible against the other. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

When parties are charged with acting together in the commission of a crime, evidence of preparation of, or weapons found on, any of them, whether before, during, or so soon after the offense as to shed any fair light on the act or intent of such alleged participants is admissible against any of them. *Flores v. State* (Cr. App.) 231 S. W. 786.

110. **Furtherance or execution of common purpose.**—Where declarations or statements or acts of alleged co-conspirator are admissible, they must be in furtherance of the common design. *Roebuck v. State*, 85 Cr. R. 524, 213 S. W. 656.

Where state's theory that the homicide was the consummation of a conspiracy to which accused and one C. were parties was supported by accused's confession and other evidence, evidence showing that an automobile was hired by C. and was in his possession and returned by him, its condition, when returned, that it had on it human hair and blood similar to that found near the body of deceased was not objectionable. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Defendant, owner of hog which died otherwise than by slaughter, and person who sold meat for him, being coconspirators in so doing, act of one within scope and duration of conspiracy was binding on other, so whether defendant's agent was innocent or guilty through lack of or possession of knowledge of way hog died, his act in selling meat was one in which defendant was guilty. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

111. — **Absence of defendant.**—So long as the parties to a conspiracy are still moving toward the accomplishment of any of its objects, the acts and declarations of

one in pursuance of the common design, whether made in the presence and hearing of others or not, becomes admissible against each of the others. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459; *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473; *Gerber v. State* (Cr. App.) 232 S. W. 334.

Where defendant was unduly intimate with a female, and arranged with a physician for an abortion, such physician was a conspirator and prosecutrix was properly allowed to testify that on occasion of one of her treatments physician stated in absence of defendant what amount of money defendant had paid him: the criminal conspiracy not yet having been fully concluded. *Hammitt v. State*, 84 Cr. R. 635, 4 A. L. R. 347, 209 S. W. 661.

In a prosecution for cow theft, where it was asserted that defendant's two confederates entered into a general agreement for the theft of cattle and their disposition, evidence of such agreement is inadmissible against the defendant where it was made while he was absent from the state. *Casanova v. State*, 87 Cr. R. 63, 219 S. W. 478.

The acts and declarations of alleged coconspirators out of the presence of accused are not available to prove his connection with the conspiracy. *Jolly v. State*, 87 Cr. R. 288, 221 S. W. 279.

Where two persons were acting together to steal an automobile and convert it into money, what was said and done by one in furthering such object was admissible against the other, whether present or not. *Smith v. State* (Cr. App.) 227 S. W. 1105.

In prosecution of an alleged accomplice to theft, court properly admitted testimony showing negotiations between alleged principals in the absence of the accused, where such testimony bore upon the guilt of the principals and was properly limited to that purpose by the court's charge. *Gerber v. State* (Cr. App.) 232 S. W. 334.

**112. — Acts and declarations during actual commission of crime.**—In prosecution of posse member for murder of a negro whose wife other members of the posse were assaulting in an endeavor to extort from her the whereabouts of a criminal, proof of acts of other members of the posse while assaulting the wife of deceased held admissible, defendant having shared in their purpose to assault the woman, or else, by having heard her screams and not interfered, having ratified the assault. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

Where defendant, a striker, killed a guard, testimony that defendant's companion, who accompanied him to the scene of the difficulty, on arriving there attacked persons at work with bludgeons was admissible. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

In a prosecution for unlawful manufacture of intoxicating liquors, where it appeared from evidence that accused agreed to aid in the manufacture of intoxicating liquors, and that he complied by hauling material and received a number of gallons of the liquor, and that it was his intention to continue, conversations between persons connected with him in the enterprise and who instigated it, to the effect that one told the other to tear down the still and deliver it to accused and to another, that the making of the whisky was merely a matter of "dollars and cents," and the other of like character made in furtherance of common design and before the termination of the conspiracy, were properly received in evidence, to connect accused with the offense and to show motive. *Shaw v. State* (Cr. App.) 229 S. W. 509.

In a prosecution for robbery, testimony that one of the victims was struck with a wrench was admissible without showing whether defendant or one of his confederates struck the blow, for the act of one was the act of all. *Hardy v. State* (Cr. App.) 231 S. W. 1097.

In contempt proceedings against an attorney for attempted bribery of jurors, statements made by one through whom the money was paid to the man who offered it to the jurors implicating the attorney in the transaction are inadmissible against the attorney. *Ex parte Kahn* (Cr. App.) 232 S. W. 797.

**114. — Subsequent to crime but before fulfillment of purpose.**—In prosecution for wife murder committed pursuant to conspiracy to obtain wife's property, statements of coconspirators made during contest of wife's will were admissible as declarations made in furtherance of the common design, since the wife's property had not been obtained at such time, and the conspiracy was therefore still pending, the main object not having been consummated. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

Where under the evidence, from the state's standpoint, accused and another were coconspirators, and the object of the conspiracy was the theft of property and the apportionment of the proceeds, the conspiracy continued until its object was accomplished, and the acts and declarations of a coconspirator in furtherance of the conspiracy were admissible, though made in the absence of accused and after the property had been taken. *Miller v. State* (Cr. App.) 225 S. W. 262.

**115. Acts and declarations after accomplishment of object.**—Acts and declarations of a conspirator after consummation of the crime are admissible only against such conspirator and cannot be used against a coconspirator. *Modello v. State*, 85 Cr. R. 291, 211 S. W. 944; *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199; *Dawson v. State*, 87 Cr. R. 434, 222 S. W. 557.

Acts and declarations occurring after commission of offense in defendant's absence, even where offense involves conspiracy to commit larceny, cannot be used against defendant, but only against conspirator who had possession of property or made statement. *Williams v. State*, 82 Cr. R. 215, 199 S. W. 296.

Testimony of a witness as to what accused's ex-partner told him after dissolution of the partnership as to a conspiracy between the partners to receive stolen goods was inadmissible against one accused of receiving stolen goods. (Per Davidson, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

In prosecution for receiving stolen goods, statements of accused's ex-partner, after termination of partnership, were not admissible against accused. *Wool v. State*, 83 Cr. R. 121, 201 S. W. 1006.

Declarations of coconspirator, in defendant's absence after completion of crime, are inadmissible, unless they are *res gestæ*, or made while declarant was in possession of the fruits of the crime. *Cannon v. State*, 83 Cr. R. 154, 202 S. W. 83.

In prosecution for theft of automobile tires, telegram from accomplice witness to defendant, sent some days after theft and disposition of property, was not introducible; defendant not being connected with it in any way. *Carroll v. State*, 83 Cr. R. 369, 203 S. W. 599.

In a homicide case sheriff could testify that after completion of conspiracy to kill one of the conspirators, while under arrest gave him information and directed him to a certain culvert, and he there obtained three pistols and cartridges identified at the trial by an accomplice as those used in the homicide, over objection that this was the act of a coconspirator subsequent to completion of conspiracy. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

Where defendant and another were arrested, charged with burglary, a statement made by the other, not in defendant's presence, to the effect that he watched while defendant broke and entered, is inadmissible. *Wright v. State*, 84 Cr. R. 521, 208 S. W. 919.

In murder trial, where it was prosecution's theory that accused and his father came to town and the killing occurred there pursuant to their plans, evidence that the father, when asking a man to sign bail bond of his son, stated that "they had accomplished just what they went there to do," was inadmissible, since it was not made in accused's presence, was some days subsequent to the transaction, and, if there was a conspiracy, its purpose had been accomplished, so that a coconspirator's statement was inadmissible. *Wood v. State*, 85 Cr. R. 268, 211 S. W. 782.

Evidence that a codefendant forfeited his bond, fled, and was again arrested, was inadmissible on defendant's trial, though they had been jointly indicted, had fled about the same time, and had been arrested about the same time. *Modello v. State*, 85 Cr. R. 291, 211 S. W. 944.

Acts and conduct of defendant's brother and P., the principal, in the absence of defendant and after stolen car had been delivered to defendant as claimed by P., were inadmissible unless defendant was in some way a party to the same or had knowledge or assented thereto. *Cone v. State*, 86 Cr. R. 291, 216 S. W. 190.

In a prosecution for receiving stolen goods, testimony as to possession of part of such goods by a third person, when defendant was under arrest and had nothing to do with the conduct of such third person, held inadmissible, though the statements, acts, and conduct of another person, to whom defendant was handcuffed, in relation to the recovery of the goods, were admissible. *Kyle v. State*, 86 Cr. R. 471, 217 S. W. 943.

Acts and conduct of the person with whom defendant, accused of receiving stolen goods, pawned such goods, were not evidence admissible against defendant, even though committed in his presence and amounting to a confession; nevertheless the fact that the person turned over the property to the officers was not inadmissible. *Id.*

Where it was charged that defendant and another acting jointly killed a third person, evidence of statements by defendant's associate after the killing are inadmissible against defendant; the transaction then being complete. *Bloxom v. State*, 86 Cr. R. 562, 218 S. W. 1068.

In a prosecution for cow theft, where it was the theory of the state that defendant, with two others, stole the animals, and it appeared that after the theft defendant was absent from the jurisdiction, evidence of declarations and conduct of defendant's confederates is inadmissible on the theory that there was a general agreement between the parties with reference to stealing cattle, where the evidence showed that the agreement, if any, was made during defendant's absence. *Casanova v. State*, 87 Cr. R. 63, 219 S. W. 478.

Where defendant, who with other strikers had gone on an alleged picketing expedition, etc., shot deceased, a guard, the fact defendant's companion had dropped the billiard cue, and picked it up just as police arrived, did not render inadmissible testimony that the companion had the cue in his hand; it being the state's version that defendant and companions went to the scene of the difficulty and began attacking persons at work. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

Under the rule permitting proof of acts of a coconspirator found in possession of fruits of the crime, it was proper in a murder prosecution to permit a witness to testify that he got a watch on the day after the homicide from one whom the state claimed was acting with the defendant. *Williams v. State* (Cr. App.) 225 S. W. 177.

Even after a conspiracy to steal property, sell it, and apportion the proceeds had ended, a check, which was a part of the fruits of the crime, and its possession by the accomplice after termination of the conspiracy, was admissible in evidence. *Miller v. State* (Cr. App.) 225 S. W. 262.

Where defendant and another acted together in burglarizing a store, and the other confessed in defendant's presence, but defendant remained silent, and the other then went and pointed out where the stolen property had been hidden, the fact could not have been used against defendant. *Garcia v. State* (Cr. App.) 228 S. W. 938.

If defendant's companion in a burglary had, in defendant's absence, pointed out where they had hidden the stolen property, the fact could not have been used against defendant. *Id.*

117. **Preliminary proof of conspiracy.**—In a prosecution for homicide committed as the result of an alleged conspiracy to assault deceased, it was error to fail to charge that acts and declarations of a conspirator in defendant's absence was inadmissible to establish a conspiracy. *Holland v. State*, 84 Cr. R. 144, 206 S. W. 88.

A jury, before considering the testimony as to acts and declarations of alleged coconspirator, must find beyond a reasonable doubt that conspiracy existed, but may consider such testimony in passing upon question of whether the existence of a conspiracy has been proved beyond a reasonable doubt. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

A conspiracy may be shown by circumstantial evidence. *Id.*

In a prosecution for placing poison in water with the intent to kill another, evidence held to prove conspiracy between defendant and his wife, making the wife's acts and declarations admissible against him. *Id.*

A conspiracy to murder must be proved aliunde, and the court should have instructed that the acts and conduct of defendant's son on the night of the murder could not be used as evidence of conspiracy between them, since such acts, if a conspiracy existed, were those of a coconspirator, and would not be evidence of a conspiracy. *Anderson v. State*, 87 Cr. R. 641, 224 S. W. 782.

When parties act together in the accomplishment of an object, their agreement so to do may be inferred without proof of an express agreement. *Henderson v. State* (Cr. App.) 229 S. W. 535.

118. — **Necessity.**—In a prosecution for manslaughter, declarations of alleged conspirators in defendant's absence to prove a conspiracy to assault deceased cannot be considered, before a conspiracy is found beyond a reasonable doubt. *Holland v. State*, 84 Cr. R. 154, 206 S. W. 89.

Statements of alleged co-conspirator, made in the absence of defendant and amounting to no more than veiled threats to do away with deceased in order to obtain defendant, deceased's wife, were inadmissible; no conspiracy having been shown. *Roebuck v. State*, 85 Cr. R. 524, 213 S. W. 656.

It is not necessary that a conspiracy be established aliunde before the acts and declarations of the coconspirators, made in the absence of the accused, become admissible in evidence; but there must be testimony, other than that of declarations of conspirators, which will tend to show an acting together of the parties. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

A jury, before considering the testimony as to acts and declarations of alleged co-conspirator, must find beyond a reasonable doubt that conspiracy existed. *Id.*

In a murder trial, where defendant's son, while riding in an automobile driven by defendant, shot and killed deceased, and the evidence did not show a conspiracy, evidence that the son, after hearing of some difficulty between his family and that of the deceased, stopped at a church, with the apparent purpose of seeing the deceased, was inadmissible. *Anderson v. State*, 87 Cr. R. 641, 224 S. W. 782.

Where conspiracy to murder was not shown, evidence that defendant's son said he was going to "pull off one to-morrow if the right party was in town," without specification that the deceased was the party referred to, or what the statement meant, was inadmissible, and should not have been considered, particularly since the deceased was in town at such time, and defendant's son left town, at defendant's suggestion, for fear there might be trouble. *Id.*

119. — **Order of proof.**—Declarations of coconspirators may be admitted without first establishing the conspiracy, the order in which the evidence to show the conspiracy is admitted not affecting the admissibility of the evidence of declarations. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

120. **Documentary evidence in general.**—In prosecution for embezzlement of funds of a company there was no error in admitting in evidence the company's charter certified to be a true copy of that filed in office of the Secretary of State by the chief clerk, acting secretary; R. S. art. 4319, authorizing chief clerk to act as secretary of the state in case of absence or inability of the secretary to act. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

121. — **Official records.**—Census reports are admissible as original evidence of facts which under the law are required to be recorded. *Mireles v. State*, 83 Cr. R. 608, 204 S. W. 861.

In a prosecution for violating tick eradication statute, a supplemental proclamation of the Governor, declaring the county under tick quarantine, was not inadmissible as against the objection that it did not appear that the proclamation had been published in any newspaper, although it would have been inadmissible on objection that it was not a copy certified by the secretary of state, as prescribed by section 9 (Civ. St. art. 7314g) of that statute. *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

122. — **Judicial proceedings and records.**—In prosecution for perjury committed while testifying as a witness, evidence of testimony given by accused at the trial at which the alleged perjury was committed may be testified to by the court stenographer at such trial. *Roberts v. State*, 83 Cr. R. 511, 204 S. W. 866.

123. — **Private writings and publications.**—A church record of birth and baptism of child is admissible on issue of her age on prosecution for assault on her with intent to rape, indictment charging that she was under age of 15 years. *Ford v. State*, 82 Cr. R. 639, 200 S. W. 841.

124. — **Maps and photographs.**—A plat used to show location of a killing should correspond as nearly as possible with real conditions and locations at that time. *Taylor v. State*, 81 Cr. R. 347, 197 S. W. 196.

In prosecution of bank president for having murdered state commissioner of banking, photographs of interior of bank from which defendant shot commissioner at door, showing location of parts of bank, especially with reference to desk occupied by defendant, were admissible. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In a prosecution for murder of defendant's mistress, photographs taken of the room where the homicide took place two or three days after it and used by witnesses in explaining the condition of the room as found by police officers when they reached the house were admissible, though the conditions of the room and the bed where the body lay had been changed to some extent. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

In a prosecution for robbery, the introduction in evidence of photographs of the locality of the crime is not error. *Clark v. State*, 87 Cr. R. 107, 220 S. W. 100.

125. — **Authentication and proof.**—In a prosecution for pursuing business of selling intoxicating liquors, express records showing shipments of liquor to defendant were admissible, although particular entry was in handwriting of another than the witness, but with which witness was familiar. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

In a prosecution for seduction, letters written by defendant to the prosecuting witness are admissible upon her testimony identifying them. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

A book kept by the seller of automobile tires, showing a tire with a number corresponding to that of a tire of the same kind found in defendant's possession was sold to the owner of the car defendant was claimed to have stolen, is inadmissible, where the salesman, who made the memoranda from which the record was entered in the book by another, did not testify, and the bookkeeper, who testified, knew nothing as to the accuracy of the memoranda. *Moore v. State*, 84 Cr. R. 527, 208 S. W. 918.

In a prosecution for adultery, where the identity of defendant's marriage license was proven by the clerk, but its execution was not proven by any one else, it was inadmissible in evidence because not filed among the papers for three days and notice given by the prosecution to defendant. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

In prosecution for embezzlement of funds of a company there was no error in permitting an attorney who procured the company's charter to identify it as the original charter. *Landis v. State*, 85 Cr. R. 381, 214 S. W. 827.

In a criminal proceeding, before the court, upon defendant's affidavit of juvenility, the admission in evidence of a school district census report which the census taker identified as having been made by him, and which was produced from the custody of its proper custodian, the county superintendent of schools, was proper to show date of defendant's birth, notwithstanding the census taker could not identify the person who gave him the information as defendant's mother, or guardian. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

In prosecution of agent for embezzlement by failing to remit proceeds collected for principal, employé of principal who had supervision of the keeping of principal's books can testify to the correctness of the books kept under his supervision. *Herberg v. State*, 87 Cr. R. 439, 222 S. W. 559.

126. — **Compelling production.**—In a homicide case, where an alleged accomplice prior to trial had made written statements exculpating the accused, and consented to give statements inculcating him only on the day of the trial, the accused should have been accorded the privilege of inspecting the previous statements. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

In a criminal prosecution there was no error in refusing to compel the state's counsel to deliver a copy of a telegram, unidentified, and wholly hearsay and secondary, to defendant's counsel. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

127. — **Exclusion of parol evidence.**—In prosecution for murder, where evidence of decedent's wife, given at inquest, was reduced to writing and signed by her some time afterwards, it was not error to permit her to testify that she made certain statements at inquest, notwithstanding her written statement did not contain them. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

Evidence as to contents of letter, in response to questions asked by state's attorney while holding letter in his hand and reading therefrom, was inadmissible, where letter itself was not introduced in evidence. *Villafranco v. State*, 84 Cr. R. 195, 206 S. W. 357.

128. **Opinion evidence in general.**—In homicide prosecution, question asked defendant's sister of whether it was not a fact that she, her father, and defendant had had no intention of pleading insanity until after the examining trial, and people had testified that the reputation of witness and defendant for virtue and chastity was bad, leading them to think that their plea of insult to female relative was broken down, and answer thereto that witness "knew it at the examining trial," and "as soon as we employed our lawyer," did not call for a conclusion of the attorney. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

129. **Facts or conclusions.**—Answer in the negative to question whether witness knew a person of a certain name is a statement of fact, and not a conclusion. *Jones v. State*, 83 Cr. R. 444, 203 S. W. 1101.

In prosecution of bank president for having murdered state commissioner of banking, testimony of commissioner's bank examiner, present at homicide, that bank at time was insolvent, held not inadmissible as conclusion or opinion. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In homicide prosecution, question of whether witness was under the rule, and answer that witness did not think so, was not objectionable. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

In a prosecution for the theft of an automobile, evidence of statement made by one defendant in a conversation with the owner when they offered to pay for the machine, wherein such defendant stated that he was out on suspended sentence and did not desire to get an additional term, held that the statement that such defendant was out on suspended sentence was not a conclusion. *Young v. State*, 87 Cr. R. 27, 218 S. W. 1063.

In a homicide case, where witness testified that he observed killing at a distance of about 100 feet, that position of deceased when shots were fired was obscured by an intervening object, and that he did not see the actual shooting, but saw a man run across the street, court properly sustained an objection to a question whether the man that ran away was the one who did the shooting, as it called for an opinion of the witness. *Shamblin v. State* (Cr. App.) 228 S. W. 241.

130. — **Evidence as to intent, belief, or knowledge.**—There being evidence that accused was suddenly attacked by deceased and companions at night, accused could

testify that he did not intend to kill, but only used his knife as a means of defense and to free himself from attack. *Lozano v. State*, 83 Cr. R. 174, 202 S. W. 510.

In prosecution of bank president for murder of state commissioner of banking, testimony of commissioner's bank examiner that he had not stated that neither he nor commissioner was armed, but that defendant in his opinion believed commissioner to be armed, held inadmissible. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In a prosecution for homicide, where witnesses on both sides testified to the same threatening remark made by deceased before the killing, a statement by wife of deceased, who was where she could hear her husband, but could not see him at the time he made the remarks, that she knew therefrom he was going to kill a dog which had been worrying hogs, was inadmissible as a conclusion, and not a statement of facts. *Jones v. State* (Cr. App.) 232 S. W. 847.

**131. — Nature, condition, relation and identity of things.**—The statement of a witness that on the night of the offense he saw two men in possession of a cow, and to the best of his knowledge one of the men was defendant, is admissible. *Jenkins v. State*, 81 Cr. R. 508, 197 S. W. 588.

Any one who had seen the wounds could testify to their being wounds, and could describe them, without the testimony being subject to the objection of being conclusions and opinions of the witness; it not taking an expert to describe a wound. *Mayer v. State*, 87 Cr. R. 512, 222 S. W. 571.

Testimony of witness "I have made an examination to see whether or not a man sitting on the top bunk \* \* \* could see, \* \* \* and I find that you can" and "one sitting in that position could see what took place in front of the door; a person or prisoner, if they are under the bunk, \* \* \* could look out through the cell door and see one or more persons in front of the door," held but a shorthand rendition of the facts representing the result of experiments made by the witness, and not objectionable as opinion evidence, there being other evidence descriptive of the interior of the jail and photographs portraying its condition. *Israel v. State* (Cr. App.) 230 S. W. 984.

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor not for medicinal, etc., purposes, testimony of a witness as to the smoked condition of the back of defendant's barn, that it looked like fresh smoke, was admissible as a shorthand rendering of the facts. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

**132. — Evidence as to tracks and stains.**—Mere statement by witness that one of the tracks was made by a horse with a peculiar chip in the hoof does not authorize his opinion that tracks leading from the place of murder were those of defendant's horse. *Black v. State*, 82 Cr. R. 358, 198 S. W. 959.

In prosecution for burglary, court properly excluded testimony that witness and deputy sheriff discussed how blood stains could have gotten on right-hand side of tracks. *Love v. State*, 82 Cr. R. 411, 199 S. W. 623.

Mere conclusion of witness as to identity of tracks is not sufficient foundation for introduction of evidence thereof. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In homicide prosecution where defendant denied having committed the crime, testimony that "The tracks I saw in the mouth of the lane that led up to the Whitehead house were large horse tracks; the tracks that led off down there looked like the very same tracks and were large tracks," held sufficient foundation for introduction of evidence as to the tracks. *Id.*

In a prosecution for murder, testimony of witnesses for defendant, after describing the appearance of the surroundings at the scene of the killing, as to what, in their opinion, the tracks, heel prints, and tearing down of the corn stalks indicated, was inadmissible as an opinion and conclusion, not coming under the classification of a shorthand rendering of the facts. *Lewis v. State* (Cr. App.) 231 S. W. 113.

**133. — Evidence as to manner, appearance and conduct.**—In prosecution for slander of female, testimony that, "My very best opinion is that he was mad, just as mad as he could be," relating to defendant at time of making slanderous remark, was not inadmissible as opinion evidence. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

In a prosecution for murder, evidence of a physician called to attend deceased, who was defendant's wife, that in his opinion defendant's grief was feigned, was not inadmissible, as being an opinion; it being a statement of an effect produced upon the mind. *Beaupre v. State* (Cr. App.) 206 S. W. 517.

In prosecution for murder, defendant setting up that he acted in defense of his son, evidence that parties did not seem on good terms, and that deceased seemed to be in a good humor, was admissible. *Mitchell v. State*, 85 Cr. R. 25, 209 S. W. 743.

In prosecution for murder, defendant setting up self-defense, the state properly asked a witness if he had talked to deceased just before the difficulty, and whether he was mad or not. *Alsop v. State*, 85 Cr. R. 36, 210 S. W. 195.

In homicide prosecution, it is competent to prove that defendant appeared angry. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

Testimony by a sheriff over objection that an alleged coconspirator suited the description of party described to him by prosecuting witness was inadmissible, being but a conclusion that such coconspirator was the man described, although it would be proper for the prosecuting witness to describe such person to the jury. *Bouldin v. State*, 87 Cr. R. 419, 222 S. W. 555.

In a prosecution for violating the Dean Law, testimony that the witness saw defendant cooking or making whisky not inadmissible as an opinion, where the witness described the equipment and apparatus and stated that he partook of the liquor. *Russell v. State* (Cr. App.) 228 S. W. 948.

**134. — Evidence as to meaning of words and acts.**—In prosecution for murder, testimony of witness that statement of another witness, impeached and sought to be

corroborated, was about the same as the testimony of such impeached witness on stand, was inadmissible as conclusion of supporting witness stating his opinion of statement of impeached witness to him. *Walker v. State*, 84 Cr. R. 136, 206 S. W. 96.

Statement, "He was not led to make any particular answer by any questions asked him that would lead to any particular kind of answer," was a conclusion of witness. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

In prosecution for murder, where defendant had killed deceased during interview in which he had complained to deceased of deceased's insulting language to his (defendant's) wife, evidence of a statement by a witness to defendant that the language used by deceased would not justify an assault by defendant, and that defendant should abandon the controversy, was inadmissible, being mere opinion of witness. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

As a general rule the opinion of a witness is not admissible to interpret the written or spoken language of another. *Ochoa v. State*, 87 Cr. R. 318, 221 S. W. 973.

In a prosecution for homicide, where a witness as to decedent's dying declaration, when asked whether decedent said anything to indicate whether or not he thought he was going to die, stated he did not "know just the words, but he meant," and on objection and direction to tell the substance stated decedent thought he would die, such testimony was not objectionable as the witness' conclusion. *Walker v. State* (Cr. App.) 227 S. W. 308.

In prosecution for assault with intent to murder, where defendant, on cross-examination of assaulted officer, asked what accused told him concerning what he was doing at the time he was accosted by the officer, to which the officer replied, "He did not say he was doing anything; he said he was going home," to which counsel replied, "Going home, is not that doing something?" and an objection was sustained to the last question, the court instructing defendant's counsel that he would permit him to prove that defendant said he was going home, but not draw any conclusion from the statement, there was no error. *Walker v. State* (Cr. App.) 232 S. W. 509.

135. — **Questions of law.**—In a prosecution of a switchman for stealing automobile tires from a box car, where defendant claimed to have found them in a car which had been unloaded by consignee, and the state alleged ownership in the freight agent, the sustaining of the state's objection to a question asked such agent as to whether he would be responsible for things left in the car by consignee was not error, since it called for testimony as to a proposition of law rather than fact, and the test of ownership in the special owner under an indictment for theft is not whether such owner would be responsible for loss. *Monroe v. State* (Cr. App.) 230 S. W. 995.

136. **Admissibility of opinions of nonexperts.**—Proof of insanity, see notes under Penal Code, art. 40.

Witnesses who had known defendant intimately for years may give their opinion that when they arrested him, immediately after the offense, he was not insane. *Long v. State*, 82 Cr. R. 312, 200 S. W. 160.

137. — **Province of jury.**—In homicide prosecution, question asked defendant's sister whether it was not a fact that she, her father, and defendant had had no intention of pleading insanity until after the examining trial, and people had testified that the reputation of witness and defendant for virtue and chastity was bad, leading them to think that their plea of insult to female relative was broken down, and answer thereto that witness "knew it at the examining trial," and "as soon as we employed our lawyer," did not invade province of jury. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

Questions of district attorney as to whether the questions asked the victim while he was making dying declaration were such as would lead victim to make any particular answer, as well as the answer of witness, was but a conclusion upon a question for the jury to decide, and should have been excluded. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

On a trial of an alleged accomplice to a murder committed by his paramour, she should not have been permitted to testify that expressions used in defendant's letters to her referred to the contemplated poisoning of deceased, where she stated no rule by which she was able to determine that the language of the letters meant other than the words and context would indicate, as defendant's meaning was to be ascertained by the jury from the letters and surrounding circumstances. *Ochoa v. State*, 87 Cr. R. 318, 221 S. W. 973.

In a homicide case, where accused killed deceased with a rifle, claiming that he shot in self-defense, in that deceased was firing at him with a shotgun, and that some of the shot hit him, the distance that the shotgun would kill or seriously injure one became the proper subject of inquiry, although opinion testimony as to such matters should not be used to deprive the accused of the privilege of having the jury solve the question of self-defense by consideration of the matters as they reasonably appeared to him at the time. *Medford v. State* (Cr. App.) 229 S. W. 504.

138. — **Impressions from collective facts.**—In a murder trial, the admission of conclusion of deceased's brother that deceased was not armed is not erroneous, where the witness put the jury in possession of all the facts upon which he based such statement. *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

The opinion of witnesses was admissible as to the extent of defendant's intoxication, which would not excuse the offense, but might mitigate the punishment in view of Pen. Code, art. 41. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

139. — **Identity of persons and things.**—A witness who has made measurements of the tracks and the foot or shoe of the defendant or who has made some comparison, as placing shoe in tracks, or who has detailed peculiarities in tracks, which correspond with shoes or with proven or admitted tracks of defendant, may give opinion as to similarity of tracks. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

Testimony of foreman of ranch to the effect that he saw calf tracks and two horse



tracks leading from one pasture to another was properly admitted, as he was competent to give an opinion as to whether certain tracks were calf and horse tracks. *McClain v. State* (Cr. App.) 228 S. W. 550.

In a prosecution for having in possession intoxicating liquors not for medical, etc., purposes, in violation of the Dean Act, testimony of a witness that from his experience in manufacturing, drinking, and handling whisky, he could tell that the bottle shown him contained homemade whisky, and that it was intoxicating, held admissible. *Rainey v. State* (Cr. App.) 231 S. W. 118.

In a prosecution for having in possession intoxicating liquors not for medical, etc., purposes, in violation of the Dean Act, testimony of a state witness, who said he was acquainted with the smell of whisky and had smelled lots of it, that the bottles taken from defendant's car, from their odor, contained whisky, and testimony of another witness, who said he had not much experience with whisky, but that in his judgment that shown him was whisky, was also admissible. *Id.*

In a prosecution for having in possession equipment for the manufacture of intoxicating liquor not for medicinal, etc., purposes, testimony that liquor in a bottle found in defendant's car was of the same kind as that in jugs in his barn did not involve any question of expert testimony. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

140. — **Time.**—In a prosecution for murder of defendant's wife, testimony of a witness that in his opinion defendant could not possibly have gotten home, committed the murder, and gone out and summoned help within the time charged, was properly excluded. *Beaupre v. State* (Cr. App.) 206 S. W. 517.

141. — **Cause and effect.**—In a prosecution for murder, where there was some conflict in the testimony as to whether two shots were fired simultaneously, one by deceased and the other by accused, and as to who fired first, a witness may be allowed to testify that an automatic pistol of the caliber of that of deceased, in shooting smokeless powder would make very little noise. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

142. — **Facts forming basis of opinion.**—Where insanity is an issue, it is competent for the state to call witnesses to prove the conversations and conduct of an accused, not admitting guilt, while in jail, as a basis for an opinion as to the sanity or insanity. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

Witness, after stating that he found a panel of the door broken out or removed, could state that one could reach through the space and remove the latch so as to open the door. *Elliott v. State*, 83 Cr. R. 366, 203 S. W. 766.

Where facts are detailed showing the individuality of a particular track in question and that the admitted or proven track immediately connected with the accused possessed the same marks or characteristics, the fact that the same was not measured is only an objection to the probative force and not the admissibility of opinion evidence. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

In cattle theft prosecution witnesses, with much experience in tracking cattle and horses and who gave peculiarities of tracks at different places, were properly permitted to testify that in their opinion the horse's tracks which accompanied tracks of stolen cattle were the same as tracks made by horse ridden by defendant, having stated the facts on which their testimony was based. *Id.*

Where the deputy sheriff testified that he saw the tracks of three persons at the place where the animal was stolen, the tracks of one making a deeper impression in the mud than the other, testimony by such deputy that he observed defendant's tracks through a thin layer of sand on the sidewalk of the courthouse, and that they resembled the tracks at the place of the theft, was inadmissible; there having been no measurement and no other peculiarity mentioned indicating that defendant made the tracks. *Casanova v. State*, 87 Cr. R. 63, 219 S. W. 478.

On the trial of an alleged accomplice to a murder, where the alleged murderer confessed, and letters from defendant to her were admitted in evidence, and she testified that defendant in a previous conversation arranged to refer to deceased in his letters by a fictitious name, her testimony that such name in one of the letters referred to deceased was admissible. *Ochoa v. State*, 87 Cr. R. 318, 221 S. W. 973.

In prosecution for theft of property of the value of more than \$50, involving issue as to value of property taken, admission of testimony by prosecuting witness as to the value of a certain razor enumerated in the indictment as a part of the alleged stolen property was not error, where such razor was under the care, control, and management of prosecuting witness, though he testified that the razor belonged to another party. *Narango v. State*, 87 Cr. R. 493, 222 S. W. 564.

In a prosecution for cattle theft, court erred in permitting witness to testify that certain horse tracks which he saw at one place were similar to those seen by himself at another place, over the objection that no peculiarity in such tracks was shown, and nothing stated by which same could be identified. *McClain v. State* (Cr. App.) 229 S. W. 550.

143. **Subjects of expert testimony.**—Proof of insanity, see notes under Penal Code, art. 40.

Proof of handwriting, see notes under art. 814, post.

Testimony of qualified expert that finger prints on paper admitted to be defendant's were identical with those on broken window in burglarized premises, made by same person, was admissible. *McGarry v. State*, 82 Cr. R. 597, 200 S. W. 527.

It was permissible for president of bank, which was depository for years of school funds, to explain meaning of language of check drawn by county superintendent of schools, set out in indictment for forgery, superintendent being charged with having forged name of payee thereto. *Carrell v. State*, 84 Cr. R. 554, 209 S. W. 158.

In prosecution for rape on child under age of consent, appearance and condition of prosecutrix becomes material, where there is denial of fact of intercourse, and testimony of experts is always admissible to show conditions rendering intercourse with some

one likely, and in all cases where evidence of other acts between parties would tend to shed light on conditions testified to, testimony of other acts is admissible. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

In a prosecution for manslaughter, testimony of a medical witness as to the character of the instrument with which the fatal wound was inflicted held admissible. *Mason v. State* (Cr. App.) 228 S. W. 952.

144. — **Cause and effect.**—On trial for murder, held that qualified witness should have been permitted to testify that axe could not have inflicted the fatal wound, because it would have made a wound of a different appearance. *Boozar v. State*, 82 Cr. R. 72, 198 S. W. 295.

In prosecution for murder, a surgeon who attended deceased from shortly after shooting until his death, and who testified as to the wound, the range of the bullet, and the place of entry, may testify as an expert that a bullet, if fired into a man lying on a fence, could have taken the range taken by bullet that killed deceased. *Houseton v. State*, 83 Cr. R. 453, 204 S. W. 1007.

A physician may testify as an expert to the nature of a wound and its probable cause and effect. *Hilliard v. State*, 87 Cr. R. 15, 218 S. W. 1052, 8 A. L. R. 1316.

In prosecution for murder committed by throwing a bottle at deceased, involving issue of whether defendant had an intent to kill when he threw the bottle, question to the physician as to whether an empty quart bottle, thrown 30 feet and striking a man square on the top of the head, was likely to produce death, held to call for improper expert testimony, it calling for a mere conjecture, and not an opinion founded on fact or knowledge acquired as a physician. *Tolston v. State* (Cr. App.) 225 S. W. 1098.

In a prosecution for statutory rape, a physician's testimony that penetration of female organs by the male organ would probably rupture the hymen held properly excluded, where there was no evidence of an examination of prosecutrix having been made, or testimony offered as to the condition of the private parts of prosecutrix. *Brooks v. State* (Cr. App.) 227 S. W. 673.

In a prosecution for manslaughter, testimony of a medical witness as to the character of the instrument with which the fatal wound was inflicted, together with his opinion as to the cause of death, held admissible. *Mason v. State* (Cr. App.) 228 S. W. 952.

145. **Competency of experts.**—Generally speaking, the decision of the trial judge as to the qualification of an expert to give testimony is not reviewable. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

In a homicide case, a physician may testify as an expert as to gunshot wounds, though his knowledge is derived alone from the study of books, and he had had no practical experience. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

Witnesses, who stated that they were familiar with children and their ages by reason of having been managers for a number of years of an orphanage and who had seen prosecutrix soon after alleged rape and had known her intimately since, were competent to testify that in their judgment she was 12 or 13 years of age. *Wooldridge v. State*, 86 Cr. R. 348, 217 S. W. 143.

A physician may testify as an expert to the nature of a wound. *Hilliard v. State*, 87 Cr. R. 15, 218 S. W. 1052, 8 A. L. R. 1316.

146. **Examination of experts.**—In a prosecution for murder of defendant's mistress, where defendant's medical witness testified as to the dislocation of the woman's left shoulder, his testimony, elicited by the state, that it was not an unusual thing that the shoulder could be relocated, as was testified by a physician for the state, was legitimate and proper. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

In a prosecution for homicide, where the doctor who saw deceased testified as to the course of the bullet, it was not improper on cross-examination to show him clothing worn by deceased, and question as to where the bullet entered, it appearing that this witness testified to much experience with gunshot wounds, etc., and the same general knowledge which would qualify him to express an opinion as to the entry and exit of a bullet in the body would qualify him to testify as to entry of a bullet through the clothing. *Eason v. State* (Cr. App.) 232 S. W. 300.

147. — **Facts forming basis of opinion.**—Physician's testimony as to defendant's sanity, based on observation of and conversation with defendant while in jail, was admissible whether defendant was warned or not, as to use of physician's testimony against him, not being of criminative character in connection with case on trial. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

In prosecution of a negro for aggravated assault by using his pistol as a bludgeon on a white man, so-called expert testimony of a physician that such a weapon used by a strong man as a bludgeon could inflict serious fatal injury or even death was inadmissible as elicited by a hypothetical question not based on the particular facts. *Hilliard v. State*, 87 Cr. R. 15, 218 S. W. 1052, 8 A. L. R. 1316.

149. **Evidence on former trial or hearing.**—Testimony of accused, see note 7 under art. 790.

As violating constitutional guaranty of confrontation of witnesses, see art. 4, note 17.

In theft prosecution, incriminating testimony given by accused on previous trial for theft is admissible. *Taylor v. State*, 82 Cr. R. 210, 199 S. W. 289.

Testimony of witness at examining trial since removed from state is admissible at trial. *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

Testimony of witness in proceedings before a magistrate or coroner's inquest, who was then aware that he was charged or suspected of crime under investigation, cannot be received against him upon his trial for same offense, unless he was warned. *Reynolds v. State*, 82 Cr. R. 443, 199 S. W. 636.

In trial for homicide, testimony of defendant on an investigation wherein she was

charged or suspected of the crime, offered to fix culpability upon her, held not admissible on ground that it was merely exculpatory. *Id.*

Where witness testifying in former trial is out of state and cannot be reached, his former testimony may be proved and introduced without violating constitutional right to be confronted by witnesses. *Robbins v. State*, 82 Cr. R. 650, 200 S. W. 525.

Defendant's silence on first trial when witness absent on second trial testified defendant at time of affray involved made remark indicating murderous intent does not render admissible, on second trial, testimony of absent witness as to such remark. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

Testimony given before the examining court by witness who at time of trial was in Mexico was admissible upon the trial. *Modello v. State*, 85 Cr. R. 291, 211 S. W. 944.

Where a defendant in a homicide case was present at the examining trial, it is not error to reproduce the testimony of a witness given at such trial who has since died; such witness having been cross-examined in defendant's interest. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

On the second trial of a homicide case, the former testimony of decedent's wife, who died before the second trial, was properly admitted. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

The testimony of a witness on former trial may be reproduced where since such witness has testified he has died or has removed beyond the limits of the state or become insane or is prevented from attending the trial through the acts of accused. *Yingo v. State* (Cr. App.) 229 S. W. 858.

The testimony of a witness who died since a former trial may be reproduced by another witness. *Russell v. State* (Cr. App.) 232 S. W. 309.

The testimony given at a former trial by a witness, who had removed from the state and whose return thereto was indefinite, held admissible on the subsequent trial. *Brent v. State* (Cr. App.) 232 S. W. 845.

**150. — Preliminary proof.**—Showing that testimony at examining trial of witness since removed from state was not reduced to writing by magistrate with formality required by art. 300, necessary for oral proof thereof over the objection that the written testimony was the best evidence held sufficient. *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

In absence of predicate laid for testimony of absent witness on former trial by showing his death or removal, it was not competent to reproduce former testimony. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

Proof that witness was living in other state held a sufficient predicate for the reproduction of her former testimony. *Revels v. State*, 88 Cr. R. 36, 224 S. W. 689.

In a prosecution for incest, predicate laid for the reproduction of testimony on former trial held insufficient; the showing being that the witness was not present at the trial and no one knew where he was or why he was absent. *Wingo v. State* (Cr. App.) 229 S. W. 858.

A letter written by a witness, who had testified at a former trial, but who had since moved to another state, stating that such other state is her present and future home, but expressing a desire at some indefinite future time to return, held insufficient to warrant rejection of the testimony given at former trial, offered in evidence on ground that witness had since moved beyond the jurisdiction of the court. *Brent v. State* (Cr. App.) 232 S. W. 845.

**151. — Method of proof.**—One may read his notes of testimony at examining trial of witness removed from state; he thus in effect refreshing his memory. *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

In prosecution for murder of a daughter, refusal to admit in evidence transcribed stenographer's notes taken by a private stenographer of defendant's counsel at the examining trial showing that a witness' statement as to what accused said with reference to killing whole family was not just the same as testimony at trial, held not error. *Anderson v. State*, 83 Cr. R. 276, 202 S. W. 953.

Where the stenographer testified to the correct transcription of her lost notes on testimony of former trial, and that the narrative statement of a deceased witness offered in the second trial was correct, and the statement of facts was agreed on as correct on appeal in the first trial, the statement was admissible to prove the former testimony of such witness. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

**152. Weight and sufficiency of evidence.**—In criminal prosecution, conflicts in testimony of prosecuting witness go to its weight, but not its sufficiency, to sustain conviction. *Parker v. State*, 83 Cr. R. 81, 200 S. W. 1083.

The defense of "alibi" arises when there is evidence that accused was at a point where he could not have been guilty of participating in the offense. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

The jury was authorized to reject or disbelieve defendant's testimony and that of his witnesses on controverted matters. *Lagow v. State*, 85 Cr. R. 69, 210 S. W. 211.

The mere presence of accused at the time and place of the homicide does not justify his conviction. *Anderson v. State*, 85 Cr. R. 411, 213 S. W. 639.

Where facts are detailed showing the individuality of a particular track in question, and that the admitted or proven track immediately connected with the accused possessed the same marks or characteristics, the fact that the same was not measured is only an objection to the probative force of opinion evidence. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

Proof of defendant's bad reputation for honesty cannot support his conviction, in the absence of facts of sufficient cogency to prove his guilt of the offense involved. *Williams v. State*, 86 Cr. R. 640, 218 S. W. 750.

In prosecution for robbery where defendant claimed an alibi, the testimony of prosecuting witness and evidence as to similarity of tracks with defendant's footprints held sufficient proof of identification to sustain conviction. *Moore v. State* (Cr. App.) 226 S. W. 415.

The exactness with which footprints made by defendant's shoes correspond to peculiar foot prints leading from place of robbery is high character of evidence of identification. *Id.*

153. — **Circumstantial evidence.**—See art. 1140, note 36; *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

Circumstantial evidence, to convict, must be sufficiently strong to exclude every reasonable hypothesis except guilt of accused. *Wilkie v. State*, 83 Cr. R. 490, 203 S. W. 1091; *Dowdell v. State*, 85 Cr. R. 472, 213 S. W. 649; *Wales v. State*, 86 Cr. R. 183, 217 S. W. 384.

Venue in a criminal action may be shown by circumstantial evidence. *Allen v. State*, 82 Cr. R. 416, 199 S. W. 633; *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

It is not essential that any one of the proven circumstances shall be sufficient to support conviction, if the verdict of conviction is supported beyond a reasonable doubt by the combined and cumulative force of all of the incriminating circumstances established. *Finch v. State* (Cr. App.) 232 S. W. 528; *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In prosecution for hog theft, circumstantial evidence held insufficient to connect defendant with original taking by another, or to show that he committed the theft. *Grace v. State*, 83 Cr. R. 442, 203 S. W. 896.

Circumstantial evidence held sufficient to sustain conviction of theft of one claiming to have been given the articles by another to sell. *Jones v. State*, 83 Cr. R. 444, 203 S. W. 1101.

Testimony of prosecuting witness in a prosecution for seduction as to intercourse may be corroborated by circumstantial evidence. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

Illicit sexual intercourse can be proved by circumstantial evidence. *Cox v. State*, 84 Cr. R. 49, 205 S. W. 131.

In order to convict on circumstantial evidence, it is not essential that the circumstances proved should to a moral certainty exclude every hypothesis that the act may have been committed by another person, known or unknown. *Parish v. State*, 85 Cr. R. 75, 209 S. W. 678.

When conviction depends upon circumstantial evidence alone, it is essential to prove each necessary fact beyond a reasonable doubt before it can become the basis of any inference adverse to accused, although each fact thus proved need not, standing alone, be of sufficient weight to establish guilt. *Id.*

Direct evidence is not per se better than circumstantial evidence. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

Mere suspicious circumstances will not support a conviction, as there must be evidence overcoming the presumption of innocence and excluding every other reasonable hypothesis except guilt. *Tolbert v. State*, 86 Cr. R. 459, 217 S. W. 153.

To sustain a verdict in a criminal case based upon circumstantial evidence alone, each fact necessary to a conviction must be established by competent evidence beyond a reasonable doubt. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a homicide prosecution, it was the province of the jury, in determining the question of defendant's identity as the slayer, to consider all the circumstances proved beyond a reasonable doubt. *Wilson v. State* (Cr. App.) 226 S. W. 687.

155. — **Conclusiveness of evidence on party introducing it.**—Where the state puts in exculpatory statements, they will be taken as true until the state discharges the burden of proving them untrue. (Per Davidson, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

The state is bound by declaration of accused introduced by it only when there is no other evidence upon which the jury may base their rejection of any part of such statement. *Banks v. State*, 85 Cr. R. 165, 211 S. W. 217, 5 A. L. R. 600.

Where the state through its own witnesses introduced defendant's declarations showing that defendant had killed deceased, and detailing in a manner in substantial harmony with defendant's own testimony the incidents and causes of the homicide, by the introduction of such statements the state became bound to the truth of all of them not disproved by evidence before the jury. *Richards v. State*, 86 Cr. R. 414, 216 S. W. 888.

157. **Reception of evidence in general.**—Conversation had by defendant's wife with police officers, when she went to arrest defendant for assault, would not be admissible on the theory that the court used it in reference to graduating the punishment or assessing the penalty. *Hays v. State*, 84 Cr. R. 349, 206 S. W. 941.

One offering a writing as evidence may at any time withdraw same before it reaches the jury. *Taylor v. State*, 85 Cr. R. 101, 210 S. W. 539.

There being no question of the sufficiency of the predicate laid by the state for the introduction of defendant's statement made at examining trial, the trial court will admit the statement, and if defendant thereafter desires to place before the jury evidence combating the voluntary character of the statement or the sufficiency of the warning, or in any way affecting the admissibility of the statement, he may do so, and have the jury instructed not to consider the statement if they find it inadmissible under the rules laid down. *Lucas v. State* (Cr. App.) 225 S. W. 257.

159. **Compelling calling of witnesses.**—The state is not bound to introduce all or any of the eyewitnesses to a transaction. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

161. **Offer of proof.**—Where defendant on cross-examination of prosecuting witness asked whether or not witness had not formerly testified as to a certain matter, no complaint can be made of refusal of court to permit an answer, where evidence was not offered to prove the former testimony, purpose being to attack the credibility of the witness, especially where the intended introduction of the impeaching evidence was dependent on the witness answering, "No." *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

An accused cannot complain that admission of testimony would affect the character

of the accused if the evidence is otherwise admissible. *Lowe v. State* (Cr. App.) 226 S. W. 674.

**162. Limiting effect of evidence.**—In prosecution of bank president for unlawfully borrowing money from bank, held, that the court should have limited evidence of subsequent transaction to its effect as tending to show existence of partnership of which president was a member, declared on in the indictment. *Le Master v. State*, 81 Cr. R. 577, 196 S. W. 829.

In homicide prosecution involving question of whether defendant was led to shoot by deceased's demonstration in view of previous threats, it was not incumbent upon court to qualify or limit the purpose for which evidence of threats was before the jury. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In prosecution for receiving stolen sheep, in determining whether facts excluded every reasonable hypothesis except defendant's guilty knowledge of theft, defendant was entitled to have jury afforded privilege of considering evidence of his advanced age and infirmities due to sickness, and court's action in limiting such evidence to amount of punishment was unauthorized. *Wilson v. State*, 85 Cr. R. 94, 210 S. W. 542.

All of the confession of defendant charged with having received or concealed stolen goods bearing on other matters than those charged in indictment should be limited by instruction to question of guilty knowledge, or, if defendant claims that his acquisition of the property was other than with guilty knowledge or intent, the other facts may be considered by the jury as bearing on the question. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

In prosecution for slander of female, evidence, to effect that accused told a witness that female in question had slighted him, is admissible as showing motive or malice of accused in making statement for which prosecuted, but should be restricted by court to that purpose. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

**163. — Impeaching evidence.**—Although denied by accused on cross-examination, the court was not required to limit to impeachment purposes testimony admissible in rebuttal. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In a prosecution for slander of female, evidence as to the act of a witness, a brother of accused, in arming himself and going to where the father of prosecutrix lived, and as to what took place there, being admissible to show bias, interest, and motive of such witness, where occurring out of the presence of accused, the effect of such testimony should be restricted by the court to the question of bias, interest, and motive of the witness. *Russell v. State*, 85 Cr. R. 179, 211 S. W. 224.

Evidence which is competent for impeachment only may properly be limited, but court in so doing should observe the legal restrictions against charging on the weight of the evidence and against misleading the jury by erroneous construction. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

Testimony as to the reputation of witnesses for truth and veracity required no limitation, being usable for no other purpose other than as affecting the credibility of such witnesses. *Id.*

Where state's witness gave no testimony touching certain witnesses for defendant, but merely testified as to good reputation for truth and veracity of another witness for the state, whose testimony conflicted with the testimony of such witnesses for the defense, instruction limiting consideration of testimony of first mentioned witness to its effect upon the credibility of such defendant's witnesses, including defendant himself, held reversible error. *Id.*

**164. — Evidence of other offenses.**—The jury's consideration of evidence of extraneous offenses, admitted under one of the exceptions to the general rule against such evidence, must be limited by the charge to the purpose for which the evidence is admissible. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

It is only when proof of the collateral offense is such as that the jury might use it improperly to convict, or that it might reasonably result in harm to appellant, that it is necessary to limit the effect for which such evidence was introduced. *Bonneau v. State*, 85 Cr. R. 434, 213 S. W. 272.

In trial for seriously threatening prosecuting witness after an altercation in which witness had slapped defendant, the evidence of prosecuting witness and another that defendant had told them that years before he had told a man that if he whipped defendant he would kill him, and that such man did whip defendant, and that he killed him, could not have been considered by jury, except to show that threat involved was seriously made, so that it was not necessary to limit purpose for which it was admitted. *Id.*

In prosecution for theft, when evidence of defendant's possession of other recently stolen property appears in the record, it is court's duty to limit such testimony. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

In prosecution for passing forged instrument where there was evidence of defendant having passed similar forged instrument in a saloon, defendant was not entitled to instruction that the fact that transaction took place in saloon should not be taken as evidence of guilt; this being a mere detail incident to the introduction of the evidence of other offenses. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

There was no error in failing to limit purpose for which evidence that defendant had been indicted for a felony was admitted, where a special charge on the matter was requested and given. *Shields v. State* (Cr. App.) 231 S. W. 779.

**165. Cumulative evidence.**—In a homicide prosecution, where six or seven acquaintances of defendant testified, and where the state in open court without limitation had admitted that defendant's reputation for peaceableness and veracity was good, court's refusal to hear further testimony as to defendant's reputation was not error, even though defendant had sought the benefit of the suspended sentence law. *Wagley v. State*, 87 Cr. R. 504, 224 S. W. 687.

167. **Admission of evidence dependent on preliminary proof.**—In prosecution for passing forged check, where prosecuting witness whose name appeared therein denied its authenticity, evidence that he occasionally gambled for money was properly rejected, where no effort was made to show that check in question was result of such transaction. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

In a prosecution for manslaughter, declarations of alleged conspirators in defendant's absence to prove a conspiracy to assault deceased cannot be considered, before a conspiracy is found beyond a reasonable doubt. *Holland v. State*, 84 Cr. R. 154, 206 S. W. 89.

In homicide trial, where the defense was largely predicated upon the fact that the fatal difficulty arose over certain rubber goods which were exhibited to accused at the time of the difficulty, the admission of testimony that witness had examined the contents of a pocketbook taken off deceased immediately after the difficulty, that he failed to find such articles therein, was not harmful error, since much of the testimony of accused and his witnesses was directed to showing that these articles were in deceased's possession. *Gillespie v. State*, 85 Cr. R. 4, 210 S. W. 967.

Testimony of county attorney that tracks near the scene of the killing had been made by a shoe about No. 8 or 9 in size, and that in his judgment defendant's boots made the tracks on the ground, held inadmissible in absence of something more definite in the witness' testimony showing proximity of tracks to body of victim. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

In homicide prosecution, testimony that defendant had sought to borrow a pistol from witness was admissible, without laying a predicate, to impeach defendant, being original testimony to show preparation for the homicide. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

As a predicate for introducing proof of tracks at the scene of the homicide, it is not incumbent on the state to introduce evidence to negative their presence there before the homicide. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

Unless it be admitted or placed beyond question that a party making a statement offered in evidence was at the time mentally unsound, the trial court will not undertake to stop the orderly progress of the trial court in order to determine what was his mental condition. *Lucas v. State* (Cr. App.) 225 S. W. 257.

168. — **Admissibility of preliminary proof.**—Where in a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that she left place of accused and went to home of another was admissible as a predicate for further testimony that he attempted to induce her to return. *Dollar v. State*, 86 Cr. R. 333, 216 S. W. 1087.

169. — **Sufficiency of preliminary proof.**—Where in a prosecution for procuring a female to become an inmate of a house of ill fame it was shown that female left the house and went to the home of a Mr. L., testimony of the female that she heard a conversation between accused and Mrs. L. when she was about six feet away in another room with open door was a sufficient predicate to admit the conversation. *Dollar v. State*, 86 Cr. R. 333, 216 S. W. 1087.

In a prosecution for murder of defendant's mistress, the fact that defendant telephoned the police station on the night of the killing in order to reach the officers was admissible, where defendant in his confession stated that he called the officers, and he also testified to the fact on the witness stand; he being thus sufficiently identified as the party who did the talking. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

170. **Objections to evidence.**—If defendant desired to object to introduction of testimony, it was his duty to have excepted to such action. *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665.

In a prosecution for robbery, where the court improperly permitted the state to introduce evidence of other criminal acts by defendant subsequent to the robbery charged, defendant's requested instruction not to consider any such testimony was a proper method to request the withdrawal and exclusion of the illegal testimony. *Cano v. State* (Cr. App.) 225 S. W. 1097.

In a prosecution for maiming, an answer to a question put to prosecuting witness as to whether he was called upon by the sheriff to assist him was not reviewable, though not responsive and relating to matters foreign to the issue; no objection having been made, and no instruction to the jury not to consider same having been requested. *Keith v. State* (Cr. App.) 232 S. W. 321.

An assignment objecting to the testimony of a justice of the peace as to statements made just after the shooting by the defendant, convicted of assault to murder, where the felony was committed in view of such witness, cannot be considered, in the absence of any objection made on the trial of the case, particularly where there was no question as to defendant's having shot the injured party, and such statements were probably admissible as *res gestæ*. *Holden v. State* (Cr. App.) 232 S. W. 803.

171. — **Sufficiency of objection.**—Objection to evidence that it is irrelevant, immaterial, and prejudicial is too general, unless obviously the evidence is inadmissible for any purpose. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583; *Sherman v. State*, 83 Cr. R. 205, 202 S. W. 93; *Jones v. State*, 83 Cr. R. 444, 203 S. W. 1101; *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

A general objection to the testimony of a witness, a part of which is material and competent, will not avail. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046; *Whitehead v. State*, 81 Cr. R. 278, 196 S. W. 851.

In prosecution for murder, where defendant objected to whole of deceased's statement to his wife to which she testified, part of it alone being admissible, admission of evidence was not error. *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652.

Where the trial court could not know what were the grounds of objection by defendant to a statement made by a witness, general objection thereto was properly overruled. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240.

**172. — Effect of failure to object.**—Though attorney could not bind accused by agreement for admission of testimony given on examining trial by witnesses absent at the trial, the admission of such evidence without objection did not vitiate the conviction, since counsel could have objected to such evidence. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

Court on appeal will not consider alleged errors in the admission of evidence, where no objection to the evidence was made in lower court, though appellant is represented by different attorney on appeal. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

To invoke the rule with reference to the inadmissibility of circumstantial evidence, where positive and direct evidence is attainable, it is necessary to urge it at trial, any failure to object being a waiver; but conviction cannot stand unless the evidence is sufficient to overcome the presumption of innocence and to establish necessary facts. *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

In a prosecution for murder, impeachment of defendant's witness by proof by her own cross-examination that she was unmarried and was the mother of a child was not reversible error in the absence of objection. *Curry v. State*, 85 Cr. R. 443, 213 S. W. 268.

Where a question was asked and answered without objection and there was no claim that there was any misunderstanding or reason for not objecting before the answer, court did not err in refusing to withdraw the answer. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

That one had been convicted of a crime may be proven by parol testimony, in the absence of objection that it is not the best evidence. *Corzine v. State* (Cr. App.) 226 S. W. 686.

When evidence is admitted without objection, the same or equivalent evidence from other witnesses will not be rejected. *Flores v. State* (Cr. App.) 231 S. W. 786.

One may not allow an objectionable question to be asked, and speculate as to its answer, or wait therefor, before making objection. *Stone v. State* (Cr. App.) 232 S. W. 818.

**173. — Motions to strike out.**—General exceptions for irrelevancy and immateriality of testimony, facts not being shown so as to explain how the matter came into the case, will not be sustained, where testimony is admissible for some purpose. *Wheat v. State*, 82 Cr. R. 441, 199 S. W. 620.

In a murder trial, evidence that, three months before, accused stated that he had killed two men, and if the jury convicted him he would get some of them, should have been stricken as immaterial to any issue, notwithstanding absence of proper objection to the predicate question upon which it was based. *Hardy v. State*, 86 Cr. R. 515, 217 S. W. 939, 8 A. L. R. 1357.

Motion to strike out objectionable testimony must be made upon ground presented when witness offered to testify. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

In homicide prosecution where bones, hair, clothing, etc., of deceased were not found until long after killing, court properly refused to strike out evidence of witnesses who found the bones, hair, etc., because of the fact that they were unable to state positively that same were those of deceased. *Id.*

In homicide prosecution, testimony that a bribe had been offered to draft board to secure defendant's classification, where not responsive to question asked and where harmful and irrelevant, should not have been permitted to remain in the record against protest of defendant. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In a prosecution for having in possession intoxicating liquor not for medical, etc., purposes, where the state's attorney asked a witness, "What first attracted your attention to the defendant?" and the witness answered, "I was standing at the fountain, watching for him," etc., if such answer was objectionable, the proper procedure would have required motion to strike it out as unresponsive, and objection to the question asked was not well taken. *Rainey v. State* (Cr. App.) 231 S. W. 118.

Where the state abandoned a question to which objection was made and then asked a question, which the witness answered before objection was made thereto, the objection, made after the answer without motion to exclude the evidence, presents no error on appeal. *Kluting v. State* (Cr. App.) 232 S. W. 305.

**174. Waiver or cure of error in admitting or excluding evidence.**—Defendant held not wanting in diligence to maintain rights on trial in relation to admission of testimony as to general reputation for veracity without being allowed to interrogate witnesses as to whether they were testifying from general reputation or particular knowledge. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

In trial for homicide, error in admitting defendant's statements on a preliminary investigation, in which she was charged or suspected of the crime, was not waived by fact that she took stand to explain the testimony or to lessen its consequences. *Reynolds v. State*, 82 Cr. R. 443, 199 S. W. 636.

In prosecution for burglary, the error in allowing statement made by accused before the grand jury of an incriminating nature to go to the jury was not cured by withdrawing such evidence in the court's charge. *Stephens v. State*, 83 Cr. R. 50, 201 S. W. 406.

It was improper for the state to offer a purported written statement by defendant's brother, who saw the homicide, for such statement was hearsay, as was the fact that the brother had made a statement, and the impropriety was not cured because the attorney for the prosecution brought out the facts by an inquiry as to whether defendant would consent to the introduction of the statement. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

Evidence being admitted over accused's objection, he may cross-examine in respect thereto without loss of his objection and bills of exception. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

In a prosecution for misdemeanor, the right to have illegal evidence excluded may be waived. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

Where there is testimony of witnesses to a fact without objection, objection to the

same testimony from other witnesses cannot be sustained. *Campbell v. State* (Cr. App.) 230 S. W. 695.

**Art. 784. [764] Rules of statute shall govern, when.**

**Proof of records and recorded instruments—Necessity of filing and notice.**—In a prosecution for adultery, where the identity of defendant's marriage license was proven by the clerk, but its execution was not proven by any one else, it was inadmissible in evidence because not filed among the papers for three days and notice given by the prosecution to defendant. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

**Art. 785. [765] Defendant presumed to be innocent; reasonable doubt.**

**4. Presumption of innocence.**—There are no presumptions against one accused of crime; the presumptions all being in favor of the accused. *Walden v. State* (Cr. App.) 232 S. W. 523.

**6. — Overcoming presumption.**—Conviction cannot stand, unless the evidence is sufficient to overcome the presumption of innocence and to establish necessary facts. *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

Conviction cannot stand unless the evidence is sufficient to overcome the presumption of innocence and to establish necessary facts. *Id.*

Mere suspicious circumstances will not support a conviction, as there must be evidence overcoming the presumption of innocence and excluding every other reasonable hypothesis except guilt. *Tolbert v. State*, 86 Cr. R. 459, 217 S. W. 153.

The accused in a criminal case is presumed innocent, and, to overcome such presumption, there must be evidence proving an offense has been committed. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

Proof that defendant failed to appear in accord with a bail bond or recognizance is admissible against the accused, and it will be presumed that a jury understood that bail is simply a means to assure accused's presence and creates no presumption of guilt. *Cook v. State* (Cr. App.) 228 S. W. 213.

In a prosecution for theft, circumstances held not of sufficient cogency to overcome presumption of innocence. *Lemon v. State* (Cr. App.) 231 S. W. 288.

**7. — Operation and effect of presumption.**—The presumption, arising from state's absence of effort to show that stolen goods found in house occupied by defendant and others were found in the part occupied by defendant or were in his exclusive possession, is in consonance with the presumption of innocence, and not against it. *Russell v. State*, 86 Cr. R. 609, 218 S. W. 1049.

**9. — Necessity of instructions.**—In view of presumption of innocence, evidence establishing facts which, if true, would mitigate or excuse assault to murder, required an instruction on the law applicable thereto, regardless of the source from which the evidence came, and notwithstanding it presented a defensive theory out of harmony with that advanced by defendant. *Knight v. State*, 84 Cr. R. 395, 207 S. W. 315.

Charge on presumption of innocence is necessary in every case. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

**11. Reasonable doubt in general.**—In a prosecution for manslaughter, declarations of alleged conspirators in defendant's absence to prove a conspiracy to assault deceased cannot be considered, before a conspiracy is found beyond a reasonable doubt. *Holland v. State*, 84 Cr. R. 154, 206 S. W. 89.

When conviction depends upon circumstantial evidence alone, it is essential to prove each necessary fact beyond a reasonable doubt before it can become the basis of any inference adverse to accused, although each fact thus proved need not, standing alone, be of sufficient weight to establish guilt. *Parish v. State*, 85 Cr. R. 75, 209 S. W. 678.

In prosecution for receiving stolen sheep, in determining whether facts excluded every reasonable hypothesis except defendant's guilty knowledge of theft, defendant was entitled to have jury afforded privilege of considering evidence of his advanced age and infirmities due to sickness. *Wilson v. State*, 85 Cr. R. 94, 210 S. W. 542.

The state must make out its case by competent evidence beyond a reasonable doubt. *Berrian v. State*, 85 Cr. R. 367, 212 S. W. 509.

The case being one of circumstantial evidence, the evidence must exclude every reasonable hypothesis, except that of guilt of accused. *Dowdell v. State*, 85 Cr. R. 472, 213 S. W. 649.

In a criminal prosecution, where there is a doubt as to the testimony, the defendant is entitled to the benefit thereof. *Jones v. State*, 86 Cr. R. 371, 216 S. W. 884.

Conspiracy, as basis for admission of acts and declarations of co-conspirators, must be proved beyond a reasonable doubt. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

**12. — Particular offenses.**—Penetration is an element of rape and must be proved beyond a reasonable doubt, though penetration made need not be of any particular depth. *Galaviz v. State*, 82 Cr. R. 377, 198 S. W. 946.

Evidence on prosecution for carrying a pistol, claimed by defendant to have been handed to him by a person in the house, held insufficient to show guilt beyond a reasonable doubt. *Bogus v. State*, 83 Cr. R. 356, 203 S. W. 597.

In prosecution for carnal knowledge of female under 15, in violation of Pen. Code, art. 1063, testimony of doctor, who examined prosecutrix that he would take her to be less than 15, her relatives being available as witnesses, but not testifying to her age, was insufficient to prove case beyond reasonable doubt. *Nolan v. State*, 84 Cr. R. 150, 206 S. W. 92.

In prosecution for burglary of crib to steal cotton seed, burden was on state to prove, beyond reasonable doubt, identity of seed found in oil mill, placed there by defendant, with seed stolen from crib. *Williams v. State*, 84 Cr. R. 461, 208 S. W. 522.

To establish the offense of receiving stolen property, the evidence must show beyond



a reasonable doubt that the property was stolen, and that thereafter defendant received it from the person alleged in the indictment with fraudulent intent, knowing it to have been stolen. *Grant v. State*, 87 Cr. R. 19, 218 S. W. 1062.

In a prosecution for statutory rape, evidence held to show defendant's guilt beyond a reasonable doubt, so as not to warrant setting aside the verdict and remanding for new trial. *Code Cr. Proc.* 1911, art. 939. *Cook v. State*, 88 Cr. R. 659, 228 S. W. 213.

Where manslaughter and self-defense are issues, the jury must find three things beyond a reasonable doubt before they are warranted in convicting for murder: First, that accused acted with malice aforethought; second, that the killing did not occur under circumstances reducing the offense to manslaughter; and, third, that accused was not acting in self-defense, and such matters may be embraced in the clause of the charge submitting murder. *Lewis v. State* (Cr. App.) 231 S. W. 113.

**13. — Grade of offense.**—Where the facts raise the issues, the accused is entitled to the benefit of the doubt on the facts as between the degrees of homicide and self-defense. *Wood v. State*, 85 Cr. R. 268, 211 S. W. 782.

In the giving of instructions all doubts as to degrees of homicide suggested by the testimony are resolved in favor of accused. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

**14. — Venue.**—Venue in a criminal action may be shown by circumstantial evidence, and need not be proven beyond a reasonable doubt. *Allen v. State*, 82 Cr. R. 416, 199 S. W. 633.

Evidence with regard to venue of crime is not required to exclude reasonable doubt. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

**15. — Necessity of instructions in general.**—See *McClain v. State* (Cr. App.) 229 S. W. 550.

Where state puts in evidence defendant's exculpatory statements, it must disprove them to jury's satisfaction, and jury must be so informed. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

In prosecution for giving liquor to minor, in view of evidence it was error to refuse to instruct that state must prove beyond reasonable doubt that defendant knew person obtaining liquor was a minor. *Earnest v. State*, 83 Cr. R. 41, 201 S. W. 175.

Charge authorizing conviction on accomplice testimony if it was believed and was corroborated by testimony tending to connect defendant with the offense is defective; it should also state that it was necessary that accomplice testimony, in connection with the other evidence, should show defendant's guilt beyond a reasonable doubt. *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653.

In a prosecution for homicide, where the evidence was wholly circumstantial, and there was substantial evidence of alibi, and also to effect that others might well have killed deceased, the failure of the court to present to the jury such questions of defense, as well as its failure to instruct that, if the jury had a reasonable doubt on the evidence as to whether any other person than defendant killed deceased, they should acquit, was error. *James v. State*, 86 Cr. R. 107, 215 S. W. 459.

In a prosecution for murder, charge that, if jury found from the evidence that defendant unlawfully and with malice aforethought killed deceased, to find him guilty of murder, held erroneous, as not telling the jury that they must so find from the evidence beyond a reasonable doubt. *Lewis v. State* (Cr. App.) 231 S. W. 113.

**16. — Sufficiency of instructions in general.**—A request to instruct that, if jury have a reasonable doubt as to whether the defendant killed the deceased in self-defense, they should find him not guilty, was properly refused. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

In a prosecution for murder, an instruction that each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt by facts, that is, the necessary facts to the conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in fact a reasonable and moral certainty that accused and none other committed the offense, held erroneous as failing to charge that the facts must show defendant's guilt and be inconsistent with any other theory than that of guilt. *Reynolds v. State*, 86 Cr. R. 453, 217 S. W. 151.

**18. — Shifting burden of proof.**—In a prosecution for manslaughter, instruction that if defendant struck and killed deceased, but without intention to kill, and defendant had not provoked the difficulty, or by his own wrongful acts had not produced the necessity of taking decedent's life, etc., then he was not guilty of a higher offense than that of an aggravated assault, held erroneous as shifting the burden of proof. *Mason v. State* (Cr. App.) 228 S. W. 952.

**19. — Sufficiency of application of law to whole case.**—Error of charge authorizing conviction on accomplice testimony if it was believed and was corroborated by testimony tending to connect defendant with the offense, is not available, another charge correcting its defect of not also stating that it was necessary that accomplice testimony in connection with the other evidence should show defendant's guilt beyond a reasonable doubt, being given at defendant's request. *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653.

**21. Burden of proof.**—In prosecution for slander by imputing want of chastity to injured party, burden was on state to prove defendant's guilt beyond reasonable doubt. *Kelly v. State*, 81 Cr. R. 408, 195 S. W. 853.

In prosecution for slander by imputing want of chastity to injured party by use of word "whore," burden held on state to prove innuendo. *Id.*

In prosecution for attempt to induce another to commit perjury, where indictment alleged all testimony in civil case given by other was true, etc., it was incumbent that state should prove truth of all testimony set out in indictment. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

Where state puts in evidence defendant's exculpatory statements, it must disprove them to jury's satisfaction, and jury must be so informed. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

Where the state puts in exculpatory statements, they will be taken as true until the state discharges the burden of proving them untrue. (Per Davidson, P. J.) *Wool v. State*, 83 Cr. R. 113, 201 S. W. 1002.

Where one accused of receiving stolen goods set up that he bought the goods without knowledge or notice of the theft, the state had the burden of showing that the theory of purchase was false. (Per Davidson, P. J.) *Id.*

Where stolen goods are found in possession of accused, who explains that he has gotten them from another, state has burden of disproving truth of his explanation. *Solomon v. State*, 83 Cr. R. 319, 203 S. W. 50.

In a murder prosecution, where the state, over defendant's objection, introduced evidence that the cause of the killing was insulting conduct towards defendant's wife, thus assuming the burden of reducing the offense to manslaughter, a judgment of conviction should be reversed. (Per Davidson, P. J.) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

In prosecution for unlawfully practicing medicine, it devolves on state to prove defendant did not have license or diploma, with verification, and did not have it registered. *Reum v. State*, 84 Cr. R. 225, 206 S. W. 523.

Under an indictment charging that an abortion was procured by administering medicine calculated to produce an abortion, and did then and there destroy the life of the fetus in the womb, the burden was on the state to show beyond a reasonable doubt that the child was alive at the time of the administration of the medicine, and that the medicine was administered for the purpose of destroying the fetus while in the womb. *Tonnahill v. State*, 84 Cr. R. 517, 208 S. W. 516.

In a homicide case, held, that the state had not sufficiently met the burden imposed upon it to establish a case of murder in the first degree, so as to warrant the court in refusing the accused bail. *Ex parte Johnson*, 84 Cr. R. 535, 208 S. W. 518.

Since the burden is upon the state to show criminality, an instruction on justification from insulting words or conduct to a female relative was erroneous, where it placed the burden upon defendant to establish that at the time of the killing accused's mind was incapable of cool reflection. *Wood v. State*, 85 Cr. R. 268, 211 S. W. 782.

In murder prosecution, where defendant admitted killing deceased, but claimed to have done so in self-defense, burden was on state to prove an unlawful homicide, to overcome presumption of innocence. *Dugan v. State*, 86 Cr. R. 130, 216 S. W. 161.

Where witness for the state, being examined by the state, testified that five minutes after the shooting deceased told him that a certain person other than accused had shot him, the burden devolved upon the state to disprove the statement. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

Where defendant's explanation of possession of stolen automobile contained no contradiction or weaknesses which of themselves would destroy it, the state had the burden of proving that the explanation was unreasonable or untrue. *Knott v. State*, 87 Cr. R. 117, 219 S. W. 825.

Under indictment charging rape on woman mentally unsound, it was requisite for state to show: First, the act; and, second, mental unsoundness of the woman. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

In prosecution for fraudulently receiving stolen property, where the state produced testimony as to statements of defendant showing that he bought the automobile from a certain person, that he paid such person for it, and received a bill of sale therefor, it was incumbent on the state to prove that defendant's theory that he was a good-faith purchaser from such person was false. *Harper v. State* (Cr. App.) 227 S. W. 190.

The burden is on the state, in a prosecution for homicide to prove the facts which show the homicide was unlawful, and which bring it within the higher, rather than the lower, grade of offense included in the indictment. *Moore v. State* (Cr. App.) 228 S. W. 218.

In prosecution of father for aggravated assault upon his child, where the facts do not affirmatively make it appear beyond question that the assault was of such character as to remove it from the possible domain of punishment administered for corrective purposes, the state has the burden of proving that the violence inflicted was not for the purposes of restraint or correction. *Walden v. State* (Cr. App.) 232 S. W. 523.

**25. — Instructions.**—In a prosecution for carrying concealed weapons, an instruction, "If you believe from the evidence beyond a reasonable doubt that the defendant had on his person a pistol, as charged, but that he was on his own premises and not in the street, then the defendant would be guilty of no offense," was erroneous, in that it put the burden on defendant to prove he was on his own premises. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

In prosecution for slander of a female, it was proper to instruct that if defendant relies on unchastity in female as a defense he has the burden of proving it by a preponderance of the evidence. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

Instruction that, if the jury believe defendant was not at the place at the time, or have a reasonable doubt of the fact, they will acquit, reverses the rule as to burden of proof. *Claunch v. State*, 82 Cr. R. 114, 198 S. W. 307.

In prosecution for vagrancy, charge to acquit if jury believes accused not guilty on either count is objectionable, as placing on accused burden of proving his innocence. *Johnson v. State*, 83 Cr. R. 49, 201 S. W. 177.

In prosecution for pursuing business of selling intoxicants in local option territory, instruction held erroneous in that it put the burden of proof on defendant. (Per Gaines, Special Judge.) *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

Instruction that jury should consider whether defendant was guilty of manslaughter if it entertained a reasonable doubt of his guilt of murder, and instruction to find him guilty of manslaughter if jury believed from the evidence beyond reasonable doubt

that defendant had killed deceased in sudden passion, held, when considered together, not to shift burden of proof to defendant, and to make plain that doubt as to whether defendant was guilty of manslaughter or murder should be resolved in favor of defendant. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In a prosecution for assault to murder, where charge on self-defense did not plainly show that burden of proof was upon state to establish facts constituting unlawful assault beyond reasonable doubt, it was error to refuse to correct charge. *Castle v. State*, 84 Cr. R. 593, 209 S. W. 416.

In murder trial, where issue of self-defense was made prominent by the facts, instruction on insulting words or conduct to female relative as justification held reversible error, as placing burden upon accused to prove justification to reduce the degree from murder to manslaughter, and then in substance, instructing that if this were not done accused would be guilty of murder, thus excluding the issue of self-defense. *Wood v. State*, 85 Cr. R. 268, 211 S. W. 782.

### Art. 786. [766] Jury are the judges of facts.

Cited in dissenting opinion, *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207; *McGlothlin v. State*, 82 Cr. R. 374, 198 S. W. 784, L. R. A. 1918C, 530; *Galaviz v. State*, 82 Cr. R. 377, 198 S. W. 946.

#### 2. Jury as judges of the facts in general.—See art. 734 and notes.

Under this article, held error to refuse to submit the question whether defendant had not abandoned the intention to kill deceased before the act was done. *Phillips v. State*, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

Granting the declarations of deceased and other surrounding circumstances are sufficient to show defendant's presence when deceased drank the whisky alleged to have contained poison and caused death, defendant's guilty knowledge would be a jury question. *Baugus v. State*, 87 Cr. R. 551, 223 S. W. 224.

In prosecution for placing poison in water with intent to injure and kill another, the question of identity of the contents of bottle, analyzed by witness, and found to be strychnine, as the powder thrown in the water and placed in bottle for purposes of being analyzed held for jury. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

In a homicide prosecution, whether defendant had proved an alibi held for the jury. *Wilson v. State* (Cr. App.) 226 S. W. 687.

In a prosecution for cattle theft, where accused lived in Kent county, held that the court was justified in the submission of the issue of theft in said county. *McClain v. State* (Cr. App.) 229 S. W. 550.

3. Weight of evidence and credibility of witnesses.—The credibility of witnesses and the weight to be given their testimony was solely for the jury. *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

In a rape prosecution, where it becomes a question of veracity between prosecutrix and defendant, the questions of the weight of testimony and the credibility of witnesses are for the jury. *Jackson v. State*, 88 Cr. R. 225, 224 S. W. 1110.

4. — Weight of evidence.—The weight of opinion evidence is for the jury. *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

It is the province of the jury to weigh the evidence and decide the issues of fact under appropriate instructions. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

5. — Credibility of witnesses.—The credibility of witnesses is a question for the jury. *Martinez v. State*, 84 Cr. R. 261, 207 S. W. 930; *Ricks v. State*, 83 Cr. R. 440, 203 S. W. 901, *Burow v. State*, 85 Cr. R. 133, 210 S. W. 805.

In perjury prosecution, where there was no proof of immunity agreement with a state's witness, but merely evidence from which such understanding could be inferred his credibility was for the jury. *Timmins v. State*, 82 Cr. R. 263, 199 S. W. 1106.

Effect of impeaching evidence is for the jury. *Hays v. State*, 83 Cr. R. 398, 204 S. W. 229.

State's witness being competent, and having testified to a state of facts which, if true, established defendant's guilt, credibility of the witness, in the light of impeaching testimony or contradictory facts, was particularly within the province of the jury. *Jacobs v. State*, 84 Cr. R. 564, 208 S. W. 917.

In homicide prosecution, the truth or falsity of defendant's testimony, raising issue of whether he acted under immediate influence of sudden passion, is a question for the jury, under appropriate instruction, and not for the trial court. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

The court should not, in sustaining objection to evidence that sister-in-law of a witness whose character was sought to be impugned had given birth to three illegitimate children, have remarked that evidence was not admissible if woman had 700, meaning 700 illegitimate children; the statutes explicitly prohibiting the court from indicating his view of the evidence, and making the jury the exclusive judge of facts, weight of testimony, and credibility of witnesses. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

Corroboration of prosecutrix is not required by law to support a conviction of statutory rape, and her credibility, like that of other witnesses, is a question for the jury in view of this article. *Cook v. State* (Cr. App.) 228 S. W. 213.

The jury are the judges of the credibility of the witnesses as well as the facts proven. *Cone v. State* (Cr. App.) 232 S. W. 816.

7. — Conflicting evidence.—Conflicts in the evidence are for the jury. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698; *Mueller v. State*, 85 Cr. R. 346, 215 S. W. 93.

15. Review of questions of fact.—It is not the province of the Court of Criminal Appeals to decide a question of fact, or to solve a doubt on the facts against defendant. *Haddad v. State*, 86 Cr. R. 592, 218 S. W. 506.

16. Conclusiveness of verdict—Verdict supported by evidence.—In view of article 566, relating to pleas of guilty in felony cases and giving the jury discretion in assess-

ing punishment, where the evidence introduced was sufficient to enable the jury to determine that the defendant on his plea of guilty should receive the lowest punishment provided by law, the case may not be reversed for lack of sufficient evidence to show guilt. *Terretto v. State*, 86 Cr. R. 188, 215 S. W. 329.

Finding of the jury on questions of fact as to whether defendant, accused of receiving stolen automobile casings got them to put on the car of his cousin, or whether he shared in the money received from the cousin with which the casings were paid for, must be approved unless there is error in the record. *Gunter v. State*, 87 Cr. R. 74, 219 S. W. 462.

That the punishment may be more than appellate courts would have inflicted under the statement of facts would never be a reason for setting aside a verdict. *Price v. State*, 87 Cr. R. 163, 220 S. W. 89.

In prosecution for assault with intent to murder, where every issue possible in the case, assault to murder, aggravated murder, simple assault, and self-defense, had been submitted to the jury, held, court will not disturb the verdict of aggravated assault unless the record be devoid of evidence from which jurors, might have fairly reached their conclusion. *Id.*

Defendant having pleaded guilty, and lowest punishment having been assessed by jury, sufficiency of evidence to sustain conviction is not in question on defendant's appeal. *Baldauf v. State*, 87 Cr. R. 228, 220 S. W. 550.

While the Court of Criminal Appeals, under article 939, has the right to reverse conviction on account of insufficiency of the evidence, and it becomes its duty to do so if the guilt of accused is not made to appear with reasonable certainty, there is no fixed rule which will in all cases furnish a certain standard, and each case must in a measure be tested by its own facts. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a prosecution for rape of a daughter under 18 years of age, held, that it was the duty of the trial court to submit the case to the jury, and the duty of the appellate court, so far as the question of sufficiency of evidence was concerned, to uphold the verdict. *Higgins v. State*, 87 Cr. R. 424, 222 S. W. 241.

The appellate court will not disturb a conviction for theft of property over the value of \$50, because the jury believed the state's evidence as to the value of the property to the exclusion of defendant's testimony, where the state's evidence would justify the conclusion of the jury. *Alarcan v. State*, 87 Cr. R. 458, 222 S. W. 982.

Unless it affirmatively appears that there was no evidence supporting the jury's finding as to the deadly character of the weapon used, or that such finding is against the weight of the testimony, it will be upheld. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

The sufficiency of circumstantial evidence of defendant's guilt of hog theft in the first instance was a question for the jury, and the duty of the Court of Criminal Appeals in its reviewing capacity is to determine whether there is any evidence in the record on which conviction may stand. *Bradford v. State*, §§ Cr. R. 122, 224 S. W. 901.

Where the question of defendant's guilt of murder was purely one of fact left to the jury under appropriate instructions by the trial court, their verdict of guilty is conclusive, in the absence of error in the record. *Prestidge v. State* (Cr. App.) 228 S. W. 217.

Where the truth and sufficiency of the reasons given by defendant for declining to dip his cattle pursuant to notice from the Live Stock Sanitary Commission were passed on by the jury and determined against him, the jury's decision held binding on the Court of Criminal Appeals under the evidence. *Walker v. State* (Cr. App.) 229 S. W. 513; *Lee v. Same* (Cr. App.) 229 S. W. 515.

A verdict is not reviewable where there is evidence to support it. *Poye v. State*, (Cr. App.) 230 S. W. 161.

That the jury might have found facts upon which to predicate a verdict finding defendant guilty of theft is not conclusive that a verdict finding him guilty of receiving and concealing the stolen property is unsupported by the evidence so as to warrant reversal. *Fallon v. State* (Cr. App.) 230 S. W. 170.

On appeal from conviction of burglary, where there was evidence upon which the jury could base their verdict, the judgment of the Court of Criminal Appeals will not be substituted for that of the jury. *Smith v. State* (Cr. App.) 230 S. W. 410.

Court of Criminal Appeals will not reverse a case because of insufficiency of testimony, unless it appears that the judgment is without support, or is so manifestly against the great weight of the testimony as to make probable the fact of a verdict resulting from prejudice. *Vogel v. State* (Cr. App.) 231 S. W. 1096.

17. — **Weight of evidence and credibility of witnesses.**—Where the testimony of many witnesses that defendant is insane is not controverted, a conviction cannot stand. *Gardner v. State*, 85 Cr. R. 103, 210 S. W. 694; *Kiernan v. State*, 84 Cr. R. 500, 208 S. W. 518.

The court on appeal will not allow a verdict of guilty to stand, where it is clearly against the overwhelming weight and preponderance of the testimony. *Kiernan v. State*, 84 Cr. R. 500, 208 S. W. 518.

Where there is no substantial evidence supporting conviction, court on appeal will not hesitate to so decide. *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749.

In homicide prosecution, the truth or falsity of defendant's testimony raising issue of whether he acted under immediate influence of sudden passion is not a question for the appellate court, but was for the jury. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

The Court of Criminal Appeals will not reverse a judgment of conviction unless there is such manifest lack of evidence as to make it apparent that the verdict was the result of prejudice, or that such verdict is against the weight of the evidence. *Smith v. State*, 85 Cr. R. 355, 212 S. W. 660.

Jurors are primarily the judges of the credibility of the witnesses and the weight to be given their testimony, and, unless there appears a manifest abuse of discretion, verdict should not be disturbed. *Woodriddle v. State*, 86 Cr. R. 348, 217 S. W. 143.

The Court of Criminal Appeals hesitates to interfere with the verdict in any case, but will do so when there is no sufficient evidence to sustain it. *Hays v. State*, 86 Cr. R. 469, 217 S. W. 938.

Although accused had a right to carry a pistol from his store to his home, where it is an issue whether it was lawfully carried under such circumstances, it becomes a matter for the decision of the jury, and if the facts tend to impeach defendant's honesty, conviction will not be disturbed on appeal, where the jury have resolved the facts against defendant. *Moore v. State*, 86 Cr. R. 502, 217 S. W. 1036.

On appeal in a criminal case, an argument that the conviction was had on perjured testimony cannot be considered, where enough facts were in evidence to justify the belief of the jury in the guilt of accused, and to support their finding; the credibility of the witnesses being ordinarily for the jury. *Washington v. State*, 86 Cr. R. 652, 218 S. W. 1043.

The question of the sufficiency of the state's testimony to corroborate an accomplice being primarily for the jury, and they having decided such matter against him, the verdict will not be disturbed on appeal. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

A verdict of guilty of murder held sustained by evidence and, the weight thereof being primarily for the jury, the appellate court will not disturb the verdict. *Watson v. State*, 87 Cr. R. 189, 220 S. W. 329.

Though the verdict must not be lightly annulled in any case it is the duty of the Court of Criminal Appeals, under article 939, to set it aside and order another trial when the evidence, viewed in its strongest light from the standpoint of the state, fails to make guilt reasonably certain. *Jolly v. State*, 87 Cr. R. 288, 221 S. W. 279.

On appeal in a murder trial from a verdict based on circumstantial evidence alone, it will not be held that the evidence is insufficient because it is in part conflicting and in part the testimony of witness whose credibility has been assailed; the jury being, under this article, the judges of facts proved, weight of testimony, and credibility of witnesses. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

**18. — Conflicting evidence.**—Court of Criminal Appeals will not reverse judgment where the evidence is merely conflicting. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959; *Fox v. State*, 83 Cr. R. 76, 201 S. W. 171; *Vann v. State*, 84 Cr. R. 97, 206 S. W. 80; *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749; *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560; *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698; *Young v. State*, 86 Cr. R. 621, 218 S. W. 754; *Perea v. State* (Cr. App.) 227 S. W. 305; *Hill v. State* (Cr. App.) 230 S. W. 1005.

Where verdict assessing death penalty for murder was supported by the evidence, it would not be disturbed on appeal, although such evidence was sharply conflicting. *Barrett v. State*, 81 Cr. R. 496, 196 S. W. 824.

Question of defendant's guilt, testimony being conflicting, was for jury, and not for Court of Criminal Appeals. *McHam v. State*, 81 Cr. R. 623, 197 S. W. 873.

Where, on a trial for violating the local option law, the state proved that defendant sold alcohol to a certain person, while defendant denied it, the jury's finding in favor of the state's evidence would not be disturbed. *Daniel v. State*, 82 Cr. R. 56, 198 S. W. 290.

In prosecution for murder, where the testimony conflicted, and that as to self-defense might have warranted acquittal, the jury's verdict convicting accused could not be set aside. *Watson v. State*, 83 Cr. R. 131, 201 S. W. 988.

There being evidence supporting theory of murder, court on appeal is not authorized to determine its truth, though evidence as to incidents of tragedy is conflicting and part of it tends to show manslaughter. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

In prosecution for selling intoxicating liquor in violation of law, finding based on conflicting testimony will not be reviewed. *Goss v. State*, 83 Cr. R. 349, 202 S. W. 556.

In a prosecution under Pen. Code art. 706, for sale of milk adulterated by adding water, a conviction on conflicting evidence is binding on appeal. *Quaternick v. State*, 84 Cr. R. 40, 204 S. W. 328.

The denial by defendant, charged with violation of local option law, of testimony of state's witness that he bought whisky from defendant and paid him \$2.75 for it, formed issue of fact for jury's solution, which Court of Criminal Appeals is not justified in reversing. *Ramos v. State*, 83 Cr. R. 479, 204 S. W. 335.

The court on appeal will not attempt to decide cases by what might have been their judgment had they occupied the jury box, and, where the evidence is merely conflicting, the finding of the jury, made the exclusive judges of the credibility of witnesses and the weight of testimony, will not be disturbed. *Scoggins v. State*, 84 Cr. R. 519, 208 S. W. 930.

In homicide prosecution defended on ground of insanity, evidence held sufficiently conflicting to justify court of criminal appeals in refusing to disturb verdict of guilty. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

Where the evidence connecting defendant with the murder was wholly circumstantial, and on several points directly in conflict, the credibility of witnesses and weight of their testimony was exclusively for the jury, and in determining whether the evidence sustains the conviction, it is necessary to look only to the incriminating testimony and the reasonable inferences therefrom. (Per Prendergast, J.) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

The case being one of circumstantial evidence, and the jury having found against defendant, the court on appeal will not set aside the verdict based on conflicting evidence, though alibi was strongly proven. *Gordon v. State*, 86 Cr. R. 262, 216 S. W. 184.

In reviewing sufficiency of evidence to support the verdict, it will be assumed all controverted questions were decided for the state; and, if evidence viewed on that

assumption is sufficient, verdict will not be annulled for want of evidence. *Reese v. State*, 87 Cr. R. 245, 220 S. W. 1096.

The Court of Criminal Appeals will not interfere with the verdict when the evidence is conflicting, and will only act in such matters when the record is so bare of supporting facts as to lead it to conclude that the result must have come through some passion or prejudice, or when the verdict is such that a reasonable mind is unable to assent to the conclusion reached by the jury. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

Where there is sufficient evidence to identify defendant as the party committing the assault, conviction cannot be disturbed because of conflicting testimony tending to show he was at another place at the time. *Mayes v. State*, 87 Cr. R. 512, 222 S. W. 571.

21. — **Approval of verdict by trial court.**—When jury, under a proper charge, have convicted, and verdict has been approved by trial judge, and there is sufficient evidence in record, if believed, to sustain it, it will not be disturbed on facts, unless clearly wrong. *Lee v. State*, 83 Cr. R. 532, 204 S. W. 110.

In prosecution for assault on rape, where conflicting theories as to whether defendant's advances towards prosecutrix were objectionable to her have been solved against defendant by the jury, and sanctioned by the trial judge, that solution is binding on appellate court. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

Verdict of guilty approved by trial court will not, unless clearly wrong, be disturbed on appeal, where there is sufficient evidence, if believed, to sustain it; the trial court having given a full, apt, and complete charge. *Barlow v. State*, 84 Cr. R. 173, 206 S. W. 198.

Where court submitted case in charge fully protecting accused's rights, and fairly submitting all issues favorable to him, and jury rejected accused's theory upon sufficient ground, and trial court approved finding, conviction will be affirmed, where nothing is found authorizing court to disturb verdict. *James v. State*, 84 Cr. R. 244, 206 S. W. 515.

Where the evidence of larceny is circumstantial and conflicting, a verdict approved by the trial court is binding upon the appellate court. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Issue as to sale of whisky in local option territory having been submitted to the jury in a charge not complained of, their finding upon conflicting evidence, approved by the trial court, will not be disturbed, in view of article 734, and this article. *Jacobs v. State*, 84 Cr. R. 564, 208 S. W. 917.

A verdict of guilty on conflicting evidence, implying a decision that witnesses on whose testimony the state relied to connect defendant with the larceny charged were not accomplices, is binding on the Court of Criminal Appeals; it having been approved by the trial court. *Pitts v. State*, 85 Cr. R. 3, 210 S. W. 198.

Where there is a mere conflict of evidence, the appellate court will decline to interfere and will approve the action of the trial court in overruling a motion for new trial on the grounds of insufficiency of the evidence. *Hughes v. State*, 86 Cr. R. 611, 218 S. W. 1048.

Where, though his son did the actual killing, defendant, who was present, was indicted for and charged with murder as a principal, held in view of the fact that the only witness who testified that the two acted in concert was before the jury, and that the trial court denied new trial, conviction will not be set aside on the theory his testimony was unbelievable because such witness was ignorant and contradicted himself on cross-examination. *Henderson v. State* (Cr. App.) 229 S. W. 535.

### Art. 787. [767] Judge shall not discuss evidence offered, etc.

1. **Remarks of judge in general.**—In prosecution for unlawfully carrying pistol, where accused, who took stand on his cross-examination, stated to examiner that he wanted to be plainly understood and did not wish further examination like that, before, admonition by court to answer questions without other statement was not error. *Pecht v. State*, 82 Cr. R. 136, 199 S. W. 290.

The trial judge should maintain no partiality and should avoid impressing jury with any of his views. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

Remarks of the judge to the jury before the trial of one accused of robbery that they should pay close attention to the testimony, and thereby avoid controversy among themselves and reach a verdict more speedily and satisfactorily, were not reversible error, where the court on objection instructed the jury not to consider his statement as evidence, or as tending to show guilt or innocence, and the remarks were not calculated to prejudice the rights of the accused. *Patterson v. State* (Cr. App.) 231 S. W. 763.

The court's general instructions to the jury upon a voir dire, with regard to the suspended sentence law, which informed the venire from which the jury was to be drawn that the law had been badly abused, etc., was improper. *Eason v. State* (Cr. App.) 232 S. W. 300.

3. **Comments on evidence.**—It was error under this article, for court, in overruling objection to evidence of prosecuting attorney, to state, "It will do so little harm that I believe I will admit the testimony," though the evidence was incompetent. *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

Comments of court on matters material and admissible, where same are upon the weight of the evidence and in the presence of the jury, are error. *Id.*

In prosecution for receiving stolen sheep, court's remarks, in admitting evidence of defendant's advanced age and infirmities, that jury might take such matters into consideration in fixing penalty, were improper, under this article, as a comment on the evidence prejudicial to defendant. *Wilson v. State*, 85 Cr. R. 94, 210 S. W. 542.

The court should not, in sustaining objection to evidence that sister-in-law of a witness whose character was sought to be impugned had given birth to three illegitimate children, have remarked that evidence was not admissible if woman had 700, meaning

700 illegitimate children; the statutes explicitly prohibiting the court from indicating his view of the evidence, and making the jury the exclusive judge of facts, weight of testimony, and credibility of witnesses. *Burkhalter v. State*, 85 Cr. R. 282, 212 S. W. 163.

In a prosecution for simple assault through having induced another to attack the assaulted party by agreeing to pay any fine, remark of the court that a witness stated that what he had said in the grand jury room was true, which ought to be enough to satisfy anybody, held erroneous as on the weight of the testimony. *Lewis v. State*, 86 Cr. R. 6, 215 S. W. 303.

Where accused sought a suspended sentence and introduced a witness who testified that accused had never been convicted of a felony, a statement by the court in cross-examining the witness that witness did not know what he was testifying, with a further statement that he would leave the testimony in the record but he thought there was a better way to prove the fact, was erroneous as a comment upon the testimony contrary to this article. *Rogers v. State* (Cr. App.) 225 S. W. 57.

Where the court permitted evidence to be given, stating he regarded it as inadmissible, no proper connection having then been shown, and because of subsequent showing it became admissible, the court's comment was not one on the weight of evidence, forbidden by this article. *Flores v. State* (Cr. App.) 227 S. W. 320.

In a prosecution for wife murder, where a girl witness for the state, 11 years old, the first to be placed on the stand, showed agitation, and the court called the child to him and told her not to be excited or scared, but to take her time and to tell things as they occurred, such action of the court was not erroneous as constituting a comment or expression on the credibility of the witness and the weight to be given her testimony. *Pounds v. State* (Cr. App.) 230 S. W. 683.

**7. Proceedings against witness or counsel.**—In prosecution for murder, it was error for the court, on conclusion of testimony of defendant's witness, to call the deputy sheriff, who then took the witness to jail. *Hughes v. State*, 81 Cr. R. 526, 197 S. W. 215.

Arrest of witness during trial on charge of perjury, not made under direction of judge nor in presence or to knowledge of jury held not within rule requiring a reversal where court's arrest of witness indicates his view of the testimony. *Steel v. State*, 82 Cr. R. 483, 200 S. W. 381.

In prosecution for murder, it was not reversible error for court to instruct sheriff to tell witness who was under rule, to report to court before leaving courthouse, it not appearing that such instruction came to jury's knowledge. *Borrer v. State*, 83 Cr. R. 198, 204 S. W. 1003.

Where the trial judge mainly in the absence of the jury reminded prosecutrix in a rape case, a girl under 15 years of age, that he had power to inflict the death penalty and had just sent a woman to the penitentiary, and committed prosecutrix to custody overnight, and subsequently threatened to send her to jail unless she repeated former testimony which she said was false and induced by coercion and which she finally repeated, judgment of conviction must be reversed. *Venable v. State*, 84 Cr. R. 354, 207 S. W. 520.

In a homicide case, the remark by the court to an important witness, who said he could not remember whether he gave certain testimony before the grand jury or not: "I dislike very much to use any harsh measures with you in this matter. You are a young boy, and I do not like to be severe with you, but it occurs to me you can answer that question"—was error as being an expression of opinion by the court under this article. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

**8. Prejudice from remarks.**—Court's statement, after a witness had testified to accused's statement that he would have excluded it, but that the question was already answered, was not reversible error, under this article, prohibiting the trial judge commenting on the weight of the evidence, where no prejudice is shown. *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595.

Whether any comment by the trial court upon the weight of testimony or credibility of witnesses in violation of this article, constitutes an infringement of the rights of accused so as to require reversal, will be determined, not by the language used or the fact that the comment is made, but by the consequences which probably result therefrom. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

In prosecution for bigamy, involving issue of whether defendant was married to alleged first wife, where prosecuting attorney asked defendant if he had not been warned by certain neighbor that his course of conduct would likely get him into the penitentiary, action of court in stating, on objection to such question, that it occurred to the court that the proposition involved the giving of advice by a third party by which the appellant was not bound, held not a comment on weight of evidence or in any way harmful to defendant. *Ahlberg v. State* (Cr. App.) 225 S. W. 253.

## 2. OF PERSONS WHO MAY TESTIFY

### Art. 788. [768] Persons incompetent to testify.

See *Amaya v. State*, 87 Cr. R. 160, 220 S. W. 98.

#### IN GENERAL

**1. Disqualification in general.**—Because prosecutrix in a statutory rape case claimed that certain absent witnesses had also had carnal intercourse with her would be no reason why the jury should not hear the witnesses speak upon the question of her age. *Young v. State* (Cr. App.) 230 S. W. 414.

#### SUBD. 1

**6. Incompetency of insane person in general.**—Under this article, insane woman upon whom a rape was charged could not testify in prosecution; law rendering her incompetent as witness. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

## SUBD. 2

11. **Witnesses held competent.**—A negro boy, who was close to the transaction testified to in a prosecution for rape, held a competent witness. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

13. **Determination of competency.**—It is a general rule of evidence that competency of children as witnesses is for the court's determination, as stated in this article. *Charles v. State*, 81 Cr. R. 457, 196 S. W. 179.

The competency as witnesses of girls of six and seven years of age was a question for the trial court, and his ruling is not to be overturned in the absence of abuse of discretion. *Carter v. State*, 87 Cr. R. 299, 221 S. W. 603.

## SUBD. 3

16. **Incompetency in general.**—In a prosecution for murder, testimony as to declarations of person who had actually done the shooting, and with whom defendant had been in company, that defendant was not guilty was inadmissible, declarant being charged by indictment with the same offense, not being a competent witness under art. 791, and being disqualified under this article by his conviction for murder. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241.

This article disqualifies one convicted of felony as a witness. *Barber v. State*, 87 Cr. R. 585, 223 S. W. 457.

Under this article, refusal to exclude testimony of witness who admitted on cross-examination that he had served a term in the penitentiary for cattle stealing and had not been pardoned held error. *Corzine v. State* (Cr. App.) 226 S. W. 686.

In a criminal prosecution, a witness for the state, who admitted that he was an escaped convict and had never been pardoned, was erroneously permitted to testify over defendant's objection. *Joiner v. State* (Cr. App.) 232 S. W. 333.

18. **Nature of offense for which convicted.**—In a murder case any witness may be impeached by showing that he has been convicted or properly indicted for a felony or misdemeanor involving moral turpitude, but not for a charge of aggravated assault with a conviction for simple assault. *Parker v. State*, 83 Cr. R. 77, 201 S. W. 173.

19. **What constitutes conviction.**—One against whom a judgment of conviction for a felony has been entered, but against whom sentence has not been pronounced, as not "convicted" of a felony. *Arcia v. State*, 26 Tex. App. 193, 9 S. W. 685.

Under this article, in prosecution for theft of automobile, trial court properly overruled defendant's objection to accomplice's competency as witness, where accomplice had pleaded guilty to stealing car, but had not been sentenced. *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771.

Where an appeal is taken from conviction of felony, defendant's civil rights, among them the right to testify as a witness, survive sentence until it becomes final on the appeal. *Grant v. State*, 87 Cr. R. 19, 218 S. W. 1062.

Under Pen. Code, art. 27, in a prosecution for receiving stolen property, defendant's accomplice, though the jury had rendered against him a verdict of guilty of a felony, was not disqualified as a witness, where he had not been sentenced when he testified. *Id.*

21. **Conviction in another state.**—The expression "other jurisdiction," in this article, is not to be limited to the tribunals of the United States exercising their jurisdiction in Texas, for such a construction would be a narrow and strained interpretation of the language used, and would not fully accomplish the legislative intent. *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210.

22. **Impeaching witness by proof of conviction.**—Conviction of felony may be interposed either as disqualification of witness, where there is no pardon, or, in case of pardon, as matter of impeachment. *Ward v. State*, 81 Cr. R. 567, 196 S. W. 840.

23. **Restoration of competency by pardon.**—The incompetency of one who has been convicted of a felony, but has not been pardoned, under this article, cannot be removed by time, but only by a pardon. *Corzine v. State* (Cr. App.) 226 S. W. 686.

23½. **Competency of one under suspended sentence.**—While, under Code Cr. Proc. arts. 865b, 865e, trial court would have no authority to suspend sentence of accused, convicted of felony in seven separate cases, he, not having been sentenced, was not disqualified as a witness under this article. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

Defendant's accomplice in burglarizing and stealing from a millinery store, who was convicted of burglary and accepted the verdict with recommendation of suspended sentence and entered into recognizance for such sentence as required, held not a "convict," until final judgment or sentence was pronounced, within Pen. Code 1911, art. 27, to disqualify him as a witness. *Brown v. State*, 86 Cr. R. 8, 215 S. W. 323.

25. **Proof of disqualification.**—Party offering witness claimed to be disqualified as having been in penitentiary, waives right to demand that his disqualification be proved by record of conviction, by failing to assert it at proper time. *Marshall v. State*, 82 Cr. R. 623, 200 S. W. 836.

26. **Proof of pardon.**—See *International & G. N. Ry. Co. v. Ash* (Civ. App.) 204 S. W. 668.

Where a witness is objected to as a convict, to entitle him to testify, he must produce his pardon. *Thompson v. State*, 84 Cr. R. 148, 205 S. W. 988.

Relative to competency of witness convicted of felony, his term of service in penitentiary is not to be considered time occurring between the conviction and the time of his testifying. *Mayer v. State*, 87 Cr. R. 512, 222 S. W. 571.

### Art. 789. [769] Female alleged to be seduced may testify.

7. **Necessity of corroboration.**—The reason for such a statute as this article, requiring corroboration of testimony of a seduced female, is not that she is an accomplice;



she being rather the victim of crime than its perpetrator. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

**8. Extent of corroboration required.**—In a seduction case, it is unnecessary that the prosecutrix be corroborated as to every material fact. *Hunt v. State*, 85 Cr. R. 622, 214 S. W. 983.

In a seduction case, it is unnecessary that the prosecutrix be corroborated as to every material fact, and it is not proper to single out isolated facts in the case, which are admissible in making out the state's case, and apply the law of accomplice testimony to each such bit of evidence. *Id.*

To sustain a seduction prosecution brought under Pen. Code, arts. 1447, 1448, the seduced female's testimony must be corroborated by other evidence tending to connect the defendant with both the carnal knowledge and the promise of marriage, in view of this article, requiring corroborative evidence "tending to connect the defendant with the offense charged," although the corroborative facts may be meager and may consist alone of circumstances. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

In a prosecution for seduction, the law requires corroboration of prosecutrix both as to the act of intercourse and the promise of marriage. *Gainer v. State* (Cr. App.) 322 S. W. 830.

**9. Admissibility of corroborative evidence.**—Acts and declarations of defendant's accomplice subsequent to alleged seduction could not be used for corroboration. *Haney v. State*, 81 Cr. R. 651, 197 S. W. 1102.

Letters identified only by the testimony of the prosecuting witness in a prosecution for seduction are not available to corroborate the truth of her testimony as to the elements of the offense. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

Upon trial for seduction, a subsequent act of intercourse coincident with a renewed promise of marriage at a fixed date within a short time is admissible to corroborate prosecutrix and as relevant to a controverted issue. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

In a seduction case, evidence that prosecutrix made dresses in preparation of marriage was provable as a corroborative circumstance which usually accompanies an engagement to marry. *Id.*

In a prosecution for seduction, corroboration of prosecutrix must come from facts and circumstances, independent of her testimony, tending to corroborate it as to the promise of marriage or sexual intimacy or both, and testimony of a third person that prosecutrix had told her (the third person) that she (prosecutrix) was engaged to defendant, prosecutrix having testified that she had so told the witness, was not corroborative of prosecutrix, but inadmissible as hearsay. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

In prosecution for seduction, the trial court properly refused defendant's requested special charge that no act, statement, or declaration of prosecutrix subsequent to the alleged seduction could be considered as corroborating her testimony. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

**10. Sufficiency of corroboration.**—In prosecution for seduction, evidence held to justify finding in favor of state on issue of corroboration. *Haney v. State*, 81 Cr. R. 651, 197 S. W. 1102.

Testimony of prosecuting witness in a prosecution for seduction as to intercourse may be corroborated by circumstantial evidence. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

In a prosecution for seduction, evidence of the prosecuting witness as to the promise of marriage held corroborated by a letter written by defendant. *Id.*

In a prosecution for seduction, testimony of prosecuting witness as to acts of intercourse held sufficiently corroborated. *Id.*

In a seduction prosecution the jury must decide what corroborating evidence is true and its efficacy in meeting the measure of the law. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

In a prosecution for seduction, it is not required by this article, that evidence corroborating the testimony of the injured female establish in and of itself the defendant's guilt. *Id.*

In a prosecution for seduction, defendant's requested peremptory instruction to return verdict of not guilty for lack of corroboration of the alleged injured female held correctly refused. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

Prosecutrix charging defendant with her seduction held sufficiently corroborated within this article. *Id.*

**11. Instructions as to corroboration.**—In view of this article, in prosecution for seduction, court should have given defendant's requested special charge in appropriate language, informing jury that acts and declarations of accomplice subsequent to seduction could not be used for corroboration. *Haney v. State*, 81 Cr. R. 651, 197 S. W. 1102.

A charge that prosecutrix in a seduction case was an accomplice, that the jury must not only believe her testimony was true, but that it showed defendant's guilt, and that her testimony must be corroborated by evidence other than her own, both as to sexual intercourse and promise of marriage, held correct, and not subject to objection that it authorized conviction if jury believed prosecutrix. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

The jury in a seduction prosecution should be told that the testimony of the injured female must be corroborated as to the marital contract and the carnal knowledge, in order to comply with this article, requiring corroboration; such instruction not extending the statute beyond its terms. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

The omission to state in charge that corroboration of testimony of the injured female in a seduction prosecution "is not sufficient, if it merely shows the commission of the offense," such language being used in art. 801, relating to accomplice testimony, was not

error, as this article, requiring corroboration of the seduced female's testimony, controls. *Id.*

In absence of demand for more specific instruction, a charge that testimony of the injured female in a seduction prosecution must be corroborated is sufficient. *Id.*

In a prosecution for seduction, defendant's requested special charge that the fact of continuous association between him and the prosecutrix was not sufficient evidence to corroborate a promise of marriage held properly refused as on the weight of the evidence, and not presenting a correct proposition of law. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

In prosecution for seduction, instruction that corroborative evidence of prosecutrix need not be direct and positive held not erroneous. *Id.*

### Art. 790. [770] Defendant may testify.

5. **Effect of testifying—Credibility of defendant.**—In homicide prosecution, the truth or falsity of defendant's testimony raising issue of whether he acted under immediate influence of sudden passion is not a question for the appellate court, but was for the jury. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

7. **Use of evidence on subsequent trial.**—In theft prosecution, incriminating testimony given by accused on previous trial for theft is admissible. *Taylor v. State*, 82 Cr. R. 210, 199 S. W. 289.

In view of this article, providing that defendant's failure to testify shall not be held against him, defendant's silence on first trial, when witness, absent on second trial, testified defendant, at time of affray involved, made remark indicating murderous intent, does not render admissible, on second trial, testimony of absent witness to such remark. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

Evidence as to the testimony given by defendant on a former trial is admissible. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

Where a defendant voluntarily takes the stand in his own behalf, his testimony is subject to the same rules as apply to other witnesses, and such testimony can be used against him at a subsequent trial of the same case, or on the trial of a different case arising from the same transaction, even though he was not warned before he gave the testimony. *Roberts v. State* (Cr. App.) 231 S. W. 759.

10. **Examination of defendant—Cross-examination.**—For purpose of showing motive and animus, held, it was proper on cross-examination of accused to show that prosecution of accused's brother-in-law by prosecuting witness for killing a cousin was cause of accused's unfriendly feeling toward prosecuting witness. *Zarafonetis v. State*, 82 Cr. R. 120, 198 S. W. 938.

In prosecution for assault to murder committed with pistol, it was improper on cross-examination to bring out that accused always carried pistol, and was armed when he passed house of the assaulted man on previous occasions before they had had trouble. *Yancy v. State*, 82 Cr. R. 276, 199 S. W. 470.

In prosecution for murder, in cross-examining defendant it was improper for the county attorney to ask, "Don't you know that you are swearing to a lie?" *Redick v. State*, 83 Cr. R. 225, 202 S. W. 743.

Although defendant is called as a witness for sole purpose of making proof to suspend his sentence, testifying merely to name, residence, and the fact that he had never been convicted of a felony, under this article, permitting him to testify, having taken the stand, he is subject to cross-examination in same manner as any other witness. *Samino v. State*, 83 Cr. R. 481, 204 S. W. 233.

It was improper on cross-examination to ask accused if his statement that he had not used an oath in a difficulty with deceased on the day preceding the homicide was as true as any of his other testimony. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349.

Where defendant in a murder case testified he had heard deceased had killed three men, but was not informed of the circumstances attending the homicides, and sought to prove the homicides by deceased's brother, this attack on deceased's character justified the state's cross-examination to develop the circumstances surrounding the homicides. *Castleberry v. State*, 84 Cr. R. 271, 206 S. W. 353.

In prosecution for seduction, permitting prosecuting attorney to ask defendant whether he was willing to marry prosecutrix was not error; it being an issue injected into the case by defendant. *Scoggins v. State*, 84 Cr. R. 519, 208 S. W. 930.

In a prosecution for murder, questions by the state's attorney as to whether defendant did not know that his son, who had been sent to the penitentiary for the homicide, denied the killing and testified that defendant fired the fatal shot, were improper; defendant not being present at the trial where his son was alleged to have so testified. *Curry v. State*, 85 Cr. R. 443, 213 S. W. 268.

Where one accused of murder was asked, on cross-examination, if he shot in self-defense when he shot deceased while crawling on his hands and knees and begging accused not to continue to shoot him, the eyewitnesses for the state having testified the shooting took place under those circumstances, and accused claiming that all his shots were in self-defense, such cross-examination was germane and not objectionable. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

In a prosecution for murder, counsel for state was properly permitted to cross-examine accused concerning statements made by him forming a part of the *res gestæ*. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

Evidence adduced on cross-examination of defendant in homicide, relying on a reasonable apprehension of danger, that he did not appeal to any one for protection when deceased brought a gun out is not obviously irrelevant and harmful. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

Accused, having offered himself as a witness, is, in general, subject to the same rules of cross-examination as other witnesses. *Id.*

11. — **Harmless error.**—In prosecution for robbery, where defendant was convicted on the testimony of accomplice witnesses and on inconclusive corroborating circumstances, and where defense rested almost alone on defendant's testimony denying guilt, refusal to permit defendant, who had been cross-examined as to his having pleaded guilty to embezzlement in previous prosecution, to explain upon redirect examination that his guilt was technical rather than moral, in that he had accepted checks instead of currency as postmaster, and that he had pleaded guilty to shield his wife from embarrassment, held reversible error. *Boone v. State*, 85 Cr. R. 661, 215 S. W. 310.

12. **Impeachment of defendant.**—In prosecution for murder, where defendant testified to facts on which self-defense was predicated, there was no error in allowing evidence that he was under the influence of intoxicants; such evidence bearing on the weight of his testimony. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In a prosecution for theft, testimony of a telephone exchange operator concerning the working of his telephone, introduced with the view of impeaching defendant on his testimony as to his efforts to call the owner of the property by telephone before taking such property, held to be inadmissible, being largely matters of opinion and guesswork. *Beach v. State*, 85 Cr. R. 64, 210 S. W. 540.

In prosecution for murder of son-in-law, examination of defendant as to whether he had not whipped his wife held improper. *Hurst v. State*, 86 Cr. R. 375, 217 S. W. 156.

Where defendant was charged with pursuing the occupation of retail liquor seller in a county where the sale of intoxicants was forbidden, it was improper to allow the state to cross-examine defendant, who took the stand, as to whether a bill seeking an injunction and alleging that he was selling intoxicating liquors had not been filed, and whether he allowed decree to go by default. *Alexander v. State*, 86 Cr. R. 606, 218 S. W. 752.

In homicide prosecution, cross-examination of defendant as to a statement claimed to have been made by him with reference to the chastity of deceased's wife, objected to as extraneous matter, held proper to show the relation between the parties, and as impeaching testimony, in view of defendant's denial. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

Where deceased was at times a peace officer and was such at the time of the homicide, and defendant claimed he had harassed and pursued him for years and on the day of the killing had threatened to lock him up if he did not leave town and then threatened to kill him, cross-examination of defendant as to his guilt of various misdemeanors, which elicited some legitimate evidence, was not improper as an attempt to discredit accused by bringing before the jury damaging facts through irrelevant questions or questions not asked for the purpose of eliciting proof. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Where a homicide case had been tried several times and on the last trial defendant gave in much detail his recollection of incidents occurring prior to the homicide, cross-examination, as to whether on the second trial he did not ascribe his absence of recollection of the incidents of the first trial to the fact that his mental condition was impaired by syphilis and drink, was not open to an objection for irrelevancy. *Id.*

In a prosecution for assault to murder defendant's wife, where defendant testified in his own behalf, and the sheriff testified he went to defendant's residence shortly after the trouble and arrested defendant, the state could not impeach defendant by showing by his own testimony, required over objection, that he did not make a statement to the sheriff at the time of his arrest, as he had testified, in fact made no statement, defendant having been asked nothing about the matter, and having said nothing about it to the sheriff, so that it was simply a question of silence. *Thompson v. State*, 88 Cr. R. 29, 224 S. W. 892.

In a prosecution for manufacturing intoxicating liquor in violation of the Dean Law, it was proper to allow the state to ask defendant, while a witness, if he had not been offering to get whisky for people about the time of the offense, and, having answered in the negative to show that he was making such offers. *Russell v. State* (Cr. App.) 228 S. W. 948.

13. — **Character or reputation.**—Where a defendant seeks to prove a good reputation as a peaceable, law-abiding citizen, the state may prove his bad reputation, and, if defendant becomes a witness, he puts in issue his reputation for truth and veracity, while, if he moves for a suspended sentence, he opens generally the issue of his reputation. *Alexander v. State*, 86 Cr. R. 606, 218 S. W. 752.

15. — **Accusation or conviction of crime in general.**—Where accused takes the stand, he may be cross-examined as to his conviction of other offenses to impeach his credibility as a witness? *Daniels v. State*, 82 Cr. R. 17, 198 S. W. 147.

Defendant not having placed his character in issue, the county attorney should not have questioned him as to having been prosecuted in other counties, and his reason for leaving them, and as to the number of times he had been prosecuted where he was then living. *Dodd v. State*, 82 Cr. R. 139, 198 S. W. 783.

In prosecution for violating local option law, it was improper to permit defendant to be asked about pending or past cases involving misdemeanors, unless they involved legal or moral turpitude. *Wrenn v. State*, 82 Cr. R. 608, 200 S. W. 397.

Proof of crime, for the purpose of impeaching the defendant as a witness, should be confined to such offenses as are not too remote, and to those which are felonies or misdemeanors involving moral turpitude. *Long v. State*, 84 Cr. R. 529, 208 S. W. 922.

Where defendant testified in his own behalf, the state on cross-examination was authorized to show his previous conviction and suspended sentence as a means of affecting his credibility, though defendant had not placed his reputation before the jury as being an honest, law-abiding citizen. *Gordon v. State*, 86 Cr. R. 262, 216 S. W. 184.

An accused having assumed the attitude of a witness in his own behalf, it was the right of the prosecution to prove by legitimate means that he had been indicted and con-

victed of a felony, or of a misdemeanor involving moral turpitude. *Rosa v. State*, 86 Cr. R. 646, 218 S. W. 1056.

It was prejudicial error, on the cross-examination of an accused, to permit the state to ask whether or not defendant had been convicted of crimes and misdemeanors at various times and places, and whether or not certain pictures and photographs were of him, when the state was without evidence with which to sustain the impeaching facts, in view of Code Cr. Proc. art. 743. *Id.*

An accused, when a witness, may be asked if he had not been charged with a felony. *Haynes v. State*, 88 Cr. R. 42, 224 S. W. 1100.

When defendant testifies in his own behalf, the state may ask him if he has been in the penitentiary, unless the prosecutor knows that such matter is too remote. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

Questions asked defendant on cross-examination as to mere arrests for other offenses or charges not shown to be legal charges by complaint, information, or indictment are too general. *Criner v. State* (Cr. App.) 229 S. W. 860.

Whether he had been indicted for a felony may be asked defendant, and the fact that he answered that he was indicted for a misdemeanor does not make the question erroneous. *Keith v. State* (Cr. App.) 232 S. W. 321.

16. — **Accusation of particular offenses.**—In a prosecution for perjury, it was admissible, as affecting credibility, to ask defendant on cross-examination if he had been charged with seduction. *Allen v. State*, 82 Cr. R. 416, 199 S. W. 633.

The offense of pursuing the business of selling intoxicating liquor in prohibited territory being a felony, proof on cross-examination of the defendant that he had been indicted therefor was legitimate for impeachment purposes. *Jennings v. State*, 82 Cr. R. 504, 200 S. W. 169.

Proof that defendant had been charged in the federal court with the sale of intoxicating liquors without a license, such crime being a misdemeanor not imputing moral turpitude, was not admissible for the purpose of impeachment. *Id.*

In prosecution for violating local option law, it was improper to ask accused whether he had been charged with pandering, where the result of examination, as to such matter, showed that he had been arrested for being found in room with woman, which does not constitute pandering. *Wrenn v. State*, 82 Cr. R. 608, 200 S. W. 397.

In prosecution for horse theft, it was not error for the county attorney to ask accused if he was the same person who had been arrested for theft, where on redirect examination accused stated that he had pleaded guilty to theft but denied his guilt. *Ingram v. State*, 83 Cr. R. 215, 202 S. W. 741.

In prosecution for assault to murder, resulting in conviction of aggravated assault, state's question to defendant as to whether he had been named as correspondent in divorce petition of assaulted person against wife held improper. *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 897.

In prosecution for failure to support wife and children, it was competent on cross-examination of defendant, as affecting his credibility, to show that he had been prosecuted for adultery; adultery being a misdemeanor involving moral turpitude. *Morrison v. State*, 85 Cr. R. 20, 209 S. W. 742.

Where defendant, who was charged with pursuing the occupation of retail liquor dealer in a county where sale was forbidden, took the stand, it was permissible for the state to inquire as to whether or not and how many times he had been indicted for selling whisky; it appearing that the indictments charged felonies. *Alexander v. State*, 86 Cr. R. 606, 218 S. W. 752.

In a prosecution for murder of defendant's mistress, the court properly permitted the state to prove by defendant that he had been indicted in nine felony cases of embezzlement; defendant qualifying his answer by the assertion he was not guilty. *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

In prosecution for theft by bailee in violation of Pen. Code, art. 1348, it was competent for state to prove, as affecting defendant's credibility as a witness in his own behalf, that he had been indicted for a felony; proof being available even if followed by acquittal. *Parkinson v. State*, 87 Cr. R. 176, 220 S. W. 774.

Theft is an offense involving moral turpitude, and the fact that a legal charge thereof has been preferred against defendant is admissible as affecting her credibility as a witness. *Criner v. State* (Cr. App.) 229 S. W. 860.

A question asked defendant on cross-examination as to how many times she had been charged in the county court with theft was proper, as she could only be charged in such court by complaint and information or indictment. *Id.*

In a prosecution for aggravated assault, asking the defendant whether or not he had been indicted for incest was permissible as affecting his credibility, and proof of the contents of the indictment and the name of the party with whom the incest occurred was not injurious to the defendant, who had admitted that he had been indicted for incest with such party. *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

17. — **Conviction of particular offenses.**—Rule that accused's testimony may be impeached by showing previous convictions for theft or misdemeanors involving moral turpitude is inapplicable to a previous conviction of a misdemeanor for fighting and disturbing the peace, since such offense involves no moral turpitude. *Taylor v. State*, 82 Cr. R. 210, 199 S. W. 289.

In prosecution for robbery, evidence that defendant had pleaded guilty of embezzlement in a former prosecution was admissible as affecting his credibility. *Boone v. State*, 85 Cr. R. 661, 215 S. W. 310.

A witness for defendant, who applied for suspended sentence, having on his direct testified to knowing defendant for 25 years and that his reputation as a peaceable and law-abiding citizen was good, and on his cross-examination that he had not heard of defendant drinking and disturbing the peace, it was not error to allow the state on

cross-examination of defendant to elicit his testimony that 16 years before he had paid two fines for drunkenness. *Baker v. State*, 87 Cr. R. 305, 221 S. W. 607.

**18. — Contradictory statements.**—In prosecution for unlawful gaming in a private residence, where defendant denied telling the officers he had played but one game, an officer could state that defendant told him that only one game had been played. *Cagle v. State*, 82 Cr. R. 347, 200 S. W. 153.

In prosecution for the murder of one who took part in an altercation with defendant's friend at a hotel, testimony to the effect that defendant said he had been looking for the hotel proprietor for the purpose of killing him was properly received in rebuttal of defendant's testimony that his visits to the hotel were for another purpose. *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

In homicide prosecution, cross-examination of defendant as to a statement claimed to have been made by him with reference to the chastity of deceased's wife, objected to as extraneous matter, held proper to show the relation between the parties, and as impeaching testimony, in view of defendant's denial. *Henry v. State*, 87 Cr. R. 148, 220 S. W. 1108.

In a murder prosecution, where defendant testified that at the time of the homicide he was wearing boots, cross-examination by the state proving by him that he might have said on a previous trial that on Wednesday after the killing he had stated that he did not remember whether he had on boots or shoes on the day decedent was killed held not inadmissible as violating the rule against repeating statements of accused while under arrest and unwarned. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a prosecution for assault with intent to rob, defendant's confession, conflicting with his testimony as to his purpose in entering complaining witness' store held admissible as tending to discredit his theory of shooting such witness in self-defense after being assaulted. *Flores v. State* (Cr. App.) 227 S. W. 320.

Where defendant was asked as to certain portions of two applications for continuance signed by him containing statements contradictory to his evidence at the trial, and he claimed certain statements in both applications were untrue and offered certain explanations, held not error for the state to introduce such portions of each application as defendant was questioned about and which were contrary to his testimony. *Brooks v. State* (Cr. App.) 227 S. W. 673.

**23. — Rebutting impeaching evidence.**—In prosecution for robbery, where fact that defendant had pleaded guilty to embezzlement in former prosecution was elicited on cross-examination of defendant, defendant had the right, upon redirect examination, to explain the circumstances attending charge of embezzlement and his plea of guilty thereto in order to modify or destroy the effect upon his credibility of such testimony. *Boone v. State*, 85 Cr. R. 661, 215 S. W. 310.

In homicide prosecution where defendant testified on cross-examination that he had been indicted for theft from an express company and testified on redirect examination that he had been acquitted by the verdict of the jury, exclusion of his testimony that the express company had compromised his claim for unjust prosecution held proper; such evidence being hearsay and not affecting his veracity as a witness. *Ray v. State* (Cr. App.) 225 S. W. 523.

**26. Contradicting defendant.**—Where defendant, charged with illegally selling intoxicants, herself swore she never sold liquor to state's witness at any time, state had right to have its witness in rebuttal swear he did buy intoxicating liquor from defendant at other times, though particulars of sales would be inadmissible. *Reed v. State*, 82 Cr. R. 657, 200 S. W. 843.

In a prosecution for theft, defendant's testimony that he did not make inquiry as to the illness of the owner of the property stolen held to be an immaterial matter, not affording a basis for impeachment. *Beach v. State*, 85 Cr. R. 64, 210 S. W. 540.

In a prosecution for theft, defendant's testimony as to his efforts to call the owner of the property by telephone before taking such property held to be an immaterial matter, not affording a basis for impeachment. *Id.*

In prosecution for aggravated assault on a female child, who had testified that defendant at the time of the offense had exhibited obscene pictures to her, the state, in laying the predicate to prove that defendant had on various occasions exhibited obscene pictures to other girls, and in contradicting his denial of such transactions, infringed the rule against impeachment on an immaterial issue. *Sine v. State*, 86 Cr. R. 221, 215 S. W. 967.

In a prosecution for aggravated assault, based on the ground that the person assaulted was a decrepit person, and that defendant was of robust health and strength, where defendant testified in his own behalf that he suffered a great deal from rheumatism, causing him to limp, and that he was not in robust health, the state might properly show that witnesses with opportunity to know had not seen him limp. *Hahn v. State*, 87 Cr. R. 22, 218 S. W. 1058.

**27. Corroboration.**—Evidence of accused on examining trial is not admissible to support his testimony when it has not been attacked. *Greenwood v. State*, 84 Cr. R. 548, 208 S. W. 662.

Statements made by accused cannot be testified to by him as corroborative of his testimony; such statements being only admissible to corroborate one impeached by proof of former contradictory statements. *Medford v. State*, 86 Cr. R. 237, 216 S. W. 175.

**29. Reference by counsel to accused's failure to testify.**—Where the court instructed that accused's failure to testify could not be taken against him, the prosecuting attorney was not thereby authorized to comment upon accused's failure to testify in view of this article. *Sheppard v. State*, 81 Cr. R. 522, 196 S. W. 541.

A statement, by the state's attorney in a murder case, that "defendant is guilty as shown by circumstances so strong that he could not face you and give you a satisfactory explanation," held reversible error under this article. *Parker v. State*, 83 Cr. R. 77, 201 S. W. 173.

Disregard of this article, prohibiting counsel alluding to or commenting on any failure to testify, requires reversal. *Haley v. State*, 84 Cr. R. 629, 209 S. W. 675, 3 A. L. R. 779.

This article held not violated, in murder trial, by state counsel's statement: "I don't know what took place in that automobile. Men who commit those crimes don't talk; but one of the men that was in that automobile is dead"—there being evidence that deceased, accused, and one C. were in the automobile, and C. having refused to testify, and the state contending that accused had admitted his presence in the automobile and his participation in the homicide. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

For the argument of counsel for the state to constitute an implied reference to accused's failure to testify, in violation of this article, the implication must be a necessary one, and where there is evidence or absence of evidence other than accused's testimony to which counsel's remarks may have reasonably been applied by the jury, the remark is not reversible error. *Id.*

30. — **Reference to failure to deny or contradict testimony.**—In prosecution for slander of female, statement by county attorney that slanderous words were not denied, was not erroneous as comment on defendant's failure to testify where it appeared that there were several witnesses present at time of slander, but none contradicted the state's witnesses. *Pickerell v. State*, 82 Cr. R. 68, 198 S. W. 303.

Where defendant in prosecution for assault with intent to kill was called as witness in his own behalf, it was proper for the state's counsel in his argument to the jury to comment on the fact that he had not been asked if he did the shooting of which he was accused. *Samino v. State*, 83 Cr. R. 481, 204 S. W. 233.

In a prosecution for seduction, statement of private prosecuting counsel in argument that prosecutrix had sworn to certain matters, and nobody denied it, held improper, as an indirect reference to defendant's failure to testify. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

In prosecution for seduction, statement of county attorney in argument that the court told the jury that before they could convict they must believe the woman's testimony was true, asking, "What is there to contradict it?" held not a reference to defendant's failure to testify transgressing the statute. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

Fact that assistant county attorney stated to jury that no testimony had been offered by defendant charged with seduction to contradict that of the state did not violate the statutory rule against referring to defendant's failure to testify. *Id.*

31. — **Reference to lack of proof.**—In prosecution for incest with his niece, the absence of inadmissible evidence that defendant had received a letter from prosecutrix informing him that she had absconded could not be used in argument as evidence of his guilt. *Hollingsworth v. State*, 82 Cr. R. 337, 199 S. W. 626.

The state could comment in argument, on failure of defendant in homicide, relying in part on alleged declaration of deceased to him of difficulties with named persons in which deceased was the aggressor, to avail himself of his privilege of proving by others the specific acts of violence attributed to deceased by his alleged declarations. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

Argument of state's attorney that no one had explained defendant's possession of stolen automobile, and that no explanation had come from him, was not comment on his failure to testify calling for reversal. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

Where no testimony was offered by defendant, charged with seduction, from any source, the fact was legitimate for comment by the state's attorney. *Klepper v. State*, 87 Cr. R. 597, 223 S. W. 468.

32. — **Reference to failure to call witnesses or produce evidence.**—Statement of prosecuting attorney, in argument, that if the tobacco was brought by or given to defendant he could have brought some one to testify thereto, which he had not done held not a reference to defendant's failure to testify. *Garrett v. State*, 83 Cr. R. 364, 203 S. W. 598.

In prosecution for larceny, question by state's attorney as to why defendant's counsel did not put defendant's boy on the stand and prove a certain fact held a legitimate argument under the record. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

Where defendant was jointly indicted with her husband for murder, and a severance was granted, state attorney's argument asking why defendant, if not guilty of murder, did not call her husband, who was then in court, and as to why she did not call witnesses to prove her innocence, allowed over objection, and without reprimand or instruction to disregard it, violated the statute, as being a direct reference to failure of both defendant and her husband to testify. *Ross v. State*, 85 Cr. R. 340, 212 S. W. 167.

In a prosecution for homicide, where defendant stated that his brother, who was present, was crazy about half the time, and refused the offer of the prosecution to introduce a purported written statement by the brother, argument of the prosecutor that it was a fair inference from the fact the brother did not testify, and that defendant would not agree for his written statement to be introduced, that it was adverse to him, was improper, and aggravated the impropriety of the attempt by the prosecution to get the statement before the jury. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

Where defendant in homicide, claiming reasonable belief that deceased was armed and making a demonstration to attack, relied in part on alleged declarations of deceased to him that deceased was the aggressor in difficulties with named persons, the state on cross-examination of him could ask whether such persons, by whose testimony as to such attacks he could support his case, were present, or whether an effort had been made to secure their attendance. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

33. — **Wife of accused.**—Failure of wife of defendant charged with theft to testify with reference to telegram improperly admitted in evidence is not subject of comment in argument by county attorney. *Carroll v. State*, 83 Cr. R. 369, 203 S. W. 599.

In a prosecution for incest, where a witness on cross-examination denied having

made a statement to the wife of defendant, held that, where there was nothing else to show that she knew of the transaction, etc., comment by the prosecutor on the failure of the defendant to put his wife on the stand was improper. *Lankford v. State*, 87 Cr. R. 435, 222 S. W. 567.

In criminal prosecution, where the only other witness to the crime was prosecutrix, statement by the district attorney that defendant, instead of putting his wife on the stand, was content to rely on his plea of not guilty, was improper as a reference to the failure of the defendant to take the stand himself. *Id.*

In a prosecution for murder of mother-in-law, state's counsel had the right to argue the failure of accused to use his wife as a witness, and to state that she alone was the only eyewitness to the killing except the defendant, and that she could tell how her mother was murdered by the defendant if he did not refuse to permit her to testify. *Smith v. State* (Cr. App.) 232 S. W. 497.

**37. — Cure of error.**—Argument of prosecution in adultery trial referring to accused's refusal to allow his wife to testify held reversible error, although jury were charged not to consider it. *Green v. State*, 83 Cr. R. 68, 201 S. W. 182.

**38. — Review on appeal.**—Where reference is made in argument by prosecuting counsel to defendant's failure to testify, it is not necessary that defendant request a special charge in order to complain on appeal. *Adams v. State*, 87 Cr. R. 67, 219 S. W. 460.

The Court of Criminal Appeals will uphold the action of the trial court in overruling motion for new trial grounded on statements in the argument of state's counsel relative to the failure of defendant to testify on his examining trial unless there is made to appear a clear abuse of the discretion necessarily confided in the trial court in such matters. *Walker v. State* (Cr. App.) 229 S. W. 527.

**39. Instructions.**—In a prosecution for cattle theft, where the court, on retirement of jury, without request, no improper argument having been made or additional evidence given, verbally instructed them not to discuss the fact that defendant did not testify, nor to arrive at the verdict by chance, such instruction, being verbal, constituted reversible error, in view of Code Cr. Proc. arts. 735, 737a, 738, 740. *Winfrey v. State*, 84 Cr. R. 579, 209 S. W. 151.

**40. Reference by jury to failure to testify.**—See *Mizell v. State*, 81 Cr. R. 241, 197 S. W. 300; *Rabe v. State*, 87 Cr. R. 497, 222 S. W. 1106; *Stevenson v. State* (Cr. App.) 230 S. W. 174; notes to art. 837, subd. 3.

Juror's remark that if he was being tried he would take the stand in his own defense held such an allusion to and comment on defendant's failure to testify as required a reversal. *Boozier v. State*, 82 Cr. R. 72, 198 S. W. 295.

Where on motion for new trial after full investigation court found upon conflicting evidence that jury did not misuse accused's failure to testify, such finding will not be disturbed. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

That the jury discussed the failure of an accused to testify in his own behalf is ground for reversal of conviction. *Haynes v. State*, 84 Cr. R. 6, 204 S. W. 430.

Where it appears from the jurors' own testimony that they discussed failure of accused to testify, the conviction must be reversed. *Roberts v. State*, 85 Cr. R. 196, 211 S. W. 219.

Evidence that two jurors were for acquittal until it was stated to them in the jury room that defendant had killed another man, whereupon they agreed to a conviction, and that certain jurors commented on defendant's failure to testify, shows misconduct requiring the granting of a new trial. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

In a prosecution for murder, misconduct of the jury in commenting on the fact that defendant had not testified, and in stating that it would have been better for defendant if she had told a lie about it than not to have taken the witness stand, held ground for reversal. *Reynolds v. State*, 86 Cr. R. 453, 217 S. W. 151.

Remarks by several jurors concerning defendant's failure to testify do not require a reversal, where the remarks were not made as any suggestion of guilt, under this article. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

The fact that the foreman stated that, if accused had any satisfactory defense, he ought to have gone on the stand, and that other jurors commented on his failure to testify, shows such misconduct of the jury as necessitates the reversal of the case. *Barrow v. State* (Cr. App.) 225 S. W. 53.

In a prosecution for violating the Prohibition Law, where defendant did not take the stand and introduced no evidence, the case being submitted on the state's evidence, it was such misconduct as to necessitate reversal for the jury to consider and discuss defendant's failure to take the stand, as well as to consider statements made by one of the jurors that defendant had been selling liquor for over 10 years and would continue, unless they convicted. *Gates v. State* (Cr. App.) 225 S. W. 170.

Where defendant had pleaded guilty to assault with intent to murder, thereby admitting all facts necessary to the conclusion of his guilt, an affidavit by a juror that several of the jurors during deliberation referred to defendant's failure to testify, but not showing that such failure was considered a circumstance against him, does not require the granting of a new trial for misconduct of the jury. *Taylor v. State* (Cr. App.) 227 S. W. 679.

In a murder prosecution, action of jurors in discussing during their deliberation defendant's failure to testify in violation of this article, held ground for reversal. *Glenn v. State* (Cr. App.) 229 S. W. 521.

Evidence given by jurors on motion for new trial held to prove that the jurors deliberating over a verdict discussed defendant's failure to testify in violation of this article, and that there was not merely a casual promptly suppressed reference thereeto. *Id.*

**Art. 791. [771] Principals, accomplices and accessories.**

See *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

**3. Incompetency in general.**—One indicted as principal with defendant for same crime was not available to him as witness, under this article, or Pen. Code, art. 91. *Terrell v. State*, 81 Cr. R. 647, 197 S. W. 1107.

**5. — Competency after acquittal or dismissal.**—In view of arts. 37, 727, the provisions of this article, allowing severance of trial of codefendants, and making competent witnesses, in behalf of the others, such of them as are tried and acquitted, or as to whom the prosecution is dismissed, were not evaded, where the state, after a severance claimed and granted, dismissed as to the two codefendants first in order to be tried, without, at the same time, granting them immunity from further prosecution for the homicide of which they were accused. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Testimony of one indicted as an accomplice is admissible after the prosecution against him has been dismissed, under this article and art. 792. *Gerber v. State* (Cr. App.) 232 S. W. 334.

**8. — Identity of offense.**—In prosecution for perjury committed as a witness at a trial, testimony of another witness at such trial, who had testified to substantially the same facts and who was also indicted for perjury, held admissible in absence of evidence that they had conspired to commit perjury; an indictment not rendering a witness incompetent unless as provided in this article, he is charged with being an accomplice, accessory, or principal to the offense for which the person is on trial. *Welch v. State* (Cr. App.) 227 S. W. 301.

**9. — Declarations of co-defendant.**—In a prosecution for murder, testimony as to declarations of person who had actually done the shooting, and with whom defendant had been in company, that defendant was not guilty, was inadmissible, declarant being charged by indictment with the same offense, not being a competent witness under this article, and being disqualified under art. 783 by his conviction for murder. *Walsh v. State*, 85 Cr. R. 208, 211 S. W. 241.

In a prosecution for robbery with firearms, where defendant did not testify, there was no error in the rejection of the testimony of another indicted for participation in the same offense, as to exculpatory statements made by him to the arresting officer at the time of his arrest, as he could not testify on defendant's behalf, and the arresting officer testified as to similar statements by defendant. *Patterson v. State* (Cr. App.) 231 S. W. 763.

**11. Competency as witnesses for the state.**—That accomplice was brought from jail to testify against defendant was no valid ground for objection to his testimony. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

An accomplice who had been found guilty by a jury, but against whom no sentence had been pronounced, was not an incompetent witness for the state in a prosecution for the unlawful manufacture of intoxicating liquors. *Shaw v. State* (Cr. App.) 229 E. W. 509.

**12. — Competency of testimony.**—In a prosecution for theft of an automobile, it was competent for an accomplice to testify that he had entered into an agreement with defendant to steal automobiles and that the car in question was taken by defendant to demonstrate how easy it was. *Hunt v. State* (Cr. App.) 229 S. W. 860.

**Art. 792. [772] Court may interrogate witness touching competency.**

See *Gerber v. State* (Cr. App.) 232 S. W. 334.

**Art. 794. [774] Husband and wife shall not testify as to, etc.**

See *Sims v. State*, 30 Tex. App. 605, 18 S. W. 410; *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

Cited. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591.

**Privileged communications—In general.**—In prosecution for rape defendant was improperly required to testify that his wife accused him of the crime, such evidence being as to a matter between defendant and his wife, which he could not be required to testify to. *Villafranco v. State*, 84 Cr. R. 195, 206 S. W. 357.

The law making the wife incompetent to testify against her husband as to privileged communications is purely statutory, being embodied in this article, and art. 795, while art. 640c makes husband or wife competent to testify to all relevant facts in a prosecution for wife desertion or for failure to support minor children. *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1043.

In a prosecution for homicide, defendant having killed deceased after his daughter informed him that deceased had outraged her, it was error for the state to show on cross-examination that defendant's wife was continually nagging at him, and that she upbraided him for his real or supposed intimacy with other women; communications and family turmoils of such sort between husband and wife not being the subject of investigation, unless brought out by defendant. *Lovett v. State*, 87 Cr. R. 548, 223 S. W. 210.

Usually evidence as to family matters and troubles, if private matters between husband and wife or private communications from one to the other, is inadmissible. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

In murder prosecution, where defendant testified on direct examination that he loved his wife, that they were not separated, and that deceased was the cause of the only trouble between them, rebuttal testimony as to wife's ownership of land and as to defendant's execution of notes and financial handling of the land for purpose of proving that defendant and wife were separated held admissible. *Id.*

Where witness for defendant was asked if he had not made contradictory state-



ment to wife, the admission of wife's testimony as to such statement held reversible error, under this article. *Bell v. State*, 88 Cr. R. 64, 224 S. W. 1108.

— **Competency of testimony after termination of relation.**—Under this article, communications between husband and wife are privileged, even though at time of trial the husband and wife are separated or divorced. *Bell v. State*, 88 Cr. R. 64, 224 S. W. 1108.

### Art. 795. [775] Same subject.

Cited, *Roy v. State*, 24 Tex. App. 369, 6 S. W. 186.

½. **Amendment of article.**—Vernon's Ann. Pen. Code 1916, art. 640c, making wife a competent witness against husband charged with wife desertion, held valid as against objection that Const. art. 3, § 36, providing that no law shall be revised or amended by reference to its title and requiring the amended section to be re-enacted and published at length, was not complied with, since such statute is complete within itself and is not an amendment of this article, notwithstanding its effect is to restrict the operation of the latter statute. *Terrell v. State* (Cr. App.) 228 S. W. 240.

1. **Witness for defendant.**—In prosecution for murder, where defendant claimed to have been angered by the attentions of deceased to his (defendant's) wife, the wife's testimony as to conduct of deceased toward her was available to defendant, but not available to the state. *Watts v. State*, 87 Cr. R. 442, 222 S. W. 558.

2. — **Cross-examination.**—Defendant's wife having testified for him merely as to his alibi, allowing the state to ask her as to her improper relations with deceased was error; the state thus making her testify against her husband on new matter. *Black v. State*, 82 Cr. R. 358, 198 S. W. 959.

In prosecution for murder, where wife of accused testified on direct examination that deceased came to her house some days prior to the killing and detailed conversation that took place, she can be required on cross-examination to testify as to whether he was accompanied at such time by another person. *Houseton v. State*, 83 Cr. R. 453, 204 S. W. 1007.

In criminal prosecution, where wife of accused takes stand in his behalf, she may be cross-examined as to all matters germane and pertinent to her direct testimony. *Id.*

The state on cross-examination of defendant's witness, his wife, should not have been permitted to ask her as to trouble between them, or as to statement she made to him, not connected with or germane to her testimony in chief. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

In murder prosecution, where defendant's wife, testifying for defendant, had testified that deceased had insulted her, and that she had informed defendant thereof before the homicide, cross-examination as to whether the wife had not told her sister at a certain time and place that deceased had not insulted her, and that all they had against him was that he had taken defendant's pistol, held proper to impeach the wife. *Bell v. State*, 88 Cr. R. 64, 224 S. W. 1108.

3. — **Impeachment and contradiction.**—In rape trial, accused's wife, testifying for him, could not be impeached by evidence that she and accused were married after birth of one or more of their children; it being immaterial. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

In prosecution for murder, accused's wife, having testified on direct examination that deceased came to her home some days prior to the killing, may be cross-examined as to whether she had not, shortly after killing, stated that she had never seen deceased before day of killing; such testimony bearing on her credibility as a witness. *Houseton v. State*, 83 Cr. R. 453, 204 S. W. 1007.

In a prosecution for rape of defendant's stepdaughter, where she denied intercourse and defendant used as a witness his wife, who had been twice carried before the grand jury, it was improper, upon cross-examination, to ask her questions not germane to the direct examination, in an attempted impeachment to obtain statements imputed to her to effect that prosecutrix had stated that defendant had intercourse with prosecutrix. *Doherty v. State*, 84 Cr. R. 552, 208 S. W. 932.

Wife of accused being a voluntary witness for him may, like any other witness, be impeached by prior contradictory statements. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

In a prosecution for aggravated assault, it was error to impeach testimony of defendant's wife on trial by means of a witness who testified to her contradictory statements before the grand jury, as a wife cannot be used in any way as a witness against her husband. *Doggett v. State*, 86 Cr. R. 98, 215 S. W. 454.

The wife of accused cannot be cross-examined on new matter not relevant to matters brought out on direct examination, such as threats by accused for the purpose of impeachment. *Briscoe v. State*, 87 Cr. R. 375, 222 S. W. 249.

It was legitimate cross-examination of defendant's wife, who, as witness for him, testified that it was late at night before the day of the killing that she told defendant of deceased's assault on her, after her insisting that her testimony was correct, and qualifiedly denying that at the examining trial she stated that she told him early in the evening, to produce and ask her to read her statement at the examining trial. *Gray v. State* (Cr. App.) 224 S. W. 513.

In murder prosecution, where defendant's wife, testifying for defendant, had testified that deceased had insulted her, and that she had informed defendant thereof before the homicide, cross-examination as to whether the wife had not told her sister at a certain time and place that deceased had not insulted her, and that all they had against him was that he had taken defendant's pistol, held proper to impeach the wife. *Bell v. State* (Cr. App.) 224 S. W. 1108.

A wife, testifying for her husband, may be impeached, as any other witness, by inconsistent statements, on a predicate relating to her testimony in chief. *Id.*

Defendant's wife, testifying in his behalf as to deceased's intimacy with her, may be impeached the same as any other witness by proof that deceased visited her on occasions which she denied. *Eason v. State* (Cr. App.) 232 S. W. 300.

In a prosecution for homicide, where defendant's wife, who maintained undue intimacy with deceased, on cross-examination denied that she had sent her child out of the house at the time decedent had intercourse with her, it was proper for the state on denial to prove the contrary. *Id.*

Art. 976, was intended to aid the officers of the law to ascertain the facts, and even if this article does not prevent an examination of the wife under the former article, it does prevent the use of the wife's statement at the trial of accused even for the purpose of impeaching the testimony of the wife given at the trial in behalf of accused. *Turner v. State* (Cr. App.) 232 S. W. 801.

4. **Incompetency as witness for state.**—Where defendant shot and killed his wife and a man at same time with separate shots, dying declarations of wife are inadmissible in prosecution for killing man, under this article. *Robbins v. State*, 82 Cr. R. 650, 200 S. W. 525.

In prosecution for murder, statements by accused's wife to a third person as to the killing were not admissible, being testimony by a wife against her husband. (Per *Davidson, P. J.*) *Bibb v. State*, 83 Cr. R. 616, 205 S. W. 135.

In view of this article, and art. 479, requiring a written oath by some credible person charging the defendant with an offense before the presentation of an information, the wife is not a credible witness, and is not competent to make complaint supporting an information against her husband for disturbing the peace of third parties. *Stribling v. State*, 86 Cr. R. 195, 215 S. W. 857.

6. — **Existence and severance of marriage relation.**—The divorced wife of one accused of an offense is competent against him in any character of case, and she may testify to any matters which are not confidential communications; and the mere fact that she was his wife when the matters sought to be elicited occurred does not prima facie make such matters privileged. *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1043.

10. **Evidence of acts and declarations of spouse.**—A husband and wife may conspire together to commit an offense, so that the acts and declarations of one not on trial may be admissible against the other. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

#### Art. 797. [777] Defendant jointly indicted may testify, when.

See *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

#### Art. 801. [781] Testimony of accomplice not sufficient to convict, unless, etc.

Cited in concurring opinion, *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

1. **Who are accomplices.**—In a prosecution for the murder of a newly-born child begotten by defendant with his own daughter, the daughter, in the absence of evidence to so show, is not an accomplice, so that her testimony must be corroborated. *Johnson v. State* (Cr. App.) 24 S. W. 285.

Prisoner in jail, who picked up from ground near window a file thrown there by defendant, was an "accomplice" of defendant, charged with having conveyed file to prisoner to aid him and others to escape, though, seemingly, one incarcerated, who merely accepts means provided by one outside to effect his escape, is not within the accomplice rule. *Lagow v. State*, 85 Cr. R. 69, 210 S. W. 211.

Where an accomplice of defendant called complainant's attention to the fact that defendant was picking up a pocketbook, and it was agreed that the contents of the pocketbook be divided equally between the three, and defendant represented that the pocketbook contained a \$500 bill and a \$100 bill, and that it was necessary to have additional money to make change, so that the division might be effected, and complainant delivered \$200 to defendant, defendant saying, "you will get your money back and the \$200," the complainant was not an "accomplice" of defendant in a prosecution under Pen. Code, art. 1332, for having appropriated the \$200 delivered by complainant, and a conviction could rest upon his testimony alone; the theft of the money, which was supposed by complainant to be in a stolen pocketbook, being but an imaginary offense. *Gordon v. State*, 85 Cr. R. 641, 214 S. W. 980.

One who remained outside the burglarized house and kept watch while defendant entered it was an accomplice whose testimony must be corroborated. *Brown v. State*, 86 Cr. R. 8, 215 S. W. 323.

One is an "accomplice" witness, within this article, who is connected with the crime, if he is connected with the offense either as principal, accomplice, or accessory by some unlawful act or omission on his part, transpiring either before, at the time of, or after commission of the offense. *Scales v. State*, 86 Cr. R. 433, 217 S. W. 149.

Where defendant's hog died from being overheated, and he butchered and attempted to sell it through another, possession, distribution, and sale of meat by such other without knowledge it had not been slaughtered did not constitute him an accomplice in offense. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

In prosecution for having had in possession, offering to sell, and having sold meat of hog that had died otherwise than by slaughter and so was unfit for food, owner of shop where meat was kept and another person who undertook to sell in vicinity, witnesses against defendant, held his "accomplices" within this article. *Id.*

As a general rule, all guilty participants in misdemeanor are "principals," and all principals are "accomplices" within this article. *Id.*

In a prosecution for the theft of oil well casing, one whom the state's evidence showed to have gone with defendant and to have taken the casing would be an accomplice, if defendant was guilty. *Davis v. State*, 87 Cr. R. 425, 222 S. W. 236.

One is not an accomplice who cannot be prosecuted for the offense with which the accused is charged. *Burgess v. State* (Cr. App.) 225 S. W. 182.

An "accomplice," as used in connection with the testimony of a witness who requires corroboration, includes all persons connected with the crime by unlawful act or omission transpiring either before, at the time of, or after the commission of the offense, and whether such witness was present or participating in the crime or not. *Robert v. State* (Cr. App.) 228 S. W. 230.

As applied to a witness for the state, the term "accomplice" includes all persons connected with offense by unlawful act or omission transpiring either before, at the time of, or after the commission of the offense, and whether such witness was present or participated in the crime or not. *Chandler v. State* (Cr. App.) 230 S. W. 1002.

For evidential purposes, within this article, any person connected with the crime by unlawful act or omission either before, at, or after the offense is an accomplice, the term including principals and accessories alike. *Chandler v. State* (Cr. App.) 231 S. W. 107.

2. — **Knowledge and concealment of crime.**—To be an accomplice witness, the witness must be criminally connected with crime on trial, and mere concealment of a crime, or of knowledge that a crime is to be or has been committed, does not make one having such knowledge an accomplice. *Herndon v. State*, 82 Cr. R. 232, 198 S. W. 788.

On trial for incest with defendant's daughter, another daughter who knew of the crime and failed to disclose it was not an "accomplice." *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

4. — **Detectives and informers.**—The fact that witnesses in a liquor prosecution were military police, and that the transaction was pursuant to their efforts to capture bootleggers, did not render their evidence insufficient upon the ground that they were accomplices. *Mansfield v. State*, 84 Cr. R. 182, 206 S. W. 195.

On a trial for pursuing the business of selling intoxicating liquors, a detective employed by the county attorney and another whose services were procured by the detective, both of whom testified that they purchased liquor from defendant, but neither of whom made any other effort to induce him to engage in business, were not "accomplices" under this article. *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

A witness against defendant charged with the sale of intoxicants who was furnished marked money, with which he said he bought whisky from defendant after the sale had been forbidden by constitutional amendment, was not an accomplice. *Berlew v. State* (Cr. App.) 225 S. W. 518.

5. — **Receiving stolen goods.**—This article applies to testimony of one who stole goods on prosecution of one he got to haul them away. *Garcia v. State*, 81 Cr. R. 316, 195 S. W. 196.

A state's witness who received from defendants property which it was claimed they obtained by a burglary must be deemed an accomplice, where he testified that when he received the property he thought it had been stolen, and conviction cannot be sustained, unless his testimony is corroborated. *Davidson v. State*, 84 Cr. R. 433, 208 S. W. 664.

In a prosecution for nighttime burglary of a private residence, where it was contended that defendant stole therefrom a can of lard, a witness whose testimony showed that on the night of the burglary he learned of defendant's possession of the lard, and after hearing of the burglary he received and hid it, is an accomplice witness. *Hornbuckle v. State*, 86 Cr. R. 352, 216 S. W. 880.

If a witness in a prosecution for burglary received certain of the stolen goods from defendant believing that they were stolen or having reason so to believe, he was a receiver of stolen property, and an accomplice when used as a witness. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

One who connects himself with a criminal enterprise at any stage becomes an "accomplice," and one who receives stolen property is an "accomplice." *Chandler v. State* (Cr. App.) 232 S. W. 337.

6. — **Participation in sexual crimes.**—Under this article, a woman consenting to an abortion on herself is so far an accomplice that the alleged principal cannot be convicted on her uncorroborated testimony. *Wandell v. State* (Cr. App.) 25 S. W. 27.

A prosecutrix, an accomplice in incest, cannot corroborate herself as to the act of intercourse by her own testimony that defendant ran away when she went before the grand jury. *Bradshaw v. State*, 82 Cr. R. 351, 198 S. W. 942.

A stepdaughter 19 years of age, who consents to intercourse, is an accomplice in a prosecution for incest. *Id.*

In prosecution for adultery, woman was an accomplice, and corroboration was necessary to conviction. *Hammett v. State*, 83 Cr. R. 536, 204 S. W. 226.

In abortion case, prosecutrix is not accomplice. *Hammett v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

A general statement of prosecutrix that accused had carnal knowledge of her without her consent or that she resisted, or that it was had through force, fear, or threats, must be considered with all other testimony and facts, in determining whether she is an accomplice witness, and, if shown that the act could not have occurred without her consent or she did not oppose it, she is an accomplice, unless consent was obtained by duress or fraud. *Wingo v. State*, 85 Cr. R. 118, 210 S. W. 547.

Prosecutrix in statutory rape case is not an accomplice, so conviction may be had on her uncorroborated testimony. *Lucas v. State*, 86 Cr. R. 439, 216 S. W. 396.

Testimony by prosecutrix that she was opposed to the first act of intercourse would not exempt her from the rule of accomplice testimony, but this rule would operate if from the whole evidence it appeared that the act could not have occurred without her consent, and the denial of a charge so stating was error. *Lawrence v. State*, 87 Cr. R. 61, 219 S. W. 460.

In a prosecution for bigamy, where there was evidence that defendant told the second woman he married that he was already married, the refusal of a charge on accom-

police testimony was error for the woman was a principal. *Burgess v. State* (Cr. App.) 225 S. W. 182.

Where incestuous relations extending over a period of many years existed between defendant and prosecutrix, his stepdaughter, 19 years of age, she was an accomplice within the rule as to accomplice testimony. *McClure v. State* (Cr. App.) 231 S. W. 774.

7. — **Disorderly houses and pandering.**—Within rule as to corroboration, one living in house, by procurement of proprietress, for immoral purposes, is "accomplice" of proprietress charged with keeping disorderly house. *O'Brien v. State*, 83 Cr. R. 39, 201 S. W. 179.

8. — **Perjury and false swearing.**—A witness in a prosecution for perjury, who was a participant in the purchase of a car knowing it to be stolen and in the commission of the perjury, if any, committed by defendant, to cover up such transaction, is an accomplice. *Godby v. State* (Cr. App.) 227 S. W. 192.

9. — **Corroboration of seduced female.**—The omission to state in charge that corroboration of testimony of the injured female in a seduction prosecution "is not sufficient, if it merely shows the commission of the offense," such language being used in this article, relating to accomplice testimony, was not error, as art. 789, requiring corroboration of the seduced female's testimony controls. *Slaughter v. State*, 86 Cr. R. 527, 218 S. W. 767.

10. — **Violations of liquor laws.**—Testimony of prosecuting witness that he met accused, who had whisky, and asked accused to sell him some, and that accused did so, did not show that witness was accomplice so as to require that he be corroborated under Pen. Code, art. 602. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

Testimony of witnesses who procured the sale of intoxicating liquor to soldier contrary to Penal Code, art. 610a, for the purpose of procuring evidence is subject to the general rule governing testimony of accomplices, the special rule in local option cases prescribed by Penal Code, art. 602, being inapplicable. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804.

By Pen. Code, art. 602, a stool pigeon, who, at the direction of an officer, purchased intoxicating liquor from defendant, who sold it in violation of the local option prohibition law, was not an accomplice of defendant, to require corroboration of his testimony. *Canales v. State*, 86 Cr. R. 142, 215 S. W. 964.

A conviction for the unlawful selling of intoxicating liquors cannot be had under the Dean Law, in view of section 31 thereof, making purchase unlawful, and section 40, which seeks to compel offenders to testify, and of Pen. Code 1911, arts. 74-88, defining principals, accomplices, and accessories, where the witness purchasing the liquor was not corroborated as required by this article. *Franklin v. State* (Cr. App.) 227 S. W. 486.

The term "accomplice," as applied to witnesses, means one who either as principal, accomplice, or accessory is connected with the crime by unlawful act or omission before, at, or after the offense, and the Dean Law, enacted to enforce Const. art. 16, § 20, prohibiting the sale of intoxicating liquors, does not exempt the purchaser of intoxicating liquors from such witness rule, as did Pen. Code, art. 602. *Id.*

The rule prescribed by this article, that accomplice's testimony must be corroborated, applies, in a prosecution for the sale of intoxicating liquors, to witnesses purchasing; Penal Code, art. 588 $\frac{1}{2}$ , making the purchase unlawful, so that, even if the purchaser was not a principal offender with the seller, he is an offender, and his testimony would require corroboration, the identity of the offense not being essential. *Franklin v. State* (Cr. App.) 227 S. W. 487.

In a prosecution for the unlawful sale of intoxicating liquors under the Dean Law, witnesses purchasing the liquor from defendants were particeps criminis and accomplices, and a conviction cannot be had on the testimony of one of them without corroboration. *Franklin v. State* (Cr. App.) 227 S. W. 488.

In a prosecution for selling intoxicating liquors in violation of the Dean Law, testimony of persons who participated in the purchase of the liquor is not alone sufficient to warrant a conviction, since this article is peremptory that a conviction cannot be had upon the uncorroborated testimony of an accomplice. *Westbrook v. State* (Cr. App.) 227 S. W. 1104.

Under the Dean Prohibition Law, purchasers of liquor are "accomplices" of the person selling it, and their testimony must be corroborated to warrant a conviction. *Robert v. State* (Cr. App.) 228 S. W. 230.

A sale of intoxicating liquor is the transfer of title of property from one person to another, and under the Dean Law the purchaser is connected with the sale and is an accomplice. *Id.*

Under the Dean Law, the purchaser of liquor illegally sold is guilty of a violation of the law, and is an "accomplice," and a conviction for unlawful possession on his testimony cannot be sustained, unless it is corroborated as required by law. *Thomas v. State* (Cr. App.) 230 S. W. 157, 158, 159.

On a trial for the unlawful sale of intoxicating liquor, the purchaser of the liquor and one who furnished the money, participated in hiring an automobile to go for the liquor, and went with the purchaser to a point near defendant's residence, and jointly with the purchaser took charge of and used the whisky, were "accomplices" as a matter of law. *Thomas v. State* (Cr. App.) 230 S. W. 160.

In a prosecution for the unlawful possession of intoxicating liquors where witness testified that he drove for defendant an automobile in which the latter placed the liquor, if the witness knew that defendant was transporting whisky in violation of law, he was an accomplice whose testimony must be corroborated. *Franklin v. State* (Cr. App.) 230 S. W. 692.

In a prosecution for the unlawful possession of intoxicating liquors, where witness testified that he drove for defendant an automobile in which the latter placed the liquor, if the witness knew that defendant was transporting whisky in violation of law, he was an accomplice whose testimony must be corroborated, and whether he did so know

was a question which should have been submitted to the jury, in view of Penal Code, arts. 588 $\frac{1}{4}$ a, 588 $\frac{1}{4}$ o, 588 $\frac{1}{4}$ qq. *Id.*

If another transported defendant down to the house of a third person knowing defendant was engaged in the illicit traffic in liquor, he was an accomplice of defendant in the offense of possessing intoxicating liquor not for medicinal, mechanical, etc., purposes, and, if the third person purchased the liquor from defendant, he was also an accomplice. *Chandler v. State (Cr. App.) 230 S. W. 999.*

In a prosecution for selling intoxicating liquor to another in violation of the Dean Law, such other, the purchaser, is an accomplice of defendant. *Id.*

If another transported defendant down to the house of a third person knowing defendant in the offense of possessing intoxicating liquor not for medicinal, mechanical, etc., purposes. *Chandler v. State (Cr. App.) 230 S. W. 1000.*

A witness who purchased whisky in violation of law from defendant accused of possessing intoxicating liquor was an accomplice. *Chandler v. State (Cr. App.) 230 S. W. 1001 (first case).*

A witness who testified that he bought two gallons of intoxicating liquors from defendant charged with their unlawful sale is an accomplice. *Chandler v. State (Cr. App.) 230 S. W. 1001 (second case).*

One who purchased whisky from defendant charged with its unlawful sale was an accomplice witness as matter of law, and required corroboration. *Chandler v. State (Cr. App.) 230 S. W. 1002.*

In a prosecution for the unlawful possession of equipment for the manufacture of intoxicating liquors not for medicinal, etc., purposes, a witness who helped defendant and another to make some whisky on the premises of such other was an "accomplice" requiring corroboration. *Chandler v. State (Cr. App.) 230 S. W. 1003.*

One who purchases liquor is an "accomplice," and so, in a prosecution based on his testimony, the refusal of a charge on accomplice testimony necessitates reversal. *Chandler v. State (Cr. App.) 231 S. W. 105.*

In a prosecution for possession of intoxicating liquor not for medicinal, mechanical, scientific, or sacramental purposes, a purchaser of liquor will, under the Dean Law, be deemed an "accomplice," and a conviction cannot be had on his uncorroborated testimony, for the term "accomplice," as used in this article, is used in a different sense from the term as used in Pen. Code 1911. art. 79, and includes any person connected with the crime by unlawful act or omission transpiring either before, at, or after the commission of the offense, and under such definition purchaser is an accomplice. *Chandler v. State (Cr. App.) 231 S. W. 107.*

One who receives or conceals property theretofore stolen by another, knowing it to have been so acquired, is an accomplice, within this article, though the offense was complete before the guilty connection of the receiver began. *Id.*

In a prosecution for the unlawful sale of intoxicating liquors, the alleged purchaser was an accomplice whose testimony is insufficient to sustain the conviction in the absence of any corroborating facts. *Chandler v. State (Cr. App.) 231 S. W. 108.*

A purchaser of intoxicating liquors is an accomplice with the seller, even though the prosecution against the seller is for unlawful possession. *Id.*

A purchaser of intoxicating liquor is an accomplice and a conviction against defendant who delivered the liquor cannot be based solely on his testimony, even though the sale was made by defendant's son, defendant delivering the liquor. *Chandler v. State (Cr. App.) 231 S. W. 109.*

When a witness testifies in a prosecution for the sale of liquor or possession only of that liquor bought by such witness he is an accomplice, and the law of accomplice testimony is applicable. *Chandler v. State (Cr. App.) 232 S. W. 337.*

One who connects himself with a criminal enterprise at any stage becomes an "accomplice," and one who receives stolen property is an "accomplice"; but a witness who purchased liquor from defendant other than that of which defendant is charged to have had unlawful possession was not an accomplice, and does not come within any of the rules of accomplice testimony. *Id.*

In a prosecution for the unlawful possession of intoxicating liquor, a state's witness who went to the home of a third person, saw defendant and another, and discussed the purchase of a quart of whisky, etc., was an accomplice witness as a matter of law, and under this article, his uncorroborated testimony would not support conviction. *Id.*

In a prosecution for the unlawful possession of intoxicating liquors, a state's witness who accompanied another such witness to the home of a third person, and saw the other witness talk to such person, but heard no part of the conversation, and testified that on their return to the home of the third person he saw another and defendant, defendant having a bucket in his hand, etc., was not an accomplice as a matter of law, he merely having taken a drink which was in possession of another, and the jury could find he was not an accomplice witness. *Id.*

Where a witness who testified against accused, charged with the unlawful sale of intoxicating liquors, admitted he drank some of the whisky purchased from accused, but disclaimed any connection with the purchase, it was not error to refuse to charge that the witness was an accomplice as a matter of law. *Venn v. State (Cr. App.) 232 S. W. 822.*

11. — **Persons jointly indicted.**—Where parties are jointly indicted and one of them turns state's evidence or testifies for the state, the court should submit a charge to the jury presenting the question of accomplice testimony and the necessary corroboration, although the witness so jointly indicted denies participation in the crime. *Gusters v. State, 87 Cr. R. 181, 220 S. W. 92.*

A witness for the state who admittedly was under indictment for the same offense as that with which defendant was charged was an accomplice in law, so that an instruction should have been given on the necessity of corroboration of an accomplice's testimony, though the defendant claimed to have innocently purchased the stolen cattle

from the witness and the witness denied any connection therewith. *Stiles v. State* (Cr. App.) 232 S. W. 805.

12. — **Evidence as to complicity.**—In prosecution for perjury in testimony at trial of one for arson, evidence held not to show that a witness against defendant was in any sense an accomplice to perjury, or to arson of which defendant previously had been convicted, so as to make his testimony incredible without corroboration. *Herndon v. State*, 82 Cr. R. 232, 198 S. W. 788.

A general statement of prosecutrix that accused had carnal knowledge of her without her consent or that she resisted, or that it was had through force, fear, or threats, must be considered with all other testimony and facts, in determining whether she is an accomplice witness. *Wingo v. State*, 85 Cr. R. 118, 210 S. W. 547.

13. — **Questions for jury.**—In prosecution for cattle theft, trial court properly submitted to jury question whether some, any, or all of certain witnesses were accomplices. *Standfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

Whether witnesses on whose testimony the state relied to connect defendant with the theft charged were accomplices, held an issue of fact for jury under evidence. *Pitts v. State*, 85 Cr. R. 3, 210 S. W. 198.

In prosecution for burglary, whether the two negro witnesses on whose testimony the state relied were accomplices of defendant, held for jury under evidence. *Pitts v. State*, 85 Cr. R. 14, 210 S. W. 199.

Where prosecutrix testified that she engaged in an incestuous relation with defendant through fear he would harm her, and gave evidence that he took advantage of his relationship to influence her to submit, which she did and kept silent, it was a question for the jury whether she was an accomplice witness, requiring corroboration as to commission of offense and defendant's connection therewith, under this article. *Wingo v. State*, 85 Cr. R. 118, 210 S. W. 547.

In view of the facts in a robbery prosecution, held that it was proper for the court to submit to the jury the question of whether a witness was an accomplice, it being the common practice to instruct that a witness is an accomplice if such fact plainly appears, but permissible to submit the question to the jury where the issue thereon is contested. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

In prosecution for having in possession, offering for sale, and selling meat of hog unfit for food, in that it had died otherwise than by slaughter, whether witness against defendant who had acted for him in selling meat was accomplice on account of his knowledge hog had not been slaughtered held for jury. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

Whether the second wife of one accused of bigamy knew at the time of her marriage that defendant was then married to another woman, so as to make her an accomplice within rules of evidence, held a question for the jury under appropriate instructions. *Burgess v. State* (Cr. App.) 225 S. W. 182.

Where the facts with respect to the participation of a witness in a crime are clear and undisputed, it is for the court to determine whether or not he is an accomplice; but that question is to be decided by the jury where the facts tending to connect the witness with the crime are disputed or susceptible of different inferences. *Smith v. State* (Cr. App.) 229 S. W. 523.

Whether a witness who participated in the crime was only a feigned accomplice, as claimed by the state, is a question for the court, where the facts are clear and undisputed and not susceptible of any inferences other than that of innocent intent. *Id.*

Innocent connection with the offense involved, while it will not render the witness an accomplice requiring corroboration, will often raise the issue of fact as to the character of his participation, and, where the issue is doubtful, its solution is for the jury under proper instruction. *Chandler v. State* (Cr. App.) 230 S. W. 1002.

In a prosecution for the unlawful sale of intoxicating liquor, whether the relation to the case of a witness who was the companion of the purchaser of whisky from defendant was such as required his corroboration as an accomplice, held a question of fact for the jury in view of the evidence. *Id.*

14. **Sufficiency of evidence—Necessity of corroboration.**—Testimony of accomplice must be corroborated. *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771; *Pitts v. State*, 85 Cr. R. 14, 210 S. W. 199.

Conviction if in perjury cannot be sustained upon testimony of accomplices alone. *Melton v. State*, 81 Cr. R. 604, 197 S. W. 715.

In prosecution for hog theft, evidence of defendant's accomplice is not sufficient to prove taking of hog, and accomplice must be corroborated as to ownership and taking, as well as defendant's presence. *Williams v. State*, 82 Cr. R. 215, 199 S. W. 296.

To justify conviction, jury must not only believe accomplice testimony to be true, and that it is corroborated, but such testimony, with other testimony, must make out case beyond reasonable doubt. *Standfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

Under this article, jury were not authorized to convict defendant, charged with having conveyed file to prisoner in jail to aid him to escape, on testimony of such prisoner, an accomplice, unless they believed prisoner's testimony was true, that it showed, with other evidence, defendant's guilt, and was corroborated by other testimony tending to connect defendant with offense. *Lagow v. State*, 85 Cr. R. 69, 210 S. W. 211.

Contempt of court by the attempted bribery of jurors is punishable only by a fine and jail sentence, and would therefore be a misdemeanor, and no conviction can be had therefor on the testimony of an accomplice unless he is corroborated by independent evidence connecting accused with the offense. *Ex parte Kahn* (Cr. App.) 232 S. W. 797.

15. **Scope and extent of corroboration required.**—Evidence sufficient to corroborate an accomplice need not be sufficient of itself to show guilt, but need only be material, and tend directly and immediately to connect accused with the offense. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804; *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227; *Halbader v. State*, 87 Cr. R. 129, 220 S. W. 85; *Shaw v. State* (Cr. App.) 229 S. W. 509.

It is not necessary to corroborate an accomplice's entire narrative, nor all of his testimony. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

This article requires as a predicate for conviction upon accomplice testimony that there be other evidence corroborating the accomplices and tending to connect accused with the offense, the corroboration being insufficient if it merely shows commission of the offense. *Corzine v. State* (Cr. App.) 227 S. W. 1102.

Evidence corroborating an accomplice, in order to be sufficient, must of itself tend to connect accused in a guilty way with the transaction in question. *Thomas v. State* (Cr. App.) 230 S. W. 159.

To obtain a conviction for unlawfully manufacturing intoxicating liquor on the evidence of an accomplice, it is not necessary that the corroborative testimony be sufficient of itself to convict, but the accomplice is sufficiently corroborated if the testimony "tends" to connect defendant with the commission of the offense; the word "tend" meaning "to have a leaning." *Chandler v. State* (Cr. App.) 232 S. W. 318.

16. — **Competency of corroborative evidence.**—The use of testimony of one accomplice to corroborate that of another does not satisfy this article. *Corzine v. State* (Cr. App.) 227 S. W. 1102; *Lockhead v. State*, 85 Cr. R. 459, 213 S. W. 653; *Westbrook v. State* (Cr. App.) 227 S. W. 1104; *Ratcliff v. State* (Cr. App.) 229 S. W. 857.

That defendant, charged with theft of automobile, was in possession of recently stolen car in connection with his accomplice was proper testimony to corroborate accomplice, who was a state's witness. *Moore v. State*, 83 Cr. R. 319, 203 S. W. 767.

The prosecutrix as an accomplice in a prosecution for incest cannot corroborate herself. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

Writings admittedly signed by defendant, introduced for comparison, are competent, on inspection by the jury, to corroborate accomplice as to defendant's signature of bill of sale in question. *Moore v. State*, 85 Cr. R. 573, 214 S. W. 347.

An accomplice cannot be corroborated by proof of his own acts and statements in the absence of the accused, nor can an accomplice corroborate himself. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

Statements made by defendant to a justice of the peace, the prosecutrix, who was an accomplice, and another are admissible in a prosecution for adultery. *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

In a prosecution for unlawful manufacture of intoxicating liquors, there was no error in allowing sheriff to testify that he got a quart bottle containing whisky from a witness to corroborate the testimony of said witness and other witnesses who were accomplices. *Shaw v. State* (Cr. App.) 229 S. W. 509.

17. **Sufficiency of corroboration.**—See *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

Evidence corroborative of accomplice held sufficient to warrant conviction of cattle theft. *Jenkins v. State*, 81 Cr. R. 508, 197 S. W. 588; *Standfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

Evidence on prosecution for the theft of automobile held sufficient to corroborate accomplice. *Moore v. State*, 85 Cr. R. 573, 214 S. W. 347; *Hunt v. State* (Cr. App.) 231 S. W. 775.

In order to ascertain whether defendant's accomplice is corroborated, his testimony should be eliminated, and then circumstances taken independent of it to ascertain whether there is sufficient evidence to corroborate. *Williams v. State*, 82 Cr. R. 215, 199 S. W. 296.

Evidence held sufficient to corroborate defendant's accomplice under this article. *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771.

In prosecution of married man for adultery, state depending on testimony of woman, an accomplice, evidence held insufficient to show corroboration, so that testimony was insufficient to sustain conviction. *Hammett v. State*, 83 Cr. R. 536, 204 S. W. 226.

In prosecution for adultery, fact that defendant took woman to town some four months after he ceased relations with her, introduced her as his wife, and occupied a bed with her, was admissible as a circumstance, but was not legal corroboration of her testimony as to their relations four or five months before. *Id.*

In view of this article, conviction of perjury cannot be sustained upon testimony of two accomplices. *Melton v. State*, 84 Cr. R. 398, 207 S. W. 316.

While this article does not require that corroborating facts or evidence shall be such as would show guilt independent of evidence of an accomplice, it does demand that corroboration with some degree of cogency tends to establish facts, material and relevant, which would authorize jury to credit testimony of accomplice. *Johnson v. State*, 84 Cr. R. 400, 208 S. W. 170.

The mere fact that accused was seen riding in a buggy with accomplice on night that two sacks of oats, which were found in the possession of accomplice, were taken from a crib, the door of which was fastened, was not sufficient, under this article, to corroborate the accomplice. *Id.*

Where grain was of a character difficult to identify with such certainty as would justify a conviction for its theft, evidence of an accomplice corroborated by circumstances held sufficient to sustain a verdict of guilty. *Vaughn v. State*, 84 Cr. R. 483, 208 S. W. 527.

To justify conviction, jury must not only believe accomplice's testimony to be true, and that it is corroborated, but such testimony, with other testimony, must make out case beyond reasonable doubt. *Stanfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

Before possession of a file by defendant, charged with conveying it to a prisoner in jail to aid him to escape, could become basis for inference that he caused it to be conveyed to jail (the inference corroborating the accomplice testimony of the prisoner), it was necessary that his possession be established beyond a reasonable doubt by evidence meeting legal test of circumstantial evidence. *Lagow v. State*, 85 Cr. R. 69, 210 S. W. 211.

In prosecution for conveying file to prisoner in jail to aid him to escape, evidence held insufficient to establish defendant's possession of file in corroboration of accomplice testimony of prisoner charged to have been aided. *Id.*

In prosecution for selling whisky to a soldier, evidence held sufficient to corroborate testimony of witnesses who procured the sale for the purpose of securing evidence, if those witnesses were accomplices. *Huggins v. State*, 85 Cr. R. 205, 210 S. W. 804.

In a prosecution for burglary, evidence corroborating the accomplice testimony, implicating defendant as a principal, held sufficient to support verdict of guilty. *Meredith v. State*, 85 Cr. R. 239, 211 S. W. 227.

In a prosecution for adultery, testimony of the woman with whom the intercourse took place held sufficiently corroborated, as it is not necessary to corroborate accomplice's testimony as to each act, but only as to some matter legally tending to show defendant's guilt. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

In a prosecution for incest, evidence of accomplice held sufficiently corroborated to sustain a conviction. *Bradford v. State*, 85 Cr. R. 660, 215 S. W. 300.

Testimony of defendant, who burglarized a house, showing his connection with the matter, he having kept watch outside, held to have corroborated an accomplice. *Brown v. State*, 86 Cr. R. 8, 215 S. W. 323.

The question of the sufficiency of the state's testimony to corroborate an accomplice being primarily for the jury, and they having decided such matter against him, the verdict will not be disturbed on appeal. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

Ordinarily, the sufficiency of the evidence to corroborate the testimony of an accomplice is a question for the jury. *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

Statements made by defendant to a justice of the peace, the prosecutrix who was an accomplice, and another are admissible in a prosecution for adultery, and, when testified to by parties other than prosecutrix, are corroborative evidence. *Id.*

In a prosecution for maliciously destroying public documents, testimony of witnesses to facts which did not tend to connect accused with the offense held insufficient to corroborate the testimony of an accomplice. *Smith v. State*, 87 Cr. R. 219, 220 S. W. 552.

In a prosecution for homicide, evidence that a son of decedent saw defendant and the accomplice at the place of the shooting, and as to measurement of tracks, held sufficient to corroborate testimony of an accomplice and to sustain a finding that defendant fired the shot which killed deceased. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

If there is other evidence independent of that of the accomplice which tends to connect the accused with the commission of the crime, the corroboration of the accomplice is sufficient. *Hasley v. State*, 87 Cr. R. 444, 222 S. W. 579.

In prosecution for burglary, evidence independent of that of accomplice, tending to connect defendant with the commission of the crime, held sufficient to sustain conviction. *Id.*

In prosecution for having sold meat of a hog that had died otherwise than by slaughter, evidence, circumstantial or direct, held insufficient to corroborate defendant's accomplices so as to sustain conviction on their testimony. *Corzine v. State* (Cr. App.) 227 S. W. 1102.

A confession of the accused tending to connect him with the offense charged was available to corroborate accomplices. *Shaw v. State* (Cr. App.) 229 S. W. 509.

In a prosecution for theft of an automobile, evidence that a few days thereafter defendant sold an automobile of the same make but not identified as the same one stolen, and that after the sale he removed therefrom a hammer and box similar to those introduced at the trial, the latter box containing dies for defacing numbers, held insufficient to corroborate the testimony of an accomplice that the automobile sold was the one stolen from the prosecuting witness. *Hunt v. State* (Cr. App.) 229 S. W. 869.

The proper test in determining whether the corroboration of an accomplice was sufficient is whether, eliminating the testimony of the accomplice, it shows or tends to show that the defendant committed the offense. *Id.*

Testimony of an accomplice to the purchase of whisky from defendant is not corroborated by testimony of another witness that he carried the purchaser and a third party out to a point, where they left his car and walked off, that he did not know where they went, and that when they came back they had whisky. *Thomas v. State* (Cr. App.) 230 S. W. 158.

On a trial for possessing liquor unlawfully, the testimony of a witness that he went with a purchaser of whisky, but did not go to defendant's house, and did not see defendant, or know from whom the purchaser got the whisky, which he brought back from the house, was not sufficient corroboration of the testimony of the purchaser. *Thomas v. State* (Cr. App.) 230 S. W. 159.

In a prosecution for theft of an automobile, evidence as to identity of the car found in possession of the defendant held sufficient to corroborate an accessory, as required by this article. *Hunt v. State* (Cr. App.) 230 S. W. 406.

Evidence in a prosecution for unlawfully possessing intoxicating liquor not for medicinal, etc., purposes held insufficient to meet the requirements of this article. *Chandler v. State* (Cr. App.) 230 S. W. 1000.

Under this article, providing corroboration is not sufficient which merely shows the commission of the offense, the state's testimony from the mouth of defendant's accomplice is sufficient if there is other testimony in the case tending to connect defendant with the commission of the offense. *Id.*

In a prosecution for possessing intoxicating liquor not for medicinal, etc., purposes, testimony of a witness for the state held not of sufficient cogency to make a case in corroboration of defendant's accomplice, a purchaser of whisky from him. *Chandler v. State* (Cr. App.) 230 S. W. 1001.

In a prosecution for the unlawful sale of intoxicating liquors, evidence held insufficient to meet the requirements of the statute as to corroboration of the accomplice's



testimony that the offense must not only be shown to have been committed, but also that accused must be connected therewith. *Id.*

In a prosecution for the unlawful possession of equipment for the manufacture of intoxicating liquors not for medicinal, etc., purposes, evidence held insufficient to corroborate an accomplice witness in placing defendant in joint possession with his father of the equipment for the manufacture of liquor. *Chandler v. State* (Cr. App.) 230 S. W. 1003.

Testimony of neighbors to having seen defendant and prosecutrix together in places which would have afforded opportunity for the commission of the crime was not sufficient corroboration to establish incest by accomplice testimony of prosecutrix, where defendant produced a large number of witnesses who testified that he bore a good reputation for virtue and chastity. *McClure v. State* (Cr. App.) 231 S. W. 774.

In a prosecution for receiving stolen goods, the testimony of the accomplices who stole the goods is sufficiently corroborated by testimony of the officers that they saw one accomplice deliver the goods to defendant, and that they were taken from his possession. *Kluting v. State* (Cr. App.) 232 S. W. 305.

In a prosecution for manufacturing intoxicating liquor, evidence held sufficient to corroborate an accomplice, showing defendant's connection with the crime. *Chandler v. State* (Cr. App.) 232 S. W. 318.

In a prosecution for manufacturing intoxicating liquor not for medicinal, etc., purposes, evidence held sufficient to corroborate defendant's accomplice, and to support the jury's verdict of guilty. *Chandler v. State* (Cr. App.) 232 S. W. 336.

In contempt proceedings against an attorney for attempted bribery of jurors, testimony relating principally to the attorney's evidence in behalf of the one who offered the bribe, all of which could be explained consistently with the innocence of the attorney, held insufficient to corroborate the testimony of an accomplice that the attorney employed him to offer the bribe. *Ex parte Kahn* (Cr. App.) 232 S. W. 707.

**20. Necessity of instructions as to accomplice testimony.**—It was proper to refuse to instruct on the law of accomplice testimony as applied to a witness, whom evidence showed was unconnected with alleged sale of intoxicating liquors, except that he was a purchaser of it. *Fisher v. State*, 81 Cr. R. 563, 197 S. W. 189.

State relying on testimony of accomplice, a charge should have been given that to convict accomplice must be corroborated as to corpus delicti. *Williams v. State*, 82 Cr. R. 215, 199 S. W. 296.

In a prosecution for incest, evidence held to require the court to instruct, as matter of law, that the testimony of the prosecuting witness would not support a conviction, unless corroborated. *Bohannon v. State*, 84 Cr. R. 8, 204 S. W. 1165.

The testimony to connect defendant with the burglary, other than that of the store owner that it was his coat which he saw on defendant, being that of a person who, though testifying that defendant unsuccessfully tried to get him to join in the burglary, said that he gave the coat to defendant, a charge on accomplice testimony should have been given. *Winn v. State*, 84 Cr. R. 475, 208 S. W. 506.

In a prosecution for burglary, where the state relied on the evidence of one who testified that when he received the property from defendant he thought it had been stolen, an instruction on accomplice testimony should be given, especially where the party had turned state's evidence to avoid punishment. *Davidson v. State*, 84 Cr. R. 433, 208 S. W. 664.

In prosecution for unlawfully living with a woman not defendant's wife while he was lawfully married to another, in view of the facts, court should have instructed on defendant's request that, in order to convict, the woman with whom he was charged to have lived, an accomplice, should be corroborated as to the fact of intercourse. *Childress v. State*, 85 Cr. R. 22, 210 S. W. 193.

That defendant in his alleged confession, which was introduced by the state, contradicted his testimony as a witness on the trial, could only affect his credibility as a witness, or his guilt, and in no wise justified ignoring the right of the jury to pass on the question of accomplice's testimony, by refusing requested instruction relating thereto. *Flores v. State*, 216 S. W. 267, 216 S. W. 185.

Where it appeared that defendant, while in the presence of the witness for the prosecution, wrote a check, signing the name of a third person, and that such witness carried the check to the bank, where it was cashed, etc., the failure of the court to charge on accomplice testimony held error. *Id.*

In prosecution of defendant as an accomplice to theft of automobile, held, that jury should have been instructed that the state must prove, first, that P. was a principal and committed the theft, and that he must be corroborated as to that issue, and, second, that defendant was an accomplice as charged, and that P.'s testimony was not sufficient to prove that fact, but must be corroborated. *Cone v. State*, 86 Cr. R. 291, 216 S. W. 190.

In a prosecution for nighttime burglary of a private residence, where it was contended that defendant stole therefrom a can of lard, a witness whose testimony showed that on the night of the burglary he learned of defendant's possession of the lard, and after hearing of the burglary he received and hid it, is an accomplice witness, and defendant's request for charge on accomplice testimony was improperly denied. *Hornbuckle v. State*, 86 Cr. R. 352, 216 S. W. 880.

Where defendant was convicted of theft of a carburetor from an automobile upon the testimony of a witness who stole the carburetor and whom defendant had helped, it was error not to permit counsel to address the jury on the matter of corroboration of accomplice's testimony and to fail to instruct thereon. *Newton v. State*, 86 Cr. R. 508, 217 S. W. 939.

In a prosecution for keeping a bawdyhouse, as to witnesses, male and female, who frequented the house or used it for purposes of assignation, the trial court properly refused to instruct on the law of accomplice testimony as declared in this article. *Clark v. State*, 86 Cr. R. 585, 218 S. W. 366.

In prosecution for keeping a bawdyhouse, where a witness testified to facts showing she was a prostitute, used defendant's house to ply her vocation, with defendant's knowledge, and shared receipts with her, defendant was entitled to have the law of accomplice testimony, as declared in this article, applied to the testimony of such witness. *Clark v. State*, 86 Cr. R. 585, 218 S. W. 366.

In prosecution for having had in possession and sold meat of hog that had died otherwise than by slaughter, where single sale proved was by testimony of one whom jury could find to have been an accomplice, court on request should have charged on limitations placed by this article, on accomplice testimony. *Cozine v. State*, 87 Cr. R. 92, 220 S. W. 102.

In a prosecution for the theft of oil well casing, one whom the state's evidence showed to have gone with defendant and to have taken the casing would be an accomplice, if defendant was guilty, and defendant's appropriate request for a special instruction that such person, used by the state as witness, would be an accomplice and would have to be corroborated, should have been given. *Davis v. State*, 87 Cr. R. 425, 222 S. W. 236.

In a prosecution for the unlawful sale of intoxicating liquors under the Dean Law, witnesses purchasing the liquor from defendants were particeps criminis and accomplices, and a conviction cannot be had on the testimony of one of them without corroboration, and it was error not to so charge under sections 2, 31, and 36 of said act (Pen. Code, arts. 588 $\frac{1}{2}$ a, 588 $\frac{1}{2}$ c, 588 $\frac{1}{2}$ qq). *Franklin v. State* (Cr. App.) 227 S. W. 488.

On a trial for the unlawful sale of intoxicating liquors, a charge on the law of accomplice testimony with reference to the purchaser's testifying to the purchase should be given. *Gardner v. State* (Cr. App.) 229 S. W. 856.

Where the state relied on the testimony of a purchaser of liquor who was an accomplice, a charge on accomplice testimony is necessary. *Chandler v. State* (Cr. App.) 231 S. W. 105.

In a prosecution for the unlawful possession of intoxicating liquor, failure to charge on accomplice testimony held not erroneous. *Chandler v. State* (Cr. App.) 232 S. W. 337.

21. — Instructions as to who are accomplices.—In a prosecution for theft, held, that defendant was entitled to have given an instruction submitting the issue of whether state's witness was an accomplice. *McCormick v. State*, 86 Cr. R. 366, 216 S. W. 871.

In view of this article, in a prosecution for receiving and concealing stolen property, the court should have instructed at defendant's request that the jury should determine whether or not a witness was an accomplice, his character as such being suggested by his testimony, and, if so, that a conviction could not be founded on his uncorroborated testimony, this though the witness denied any connection with the crime. *Scales v. State*, 86 Cr. R. 433, 217 S. W. 149.

In a prosecution for assault with intent to murder, where it appeared that a freshly discharged gun was found at the home of the wife of the person assaulted, evidence held not to show such relation between the wife and defendant as to justify an instruction that she was an accomplice; there being no evidence of conspiracy between such wife and defendant. *Henry v. State*, 87 Cr. R. 392, 221 S. W. 1085.

In prosecution for swindling by selling an 85-cent time check for \$41.15, testimony that defendant had first offered the check to a third person, whom he convinced that the check was for \$85, whereupon the third person stated to prosecuting witness that the check was for \$85, held insufficient to call for an instruction that such third person was or might be an accomplice. *Scott v. State* (Cr. App.) 228 S. W. 1099.

Under this article, where a witness who admittedly participated in the offense claimed to have been only a feigned accomplice, but there was no evidence of that fact except his own testimony, though other evidence would have been available if it was true, it was error to refuse requested instructions submitting to the jury the question whether that witness was an accomplice whose testimony needed corroboration. *Smith v. State* (Cr. App.) 229 S. W. 523.

In a prosecution for murder, a charge that a witness, who came to the scene of the shooting two hours after it took place, and assisted in carrying deceased to his home, was an accomplice, was correctly refused, the fact that the justice of the peace filed complaints against all the parties who had anything to do with the transaction, including such witness, not necessitating such a charge as to him; there being no evidence to connect him with the shooting. *Barnes v. State* (Cr. App.) 232 S. W. 312.

22. Sufficiency of instructions as to corroboration.—A charge that prosecutrix in a seduction case was an accomplice, that the jury must not only believe her testimony was true, but that it showed defendant's guilt, and that her testimony must be corroborated by evidence other than her own, both as to sexual intercourse and promise of marriage, held correct, and not subject to objection that it authorized conviction if jury believed prosecutrix. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

Charge on accomplice testimony, to be sufficient, should (1) define accomplice; (2) give statutory inhibition against conviction on uncorroborated accomplice testimony; (3) state that corroborated evidence must be as to some material matter, etc.; and (4) apply law to facts. *Standfield v. State*, 84 Cr. R. 437, 208 S. W. 532.

An instruction, in a prosecution for incest, held unduly restrictive in predicating the jury's right to find prosecutrix an accomplice witness upon belief that she "did voluntarily, and with the same intent which actuated defendant, unite with him in the alleged commission of the offense." *Wingo v. State*, 85 Cr. R. 118, 210 S. W. 547.

Charge authorizing conviction on accomplice testimony if it was believed and was corroborated by testimony tending to connect defendant with the offense is defective; it should also state that it was necessary that accomplice testimony, in connection with the other evidence, should show defendant's guilt beyond a reasonable doubt. *Lockhead v. State*, 85 Cr. R. 469, 213 S. W. 653.

23. — Authorizing conviction on accomplice testimony tending to show guilt.—Instruction on accomplice's testimony that there must be other evidence than that of the accomplice "tending to connect" the accused with the offense charged held proper:

the words "tending to connect" having reference to the corroborated testimony and not to the accomplice's testimony. *Middleton v. State*, 86 Cr. R. 307, 217 S. W. 1046.

### 3. EVIDENCE AS TO PARTICULAR OFFENSES

**Art. 806. [786] Perjury and false swearing; two witnesses, etc., required.**

**Sufficiency of evidence in general.**—Under this article, held, on an indictment for perjury, that a witness whose general reputation for truth and veracity is bad, and whose testimony is directly contradicted by defendant and an unimpeached and disinterested witness, is not a "credible" witness, and his testimony, only slightly corroborated, is insufficient to support a conviction. *Kitcken v. State*, 29 Tex. App. 45, 14 S. W. 392.

Under this article, a person cannot be convicted of perjury on the uncorroborated testimony of one witness as to the falsity of the statement charged. *Taylor v. State* (Cr. App.) 22 S. W. 974.

In prosecution for attempt to induce another to commit perjury by filing, in support of motion for new trial, affidavit falsifying testimony, falsity must be proved by two credible witnesses, or one credible witness, supported by statutory corroboration. *Shipp v. State*, 81 Cr. R. 328, 196 S. W. 840.

Falsity of accused's testimony before grand jury held established by two credible witnesses or one credible witness strongly corroborated, as required by this article. *Timmins v. State*, 82 Cr. R. 263, 199 S. W. 1106.

In perjury prosecution, where there was no proof of immunity agreement with a state's witness, but merely evidence from which such understanding could be inferred, such person was a competent witness within this article. *Id.*

Under this article, conviction of perjury cannot be sustained upon testimony of two accomplices, or upon the testimony of one credible witness and one accomplice. *Melton v. State*, 84 Cr. R. 398, 207 S. W. 316.

An accomplice in perjury who under oath admitted giving directly contrary evidence in a civil trial, and whose reputation for truth and veracity was shown to be bad, and who had been convicted of a felony, is not a "credible witness" within this article. *Godby v. State* (Cr. App.) 227 S. W. 192.

Evidence held not to show that the statement assigned as the basis for the perjury charged was sworn to by two credible witnesses or by one such, strongly corroborated by other witness as to such falsity, as required by this article. *Id.*

**Instructions.**—The provision of article 806, that no person shall be convicted of perjury, except on testimony of two credible witnesses, or of one strongly corroborated, must be stated in the instructions, on a trial for perjury. *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180.

### 4. OF DYING DECLARATIONS AND OF CONFESSIONS OF THE DEFENDANT

**Art. 808. [788] Dying declarations, evidence, when.**

**In general.**—In prosecution of bank president for having murdered state commissioner of banking, statements by commissioner immediately after he was shot, also later, made to physicians called to attend him, held admissible as dying declarations. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In a prosecution for manslaughter, dying declaration made by deceased held admissible in evidence. *Mason v. State* (Cr. App.) 228 S. W. 952.

**Consciousness of impending death.**—Deceased's dying declarations are inadmissible in absence of predicate laid by proof of decedent's consciousness of impending death. *Wallace v. State*, 82 Cr. R. 538, 200 S. W. 407.

To render a dying declaration admissible in prosecution for murder, decedent must have believed when he made the statement that he was going to die by reason of the wound inflicted and that he could not recover. *Walker v. State*, 84 Cr. R. 136, 206 S. W. 96.

In prosecution for murder, shooting having occurred in latter part of September, and death December 24th, decedent's dying declaration, purporting to have been made on November 6th, decedent having subsequently to declaration expressed belief he would get well, was inadmissible, there being no evidence decedent believed he was going to die immediately when he made statement. *Id.*

Statements of deceased shortly before death are admissible as dying declarations, where it clearly appears that he was aware of his physical condition, and did not believe that he could live. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

Where evidence showed deceased was told by his medical attendant that he must die, and he sent for a minister who administered the dying sacrament, and talked with his brother about his business, and expressed commiseration for his wife and children, a sufficient foundation was laid for admitting in evidence his dying declaration. *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327.

Where deceased, cut in an affray by defendant, believed death to be near, and had no hope of recovery, and voluntarily made a dying statement, as appeared from the statement itself, such statement or dying declaration was admissible. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Testimony that physician told deceased that his wound was a "serious one" and "he thought fatal" was not a sufficient predicate upon which to permit the introduction of a statement then made by deceased as a dying declaration. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

In homicide prosecution, evidence that physician told deceased that she could not live but two or three days, and that deceased about the same time told witness, to whom

she made claimed dying declaration, that she did not expect to recover or get well, held a sufficient predicate for admission of the dying declarations. *Hill v. State* (Cr. App.) 225 S. W. 521.

The length of time elapsing between making of decedent's claimed dying declaration and the date of his death did not conclude the matter as to whether the declaration was admissible under this article, nor render it inadmissible. *Walker v. State* (Cr. App.) 227 S. W. 308.

**Signature.**—Getting deceased's statements and then reducing them to what the county attorney called "the substance," which the deceased signed by mark after hearing it read, was hardly a compliance with the law as to dying declarations. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

**Answers to interrogatories.**—Questions to elicit a dying declaration are not prohibited by this article, and do not destroy the declaration unless their character is such as to lead the dying man to make a particular statement. *Walker v. State* (Cr. App.) 227 S. W. 308.

**Relevancy and competency of declaration.**—Where defendant killed his wife and man at same time, dying declarations of wife are inadmissible in prosecution for killing man, under this article. *Robbins v. State*, 82 Cr. R. 650, 200 S. W. 525.

A dying declaration that defendant had put poison in whisky, which he gave to deceased, because it was so bitter, was not inadmissible as an opinion. *Fults v. State*, 83 Cr. R. 602, 204 S. W. 108.

Hearsay statements in dying declaration, such as statement that deceased and another heard defendant cock his gun, should have been excluded. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

A statement of deceased that he was glad that the officers got the right man, made when an officer said that he had "arrested the right man," was not admissible as a dying declaration. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

When the death of the declarant and the circumstances immediately connected therewith are the subjects mentioned, dying declarations are admissible. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

In a prosecution for murder, court did not err in permitting the state to introduce in evidence the dying declaration of deceased that he came to the place where accused was immediately preceding the shooting for the purpose of apologizing, over the objection of accused that it tended to prove an undisclosed purpose, where several witnesses and accused himself testified that deceased came into his shop just prior to the shooting, and stated that accused had judged him wrong, that he did not mean to insult the girl, and had come to settle the thing and get it squared; accused not shooting deceased upon any theory of apparent danger. *Id.*

In prosecution for wife murder, the admission, as dying declarations, of statements by deceased as to defendant's whipping and beating her on other occasions held error, since dying declaration should be confined to the immediate facts of the homicide. *Hill v. State* (Cr. App.) 225 S. W. 521.

The scope of a dying declaration is limited to actual facts pointing directly to the cause of death and the circumstances producing and attending it. *Walker v. State* (Cr. App.) 227 S. W. 308.

Dying declarations, as introduced in evidence in prosecution for murder, held admissible, portions thereof as to what decedent and a woman were doing at the time, and what defendant said when he discovered them, tending to develop the res gestae of the offense and being inextricably mingled with the rest of the statement. *Id.*

**Predicate for admission of declaration and method of proof.**—In homicide prosecution, evidence that deceased prior to his death, knowing that he could not live, told witness "about the condition of his wife. He told me a few things. He wanted me to look after his family"—was admissible as tending to show deceased's mental condition at time of making statement and to rebut defendant's contention that he did not know what he was talking about at such time. *Mason v. State*, 85 Cr. R. 254, 211 S. W. 593.

The predicate for dying declaration as shown by testimony of witnesses held hardly in compliance with the law. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

Where there is doubt as to whether victim at time of making dying declaration believed he was in danger of death in such manner as required by statute, the question should be submitted to the jury. *Id.*

Wherever there is a doubt as to a dying declaration that involves a doubt as to the law and fact, the jury should be left untrammelled to decide whether a proper predicate had been laid, and instructed that if they do not so find they should not consider it. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

Evidence tending to establish the predicate required by this article, held sufficient to justify admission of the dying declaration. *Walker v. State* (Cr. App.) 227 S. W. 308.

In a prosecution for homicide, testimony of a witness as to decedent's dying declaration that deceased got worse before making the declaration and told witness he knew he was going to die was admissible as embodying decedent's opinion on the matter of his approaching dissolution. *Id.*

When the evidence is conflicting, but sufficient, if believed, to establish the predicate required by this article, for a dying declaration, the practice of submitting the issue to the jury is pursued. *Id.*

**Impeachment and contradiction.**—In a homicide case where a witness for the state testified that five minutes after the shooting deceased told him that a person other than accused had shot him, the court erred in refusing to submit to the jury the question as to whether or not such third person and not accused killed deceased. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

### Art. 809. [789] Confession of defendant.

Cited, *Oliver v. State*, 81 Cr. R. 529, 197 S. W. 185.

**Art. 810. [790] When confession shall not be used.**

1. **Nature and sufficiency of confession as admission of guilt.**—Evidence that, after his arrest, the defendant refused to divulge his name, was erroneously admitted, in view of the absence of proof bringing such evidence within the exceptions of this article. *Carter v. State*, 23 Tex. App. 508, 5 S. W. 128.

In prosecution for perjury at hearing on writ of habeas corpus for bail in homicide case, evidence that defendant, arrested for the killing, denied any knowledge of it, and his presence at time and place, held inadmissible as incriminating fact made without warning and without writing, though he testified in habeas corpus proceedings that he was present. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

In a prosecution for receiving stolen goods, testimony that defendant, while under arrest, took the officers to a place where he represented they might recover the rest of the goods, part having been recovered already, though he stated that he did not know where they were, held inadmissible, as in the nature of a confession, in the face of the fact defendant had stated he did not know where the property was. *Kyle v. State*, 86 Cr. R. 471, 217 S. W. 943.

In a prosecution for burglary, property recently stolen and found in defendant's possession is admissible against him regardless of whether he was or was not under arrest when the same was found. *Rippey v. State*, 86 Cr. R. 539, 219 S. W. 463.

Admission of a criminating fact, as that grips containing recently stolen goods are accused's property, is a "confession" within this article. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

In a murder prosecution, testimony by the sheriff that after he arrested defendant and without warning him received from him a pair of shoes, which he subsequently used in comparison with tracks found about the scene of the homicide, did not constitute an infringement of the statutory rule against receipt of a confession from one who is under arrest and unwarned. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a prosecution for theft from a railroad car, a statement by defendant to arresting officer immediately after arrest, where nothing was said about pointing out the car, held inadmissible, as against contention that it was a part of a later conversation at the jail in which he agreed to point out the car. *Monroe v. State* (Cr. App.) 230 S. W. 995.

In a prosecution for robbery, testimony of an arresting officer that defendant offered to pay him to release him was inadmissible, under this article, the offer, if not a confession of guilt, laying the foundation for argument equally harmful, and being offered as an inculpatory fact. *Stanchel v. State* (Cr. App.) 231 S. W. 120.

In prosecution for forgery, defendant's written statement that he signed another's name to the check without authority from such other person, and without even knowing him, held admissible as a confession, as against contention that it did not connect defendant with the crime. *Mettall v. State* (Cr. App.) 232 S. W. 315.

2. **Confession distinguished from exculpatory statements.**—In a prosecution for embezzlement where the state introduced evidence of a declaration by defendant as to a deposit in his own name with the statement that the money resulted from a speculation, the latter statement was exculpatory, and it was error to refuse a requested charge that it was the state's duty to rebut such exculpatory statement and that it could not be considered against accused. *Miller v. State* (Cr. App.) 225 S. W. 382.

3. **Admissibility of confession in general.**—Where accused in attempting to avoid arrest for burglary shot the deputy sheriff, his confession to the burglary after arrest on both charges was admissible in the prosecution for murder, if material. *Burkhardt v. State*, 83 Cr. R. 228, 202 S. W. 513.

In prosecution for murder of deputy sheriff who attempted to prevent escape of accused after arrest for burglary, accused's subsequent confession to the crime of burglary was admissible on the question of motive. *Id.*

In a prosecution for receiving or concealing stolen goods, where the course of conduct detailed in defendant's confession might have had weight as bearing on his guilty knowledge or intent, the confession was admissible. *Czernicki v. State*, 85 Cr. R. 169, 211 S. W. 223.

In view of this article, in prosecution for rape on female under age of consent, confession showing only assault to rape, if any, held admissible to establish charge of rape. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

The purpose of this article was to prohibit the proof of verbal confessions made while under arrest, which did not come within some of the exceptions named in the statute. *Williams v. State* (Cr. App.) 225 S. W. 177.

Where defendant was indicted for assault to rob and for murder, a confession tending to support the latter, when the state had elected the former, held admissible. *Flores v. State* (Cr. App.) 227 S. W. 320.

In a prosecution for theft from a railroad car, a statement by defendant to arresting officer immediately after arrest where nothing was said about pointing out the car, held inadmissible as against contention that it was a part of a later conversation at the jail in which he agreed to point out the car, and harmful under the circumstances, his explanation being that he was taking the goods to the proper railroad officer. *Monroe v. State* (Cr. App.) 230 S. W. 995.

5. **Confession by party not in confinement or in custody.**—Where one was examined as a witness in proceedings before a magistrate or on a coroner's inquest, and was then aware that he was charged or suspected of the crime under investigation, his testimony there cannot be received against him upon his trial for the same offense, unless he was warned. *Reynolds v. State*, 82 Cr. R. 443, 199 S. W. 636.

Accused's testimony on such investigation, introduced to fix culpability upon some one, especially upon accused, and which placed her at the scene of the homicide in a position where she could have used the gun, and excluded the presence of everybody except herself and deceased was not admissible on the ground that it was merely exculpatory. *Id.*

In a trial for homicide, error in admitting the statements of defendant on a preliminary investigation in which she was charged or suspected of the crime was not waived by the fact that she took the stand to explain the testimony or lessen its consequences. *Id.*

An alleged oral statement, made by defendant when he was in the presence of two officers, who later took him into custody, that he was guilty, not having been reduced to writing, and signed in the presence of two disinterested witnesses, held not admissible as a confession, no warning having been given. *Bonatz v. State*, 85 Cr. R. 292, 212 S. W. 494.

As it is not necessary to make an arrest in formal words, and the fact of arrest can be shown by surrounding facts and circumstances, a defendant, who objected to the admission of a purported confession made at a time he was in the presence of two officers who would not have allowed him to escape, must be deemed under arrest. *Id.*

Though constable suspected that defendant had stolen or received stolen chickens when he went to defendant's restaurant and there found some chickens that had been killed and dressed, and would not have permitted defendant to escape, where defendant did not know of constable's state of mind, statements made by defendant in explanation of his possession were not statements within rule prohibiting use of confessions made by one under arrest, in absence of compliance with statute. *Phillips v. State*, 86 Cr. R. 624, 219 S. W. 454.

Where defendant called at the sheriff's office in response to a telephone message, and there made an alleged confession in response to an assertion by officer that his confederates had confessed, held that, though defendant was not formally placed under arrest until after his statement, he must be deemed to have been arrested at the time, so that the confession which was not reduced to writing in accordance with the statute was inadmissible. *Casanova v. State*, 87 Cr. R. 63, 219 S. W. 478.

In a prosecution for robbery, defendant's statement made to a justice of the peace when he was not strictly under arrest, but was suspected of crime and was being questioned with reference to it, and was not warned, was inadmissible. *Buddy v. State* (Cr. App.) 227 S. W. 323.

**6. Confession while in confinement or in custody.**—Under this article, defendant's statement of his connection with crime made before grand jury, where after arrest he was brought by jailer, is inadmissible. *Oliver v. State*, 81 Cr. R. 529, 197 S. W. 135.

Any inculpatory fact or circumstance involved in a statement by defendant while in jail or under arrest and when he has not been cautioned cannot be used as evidence against him in view of this article. *Dover v. State*, 81 Cr. R. 545, 197 S. W. 192.

A conversation between defendant and officers having him under arrest, detailing his conduct complained of, he not being warned, was inadmissible. *Dodd v. State*, 82 Cr. R. 139, 198 S. W. 733.

To exclude defendant's confession or incriminating statement, detention, legal or illegal, is sufficient, and it is not necessary that complaint or indictment be filed as basis of arrest. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

Statements of defendant to arresting officer are properly admitted over defendant's mere objection that they were made after his arrest; the officer testifying they were made before he had stated he intended to arrest. *Hollis v. State*, 83 Cr. R. 612, 204 S. W. 432.

Verbal statements concerning stolen property, made to arresting officer by defendant while he understood that he was under arrest, but before he was taken to jail, held to have been made by defendant while "under arrest," within this article. *Clark v. State*, 84 Cr. R. 390, 207 S. W. 98.

Under this article, it is unnecessary that arrest be made in formal words if it clearly appears from the surrounding facts. *Id.*

The uncontradicted evidence showing that when accused made his confession he was in fact under detention by officers, and nothing more being shown, he was in the "custody of an officer" within this article. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

The court erred in permitting the sheriff to testify that he obtained a pistol from the home of accused's father and exhibited it to accused, and that he admitted that it was the pistol used in the robbery, the accused then being under arrest, unwarned, declaration not being reduced to writing, and pistol not being found by reason of the declaration. *Hilliard v. State*, 87 Cr. R. 416, 222 S. W. 553.

Testimony of statements by defendant to police officers, amounting to a confession, made while he was under arrest without being warned and without being reduced to writing, held inadmissible. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

Statements made by accused while under arrest, some of which were made to the party having him under arrest and some of which were made to the grand jury, are all incompetent where the record shows that accused was not warned and that his statements were not reduced to writing and signed by him as required by this article. *Mayzone v. State* (Cr. App.) 225 S. W. 55.

Admission of testimony as to statements made by accused while in custody, not reduced to writing and made without accused being warned, held error, under this article. *Deckerd v. State* (Cr. App.) 225 S. W. 166.

The rule that, unless the confession made by defendant while being confined or in the custody of an officer came within the exceptions named in White's Ann. Code Cr. Proc. art. 790, which differed from the present statute only in not requiring a written, signed statement, it was inadmissible, applied to statements before the grand jury, but not to the reproduction of testimony given by defendant upon the trial of his case in open court. *Williams v. State* (Cr. App.) 225 S. W. 177.

In a prosecution for transporting and possessing intoxicating liquor in violation of the Dean Law, testimony of the officer who found defendant and wife in bed in his hotel, and two grips or suit cases filled with pint bottles of whisky in the room, as to the statement made to him by defendant concerning the grips and liquor, held inadmissible.

ble on the ground that defendant was under arrest or legal restraint and was not warned. *Campbell v. State* (Cr. App.) 230 S. W. 695.

7. — **Caution.**—An alleged oral statement, made by defendant when he was in the presence of two officers who later took him into custody, that he was guilty held not admissible as a confession, no warning having been given. *Bonatz v. State*, 85 Cr. R. 292, 212 S. W. 494.

In a prosecution for an assault with intent to murder, evidence that, after the difficulty, witness said to defendant, "You have liked to have got him," and that defendant replied, "I done the best I could," occurring when defendant was under arrest and was not warned, should have been excluded under the statute expressly forbidding introduction of admissions or confessions of one accused of crime made under such circumstances. *Brown v. State*, 85 Cr. R. 493, 213 S. W. 658.

Though defendant was not in fact in custody, still, where the circumstances surrounding him when and after he was directed by the constable to go before the county attorney were such as to indicate to him that he was in custody, written statements made by him before the county attorney about alleged stolen chickens in his possession were not admissible against him; it affirmatively appearing that no warning was given. *Phillips v. State*, 86 Cr. R. 624, 219 S. W. 454.

Sheriff's testimony as to defendant's declarations, made while under arrest and unwarned, held inadmissible. *Chadwick v. State* (Cr. App.) 232 S. W. 842.

Any testimony as to what had been said and done by defendant while in jail without having been warned held error under this article. *Brent v. State* (Cr. App.) 232 S. W. 845.

8. — **Voluntary statements before examining court.**—Where defendant and another Texas ranger attempted to enter premises and in the course of the proceedings one of the occupants was shot, testimony by defendant and the other ranger on examination before a justice of the peace is inadmissible, where the parties were not warned; this being so regardless of whether they were under arrest or not. *Bloxom v. State*, 86 Cr. R. 562, 218 S. W. 1068.

9. — **Voluntary character of confession in general.**—A confession, to be admissible, must have been freely and voluntarily made, without compulsion or persuasion, or promise of immunity, or other improper influence. *Johnson v. State*, 82 Cr. R. 82, 197 S. W. 995.

In prosecution for selling intoxicating liquors in violation of law, testimony that defendant had told witness, a grand jurymen, that he had sold beer to prosecuting witness, and that he would plead guilty if witness would aid him in getting suspended sentence, held not inadmissible as involuntary confession. *Goss v. State*, 83 Cr. R. 349, 202 S. W. 956.

Incriminating statements of accused voluntarily appearing before grand jury and making the statements after having been duly warned in terms of law are admissible against him. *Webb v. State*, 86 Cr. R. 337, 216 S. W. 865.

Where the evidence shows without conflict that a confession was induced by coercion on the part of the officers in charge of the prisoner, the court should exclude it. *Williams v. State* (Cr. App.) 225 S. W. 177.

Where defendant, while under arrest, voluntarily made footprints for purpose of comparison with those at place of crime, evidence thereof was not incompetent because no warning was given. *Moore v. State* (Cr. App.) 226 S. W. 415.

10. — **Threats, fear, promises or other inducements.**—Confession, forced or extorted in any manner, whether by overpersuasion or promise or threats, is not voluntary. *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853.

In homicide prosecution where defendant testified he was induced to sign confession by sheriff's promise of release and immunity from prosecution, court upon defendant's request should have instructed jury to disregard confession if it was found to have been responsive to promises and threats, and inducements offered by sheriff. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

In determining whether subsequent confessions are admissible, where former confessions were improperly obtained, the inquiry is whether, considering the degree of intelligence of the prisoner and the attendant circumstances, it is affirmatively shown that the effect of the primary improper inducement was so entirely obliterated from his mind that the subsequent confession could not have been in the slightest degree influenced by it, and if there is any doubt the confession must be excluded. *Williams v. State* (Cr. App.) 225 S. W. 177.

Where a written confession was made under domination of the same officer who had previously assaulted the prisoner in obtaining an oral confession, the presumption should obtain that the same influences which coerced the admission of guilt in the first place impelled the subsequent reaffirmance of the guilt, although at the time of the written confession there were no threats or violence used. *Id.*

Where a negro defendant, after being severely whipped and otherwise assaulted by the sheriff, made an oral confession, his subsequent written confession, made under domination of the same officer, held properly excluded, although at the time he signed the written confession there were no threats or violence used. *Id.*

11. — **Written confession.**—Officers are inhibited from becoming subscribing witnesses to confessions only when accused signs it by making his mark. *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

Confession to which defendant made his mark and which was signed by a competent witness is not inadmissible because also signed by an incompetent witness. *Elliott v. State*, 83 Cr. R. 366, 203 S. W. 766.

In prosecution for murder, defendant's written confession, stating fairly well facts as proved by witnesses as to most of incidents in connection with homicide and matters leading up to it, taken in compliance with statute, was properly admitted. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

Voluntary admission of defendant as to participation in shooting at train, resulting in death of brakeman, held admissible as coming within the statute authorizing written confessions by a person under arrest. *Davis v. State*, 85 Cr. R. 163, 211 S. W. 589.

In homicide prosecution, defendant's signed confession, made in presence of sheriff, county attorney, and one or two other officers, and witness as required by the statute when taken in the presence of officers, was properly admitted. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

In prosecution for rape on child under age of consent, written confession by defendant after arrest, it and warning given being in substantial compliance with statute, held admissible. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

A confession wherein the statutory formalities have been complied with is not to be excluded because made in the presence of the grand jury, although where one is under arrest and makes a confession, not conforming to the statutory provisions, the fact that it is made in the presence of the grand jury does not render it admissible. *Williams v. State* (Cr. App.) 225 S. W. 177.

Defendant's confession, made before the grand jury while he was under arrest, coming within no exception named in the statute, and not reduced to writing, nor signed by defendant, was inadmissible. *Id.*

In a prosecution for keeping a gaming house, where it appeared that defendant had testified previously as to such house before the grand jury, his testimony not having been reduced to writing, as required by this article, held not admissible as a confession. *Dodson v. State* (Cr. App.) 232 S. W. 836.

**12. — Truth of statement of inculpatory facts or circumstances.**—Under this article, an oral statement so made by one accused of robbery, which led to the finding of the pistol claimed to have been used, was admissible. *Williams v. State* (Cr. App.) 231 S. W. 110; *Patterson v. State* (Cr. App.) 231 S. W. 763.

Under this article, the statement, made by one while in jail on the charge of burglary, that a certain article with which the building was broken into, and a certain article taken therefrom, would be found in a certain place under a building, is, in connection with evidence that they were so found, admissible against him. *Davis v. State* (Cr. App.) 23 S. W. 687.

Where the fruits of a crime may alone have been discovered by reason of a confession, the confession is admissible whether or not in writing or signed. *Elliott v. State*, 83 Cr. R. 366, 203 S. W. 766.

In a prosecution for the larceny of an automobile, an oral confession by defendant which led to the finding of the stolen property was admissible, notwithstanding a subsequent written confession. *Torrence v. State*, 85 Cr. R. 310, 212 S. W. 957.

In a prosecution for theft of an automobile subsequently recovered from a third party who claimed to have purchased it, a confession by defendant was admissible where it led to the finding of the stolen property, notwithstanding that the number and means of identification were obtained from the sheriff of another county. *Id.*

Under this article, in a prosecution for burglary of a grocery store, evidence that various articles such as were kept in grocery stores were found in defendant's possession, and that he stated part of them had come from the burglarized store, etc., held admissible in so far as it related to the burglary charged. *Hayes v. State*, 85 Cr. R. 433, 213 S. W. 664.

In a prosecution for burglary of a private residence, a confession obtained by force is admissible if in connection therewith defendant made statements which led to the finding of the stolen property, the fruits of the crime. *Washington v. State*, 86 Cr. R. 327, 216 S. W. 869.

Defendant's confession to having received stolen goods, which resulted in the finding and recovery of the property, made while under arrest, did not have to be made under warning, and reduced to writing, to be admissible in evidence against him. *Kyle v. State*, 86 Cr. R. 471, 217 S. W. 943.

Statements and admissions made by defendant which led to the finding of the alleged stolen property are admissible, though made under arrest and without warning. *Hughes v. State*, 86 Cr. R. 611, 218 S. W. 1048.

Statements of defendant while under arrest which are found to be true and which aid in establishing his guilt are admissible against him, and while under arrest defendant may be compelled to place his feet in certain tracks, or his shoe may be removed from his foot and placed in certain tracks, for identification. *Rippey v. State*, 86 Cr. R. 539, 219 S. W. 463.

Rule that a confession is competent when in or in connection with it statements are made which are found to be true and conduce to establish accused's guilt, such as finding stolen property, is inapplicable where officers found grips and opened them and observed their contents and intended to further examine them, and did so after, but not because of his statement that the grips were his, and there was no other evidence that they belonged to him. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

In a prosecution for burglary where the whereabouts of the property taken was unknown until defendant made his confession, and was recovered as a result of such confession, the confession was admissible under this article, though the confession was procured by threats or persuasion after arrest and though defendant had not been warned. *Singleton v. State*, 87 Cr. R. 302, 221 S. W. 610.

A declaration of one accused of robbery leading to the discovery of money or property taken is admissible, although made while under arrest, without warning, and although induced by promise and not reduced to writing, but it is incumbent upon the state to prove identity of the money found and that taken. *Hilliard v. State*, 87 Cr. R. 416, 222 S. W. 553.

In a murder prosecution, the sheriff's testimony as to finding certain evidence of the crime after following instructions given by defendant was admissible, under provision of the statute relating to confessions. *Williams v. State* (Cr. App.) 225 S. W. 177.



In a prosecution for burglary committed by defendant and another, where defendant and the other made confessions in jail, describing the place where the stolen articles were hidden, and defendant's companion aided an officer in finding the articles in the place described by defendant, the confession and the facts with reference to finding the stolen articles were admissible against defendant under this article. *Garcia v. State* (Cr. App.) 228 S. W. 938.

In a prosecution for burglary, testimony of the arresting officer that defendant confessed, while under arrest, that he entered the house, took out the articles, and was hauling them off on a bicycle when arrested, and that he told him where the bicycle was, whereupon the witness found one of the stolen articles in a box tied to the bicycle, *if res gestæ*, was admissible. *McGoldrick v. State* (Cr. App.) 232 S. W. 851.

13. **Confessions by co-defendants or by persons other than defendant.**—For evidence of statements made by one with whom defendant was associated at the time of the killing to be admissible, it must appear that defendant was present and not under arrest at the time of making the statements and in such position that he was called upon to deny the same. *Bloxom v. State*, 86 Cr. R. 562, 218 S. W. 1068.

A confession of an alleged coconspirator in a robbery case was not admissible as against defendant, where made after the transaction. *Bouldin v. State*, 87 Cr. R. 419, 222 S. W. 555.

In prosecution for theft, testimony as to statements, amounting to confessions, made to police officers by two of defendant's associates, separately made while in separate rooms in the jail, held not admissible. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

Where defendant was indicted as an accomplice, evidence as to declarations constituting confessions of one named in indictment as principal is admissible, as it is necessary to prove the guilt of the principal as a part of case against defendant. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

In prosecution of an accomplice, testimony as to declarations constituting confessions is not admissible on the theory that the person who made the declarations is a principal, and that declarations are admissible to prove his guilt as a part of the case against accomplice, where such person was not named in the indictment as principal. *Id.*

In a prosecution for receiving stolen property, confessions of the alleged thief, made out of the presence of the defendant, were admissible only in so far as it tended to establish that the property in question had been stolen, and was not admissible as to that portion relating to the sale of the property to defendant. *Hoyt v. State* (Cr. App.) 228 S. W. 936.

Where defendant and another acted together in burglarizing a store, and both made confessions, being together at the time they were made, so that the confessions were made in the presence of each other, the confessions of both or either would be admissible against defendant, if not otherwise objectionable. *Garcia v. State* (Cr. App.) 228 S. W. 938.

In prosecution for receiving stolen property, the confession of the thief, made out of court, that he had stolen the property and had sold it to accused, in whose possession it was found, was admissible to prove that he was the thief, but not admissible to prove that accused was the receiver of the stolen property. *Donegan v. State* (Cr. App.) 229 S. W. 857.

14. **Preliminary evidence as to admissibility of confession.**—Evidence held to show that alleged confession introduced by district attorney was not voluntary. *Robertson v. State*, 81 Cr. R. 378, 195 S. W. 602, 6 A. L. R. 853.

No error appears in admission of written confession on its face filling legal requirements, when the prosecuting attorney before whom it was made testified that proper legal warning was given, and that no promise or threat was made, and that the confession was freely and voluntarily made, especially where the court submitted to the jury the question whether the confession was freely and voluntarily made. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

The proof that money discovered by reason of a declaration of one accused of robbery and under arrest is that which was taken from prosecuting witness, necessary to render the declaration admissible, may be made by circumstances. *Hilliard v. State*, 87 Cr. R. 416, 222 S. W. 553.

18. **Effect of confession.**—The state placing statements of defendant before the jury is bound thereby, unless disproved. *Blacklock v. State*, 81 Cr. R. 511, 196 S. W. 822.

Where the state puts in a confession, some of which is exculpatory, the state is bound by the confession, unless it disproves exculpatory testimony. *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

In prosecution for murder, where the state introduced entire confession of accused, it was bound by statement therein, unless there was some other evidence upon which jury might base a rejection of statement. *Davis v. State*, 85 Cr. R. 15, 209 S. W. 749.

In trial for murder by shooting into passing train, where the state introduced accused's statement admitting shooting at the time with a certain caliber pistol, the state was not bound by part of his statement, stating that he shot into the ground and not at the train, where the proof showed that two pistols were used of different caliber, and that the bullet which killed deceased was of the caliber of accused's pistol. *Banks v. State*, 85 Cr. R. 165, 211 S. W. 217, 5 A. L. R. 600.

In prosecution for rape, statements and confession of defendant introduced by state were binding on it unless disproved. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

As a general rule, where defendant's confession as a whole is inconsistent with the state's theory of conspiracy and directly opposed thereto in some parts, the state introducing it assumes the burden of disproving statements therein, if they are obstacles to conviction. *Baugus v. State*, 87 Cr. R. 551, 223 S. W. 224.

Where the state introduced a confession by defendant to prove the offense of rape, and the confession contained statements which negated penetration, the state was

bound by the exculpatory statements contained therein unless disproved, and it was error for the court to refuse to instruct as to the force and effect of the exculpatory statements. *Mullins v. State* (Cr. App.) 225 S. W. 164.

Where the state introduced a confession by defendant to prove the offense of rape, and the confession contained statements which negatived penetration, the state was bound by the exculpatory statements contained therein, unless disproved. *Id.*

19. — **Corroboration, and proof of corpus delicti.**—Defendant's uncorroborated confession that, after being chased by an officer he fired one shot, which proved fatal, held insufficient to justify conviction for murder, assessing death penalty. *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

An uncorroborated confession without proof of corpus delicti will not warrant a conviction. *Id.*

Evidence as to there being surgical instruments and papers in stolen car and as to finding them along a certain road held admissible to corroborate defendant's confession as to the route he and others went in the stolen machine. *Hamilton v. State*, 82 Cr. R. 544, 200 S. W. 155.

Defendant's confession of his connection with the crime will justify conviction when the facts making out the substantive crime were shown otherwise. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

In prosecution for injuring or damaging railroad track in such manner as to endanger the lives of any person, in violation of Pen. Code, art. 1229, evidence held sufficient to corroborate defendant's confession as to his guilty connection with the commission of the crime. *Id.*

In prosecution for rape on insane woman, defendant's confession of the act, taking it in its fullest force, although it may be used to aid proof, cannot of itself be held to prove the corpus delicti. *Cokeley v. State*, 87 Cr. R. 256, 220 S. W. 1099.

The corpus delicti, or crime itself, cannot be established by confession alone of the party charged with the commission of the crime. *Robert v. State* (Cr. App.) 228 S. W. 230.

In prosecution for forgery, defendant's confession was available to the state in aid of other proof to establish the corpus delicti. *Mettall v. State* (Cr. App.) 232 S. W. 315.

Where the corpus delicti is established, the identity of the accused may be established by his own confession. *Id.*

20. **Charge.**—Court should instruct that if a confession is used it shall all be taken together, and that, where the confession includes exculpatory statements which disprove state's case, it devolves upon state to show that they are false. *McInish v. State*, 82 Cr. R. 141, 198 S. W. 780.

In homicide prosecution where defendant claimed that the killing followed a second act of misconduct of deceased toward defendant's wife during a second interview of defendant with deceased after deceased had promised on first interview not to repeat misconduct, failure to submit question of voluntary character of confession to jury and instruct jury to disregard confession if not voluntary, there being evidence of confession being procured by promises and inducements, was reversible error, though confession was introduced in rebuttal only, where confession failed to mention second interview; it being effective to impeach defendant. *Bozeman v. State*, 85 Cr. R. 653, 215 S. W. 319.

In prosecution for rape on child under age of consent, where defendant testified he was not warned before making confession, and did not understand what he was saying, court properly instructed jury should not consider written confession for any purpose unless freely and voluntarily made after warning. *Anderson v. State*, 87 Cr. R. 230, 220 S. W. 775.

## 5. MISCELLANEOUS PROVISIONS

**Art. 811. [791] When part of an act, declaration, etc., is given in evidence.**

See *Payne v. State* (Cr. App.) 232 S. W. 802.

**Evidence admissible.**—On a prosecution for murder, where a witness testified as to the threatening attitude and language of deceased towards defendant just before the shooting, it was error to permit the state to impeach the witness by introducing a part of the testimony given by him on a previous trial, which part failed to corroborate him as to such threats, and to refuse to admit another part thereof which agreed with his evidence in that respect. *Jones v. State* (Cr. App.) 25 S. W. 634.

Under this article, in prosecution for assault to murder, where county attorney stated that defendant, when he made statement about knife, also made statement about difficulty, that it was all same statement, etc., defendant's offer to prove balance of statement or conversation was improperly rejected. *Davis v. State*, 81 Cr. R. 625, 197 S. W. 871.

Affidavit of father of prosecutrix, made for school purposes, giving her birthday, having in statutory rape been introduced by the state, defendant could introduce another part of it giving the birthday of the next child only six months later. *Ford v. State*, 82 Cr. R. 639, 200 S. W. 841.

Under this article, where state introduced witness who reproduced portion of testimony given by defendant in former prosecution for burglary growing out of transaction involved, defendant had right to prove by same witness other facts testified to. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

In prosecution for passing forged instrument, where defendant gave testimony as to his financial resources, evidence as to status of his account with grocer was properly received in rebuttal. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

If defendant introduced isolated portions of witness' examining trial testimony as impeachment or in contradiction of her testimony on final trial, state had right to introduce such portions of her examining trial testimony as were explanatory of those put in evidence by defendant, but such portions as did not throw light on those introduced by defendant would not be admissible. *Earnest v. State*, 83 Cr. R. 257, 202 S. W. 739.

Whole of defendant's statement to officer, who came with search warrant to his house looking for stolen hogs, explanatory of defendant's possession, was admissible, state having introduced part of it, and part should not have been excluded on ground it was self-serving. *Grace v. State*, 83 Cr. R. 442, 203 S. W. 896.

In prosecution of defendant for assault with intent to murder his son-in-law, evidence that victim had married defendant's daughter to avoid a prosecution for seduction and that he had undertaken to produce an abortion upon her held admissible as explanatory of a conversation between defendant and victim just preceding difficulty and as bearing upon question of who began difficulty. *Bolin v. State*, 83 Cr. R. 590, 204 S. W. 335.

Admission of testimony which was part of a conversation between prosecutrix and her husband elicited by accused, cannot be error, in view of this article *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

Where part of a conversation is brought out and the remaining portion of the conversation is necessary to make the preceding part clear or to explain the same, the remainder is admissible. *Payne v. State*, 85 Cr. R. 288, 212 S. W. 161.

When a witness in a criminal case is attacked by proof of a part of a conversation contradicting his testimony, the other side has the right to prove all that he said at the time relative to the same subject. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

In a prosecution for the theft of an automobile, evidence of statement made by one defendant in a conversation with the owner when they offered to pay for the machine, wherein such defendant stated that he was out on suspended sentence and did not desire to get an additional term, held admissible as a part of a conversation brought out by defendant. *Young v. State*, 87 Cr. R. 27, 218 S. W. 1063.

In prosecution for assault with intent to kill, where there was evidence that accused had stated the injured party ought to be shot, testimony regarding what the person with whom he was conversing had said was admissible as part of the same conversation, and to make accused's statement understood by the jury. *Beasley v. State*, 88 Cr. R. 220, 225 S. W. 748.

In a prosecution for assault with intent to rob, where defendant claimed that he merely defended himself when assaulted by complaining witness, who testified on cross-examination that he had formerly accused defendant of burglarizing his store, and defendant introduced testimony of arresting officer on such former occasion as to results of his investigation, such witness' testimony on cross-examination that a place had been dug underneath the front door of a store, was admissible on a theory that, a part of the transaction having been admitted at the instance of one party, the remainder could be introduced by the other as explanatory, under this article. *Flores v. State*, 88 Cr. R. 349, 227 S. W. 320.

In a prosecution for aggravated assault occurring when defendant and his companion went to the store of the prosecuting witness, the state having introduced part of the transaction leading up to the assault, defendant was, under this article, entitled to introduce the whole of the transaction and show that the call was on account of an alleged insulting letter written by the complaining witness to the daughter of defendant's companion. *Barnett v. State* (Cr. App.) 230 S. W. 144.

An objection to the whole of an occurrence as detailed cannot be sustained if any part thereof would make more apparent the truth of the charge against accused. *Id.*

In prosecution for statutory rape, where prosecutrix had testified that the intimacy between herself and accused was confined almost exclusively to rides with him in his automobile, and that he had taken her out several times, and had her out in his car on the occasion of the alleged intercourse, the fact that he came to her home with his car a few days thereafter would be an admissible fact, so that an objection to the entirety of testimony of her father as to what occurred on such visit was not sustainable, part thereof being admissible. *Id.*

Under this article, one accused of robbery could prove that, in connection with certain inculpatory statements, proved by the state, he made other exculpatory statements. *Williams v. State* (Cr. App.) 231 S. W. 110.

Where the state, in a prosecution for robbery, used defendant's admission of having thrown away the pistol found at the scene of the robbery to incriminate him, defendant's right to introduce evidence explanatory of the admission could not be nullified by the state's claim that the part of the transaction and conversation introduced by it was exculpatory. *Id.*

Under this article, one accused of robbery may testify, in explanation of his admission of having thrown away the pistol and playing cards found on the scene of the robbery, that he told the arresting officer immediately after he was arrested that he won the money gambling, and, believing he was to be arrested for gambling, fled and threw away his pistol and the playing cards, and that he told the names of the others in the game and where they were, and requested the officer to go get them; the statute not being restricted to declarations that are part of the *res gestæ*, but embracing explanatory acts and declarations by the accused after his arrest. *Id.*

In a prosecution for murder, where defendant appellant introduced his wife as a witness, and proved by her that she had met deceased and occupied a hotel room with him for several hours with doors locked, it was proper for state, on cross-examination of the wife, to develop that at this meeting no criminal conduct took place, in view of this article. *Boaz v. State* (Cr. App.) 231 S. W. 790.

**Evidence not admissible.**—In criminal prosecution, evidence that defendant had told third party during conversation that the officers had told deceased to kill him, and

that third party was going to get defendant into trouble, was inadmissible, where offered as independent testimony and not as part of any conversation drawn out by state, being self-serving. *Lagrone v. State*, 84 Cr. R. 609, 209 S. W. 411.

In a prosecution for burglary, an alleged accomplice who testified against defendant, and to the effect that, when his house was searched, he escaped to the residence of defendant in which were present defendant's wife and sister, should not, because asked what they said when told his house was being searched, have been allowed to testify that the women later requested him to run off so that defendant could escape. *Payne v. State*, 85 Cr. R. 238, 212 S. W. 161.

Where defendant's brother saw the homicide, and defendant testified on cross-examination that he didn't care if his brother was a witness, for, if he told the truth, it would not injure his case, but that the brother was crazy about half the time, such testimony did not warrant the introduction of a written statement by defendant's brother. *Dunn v. State*, 85 Cr. R. 299, 212 S. W. 511.

In a murder trial, a conversation between a witness and another out of the presence and hearing of the defendant was inadmissible as hearsay, and that the defendant asked a question of such witness which might have elicited the same matters, but was withdrawn before it was answered, was no reason for permitting the state to bring out such hearsay testimony over defendant's objections. *Parker v. State*, 86 Cr. R. 222, 216 S. W. 178.

In prosecution for assault to murder defendant's creditor, whom he cut with a borrowed pocketknife, where statement of blacksmith proved that short time after assaulted person demanded payment of his debt from defendant, latter was seen in blacksmith's shop, sharpening his knife on a whetrock, testimony of blacksmith on cross-examination by defendant that at the time he told the blacksmith, if his creditor would give him a little time, he would pay what he owed held inadmissible as self-serving. *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554.

Where, after the shooting, defendant left the scene of difficulty, going to his parents' home, some miles distant, and defendant explained his flight by testimony that his mother was ill, testimony that he told the friend who was carrying him away that he would allow the friend to surrender him and collect the reward was properly rejected as a self-serving declaration. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

It appearing that the court permitted proof of all that occurred in a conversation between a witness and the deceased, in which the deceased threatened to go and kill the accused and his wife, there was no error in excluding part of the conversation in which the witness argued with deceased and endeavored to dissuade him from such purpose, especially where it is not contended that accused was aware of the conversation before the homicide. *Allen v. State*, 88 Cr. R. 32, 224 S. W. 891.

In a prosecution for homicide, where the state had introduced evidence of a difficulty between defendant's father and deceased, in which defendant stood by with a gun, defendant's offer in evidence of a complaint by him charging deceased with having slandered defendant's wife was not admissible, under this article, as an explanation of the previous trouble, where defendant had stated the previous trouble arose because of a remark deceased had made about his mother, and there was no showing that the slander of defendant's wife had any relation thereto, except a statement by defendant's counsel that he offered the evidence to show the insult of defendant's wife led up to the first difficulty. *Jones v. State* (Cr. App.) 232 S. W. 847.

### Art. 814. [794] Evidence of handwriting by comparison.

See *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

**Admissibility and effect of evidence as to handwriting.**—In prosecution for sending anonymous letter reflecting on chastity and good character of recipient, testimony of experts that another letter and a communication known to have been written by accused were written upon the same typewriter was admissible under the rules of comparison of handwriting. *Rudy v. State*, 81 Cr. R. 272, 195 S. W. 187.

In prosecution for passing forged instrument where there was evidence of other forged instruments having been passed, and where the genuineness of defendant's signatures as indorsed on such instruments was fully established, comparison of the handwriting of the proven signature and that claimed to be forged might be made by experts or persons who had seen accused write, or by jury themselves under this article. *Fry v. State*, 86 Cr. R. 73, 215 S. W. 560.

This article does not preclude proof of forgery by circumstantial evidence. *Williams v. State*, 86 Cr. R. 640, 218 S. W. 750.

In a prosecution for theft, where there was an issue of fact as to whether accused had indorsed a check delivered to an alleged coconspirator, an admitted signature of accused was admissible in evidence, under this article. *Miller v. State* (Cr. App.) 225 S. W. 262.

In view of this article, and of the fact that the jury are the judges of the credibility of witnesses as well as the facts proven, the question whether defendant forged a check held properly submitted to the jury, notwithstanding defendant testified that he did not write the check, but received it from the alleged maker, and offered much expert testimony that it was the check of the maker. *Cone v. State* (Cr. App.) 232 S. W. 816.

— **Competency of witnesses.**—In a prosecution for forgery a bank manager, who testified that he had been familiar with defendant's handwriting for over four years in connection with the banking business, qualified himself to testify as an expert that the alleged forged check was not drawn by defendant. *Cone v. State* (Cr. App.) 232 S. W. 816.

**Inspection.**—Where the state introduced a handwriting expert to compare the writing in certain documents which were used in evidence, it was not error to overrule

accused's motion to be allowed to inspect the documents, where all of the documents had been used in evidence at the examining trial, opportunity to inspect them was tendered accused's counsel when the motion was made, it was understood that the witness would be held to the conclusion of the trial, and, although the trial continued thereafter for nearly a week, no further demand was made and no experts introduced to contradict, although generally an inspection of such documents, when demanded, should be afforded. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

**Art. 815. [795] Party may attack testimony of his own witness, when and how.**

See *Davis v. State* (Cr. App.) 21 S. W. 369; *Carroll v. State*, 32 Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786.

Cited in dissenting opinion, *Messenger v. State*, 81 Cr. R. 465, 198 S. W. 330.

**Impeachment of witness.**—Where state's case, as made by wife's testimony, was that she was about to hit defendant husband, when he struck her, if she made statements contradictory of this, or showing more aggravation than she stated, still it would be impeachment and could not be used as original evidence by the state in making out its case. *Hays v. State*, 84 Cr. R. 349, 206 S. W. 941.

It was not error to refuse to permit defendant to lay the foundation for impeachment of his own witness, who gave no damaging testimony against defendant, but merely failed to give the evidence defendant desired. *Ice v. State*, 84 Cr. R. 509, 208 S. W. 343.

**Art. 816. [796] Interpreter shall be sworn to interpret, when.**

**Interpreters.**—In a criminal proceeding, a partisan interpreter should not be used. *Nader v. State*, 86 Cr. R. 424, 219 S. W. 474.

**CHAPTER EIGHT**

**OF THE DEPOSITIONS OF WITNESSES AND TESTIMONY  
TAKEN BEFORE EXAMINING COURTS AND JURIES  
OF INQUEST**

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| Art.<br>822. Shall be taken as in civil cases. | Art.<br>833. District or county attorney may make oath.                    |
| 824. How defendant shall proceed, etc.         | 834. Testimony taken before examining court may be read in evidence, when. |
| 832. Deposition shall not be read unless, etc. |  |

**Article 822. [802] Shall be taken as in civil cases.**

Cited *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

**Art. 824. [804] How defendant shall proceed, etc.**

**Affidavit.**—Since it is the duty of the clerk of court to have the affidavit required by this article, preliminary to issuing commission to take deposition, the presumption obtains prima facie at least that the affidavit was present before the commission was issued. *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

Affidavit required by this article, as a predicate for obtaining commission to take deposition, is to be regarded as an item of procedure going to the manner and form of taking depositions in a criminal case in view of Civ. St. art. 3676, and notes. *Id.*

Where county attorney had notice and filed cross-interrogatories and the clerk issued commissions and the depositions were taken and filed, motion made at a subsequent term to quash depositions on the ground that affidavit required by this article, as a predicate for obtaining commission, was not shown to have been made, should not have been entertained in view of Civ. St. art. 3676, made applicable to criminal cases by Code Cr. Proc. art. 822, affidavits having been filed embodying the facts required by art. 832, as a predicate for introduction of depositions. *Id.*

**Art. 832. [812] Depositions shall not be read, unless, etc.**

See *Conner v. State*, 23 Tex. App. 378, 5 S. W. 189; *Young v. State*, 82 Cr. R. 257, 199 S. W. 479.

Cited, *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

**Admissibility of depositions in evidence.**—Upon a trial for horse-stealing, the prosecution offered the deposition of the alleged owner of the animals, after showing that the deponent was unable, from illness, to be present. Held, that under this article, and art. 834, relating to the admission of evidence and depositions in writing, the judge could exercise his discretion, and decide whether, in the interests of justice, it were better to read the deposition, or to adjourn the trial, in order to obtain the oral testimony of the witness. *Collins v. State*, 24 Tex. App. 141, 5 S. W. 848.

The return of attachments for a witness, issued to every county in the state, not executed because no such person resided in those counties, is not sufficient evidence of his removal out of the state to render his deposition admissible in a criminal prosecution under arts. 832-834, providing for proof of such removal by the prosecuting attorney or other credible person. *Martinas v. State*, 26 Tex. App. 91, 9 S. W. 356.

In a murder case it appeared that after the trial, at a previous term of the court of a person indicted with defendant and others for the murder, the state's most important witness went to Alabama. S. testified that he knew the witness; that she resided in Alabama, and might be on her way to Texas; that she stayed at his house a few days after such term of court, and then left, with the declaration that she was going to make her home with his brother in Alabama, the latter accompanying her; that six days ago he received a letter from his brother, inclosing a message from the witness in such state; that she had taken her household furniture with her; that he had written to her to be at court three days ago, and did not know whether she was on her way or not; and that she was 70 years old. Held, that the proof was sufficient to entitle the state to read the evidence of such witness taken before the examining court, under this article, and art. 834. *Peddy v. State*, 31 Tex. Cr. R. 547, 21 S. W. 542.

Where county attorney had notice and filed cross-interrogatories, and the clerk issued commissions, and the depositions were taken and filed, motion made at a subsequent term to quash depositions, on the ground that affidavit required by Code Cr. Proc. art. 824, as a predicate for obtaining commission, was not shown to have been made, should not have been entertained, in view of Civ. St. art. 3676, made applicable to criminal cases by Code Cr. Proc. art. 822; affidavits having been filed embodying the facts required by art. 832, as a predicate for introduction of depositions. *Barton v. State*, 86 Cr. R. 198, 215 S. W. 968.

**Art. 833. [813] District or county attorney may make oath.**

See *Young v. State*, 32 Cr. R. 257, 199 S. W. 479.  
Cited, *Martinas v. State*, 26 Tex. App. 91, 9 S. W. 356; *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

**Art. 834. [814] Testimony taken before examining court may be read in evidence, when.**

See *Collins v. State*, 24 Tex. App. 141, 5 S. W. 848; *Peddy v. State*, 31 Cr. R. 547, 21 S. W. 542; *Young v. State*, 32 Cr. R. 257, 199 S. W. 479.  
Cited, *Martinas v. State*, 26 Tex. App. 91, 9 S. W. 356.

**TITLE 9**

**OF PROCEEDINGS AFTER VERDICT**

<p>Chap. 1. Of new trials. 2. Arrest of judgment. 3. Judgment and sentence.     1. In cases of felony.</p>	<p>Chap. 3. Judgment and sentence—Continued.     1½. Indeterminate and suspended sentences.     2. Judgment in cases of misdemeanor.</p>
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**CHAPTER ONE**

**OF NEW TRIALS**

<p>Art. 835. Definition of "new trial." 837. New trial in felony cases shall be granted for what causes. 839. Must be applied for within two days, except. 840. Motions for new trial shall be in writing. 841. State may controvert truth of causes set forth. 843. Effect of a new trial. 844. When new trial is refused, statement of facts, etc. 844a. Time for presentation of statements of fact and bills of exception; time for preparation of findings; authority of judge after expiration of term of office. 844b. Duty of shorthand reporter to transcribe notes on appeal being taken; duplicate; fees.</p>	<p>Art. 844c. Party appealing may make statement from transcript filed by shorthand reporter; agreement of parties; shorthand reporter may make statement of facts; fees. 845. Time for preparing and filing statement of facts and bill of exceptions; extension of time; failure to agree on statement of facts; duty of court; what constitutes filing within time. 845a. [Superseded.] 845b. Duty of shorthand reporter to make transcript of evidence on request. 846. Shorthand reporter shall keep stenographic record; condensation, etc.</p>
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**Article 835. [815] Definition of "new trial."**

**Nature of remedy in general.**—Question whether complaint was defective and did not support information may not be reviewed, where no motion to quash was filed and motion in arrest of judgment did not urge such ground; the attention of the court being first called to the defects in an amended motion for new trial filed more than a month after the judgment was rendered. *Burnett v. State* (Cr. App.) 228 S. W. 239.

**Necessity of motion.**—Court rule 101a (159 S. W. xi), relating to necessity of motion for new trial, does not control the authority of the court to pass on questions disclosed in the record on appeal. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

Defendant's motion for new trial was not essential as basis for appeal. *Daumery v. State*, 82 Cr. R. 231, 199 S. W. 291.

Motion for new trial is not necessary to give jurisdiction of appeal from conviction for robbery. *Connell v. State* (Cr. App.) 229 S. W. 502.

### Art. 837. [817] New trial in felony cases granted, for what causes.

Cited, *St. Louis, B. & M. Ry. Co. v. Vick* (Civ. App.) 210 S. W. 247.

#### SUBD. 1

**Trial without counsel.**—Where defendant had no attorney, insanity at the time of the alleged crime and trial is a good ground for a new trial on motion by relatives who became aware of the prosecution after conviction. *Gardner v. State*, 82 Cr. R. 38, 198 S. W. 312, L. R. A. 1918B, 1144.

Where defendant, who had been on ball nearly a year, asked continuance, stating he was without counsel, and immediately thereafter his counsel appeared, and cause was set for another day, and during trial defendant's counsel after moving for postponement left to engage in trial of another case in which he had been employed subsequent to setting case, held that defendant was not deprived of counsel. *Johnson v. State*, 84 Cr. R. 567, 208 S. W. 928.

**Abandonment of case.**—Abandonment of a defendant's case by his counsel is no cause for new trial, unless the defendant was deprived of counsel by the action of the state or some outside influence over which he had no control. *Holden v. State* (Cr. App.) 232 S. W. 803.

Where defendant was not insane, and not charged with a capital offense, and his plea of suspended sentence was prepared, presented, and duly submitted to the jury, and it is not shown why counsel refused to proceed therewith, failure of counsel to appear and defend held not to warrant the granting a new trial. *Id.*

#### SUBD. 2

4. **Denial of continuance.**—See *Cooley v. State*, 83 Cr. R. 340, 203 S. W. 356; notes to art. 608.

5. **Error in rulings on evidence.**—In a prosecution for violation of the local option law, where the court erroneously excluded testimony offered to show motive of the state's witness, held that defendant should have been granted a new trial, where it further appeared that the jury assumed that if verdict was not shortly reached they would be confined over Sunday. *West v. State*, 86 Cr. R. 296, 216 S. W. 186.

6. **Error as to instructions.**—Under this subdivision, error in requiring assault by deceased producing pain to have been calculated to produce passion in defendant's mind held ground for new trial, and conviction for murder with death penalty assessed will be reversed. *Mickle v. State* (Cr. App.) 227 S. W. 491.

**Misconduct of court.**—Where defendant pleaded guilty to a charge of assault upon his wife, under the impression that the county attorney had agreed that he should receive a fine of only \$25, and the court took the matter under advisement, and, having talked with the wife and her physician, assessed a fine of \$100 and 60 days in jail, held that, as the evidence on which the punishment was based was heard out of court, defendant was entitled to a new trial. *Brooks v. State*, 85 Cr. R. 431, 213 S. W. 646.

#### SUBD. 3

**Verdict decided by lot.**—Where the jury put down their several opinions as to the length of defendant's sentence, and divided by 12, to see what it would bring them to, the result being five and a fraction years, whereupon a juror moved that they fix defendant's punishment at six years, to which all assented, there was no error. *Cockrell v. State*, 85 Cr. R. 326, 211 S. W. 939.

Where jurors agreed to add up their preferences as to length of sentence and divide by 12, and quotient amounted to four years and five months, and thereupon it was suggested that the verdict be fixed at four years and there was a unanimous vote in favor of such term, held, there was no violation of this subdivision. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

**Improperly influencing assent to verdict.**—Testimony of juror that, although he believed defendants not guilty, he acquiesced in verdict of guilty, because he wanted to go home was insufficient to authorize new trial. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

#### SUBD. 4

**Bias or prejudice of juror.**—That a juror, upon his examination, misled the defendant with reference to his being impartial, without a showing that defendant learned of juror's prejudice subsequent to his acceptance, is insufficient for a new trial. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

Evidence that a juror was in favor of a felony conviction, although other jurors favored acquittal or conviction of an aggravated assault with a fine of only \$25, the jury finally agreeing on conviction of an aggravated assault with a fine of \$100, is not sufficient to show that the juror was prejudiced. *Samino v. State*, 83 Cr. R. 481, 204 S. W. 233.

The court did not err in refusing to grant a new trial in a homicide case on account of a juror having stated that, if he was taken on the jury and the evidence showed that accused was guilty, he would break his neck. *Salazar v. State* (Cr. App.) 225 S. W. 528.

## SUBD. 5

**Deprivation of testimony.**—Defendant, having on misinformation by the sheriff as to the name of the person who said defendant was not the person with the stolen property summoned the wrong witness, should be given a new trial for refusal of postponement till the next morning to get the witness. *Claunch v. State*, 82 Cr. R. 114, 198 S. W. 307.

## SUBD. 6

1. **In general.**—See *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536; notes to art. 840. A defendant is entitled to a new trial on the ground of newly discovered evidence, if, in the light of the evidence itself on the trial, the absent testimony set out in the application for a continuance was material and probably true. *Mireles v. State*, 83 Cr. R. 608, 204 S. W. 861.

The rule with reference to cumulative evidence and strict diligence does not apply to the question of insanity, viewed in the light of newly discovered testimony. *Walker v. State*, 86 Cr. R. 441, 216 S. W. 1085.

2. **Discretion of trial court.**—The question of granting a new trial on the ground of newly discovered evidence is largely left to discretion of the trial judge, and will not be disturbed, except where appellant shows the court abused its discretion. *Lewis v. State*, 82 Cr. R. 285, 199 S. W. 1091.

The decision of the trial judge overruling a motion for new trial, based on newly discovered evidence, is binding upon appeal, unless the appellate court is satisfied that the trial court abused its discretion. *Gordon v. State*, 88 Cr. R. 17, 224 S. W. 894.

3. **Time of discovery.**—Where defendant knew what witness would testify, if he told the truth, he cannot have a new trial on his testimony as newly discovered, though he, because he did not want to be mixed up in the case, would not before the trial say what his testimony would be. *Hunter v. State*, 81 Cr. R. 471, 196 S. W. 820.

In a murder trial, new trial would not be granted on affidavit of accused's daughter as to who shot first, nor affidavit as to character of wound on deceased, as newly discovered evidence, where both witnesses attended the trial and accused knew that his daughter was present at the killing and saw and heard all that occurred. *Jackson v. State*, 81 Cr. R. 597, 196 S. W. 826.

That witness would have testified that accused did not work for him at the time another witness said he did, and at the time of the sale of the whisky, was not newly discovered testimony, as accused knew such facts at the time of the trial. *Coursey v. State*, 82 Cr. R. 272, 199 S. W. 1091.

Testimony of a witness who heard the testimony of deceased's wife at the examining trial, with which it is desired to impeach the wife's testimony given at the regular trial, is not newly discovered, where defendant and his attorney were not only present at the examining trial, but introduced such evidence as there given into the regular trial, at which such witness under subpoena was also in attendance. *Lewis v. State*, 82 Cr. R. 285, 199 S. W. 1091.

Matters coming out on trial of defendant in trial in another county prior to trial in question cannot be newly discovered evidence. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

Evidence is not newly discovered in law, when the facts sought to be shown thereby could have been shown on trial, and the persons were all accessible, and could have testified at the trial. *Williams v. State*, 83 Cr. R. 26, 201 S. W. 188.

Where, in prosecution for passing forged check, defendant claimed to have received it in consideration for his assignment of lease, and testified that transaction occurred at meeting with assignee, alleged newly discovered testimony that defendant's brother-in-law was present and familiar with transaction is no ground for new trial, for defendant must have known it at time of trial, and, if true, would have produced brother-in-law. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

The refusal of a new trial on the ground of newly discovered evidence did not warrant reversal, where it did not appear that the facts set out in the affidavits were unknown to defendant before the trial, at which the witnesses testified, nor that such evidence would have produced a different result. *Mansfield v. State*, 84 Cr. R. 132, 206 S. W. 195.

In a prosecution for murder of defendant's mistress, new trial was properly refused when asked on account of newly discovered evidence of the city marshal that decedent was a mean and vicious woman, who had previously attacked defendant two or three times, as such evidence could not be newly discovered so far as defendant was concerned. *Johnson v. State*, 86 Cr. R. 276, 216 S. W. 192.

Facts of which accused had knowledge before the trial cannot be considered as newly discovered evidence. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

It was not error to overrule a motion for a new trial on the ground of newly discovered evidence, where an absent witness would have testified to threats against defendant by one at whom he shot with intent to murder, which were communicated to defendant; defendant having known of them before the trial. *Jones v. State* (Cr. App.) 231 S. W. 122.

4. **Diligence in procuring evidence.**—Under this subdivision, new trial for newly discovered evidence as to a date held properly refused, for failure to explain the failure to call certain witnesses or to seek a postponement. *Hensley v. State*, 81 Cr. R. 620, 197 S. W. 869.

New trial held properly denied, because of failure to account for defendant's alleged want of knowledge that the new witness knew the facts. *Id.*

Where accused's brother and sister were very familiar with him, and the brother testified on the trial, accused's motion for new trial, on the ground of newly discovered evidence by his sister, showing that he was of weak mind, disclosed no diligence. *Miller v. State*, 82 Cr. R. 586, 200 S. W. 398.



The evidence of defendant's appropriation of his employer's car to his own use being unsatisfactory, he should be granted a new trial for the testimony of the person to whom he claimed to have rented the car, though he did not move for a continuance because he did not know his name or whereabouts, and the testimony being consistent with prior statements of defendant and testimony at the trial. *Miller v. State*, 84 Cr. R. 466, 208 S. W. 508.

Newly discovered evidence held not sufficient to require a new trial, where defendant's counsel had talked with the witnesses, but had failed to discover facts known by them, and did not place them on the stand. *Patten v. State*, 84 Cr. R. 584, 209 S. W. 664.

An accused is not entitled to a new trial upon the ground of newly discovered evidence, consisting of testimony of his wife and another woman, who were both present at court but were not put on stand. *Taylor v. State*, 85 Cr. R. 101, 210 S. W. 539.

Defendant should show why the evidence was not offered on the trial, or that it was unknown to defendant or his attorney and could not have been discovered by the use of reasonable diligence. *Gerlich v. State*, 86 Cr. R. 252, 216 S. W. 164.

A new trial will not be granted to enable defendant to show by an almanac the time the moon set on the night of the alleged crime, though the prosecuting witness claimed to have recognized him by the light of the moon, where the question of recognition and identity was an issue on the trial, and there is nothing to show that he did not know, or could not have discovered and brought out on the trial, the time that the moon set. *Shaw v. State*, 86 Cr. R. 520, 217 S. W. 942.

Diligence of defendant to discover, previous to trial, that a witness was a convicted felon, held sufficient to justify new trial. *Barber v. State*, 87 Cr. R. 585, 223 S. W. 457.

The rule denying a new trial, where due diligence to procure the evidence was not shown applies, notwithstanding defendant is in jail, at least unless it appears that there was no outside assistance available. *Gordon v. State*, 88 Cr. R. 17, 224 S. W. 894.

Where accused had counsel during the several months he was confined in jail, the want of diligence of that counsel to procure testimony is chargeable to accused, so that a motion for new trial, presented by different counsel, should show that the counsel who conducted the trial did not know of the new testimony. *Id.*

Accused must use diligence to secure witnesses before the appellate court is required to reverse a conviction by reason of the denial of the motion. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

In a prosecution for murder, held, that no due diligence was shown as to the testimony of a witness claimed to have been newly discovered. *Taylor v. State* (Cr. App.) 229 S. W. 552.

If defendant desired testimony of a witness for whose newly discovered testimony he asks new trial, he should have taken steps during trial to procure such testimony; it having developed that she was present at the conversation to which she was to testify. He should have secured subpoena for her, and, if necessary, asked postponement in order to procure her presence. *Id.*

Testimony to support a defensive theory, otherwise resting upon defendant's testimony alone, being such as the law regards with favor, the absence of complete diligence to secure such testimony of absent witnesses does not necessarily justify the denial of a new trial. *Giles v. State* (Cr. App.) 231 S. W. 765.

Relative to new trial for so-called newly discovered evidence consisting of a statement by defendant as to his age, made to the assistant county attorney before his age became an issue, conceding defendant's ignorance of its importance, held no sufficient reason was shown why it should not have been ascertained by counsel. *Flores v. State* (Cr. App.) 231 S. W. 786.

**6. Nature and purpose of evidence in general.**—New evidence of an alleged eye-witness of the assault that defendant was retreating from an armed adversary, and shot in self-defense, is no ground for new trial, when it could easily have been produced before, only cumulates the testimony of defendant and three others, and is so questionable that on another trial it would not "probably produce a different result." *Hickman v. State* (Cr. App.) 25 S. W. 126.

In prosecution for unlawfully carrying knucks, it was error to overrule defendant's motion for new trial to procure attendance of witnesses who would swear positively that defendant did not have knucks at the time charged; due diligence being shown. *Hargrove v. State*, 81 Cr. R. 407, 195 S. W. 855.

Where conviction of burglary rested largely on tracks similar to those of accused at the scene of the burglary, and after conviction, a third person made affidavit that his house had been burglarized and a similar track found while accused was in jail, such testimony warranted new trial. *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735.

Where the evidence upon which defendant was convicted tended strongly to prove an alibi, and raise doubt as to his identity with the criminal, a motion for a new trial on the ground of newly discovered evidence, supporting proof of mistaken identity, should have been granted. *Lumpkin v. State*, 84 Cr. R. 33, 204 S. W. 431.

In a prosecution for statutory rape, it was error to refuse a new trial, applied for on the ground that defendant had discovered that records disclosing the girl's age to be more than 15 years existed in Mexico. *Mireles v. State*, 83 Cr. R. 608, 204 S. W. 861.

There having been no lack of diligence, and it not appearing the testimony could be procured from other source, known to defendant, new trial should have been granted for absence of witness who would testify that a few days before the homicide deceased told him he was going to kill defendant, and that he (witness) told this to defendant two days before the homicide. *Bell v. State*, 85 Cr. R. 475, 213 S. W. 647.

In a prosecution for arson, defendant's motion for new trial on the ground of newly discovered testimony of two farmers, should have been granted, where circumstances were relied on to prove defendant's guilt, and the farmers' testimony tended to show that when defendant was in his house another person, admittedly an accomplice, was

in proximity to the destroyed property under suspicious circumstances. *Kelley v. State*, 86 Cr. R. 281, 216 S. W. 188.

Denial of new trial for evidence that a state's witness, before the trial, had been requested by other witnesses for the state to join them in testifying against defendant, held proper, in view of the nature of testimony given by such witness, and the fact that having testified during trial such alleged new evidence was not new. *Redwine v. State*, 87 Cr. R. 387, 221 S. W. 605.

That a new trial was granted an accomplice witness after he testified for the state would not be newly discovered evidence, there being no agreement with him that a new trial should be granted in consideration of such act on his part. *Shaw v. State* (Cr. App.) 229 S. W. 509.

In a prosecution for seduction, held, that new trial should have been granted for newly discovered evidence that prosecutrix was unchaste, defendant and his counsel having used due diligence to procure the testimony of the witness, who testified, but suppressed the fact that he had had relations with prosecutrix. *Gainer v. State* (Cr. App.) 232 S. W. 830.

7. **Relevancy, materiality, and competency.**—Alleged newly discovered evidence that defendant had been informed by unnamed parties that state's witnesses had been paid \$50 apiece to send whisky peddlers to penitentiary was hearsay. *Hays v. State*, 83 Cr. R. 398, 204 S. W. 229.

8. **Cumulative evidence.**—Though evidence on motion for new trial in prosecution for selling whisky to accused's father was partly cumulative, new trial held to be granted where it made stronger case as to the father's craziness and hostility towards his children. *Harris v. State*, 83 Cr. R. 107, 201 S. W. 405.

Where principal witness for defendant was favorably inclined toward defendant, and was attacked by state in such manner as to probably justify jury in doubting truthfulness of her testimony, refusal to continue trial for absence of two disinterested witnesses, who would have strongly corroborated testimony of such witness, on motion showing reasonable diligence, held error; the evidence not being merely cumulative. *Beland v. State*, 86 Cr. R. 285, 217 S. W. 147.

Where there was testimony that a man other than accused shot deceased, and that the other man's name was used in the altercation preceding the shooting, and that deceased first accused the other man, but when both were brought before him, identified accused, newly discovered evidence that the shot was fired by the other man is cumulative and the appellate court will generally not set aside the verdict for evidence of that character. *Gordon v. State*, 88 Cr. R. 17, 224 S. W. 894.

Testimony to support that of another witness occupies the same position, so far as continuance or new trial to obtain it is concerned, as impeaching evidence. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In a prosecution for murder, testimony as to threats made by deceased shortly before the killing, held cumulative and not ground for new trial. *Id.*

In a prosecution for murder, the trial judge did not abuse his discretion in failing to grant a new trial for absence of witness who could give evidence of deceased's having admitted his correspondence with defendant's wife and defendant's jealousy, where it was disclosed by evidence without controversy that such clandestine correspondence was conducted, such being merely cumulative evidence upon an uncontroverted issue, and testimony of another witness of an uncommunicated threat, where there was also evidence of a communicated threat. *Boaz v. State* (Cr. App.) 231 S. W. 790.

9. **Impeachment of witness.**—A new trial will not be granted on the ground of newly discovered evidence which would go solely toward impeaching a witness. *Lewis v. State*, 82 Cr. R. 285, 199 S. W. 1091; *Ballew v. State*, 82 Cr. R. 398, 199 S. W. 1109; *Paterson v. State*, 85 Cr. R. 643, 215 S. W. 308; *Washington v. State*, 86 Cr. R. 652, 218 S. W. 1043; *Redwine v. State*, 87 Cr. R. 387, 221 S. W. 605; *Henderson v. State* (Cr. App.) 229 S. W. 535.

Refusing new trial, held not abuse of discretion, where newly discovered evidence would merely have impeached prosecuting witness' testimony by inconsistent statements. *Ballew v. State*, 82 Cr. R. 398, 199 S. W. 1109.

Motion for new trial of defendant charged with robbery, supported by affidavits showing prosecuting witness had made affidavit retracting essential inculpatory testimony, and had been convicted of forgery, should have been granted. *McConnell v. State*, 82 Cr. R. 634, 200 S. W. 842.

Alleged impeaching statements of witnesses out of court, conflicting with their testimony on trial, are generally treated as insufficient to require new trial on ground of newly discovered evidence. *Alexander v. State*, 84 Cr. R. 185, 206 S. W. 362.

In prosecution for murder, where a witness against defendant was a convicted felon, and hence disqualified, so that his testimony could not have been used had such witness not sworn falsely as to his conviction, denial to defendant of new trial on ground of newly discovered evidence as to the witness' conviction held error. *Barber v. State*, 87 Cr. R. 585, 223 S. W. 457.

10. **Conflicting or contradicted evidence.**—Where testimony relied on for conviction was that of confessed accomplice and another witness under indictment for several felonies, new trial should have been granted for newly discovered evidence, directly contradicting testimony of accomplice material to case. *Chenault v. State*, 83 Cr. R. 104, 201 S. W. 657; *Jackson v. Same*, 83 Cr. R. 106, 201 S. W. 658.

It was not error to overrule a motion for a new trial where the newly discovered testimony of an absent witness as to an uncommunicated threat against defendant, made by one at whom he shot with intent to murder, was so contradictory that the court was justified in disregarding it. *Jones v. State* (Cr. App.) 231 S. W. 122.

It was not error to overrule a motion for new trial on the ground of error in refusing a continuance, where the affidavits of absent witnesses denied that they would have given the testimony expected of them. *Keith v. State* (Cr. App.) 232 S. W. 321.

11. **Credibility and probable effect.**—To require the Court of Criminal Appeals to review the action of the trial court in refusing a new trial for newly discovered evidence, it must appear that the evidence is probably true. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

In a prosecution for aggravated assault, alleged newly discovered evidence tending to make out a case of self-defense, but lacking the probability of truth, held no ground for granting new trial. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

In prosecution for passing forged check which defendant claimed he received for his assignment of lease, and that he paid difference in money, alleged newly discovered testimony, which was probably not true, that defendant's wife saw him writing transfer of lease, and thereafter found that considerable sum of money was missing from his pockets, is no ground for new trial. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

Where showing of diligence in procuring absent witness is insufficient, it is not incumbent upon court to order new trial, unless considered in connection with evidence adduced on the trial, it is reasonably probable that a result more favorable to accused would have been occasioned by the presence of the witness. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

In prosecution for theft of an automobile in W., newly discovered evidence that defendant registered a car at a point about 60 miles from W. on that day would not justify the inference it might produce different result; it being possible to reach W. in time to commit the theft. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

Where deceased and his companion positively identified accused as the man who fired the shot, and other witnesses also identified him, the appellate court cannot say that it was an abuse of discretion to deny a new trial for new evidence that the shot was fired by another on the ground that such evidence was improbable. *Gordon v. State*, 88 Cr. R. 17, 224 S. W. 894.

Testimony by a witness discovered since the trial that he saw the shooting through a window and that at the time another witness was holding defendant's right hand, which fact was not testified to by any other witness was not so probably true as to require a new trial. *Mims v. State* (Cr. App.) 227 S. W. 315.

In a prosecution for having equipment for making intoxicating liquor, where defendant admitted he brought the equipment, which he claimed had been given him by another negro, to his premises, newly discovered evidence that the new witness met two negroes carrying the equipment toward defendant's premises would not probably change the result, and does not require a new trial. *Andres v. State* (Cr. App.) 229 S. W. 503.

In a prosecution for murder, new trial on the ground of newly discovered evidence consisting of testimony as to a threat made by deceased toward defendant held properly denied, as it would not be liable to produce a different result upon another trial. *Taylor v. State* (Cr. App.) 229 S. W. 552.

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See *Mason v. State* (App.) 16 S. W. 766; *Lowe v. State* (Cr. App.) 226 S. W. 674. Cited, *Smith v. Texas Power & Light Co.* (Civ. App.) 206 S. W. 119.

**Receiving other testimony.**—In a prosecution for murder, testimony of witnesses held to show that, after the jury had retired to deliberate upon the case, a juror made statements to them of facts stated to be of his own knowledge, not irrelevant or immaterial, and such as were testimony within the meaning of this article. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In view of this provision, where a juror discussed facts known to him concerning the place where the murder was committed, the court will not speculate upon its effect upon the jury, but will reverse the case. *Id.*

The court should have granted a new trial in a robbery case where the jury in their retirement were informed that a coindictee had been convicted and his punishment assessed at confinement for five years, and such information was made the subject of discussion by the members of the jury before they arrived at a verdict. *Hilliard v. State*, 87 Cr. R. 416, 222 S. W. 553.

In a prosecution for manslaughter, testimony of all jurors held to lead to conclusion they had discussed on a number of occasions, the fact that defendant's brother had been convicted and given 5 years in the penitentiary, and that defendant had been tried once with a hung jury and again with a conviction and 12-year sentence. *Cotton v. State* (Cr. App.) 228 S. W. 943.

In such prosecution, discussion of defendant's former conviction, and with reference to his brother being convicted for the same offense, held prejudicial to defendant justifying a new trial under provision of this subdivision. *Id.*

Where testimony other than that used during trial is received by the jury after it has retired to deliberate, in violation of this subdivision, the accused, in order to obtain a new trial by reason thereof, is not required to show injury, but the state has the burden of showing that the fairness of the trial was not affected thereby. *Hallmark v. State* (Cr. App.) 230 S. W. 697.

That testimony other than that produced during trial is received by the jury after it has retired to deliberate is not ground for reversal, under this subdivision, where the fairness of the trial could not have been affected thereby. *Id.*

Action of jurors, during deliberations, in reading and discussing a newspaper article in which the defendant was charged in 19 other cases with burglary, theft, and receiving stolen property, and in discussing the fact not in evidence that defendant had been living with a prostitute, held misconduct. *Golden v. State* (Cr. App.) 232 S. W. 813.

**Statement by one juror to other jurors.**—In prosecution for rape, it was ground for new trial for jurors before reaching verdict and to influence others to say that they knew the state's principal corroborating witness and that he was truthful. *Mizell v. State*, 81 Cr. R. 241, 197 S. W. 300.

Evidence that two jurors were for acquittal until it was stated to them in the jury room that defendant had killed another man, whereupon they agreed to a conviction, and

that certain jurors commented on defendant's failure to testify, shows misconduct requiring a new trial. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

In homicide prosecution, juror's discussion of fact that accused had been indicted for another killing, and of fact that a codefendant had been previously tried and convicted, held misconduct justifying reversal. *Luman v. State*, 86 Cr. R. 298, 216 S. W. 395.

In a prosecution for violating the Prohibition Law, where defendant did not take the stand and introduced no evidence, the case being submitted on the state's evidence, it was such misconduct as to necessitate reversal for the jury to consider statements made by one of the jurors that defendant had been selling liquor for over 10 years and would continue unless they convicted. *Gates v. State* (Cr. App.) 225 S. W. 170.

This subdivision held applicable to statements made by one juror to another of facts not in evidence after jury has retired to deliberate. *Hallmark v. State* (Cr. App.) 230 S. W. 697.

**Conversing with persons other than jurors.**—Denial of new trial for misconduct of jurors and deputy sheriff in conversing about White boys, of which defendant was one, having been charged with counterfeiting, held proper. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

Communications with jurors, except within statutory limitation, are improper and should not be permitted, but to constitute error justifying new trial they must relate to the case and injury must follow, under this subdivision. *Lowe v. State* (Cr. App.) 226 S. W. 674.

**Review.**—Finding of judge on controverted testimony that there was no misconduct of jury or deputy sheriff in his conversation with them warranting new trial will not be disturbed on appeal. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

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**Misconduct in general.**—In prosecution for rape, it was misconduct warranting new trial for jurors before reaching verdict, and to influence others, to refer frequently to accused's failure to testify, though others each time immediately said that that could not be considered. *Mizell v. State*, 81 Cr. R. 241, 197 S. W. 300.

That the jury, in their deliberations, referred to the fact that defendant during the trial dozed off to sleep and nodded several times, does not require a new trial. *Wright v. State*, 84 Cr. R. 352, 207 S. W. 99.

Under this article, the action of jurors, after retirement in a trial for murder and after a disagreement as to character of punishment, in stating instances in which the Governor had used pardoning power in urging the death penalty, is ground for a new trial. *Weaver v. State*, 85 Cr. R. 111, 210 S. W. 698.

Evidence that two jurors were for acquittal until it was stated to them in the jury room that defendant had killed another man, whereupon they agreed to a conviction, and that certain jurors commented on defendant's failure to testify, shows misconduct requiring the granting of a new trial. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

Conviction of manslaughter will not be reversed because in testing the qualifications of jurors some incidental reference was made to defendant's former conviction, and thereafter the jury, after its retirement, based on the information thus obtained, further made some casual reference thereto; the trial court having overruled motion for new trial on such account. *Wood v. State*, 86 Cr. R. 550, 217 S. W. 1037.

Where a number of jurors were in favor of a two-year sentence until the fact that accused had not testified was called to their attention by jurors, and after the matter was discussed for some time, and because of such discussion, agreed to a four-year sentence, court erred in not granting a motion for a new trial. *Rabe v. State*, 87 Cr. R. 497, 222 S. W. 1106.

In a prosecution for murder, where, after the jury retired, they stood ten for murder and two for manslaughter, an incidental remark by some one that if a man was convicted of manslaughter he could not thereafter be convicted of murder, was not such misconduct as would justify new trial under the statute. *Taylor v. State* (Cr. App.) 229 S. W. 552.

In a prosecution for forgery, where the jury considered testimony which had been withdrawn from their consideration, a new trial should have been granted. *Stevenson v. State* (Cr. App.) 230 S. W. 174.

In a prosecution for forgery, where the jury discussed the failure of defendant to testify, and the general reputation of the defendant, which had not been put in issue, a new trial should have been granted. *Id.*

**Discretion of trial court and review.**—Where on motion for new trial after full investigation court found upon conflicting evidence that jury did not misuse accused's failure to testify, such finding will not be disturbed. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

In prosecution for manslaughter, facts as to misconduct of jury held insufficient to justify disturbance of trial judge's finding that claim of misconduct did not call for new trial. *Alexander v. State*, 84 Cr. R. 185, 206 S. W. 362.

A finding on motion for new trial as to improper discussion by the jurors will not be disturbed on appeal, unless it is clear that it is contrary to the evidence. *Reese v. State*, 87 Cr. R. 245, 220 S. W. 1096.

Findings by the trial court upon fact issues raised by testimony of jurors as to manner of arriving at verdict on motion for new trial are always upheld on appeal, unless it appears that the decision is manifestly wrong, under this article. *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293.

**Evidence in general.**—Where it is claimed in a criminal trial that the jury has violated art. 748, the burden is on the state to show by testimony other than that of the jurors that no injury has occurred. *Mann v. State*, 84 Cr. R. 109, 204 S. W. 434.

**Affidavits and testimony of jurors as to misconduct.**—It would be against public policy to permit impeachment of a verdict by testimony that after agreeing to the verdict a juror desired to retract. *Watson v. State*, 82 Cr. R. 305, 199 S. W. 1113.

The discretion allowed the trial judge as to the method of ascertaining what occurred in the jury room is of such breadth that the fact that a leading question may have been asked would not furnish ground for reversal. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349.

The verdict cannot be impeached by affidavits of jurors that they or other jurors misunderstood the charge of the court. *Bridges v. State*, 88 Cr. R. 61, 224 S. W. 1097.

Testimony of jurors as to the deductions they drew from a remark of the county attorney on the trial was not admissible on motion for new trial, as proof thereof trenches upon the rule declaring them incompetent to impeach the verdict, under this article. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

#### SUBD. 9

**Conviction of degree of offense lower than that charged.**—An indictment charging assault with intent to rape includes, though not describing the means used to commit the lesser offense, a charge of aggravated assault under arts. 771 and 772 and this subdivision. *Cirul v. State*, 83 Cr. R. 8, 200 S. W. 1088.

**Judgment unsupported by verdict.**—The objection that the verdict does not support the judgment is fundamental in view of art. 837, subd. 9, and article 853, and can be raised for first time on appeal without bill of exceptions. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

#### OTHER MATTERS RELATING TO NEW TRIALS

**In general.**—Refusal to grant new trial, when it was disclosed that one of the jurors who had rendered verdict of guilty of murder was an unpardoned convict, requires reversal of judgment, in view of arts. 692, 695, as to qualification of jurors. *Russell v. State*, 84 Tex. Cr. 245, 209 S. W. 671.

The special veniremen having been sworn individually as they were impaneled, the failure to swear them en masse was an irregularity not available when raised for the first time on motion for a new trial. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

Defendant, an ignorant negro, charged with aggravated assault, when asked by the prosecuting officer what he was going to do, said he slapped her and reckoned he was guilty, whereupon, in reply to the judge's inquiry, he stated that he would plead guilty, and the judge fixed a somewhat severe sentence, after prosecuting officer had stated that defendant was a bad negro and should have heavy punishment. Held, that the facts were insufficient to sustain waiver of jury trial, and defendant should have been granted a new trial. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

**Misconduct of third persons.**—In prosecution for murder, demeanor of and remark by widow of deceased person to leading counsel for defendant while latter was closing his argument held not to require reversal, having been provoked by counsel himself. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

Where the district attorney and prosecuting officer threatened prosecutrix, a girl under 15 years of age, with a prosecution for perjury unless she repeated her testimony as given before court of inquiry and grand jury which she said was false and induced by coercion, and she was thus induced to testify, a conviction based thereon must be reversed. *Venable v. State*, 84 Cr. R. 354, 207 S. W. 520.

Defendant, convicted of aggravated assault and battery on his plea of guilty, and fined \$100 and sentenced to 30 days' imprisonment, held not entitled to new trial on the ground that the prosecuting officer informed him through his lawyer that, if he would plead guilty to aggravated assault, the prosecution would be dismissed; the lawyer telling him that he did not know what his fine would be, but about \$50 or \$60 with costs. *Franklin v. State*, 86 Cr. R. 147, 215 S. W. 304.

**Trial jury.**—That defendant did not know that one of the jurors was not a householder or freeholder, and thereby subject to challenge at the time he was accepted, will not of itself require the granting of a new trial. *Watson v. State*, 82 Cr. R. 462, 199 S. W. 1098.

**Review of rulings on motion.**—See *Ballew v. State*, 82 Cr. R. 398, 199 S. W. 1109; notes to art. 938.

#### Art. 839. [819] Must be applied for within two days, except.

**Time for filing.**—Under this article, it is mandatory in misdemeanor cases that a motion for a new trial be filed within two days of conviction. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

Under this article, it was error for the trial court, on an arbitrary rule of its own, not to hear evidence offered as justification for not filing within two days a motion for new trial, setting up misconduct of the jury. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

A showing that the verdict was returned on Saturday, that the following Monday was Christmas Eve, that the jurors when discharged departed to their various homes, that attorneys for accused and judge lived in different localities, and that the weather was inclement, was sufficient excuse for not filing a motion for new trial, setting up misconduct of the jury, within two days as prescribed by statute. *Id.*

#### Art. 840. [820] Motions for new trial shall be in writing.

Cited, *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

**2. Statement of grounds.**—The denial of defendant's application for continuance on the ground of absence of witnesses, residents of the county who were not summoned, will not be reviewed, where the motion for new trial did not complain of any injury or

error in respect to them, and no affidavits of such witnesses were attached to the motion. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

The Court of Criminal Appeals cannot consider a motion for new trial, not signed or sworn to, nor stating its facts in such a way as to make their truth a question to be considered, either by the trial court or the Court of Criminal Appeals. *Hunter v. State*, 86 Cr. R. 384, 216 S. W. 871.

6. — **Charge of court.**—In the absence of any statement of the grounds upon which defendant regarded his requested charge applicable, embraced within the exception to its refusal or the motion for new trial, the matter is not so presented as to demand attention on appeal in view of Acts 33d Leg. c. 138. *Vaughn v. State*, 84 Cr. R. 483, 208 S. W. 527.

Under art. 737a, as added by Acts 33d Leg. c. 138, to review denial of a special charge, either in the bill of exceptions or the motion for new trial there should be given the reasons appearing in the record why instruction should have been given. *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

6½. — **Verdict contrary to law and evidence.**—The charge and judgment showing that, before receiving the plea of guilty, on which defendant was convicted, he was admonished of the consequences of his plea, as required by art. 656, and defendant having merely filed a motion for new trial, alleging the judgment and verdict were contrary to the law and evidence, there is nothing to review. *Kimball v. State*, 84 Cr. R. 161, 205 S. W. 989.

7. — **Newly discovered evidence.**—Motion and affidavit for new trial on ground of newly discovered evidence held too indefinite for consideration, and not within any rule authorizing a new trial for newly discovered evidence. *Hays v. State*, 83 Cr. R. 398, 204 S. W. 229.

9. **Verification.**—See *Hunter v. State*, 86 Cr. R. 384, 216 S. W. 871.

Under art. 837, subd. 6, motion for new trial on ground of newly discovered evidence is properly overruled where it was not sworn to, affidavit of claimed witness and what she would testify is not attached, and failure to do so not explained, no evidence offered to support motion, no newly discovered facts, and no diligence shown. *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536.

On motion on ground that defendant by his plea of guilty meant only that he killed deceased, and not that the homicide was unlawful, held, that motion should have been verified by affidavit or proof. *Epperson v. State*, 82 Cr. R. 245, 199 S. W. 478.

Grounds for new trial that appellant had been influenced to plead guilty under threats of other prosecutions cannot be considered in the absence of verification. *Jackson v. State*, 84 Cr. R. 181, 206 S. W. 192.

Motion must be sworn to by the party or his counsel. *Young v. State*, 86 Cr. R. 621, 218 S. W. 754.

Acknowledgment of motion must state that the person whose statement is being acknowledged was sworn or affirmed, or made such statement under oath or affirmation. *Id.*

Motion based on newly discovered evidence, alleging that the evidence was not known to accused or his counsel before the trial, must be verified by accused or his counsel, it being insufficient that the accompanying affidavit of the witness stated that he had not told accused or his counsel of his testimony, and had no reason to believe they knew of it. *Andres v. State* (Cr. App.) 229 S. W. 503.

Where a motion for a new trial on the ground of newly discovered evidence is not sworn to, the appellate court cannot consider the motion. *Fallon v. State* (Cr. App.) 230 S. W. 170.

10. — **Oath administered by attorney in case.**—Refusal to grant a new trial on the ground of newly discovered evidence will not be considered on appeal, where the affidavits attached to the motion were sworn to before one of appellant's attorneys, and where the motion for the new trial was not duly sworn to. *Steele v. State*, 87 Cr. R. 588, 223 S. W. 473.

11. **Amendment of motion.**—The filing of an amended motion for new trial is generally within the sound discretion of the trial court. *Alvarado v. State*, 83 Cr. R. 181, 202 S. W. 322.

Under Bill of Rights, § 10, in view of section 29, an indictment, leaving out the words "by the" in the formal clause "by the authority of the state," held fatally defective, so that court erred in not allowing amended motion for new trial for alleged discovery that indictment had been amended by inserting such omitted words. *Id.*

12. **Affidavits and other proofs in general.**—See *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536.

Affidavits made by accused in support of motion for new trial after such motion had been overruled will be stricken upon appeal. *Jeffries v. State*, 82 Cr. R. 42, 198 S. W. 778.

Though there was lack of diligence shown in application for continuance which justified trial court in overruling it, it, with affidavits supporting it, were proper factors to be considered on the motion for new trial. *Eppison v. State*, 82 Cr. R. 364, 198 S. W. 948.

Failure to attach supporting affidavit or evidence to motion for new trial for absence of witness does not absolve court from considering it, but bears on question whether refusal was reversible error. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

Under arts. 840, 841, court was privileged to try motion for new trial on affidavits, declining to receive oral testimony. *McConnell v. State*, 82 Cr. R. 634, 200 S. W. 842.

Evidence not introduced by defendant charged with gaming on hearing of his motion to dismiss because suit was instituted in justice court, and was still pending therein, not offered until motion for new trial was heard, held introduced too late. *Wrenn v. State*, 82 Cr. R. 642, 200 S. W. 844.

To motion for new trial for refusal of continuance for absence of witness should be attached her affidavit that she would have testified as alleged. *Hollis v. State*, 83 Cr. R. 612, 204 S. W. 432.

Evidence, heard by court on motion for new trial on ground that indictment was not read to jury, held sufficient to sustain action of court in overruling motion. *Trevino v. State*, 83 Cr. R. 562, 204 S. W. 996.

Affidavit attached to motion for new trial is but a pleading, which authorizes introduction of supporting evidence, not being evidence itself, unless introduced as such on trial of motion in one of the ways specified. *Lopez v. State*, 84 Cr. R. 422, 208 S. W. 167.

In a prosecution for burglary, wherein an issue of insanity had been found against defendant, affidavits on a motion for new trial on that issue held to present evidence requiring a new trial notwithstanding that such evidence was, strictly speaking, not newly discovered evidence. *Walker v. State*, 86 Cr. R. 441, 216 S. W. 1085.

On a motion for new trial for error in refusing continuance for absent witness, a discrepancy between the affidavit of the absent witness, filed with the motion, and his testimony on the hearing of the motion, held a fact to be considered by the jury as bearing upon the credibility of his testimony, but not to authorize the trial judge to determine the issue of fact against the accused and deny the motion. *Torez v. State*, 86 Cr. R. 465, 217 S. W. 948.

**13. Affidavits as to newly-discovered evidence.**—An affidavit of only one witness to the effect that the main witness was hostile to accused was not sufficient to require the granting of a motion for a new trial on the ground of newly discovered evidence. *Gerlich v. State*, 86 Cr. R. 252, 216 S. W. 164.

An affidavit by accused alone that an absent witness would testify to threats by deceased, which accused testified were confirmed by a witness who was present, but which were denied by the dying declaration and by the witness who was present, do not establish the truth of the alleged testimony or the probability that it would affect the result sufficiently to show an abuse of discretion in denying the new trial. *Bocknight v. State*, 87 Cr. R. 428, 222 S. W. 259.

**14. — By proposed witnesses.**—See *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536; *Gill v. State*, 84 Cr. R. 531, 208 S. W. 926.

Where testimony of absent witness as given in motion for new trial was different from that given in application for continuance, held, that failure to support motion by his affidavit or sworn statement prevented a review. *Alexander v. State*, 82 Cr. R. 431, 199 S. W. 292.

Failure to attach to motion, affidavit of the person whose testimony is alleged to have been newly discovered, renders motion insufficient. *Gates v. State*, 82 Cr. R. 603, 200 S. W. 397.

Where new trial is sought upon ground of newly discovered evidence, overruling of motion cannot be reviewed in absence of affidavits of purported new witnesses or satisfactory explanation of failure to produce them. *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

New trial for newly discovered evidence is properly denied, where defendant failed to produce affidavits of absent witnesses on the hearing of the motion more than a month after conviction. *Payne v. State*, 84 Cr. R. 2, 204 S. W. 765.

Court did not abuse its discretion in denying a new trial for newly discovered evidence, where the motion was not accompanied by any affidavit of the new witnesses and a failure to produce them at the trial was not sufficiently accounted for. *Patterson v. State*, 85 Cr. R. 643, 215 S. W. 308.

### Art. 841. [821] State may controvert truth of causes set forth.

See *Lyons v. State* (App.) 12 S. W. 740; *Russell v. State*, 84 Cr. R. 245, 209 S. W. 671.

**Right of state in general to controvert grounds for new trial.**—This article expressly allows state to take issue as to truth of causes set forth in motion for new trial. *Jackson v. State*, 81 Cr. R. 597, 196 S. W. 826.

Under this article, on motion for new trial based on overruling of motion for continuance because of absence of witness, state had right to show lack of diligence in procuring attendance of such witness. *Mills v. State*, 83 Cr. R. 515, 204 S. W. 642.

**Effect of affidavits.**—In a prosecution for maiming, an issue as to communicated threats made by prosecuting witness cannot be eliminated by an ex parte affidavit of the witness alleged to have communicated such threats, attached to the state's pleading denying the allegations contained in the motion for new trial, as affidavits attached to such a motion cannot be used as a substitute for testimony before the jury. *Keith v. State* (Cr. App.) 232 S. W. 321.

**Failure of state to take issue on motion.**—When a motion for new trial, setting up newly discovered evidence, is properly sworn to, and the affidavits of the witnesses are attached, the same should be considered as properly before the trial court, and must be taken as true, unless the state sees fit to file its traverse under this article, and the court hears evidence upon the issue thus made. *Washington v. State*, 86 Cr. R. 652, 218 S. W. 1043.

**Oral evidence.**—By direct provision of statute, trial court may hear evidence on motion for new trial, either by affidavit or otherwise. *Shipp v. State*, 81 Cr. R. 323, 196 S. W. 840.

Under arts. 840, 841, court was privileged to try motion for new trial on affidavits, declining to receive oral testimony. *McConnell v. State*, 82 Cr. R. 634, 200 S. W. 842.

**Scope of inquiry at hearing.**—Inquiry into use made by jury of legitimate evidence is not proper on motion for new trial. *Easley v. State*, 82 Cr. R. 238, 199 S. W. 476.

Probable truth of testimony of absent witness may be looked into on motion for new trial, in connection with evidence adduced upon trial. *Woods v. State*, 83 Cr. R. 332, 203 S. W. 54.

**Review of ruling on motion.**—Where court tried motion for new trial on affidavits, declining to receive oral testimony, the only evidence which Court of Criminal Appeals can consider is affidavits and certified copies of records attached to motion and filed during term. *McConnell v. State*, 82 Cr. R. 634, 200 S. W. 842.

This article permits state to take issue with defendant on truth of grounds of motion for new trial, and when state does so, court hearing evidence and deciding against defendant, decision is conclusive on Court of Criminal Appeals, unless evidence on which trial judge acted is legally brought up for review. *Alexander v. State*, 84 Cr. R. 185, 206 S. W. 362.

Where the statement in the motion for new trial that defendant had filed a plea of insanity was traversed as authorized by this article, and the record recited that the court heard evidence on the issue, but such evidence was not brought up on appeal, it must be presumed that the evidence supported the denial of the motion. *Taylor v. State* (Cr. App.) 227 S. W. 679.

Where on motion for new trial on ground of misconduct of jury the evidence was conflicting, the trial judge's determination of the issue under provision of this article, will not be disturbed unless it appears to the appellate court that he had committed an error in his judgment thereon. *Glenn v. State* (Cr. App.) 229 S. W. 521.

### Art. 843. [823] Effect of a new trial.

See *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115.

**Allusion to or consideration of former conviction.**—In view of this article, held, defendant's counsel may not read to the court and jury the opinion of this court on a former appeal. *Guest v. State*, 24 Tex. App. 530, 7 S. W. 242.

In a prosecution for violating the local option law, evidence that defendant had been convicted before under the same statute in another case held prejudicial in view of this article, and of testimony by the jury that they had taken it into consideration. *Mann v. State*, 84 Cr. R. 109, 204 S. W. 434.

State's attorney's reply to defendant's objection to introduction of certain testimony, "the fact is the court of criminal appeals has held all of these facts and circumstances are admissible," was not an allusion in argument to the former conviction, inhibited by this article. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

The conduct of one or more of the jurors in mentioning, at a time when the jury stood nine for conviction and three for acquittal, that defendant had been previously tried, and that such trial had resulted in a mistrial because the jury stood nine for conviction and three for acquittal, held ground for reversal. *Pierce v. State*, 87 Cr. R. 379, 222 S. W. 565.

### Art. 844. [824] When new trial is refused, statement of facts, etc.

**2. Deprivation of statement of facts.**—Accused held entitled to reversal of conviction for petty theft, where without his fault he was deprived of a statement of facts and bills of exception. *Ward v. State*, 82 Cr. R. 386, 200 S. W. 378.

**5. Decisions not reviewable without statement of facts.**—In the absence of a statement of facts or bill of exceptions, the judgment will be affirmed, where no errors are disclosed in the record. *Wallace v. State* (Cr. App.) 197 S. W. 869; *Linthecum v. State*, 85 Cr. R. 247, 211 S. W. 456; *Bailey v. State* (Cr. App.) 225 S. W. 515 (first case); *Bailey v. State* (Cr. App.) 225 S. W. 515 (second case); *Franklin v. State* (Cr. App.) 231 S. W. 392; *Perkins v. State* (Cr. App.) 232 S. W. 821.

Where record is without statement of facts or bill of exceptions, no question is presented for revision by Court of Criminal Appeals. *Burkhardt v. State* (Cr. App.) 200 S. W. 840; *Casey v. State* (Cr. App.) 203 S. W. 901; *Miller v. State* (Cr. App.) 204 S. W. 334; *Sweeney v. State*, 84 Cr. R. 58, 205 S. W. 335; *Wall v. State* (Cr. App.) 215 S. W. 300; *Petty v. State* (Cr. App.) 225 S. W. 1098.

Where there is neither a statement of facts nor bill of exceptions and nothing presented which can be reviewed in the absence of these, a conviction will be affirmed. *Newton v. State* (Cr. App.) 199 S. W. 467; *Moye v. State* (Cr. App.) 198 S. W. 961; *Oliver v. State* (Cr. App.) 199 S. W. 466; *Dyer v. State* (Cr. App.) 229 S. W. 326.

In the absence of bill of exception and statement of facts, the only question raised is the sufficiency of the indictment. *Price v. State*, 83 Cr. R. 300, 202 S. W. 948; *Hamilton v. State* (Cr. App.) 198 S. W. 291; *Amason v. State* (Cr. App.) 208 S. W. 917; *Dixon v. State*, 86 Cr. R. 406, 216 S. W. 1097.

Where the indictment, charge, and record are in conformity with law, and there are no bills of exception or statement of facts, the judgment will be affirmed. *Bailey v. State* (Cr. App.) 225 S. W. 515 (third case); *Ramirez v. State* (Cr. App.) 222 S. W. 1106; *Smith v. State* (Cr. App.) 231 S. W. 1096.

Where indictment appeared regular, and instructions were not complained of by any bill of exceptions, and record contains neither a statement of facts nor a bill of exceptions, nothing is presented for review, and judgment of lower court will be affirmed. *Martinez v. State*, 82 Cr. R. 404, 199 S. W. 629; *Rodgers v. State*, 82 Cr. R. 143, 198 S. W. 574.

Where the record is without statement of facts or bills of exceptions, the judgment of conviction will be affirmed, if the indictment charges an offense and no error appears on the face of the record. *Eddleman v. State* (Cr. App.) 230 S. W. 421; *Fovella v. State*, 85 Cr. R. 97, 210 S. W. 207.

On appeal from conviction for arson, with lowest penalty assessed, nothing is presented for review, in absence of statement of facts or bill of exceptions. *Peace v. State* (Cr. App.) 196 S. W. 952.

Where record contains no statement of facts proved and no evidence, and bills of exception and grounds for motion for new trial cannot be intelligently revised, conviction will be affirmed. *Burrage v. State*, 81 Cr. R. 638, 197 S. W. 997.



Where court trying charge of burglary heard all testimony on appeal, in absence of statement of facts, there being nothing contrary in record, Court of Criminal Appeals must assume that defendant's claimed alibi as to particular night charged would have availed him nothing. *Stegall v. State*, 82 Cr. R. 117, 198 S. W. 311.

It is only through bills of exception, as required by art. 744, and the statement of facts provided for by art. 844, that the court is apprised of occurrences at the trial, and, in view of art. 938, court can consider as ground for reversal only matters presented for review as so required. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

In absence of statement of facts and no error appearing on the face of the record, nothing is presented which can be reviewed. *Pierce v. State*, 84 Cr. R. 334, 206 S. W. 936.

In absence of statement of facts, Court of Criminal Appeals cannot consider alleged errors on trial. *Turner v. State*, 84 Cr. R. 605, 209 S. W. 406.

In absence of statement of facts, it would be presumed on appeal that action of lower court was correct. *Lintheum v. State*, 85 Cr. R. 247, 211 S. W. 456.

A record which does not contain a statement of facts or bill of exceptions cannot be considered on appeal. *Jones v. State* (Cr. App.) 213 S. W. 671.

In the absence of a statement of facts or bills of exception, the only matters reviewable are the sufficiency of the indictment and the charge of the court. *White v. State*, 86 Cr. R. 420, 217 S. W. 389.

Where there was a motion to quash the venire on the grounds that a jury commissioner was not a freeholder in the county and that the commissioners were not residents of different portions of the county, and there is no statement of facts or bills of exception, and no exception was reserved, and the grounds are not verified or established by evidence, so far as shown by the record, conviction will be affirmed. *Bowen v. State*, 87 Cr. R. 657, 224 S. W. 776.

Where defendant charged with unlawfully selling intoxicating liquor pleaded guilty, and his punishment was fixed at the minimum penalty for such offense, the Court of Criminal Appeals will not consider his appeal, in absence of statement of facts or bills of exceptions, but will affirm the judgment. *Armstrong v. State* (Cr. App.) 227 S. W. 322.

Where the record contains no statement of facts, and the only bills of exceptions appearing are not signed or approved, and an examination of the indictment and charges show no error, and there is no error complained of in the motion for new trial which can be considered in the condition of the record, the judgment must be affirmed. *Marshall v. State* (Cr. App.) 227 S. W. 1103.

Neither motion for new trial, statement of facts, nor bills of exceptions are necessary to give jurisdiction of appeal from conviction for robbery. *Connell v. State* (Cr. App.) 229 S. W. 502.

In the absence of a statement of facts, the presumption in favor of the regularity of the conviction is ordinarily not overcome, unless the bill of exceptions is drawn so as to demonstrate that the procedure complained of was calculated to injure defendant. *Smith v. State* (Cr. App.) 230 S. W. 161.

In the absence of a statement of facts, only fundamental errors will be considered, and every presumption will be allowed in favor of the regularity of the conviction, the court's charge, the sufficiency of the evidence, and the correctness of the court's rulings. *Searcy v. State* (Cr. App.) 232 S. W. 319.

6. — **Grounds for new trial in general.**—Without bills of exceptions and statement of facts, grounds for new trial cannot be reviewed. *Spurlock v. State*, 81 Cr. R. 626, 197 S. W. 873; *Odom v. State*, 82 Cr. R. 580, 200 S. W. 833.

Questions raised in motion for new trial are not reviewable, where they are not verified by bills of exceptions and no statement of facts is contained in record. *Young v. State* (Cr. App.) 202 S. W. 509; *Brady v. State*, 84 Cr. R. 172, 206 S. W. 527; *Brown v. State* (Cr. App.) 219 S. W. 825.

Assignments in motion for new trial cannot be reviewed on appeal, in the absence of statement of facts. *Lintheum v. State*, 85 Cr. R. 247, 211 S. W. 456; *Dixon v. State*, 86 Cr. R. 406, 216 S. W. 1097.

Where a motion for a new trial was contested and overruled, where no statement of facts in the record showed such evidence, the matter could not be reviewed. *Ross v. State*, 85 Cr. R. 340, 212 S. W. 167; *Payne v. State* (Cr. App.) 232 S. W. 802.

Where there is nothing in motion for new trial that can be considered in absence of facts and bills of exception, the judgment will be affirmed. *Avery v. State*, 83 Cr. R. 80, 200 S. W. 832.

For review, as to motion for new trial, the facts stated as grounds in the motion must be prepared and sent with the record. *Williams v. State*, 83 Cr. R. 290, 202 S. W. 958.

Where evidence on hearing of motion for new trial was not preserved by bill of exceptions or statement of facts, it must be assumed that conclusions of trial judge that facts aliunde the record set up in motion were not sustained by evidence were correct. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

Art. 841, permits state to take issue with defendant on truth of grounds of motion for new trial, and when state does so, court hearing evidence and deciding against defendant, decision is conclusive on Court of Criminal Appeals, unless evidence on which trial judge acted is legally brought up for review. *Alexander v. State*, 84 Cr. R. 185, 206 S. W. 362.

Court of Criminal Appeals is not in position to pass on correctness of ruling of trial court in denying new trial based in part on newly discovered evidence, where evidence which influenced action of court is not preserved by bill of exceptions or statement of facts; presumption being that, if affidavits attached to motion were used in evidence, they were met by controverting facts supporting court's action. *Mitchell v. State*, 85 Cr. R. 25, 209 S. W. 743.

Where evidence heard upon motion for new trial is not presented by statement of facts or bill of exceptions filed during the term, but it appears the court heard evidence, the presumption is indulged that the facts heard justified the conclusion reached. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

**7. — Denial of continuance, recess, or postponement.**—Refusal of continuance cannot be reviewed, in absence of bill of exceptions and statement of facts. *Spurlock v. State*, 81 Cr. R. 626, 197 S. W. 873; *Tucker v. State*, 84 Cr. R. 332, 206 S. W. 942; *Nicolatte v. State*, 85 Cr. R. 245, 211 S. W. 456.

In the absence of statement of facts, a bill complaining of the overruling of a motion for continuance on account of absence of a witness cannot be reviewed. *Young v. State*, 84 Cr. R. 232, 206 S. W. 529; *Hughes v. State*, 86 Cr. R. 611, 218 S. W. 1048.

Where there is no statement of facts presenting the testimony heard on a motion for continuance, the court's ruling will be presumed to have been justified by the evidence. *Roberts v. State*, 83 Cr. R. 511, 204 S. W. 866.

In the absence of a statement of facts, it is impossible to tell on appeal whether the court committed error in refusing continuance, for the absence of a witness, for even though diligence may have been used, and the testimony might be material from the face of the application, yet in the light of the testimony given it might appear that no error was committed in refusing the continuance, and the witness' testimony might not affect the result. *Searcy v. State* (Cr. App.) 232 S. W. 319.

**8. — Incompetency of jurors.**—A bill of exceptions to the overruling of challenges to a juror, who stated that he had at one time formed an impression, yet, if selected, could lay same aside and decide the case according to the law and the evidence, held to present no error in the absence of a sufficient statement of facts. *Maguire v. State* (Cr. App.) 226 S. W. 683.

**9. — Rulings on admissibility of evidence.**—In the absence of a statement of facts, objections to the introduction of testimony cannot be reviewed. *Pulliam v. State*, 87 Cr. R. 127, 219 S. W. 828; *Smith v. State*, 81 Cr. R. 446, 196 S. W. 519; *Spurlock v. State*, 81 Cr. R. 626, 197 S. W. 873; *Kitchens v. State*, 83 Cr. R. 324, 203 S. W. 768; *Turner v. State*, 84 Cr. R. 605, 209 S. W. 406; *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665; *Brown v. State* (Cr. App.) 211 S. W. 786; *Clements v. State* (Cr. App.) 223 S. W. 1105; *Escue v. State* (Cr. App.) 227 S. W. 483.

Questions and answers set out in motion for new trial and not verified by the trial court held not reviewable without a statement of facts or bill of exceptions. *Ramirez v. State*, 81 Cr. R. 367, 195 S. W. 599.

That the merits of admission of evidence of another crime may be reviewed, the state of the evidence affecting its admissibility must be shown by statement of facts or bill of exceptions. *Lozano v. State*, 83 Cr. R. 597, 204 S. W. 323.

Where there is no evidence in the record and no bill of exceptions reserved in a prosecution for assault with intent to murder, the appellate court cannot review the proposition that the verdict was contrary to law and the evidence, in that the court erred in permitting a witness to state that defendant, previous to the assault, had cut his wife. *Johnson v. State*, 84 Cr. R. 474, 208 S. W. 520.

An exception to the court's action in admitting as a part of the *res gestæ* a statement to the effect that defendant shot deceased cannot be determined, where there is no statement of facts. *Thomas v. State*, 85 Cr. R. 42, 210 S. W. 201.

In the absence of the facts, in a prosecution for theft of an automobile, the appellate court cannot review a ruling permitting a state's witness to demonstrate the use of instruments found in defendant's possession to show how the car was dismantled after it was taken. *Clay v. State*, 85 Cr. R. 128, 210 S. W. 968.

Without a statement of facts appellate court cannot determine whether confession was obtained by force. *Washington v. State*, 86 Cr. R. 327, 216 S. W. 869.

Except where evidence admitted is flagrantly irrelevant and obviously injurious, or is forbidden by statute, rulings on evidence cannot be held erroneous or prejudicial, in the absence of statement of fact or statement in bills of exceptions making plain the relation of the matters referred to in the bills. *Pilgrim v. State*, 87 Cr. R. 6, 219 S. W. 451.

In the absence of bills of exceptions and statement of facts, the Court of Criminal Appeals must presume the rulings of the trial court on the admission and exclusion of evidence to have been correct. *Williams v. State* (Cr. App.) 226 S. W. 411.

In the absence of a statement of facts, a bill of exceptions to the refusal to permit accused to prove by his own testimony that his reputation for truth and veracity was good or permit him to give like testimony with reference to general reputation for honesty and fair dealing and with reference to being a peaceable and law-abiding man did not show error, even upon the issue of suspended sentence. *Cundiff v. State* (Cr. App.) 226 S. W. 412.

In a prosecution for unlawfully playing cards, evidence as to incriminatory statements by accused in the sheriff's office as against the objection that accused had not been warned, could not, on appeal, be held inadmissible and prejudicial, in the absence of a sufficient statement of facts. *Maguire v. State* (Cr. App.) 226 S. W. 683.

On appeal the court must presume that the trial court acted correctly in his rulings on the admission of testimony, unless it can be ascertained from the record that he was in error with reference thereto, and it is impossible to determine, in the absence of a statement of facts, whether the admission of certain testimony over appellant's objection was error. *Searcy v. State* (Cr. App.) 232 S. W. 319.

**10. — Rulings on instructions.**—Without the statement of facts, a ruling of the court with reference to special charges cannot be considered. *Anaya v. State*, 85 Cr. R. 647, 215 S. W. 302; *Clay v. State*, 85 Cr. R. 128, 210 S. W. 968; *Erwin v. State*, 87 Cr. R. 71, 219 S. W. 827; *Lewis v. State*, 87 Cr. R. 269, 220 S. W. 1094; *Escue v. State* (Cr. App.) 227 S. W. 483; *Gumpert v. State* (Cr. App.) 229 S. W. 330; *Searcy v. State* (Cr. App.) 232 S. W. 319.

Exceptions to the charge as given cannot be considered on appeal, in the absence of statement of facts. *Gibson v. State* (Cr. App.) 220 S. W. 548; *Smith v. State*, 87 Cr. R. 12, 218 S. W. 1043; *Gumpert v. State* (Cr. App.) 229 S. W. 330.

In absence of a statement of facts, instruction submitting the offense charged will be presumed to have charged the law applicable to the evidence. *Garcia v. State*, 81 Cr. R. 456, 196 S. W. 181.

Where complaints of charge and refusals of requests are not covered by bills of exceptions, and, in absence of statement of facts, charge is applicable to state of facts that may have arisen under evidence, as set forth in allegations and indictment, conviction will be affirmed. *Smith v. State*, 81 Cr. R. 538, 196 S. W. 952.

Bill of exceptions complaining of court's charge presents nothing for review, where there was no statement of facts showing evidence upon which charge was based. *Pritchard v. State*, 82 Cr. R. 219, 199 S. W. 292.

In the absence of a statement of facts or bill of exceptions, an exception to the court's charge on circumstantial evidence will not be reviewed, unless the matter is of a very serious or fundamental nature. *Wallace v. State* (Cr. App.) 200 S. W. 1088.

In the absence of bill of exceptions and statement of facts, alleged errors in refusing instructions cannot be determined. *Spohn v. State*, 83 Cr. R. 219, 202 S. W. 732.

Exceptions to the charge, and grounds of motion for new trial both in refusing instructions and in passing on sufficiency of evidence, need not be considered, where the evidence does not accompany the record. *Railey v. State*, 84 Cr. R. 241, 206 S. W. 523.

Where no statement of facts or bill of exceptions accompanies the transcript, errors in regard to the court's charge as given, and the refusal to give defendant's requested instructions, cannot be considered or revised. *Nicolatte v. State*, 85 Cr. R. 245, 211 S. W. 456.

Where the special charge which was refused defendant prosecuted for murder related to a matter of testimony, and the Court of Criminal Appeals is not informed of facts to show it was error to refuse such charge, the court is compelled to hold that the refusal presents nothing justifying reversal. *Watson v. State* (Cr. App.) 226 S. W. 410.

11. — **Absence of evidence and newly discovered evidence.**—The denial of a motion for a new trial for newly discovered evidence cannot be considered on appeal, where the evidence is not brought up. *Fisher v. State*, 82 Cr. R. 56, 198 S. W. 291.

12. — **Misconduct of jury, prosecuting attorney, and others.**—In absence of statement of facts showing evidence, denial of motion for new trial based on theory that jury received evidence after its retirement and considered same held not to show abuse of discretion. *Pritchard v. State*, 82 Cr. R. 219, 199 S. W. 292; *Lopez v. State*, 84 Cr. R. 422, 208 S. W. 167.

13. — **Verdict contrary to law and evidence.**—In the absence from the record of a statement of facts, the court must presume on appeal that there was sufficient evidence to support the conviction. *Pace v. State*, 83 Cr. R. 368, 203 S. W. 595; *Peace v. State*, 81 Cr. R. 540, 196 S. W. 839; *Stegall v. State*, 82 Cr. R. 117, 198 S. W. 311; *Green v. State*, 84 Cr. R. 485, 208 S. W. 514; *Brown v. State* (Cr. App.) 211 S. W. 786; *Sanders v. State*, 85 Cr. R. 659, 215 S. W. 300; *Wims v. State*, 85 Cr. R. 657, 215 S. W. 304; *Cundiff v. State* (Cr. App.) 226 S. W. 412; *Sessums v. State* (Cr. App.) 228 S. W. 224; *Armstrong v. State* (Cr. App.) 228 S. W. 224; *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238; *Connell v. State* (Cr. App.) 229 S. W. 502.

The Court of Appeals cannot pass on the sufficiency of the evidence where there is no statement of facts or bill of exceptions. *Edwards v. State*, 85 Cr. R. 19, 209 S. W. 743; *Lewis v. State* (Cr. App.) 203 S. W. 767; *Railey v. State*, 84 Cr. R. 241, 206 S. W. 523; *Christopher v. State* (Cr. App.) 210 S. W. 799; *Rogers v. State*, 85 Cr. R. 534, 213 S. W. 650; *Walker v. State* (Cr. App.) 217 S. W. 939; *Maguire v. State* (Cr. App.) 226 S. W. 683.

In absence of a statement of facts or bill of exceptions containing the testimony, appellate court cannot pass upon the complaint in the motion for new trial that the judgment is contrary to the law and the evidence. *Garcia v. State* (Cr. App.) 217 S. W. 943; *Martinez v. State*, 84 Cr. R. 261, 207 S. W. 930.

Where the facts are not in the record, and there is no bill of exceptions, the court on appeal will presume the trial regular, and the verdict supported by the evidence. *Stroud v. State* (Cr. App.) 225 S. W. 256; *Jones v. State*, 83 Cr. R. 30, 224 S. W. 888.

In prosecution for violation of local option law, where there is no statement of facts, it will be concluded on appeal that everything necessary to be proved to put the prohibitory law in force was proved. *Wright v. State*, 83 Cr. R. 415, 203 S. W. 775.

A motion for new trial, claiming that the verdict is contrary to law and evidence, cannot be considered, in absence of a statement of the facts; the indictment being in the usual form. *Bybee v. State* (Cr. App.) 205 S. W. 985.

Where indictment charging forgery did not give initials of payee, but stated that false instrument was in possession of accused, and grand jury was unable to obtain it, and could not set it out by its tenor, it will be presumed on appeal, in the absence of a statement of facts, that proof showed forgery as alleged, that original instrument was in appellant's possession, and that state was unable to obtain it, and for that reason could not further set it out. *Tucker v. State*, 84 Cr. R. 332, 206 S. W. 943.

Where there is no evidence in the record, the appellate court cannot review the proposition that the verdict of the jury was contrary to law and the evidence, in that the court erred in permitting a witness to state that defendant previous to the assault had cut his wife. *Johnson v. State*, 84 Cr. R. 474, 208 S. W. 520.

Where there are no bills of exceptions complaining of any action of the trial court, its officers or the jury that rendered the verdict, or any statement of facts embodying the evidence, it will be presumed that proceedings in homicide case were regular, and that evidence justified sentence of death assessed. *Jones v. State*, 84 Cr. R. 471, 208 S. W. 523.

Where appeal from a conviction under Acts 35th Leg. 4th Called Sess. c. 8, creating offense of disloyalty, came up without bills of exceptions or statement of facts, and motion for new trial only questioned the sufficiency of the evidence, and court finds that indictment follows language of statute, and that language imputed to defendant, if uttered, violated the law, the conviction would be affirmed. *Meyer v. State*, 85 Cr. R. 168, 212 S. W. 504.

An objection that a verdict of assault to murder is contrary to the law and evidence, and not based on evidence adduced upon the trial, nor supported by the testimony, cannot be reviewed, where the record contains no statement of facts. *Hood v. State* (Cr. App.) 226 S. W. 405.

Defendant's insistence that verdict of guilty was contrary to the evidence because the evidence showed his insanity cannot be considered by the Court of Criminal Appeals in the absence of a statement of facts. *Escue v. State* (Cr. App.) 227 S. W. 483.

15. — **Matters appearing in bill of exceptions.**—In absence of a statement of facts, presumption of correctness of the court's ruling will prevail on appeal, unless bill of exceptions is complete to a degree that renders the harmful error apparent. *Pilgrim v. State*, 87 Cr. R. 6, 219 S. W. 451.

18. **Statement of facts where motion for new trial is not filed.**—Arts. 744, 844, relative to bills of exceptions and statements of facts, and other statutes providing the requisites of bills of exceptions and statements of facts, constitute the statutory means in criminal cases for bringing questions before the appellate court for review, and a motion for a new trial is unnecessary, except as to questions not raised by bills of exceptions or statement of facts. *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

19. **Filing.**—Under this article, the rules relative to filing statements of fact are the same in criminal as in civil cases. *Blackshire v. State*, 33 Cr. R. 160, 25 S. W. 771.

Where statement of facts was delivered into possession of clerk of trial court within the time allowed by law, the delivery thereof will be held a sufficient filing, though the statement does not bear any file marks of the clerk. *Young v. State*, 86 Cr. R. 621, 218 S. W. 754.

21. **Form, contents, and requisites of statement.**—Evidence heard on any motion of accused will not be considered, unless preserved either by bill of exceptions or a statement of facts approved and filed during term time. *Reyes v. State*, 81 Cr. R. 588, 196 S. W. 532.

Under Civ. St. art. 2068, authorizing parties to agree to a written statement of facts, such a statement, when duly made and approved by the trial judge and filed in time, is sufficient. *Galaviz v. State*, 82 Cr. R. 377, 198 S. W. 946.

When a statement of facts fails to contain any fact essential to a conviction, a recital in the charge that such fact is admitted will not supply the omission. *McConnell v. State*, 85 Cr. R. 409, 212 S. W. 498.

See, also, notes to art. 846.

22. **Approval, signing and authentication.**—A statement of fact, though in form an agreed statement, but not signed by the prosecuting attorney, bearing a certificate signed by the judge: "The above examined, found correct, approved, and order filed as a statement of facts"—is sufficient. *Miles v. State*, 82 Cr. R. 489, 200 S. W. 153.

A statement of facts, to be available, must be approved by the trial judge; signing by the lawyers not being enough. *Thompson v. State*, 84 Cr. R. 148, 205 S. W. 983.

A so-called statement of facts, not verified either by agreement of the attorneys or certificate of the trial judge, is wanting in statutory essentials. *Abogado v. State*, 84 Cr. R. 253, 206 S. W. 527.

Where the term at which conviction of misdemeanor occurred adjourned August 3d, a separate paper, not filed in trial court until October 18th, though indorsed as a statement of facts, being unapproved by the trial judge, cannot be considered by the Court of Criminal Appeals for any purpose. *Pierce v. State*, 84 Cr. R. 334, 206 S. W. 936.

Statement of facts found in the record, but not approved by the trial judge, cannot be considered. *Nichols v. State*, 84 Cr. R. 522, 208 S. W. 931.

A statement of facts not approved by the trial judge will not be considered on appeal in a criminal case. *White v. State*, 84 Cr. R. 545, 210 S. W. 200.

Where a statement of facts, signed only by appellant's attorney, was approved by the judge, and no attack made on its correctness, and no effort made to show that it was not agreed to by state's attorney, it must be held sufficient. *Thomas v. State*, 85 Cr. R. 42, 210 S. W. 201.

In a murder case, a statement of facts on appeal, signed by counsel and district attorney and certified by a judge other than the trial judge, will not be considered; it being necessary that the statement of facts be approved by the judge before whom the case was tried. *Ellis v. State*, 85 Cr. R. 529, 213 S. W. 264.

Under the statute, the judge trying the case must approve the statement of facts, though he has ceased to hold office, and approval by his successor is insufficient. *Quinney v. State*, 86 Cr. R. 358, 216 S. W. 882.

Statement of facts on appeal, not being authenticated by trial judge, cannot be considered. *Pilgrim v. State*, 87 Cr. R. 6, 219 S. W. 451.

The statement of facts will not be disregarded, though not approved by the trial judge, where it was prepared in ample time, approved by the attorneys, and left with the judge for his official approval, and where the judge certified that he intended to approve, and thought he had approved, the statement until his attention was called to the matter, and that his omission was an oversight. *Berrian v. State*, 87 Cr. R. 284, 221 S. W. 282.

Neither a narrative statement of facts nor a question and answer statement of facts, not signed by the attorney nor approved by the trial judge, will be considered on appeal. *Glenn v. State* (Cr. App.) 229 S. W. 521.

Where a transcript is not certified by the clerk, and the bills of exceptions are

not approved by the judge, and the statement of facts is neither signed by the attorneys nor by the judge, an appeal must be dismissed without passing upon the merits under art. 929, and Civ. Stat. art. 2114. *Ray v. State* (Cr. App.) 231 S. W. 396.

**23. Statement of facts in misdemeanor cases.**—On appeal in misdemeanor cases, if there is a statement of facts, it must be copied in the transcript of the record, and certified, like all other orders and proceedings, and the original must not be sent up, but kept on file in the lower court. *Pierce v. State*, 84 Cr. R. 334, 206 S. W. 936; *Grayson v. State*, 84 Cr. R. 337, 206 S. W. 943.

In misdemeanor cases, the statement of facts must be prepared in 90 days, and if that is not done it must be filed before the transcript in the Court of Criminal Appeals, and cannot be sent up as an original paper. *Evans v. State*, 84 Cr. R. 577, 209 S. W. 147.

In misdemeanor case, where there is no statement of facts copied in transcript or certified by clerk, appellate court cannot consider what purports to be statement of facts filed in a separate document. *Hopson v. State*, 84 Cr. R. 619, 209 S. W. 410.

**24. Conclusiveness and effect.**—Viewed in the light of testimony in the statement of facts held that the record, fairly construed, did not bear the interpretation that, as complained in bill of exceptions, the opinion of witness was taken as evidence. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

**25. — Relation to bill of exceptions.**—This court cannot refer to statements of facts to supply omissions of fact in bills of exception. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298.

Where a bill of exceptions is qualified, the qualification controls, and the two together control the statement of facts, where there is a conflict between the bill and the evidence. *Fults v. State*, 83 Cr. R. 602, 204 S. W. 108.

Where there is a conflict between the bill of exceptions and the statement of facts, the court on appeal will treat the bill as correctly reflecting the record. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

**26. Adoption of statement in other case.**—Where two persons are indicted separately for complicity in the same crime and are tried simultaneously and identical transcripts in each case with but one statement of facts filed, the appellate court will treat the record not containing the statement of facts as being before it without such statement, as the record must be complete in each case. *Patterson v. State* (Cr. App.) 231 S. W. 763.

Where defendant was charged with liquor offenses in three indictments, and such three cases, by agreement, were tried at the same time, three separate charges submitting the law applicable to the cases being given, and three verdicts being returned, while on defendant's appeal there are in the three separate records only one statement of facts, such procedure is objectionable as hampering the court. *Thielepape v. State* (Cr. App.) 231 S. W. 769.

It is insufficient that counsel for appellant state that there are other cases involving the same transaction in which a statement of facts has been filed, and request consideration of same, for the statement of facts filed in one case cannot be considered in the disposition of another. *Searcy v. State* (Cr. App.) 232 S. W. 319.

**29. Incorporation in record.**—Where the original statement of facts does not accompany the record, as required by this article, the Assistant Attorney General's motion to disregard it must be sustained. *Martin v. State*, 85 Cr. R. 89, 209 S. W. 668.

In view of the present statute, the original statement of facts in felony cases must be sent to the Court of Criminal Appeals, and a statement of facts copied in the record will be stricken on the state's motion, and the appeal dismissed. *Powell v. State* (Cr. App.) 228 S. W. 1096.

**30. Affidavits.**—Ex parte affidavits will not be considered as attacking or assailing the correctness of the statement of facts. *McConnell v. State*, 85 Cr. R. 409, 212 S. W. 498.

### Art. 844a. Time for presentation of statements of fact and bills of exception; time for preparation of findings; authority of judge after expiration of term of office.

**Repeal.**—Acts 31st Leg. c. 39, relating to time for filing bills of exceptions, not only repealed Acts 30th Leg. (1st Called Sess.) c. 24, but also all other laws in conflict therewith, including Acts 30th Leg. (1st Called Sess.) c. 7, as to district court procedure; and art. 845, giving 30 days in which to file statements of facts and bills of exception, governs appeals in misdemeanor cases. *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

**Time allowed for filing in general.**—Under this article, a statement of facts in the county court must be filed during the term, except when an order of court is made extending the time, and then it must be filed within the time as extended. *Smith v. State*, 81 Cr. R. 446, 196 S. W. 519.

Evidence heard on any motion of accused will not be considered unless preserved either by bill of exceptions or a statement of facts approved and filed during term time. *Reyes v. State*, 81 Cr. R. 588, 196 S. W. 532.

Bills of exceptions, setting out testimony with reference to matters occurring after the jury's retirement, must be taken and approved during the term, that they may be considered on appeal. *Gray v. State*, 83 Cr. R. 1, 224 S. W. 513.

See, also, notes under art. 845.

**Extension of time for filing.**—See *Mathason v. State* (Cr. App.) 229 S. W. 548; notes to art. 845.

Where it appears from the record on appeal that statement of facts and bill of exceptions were filed beyond term time, an order of court for such filing should be shown. *Thompson v. State*, 83 Cr. R. 18, 202 S. W. 91.

Bills of exceptions and statement of facts in misdemeanor case in county court having no official stenographer must be filed in term time or within 20 days thereafter, and, if filed after adjournment, record must show order duly entered extending time within which filing might be made. *Lee v. State*, 83 Cr. R. 250, 202 S. W. 732.

Where the court which tried a prosecution for misdemeanor entered an order allowing 60 days after adjournment in which to file statement of facts and such statement was in fact filed within the 60 days, it will not be stricken out because filed more than 20 days after adjournment, the same rule applying in regard to statements of fact and bills of exception in misdemeanor as in felony cases. *Howard v. State*, 86 Cr. R. 288, 216 S. W. 168.

**Effect of failure to file in time.**—Statement of facts and bills of exceptions filed in lower court, after adjournment of term, cannot be considered. *Gates v. State*, 82 Cr. R. 603, 200 S. W. 397; *Hargrove v. State*, 81 Cr. R. 496, 196 S. W. 536; *Wright v. State*, 83 Cr. R. 559, 204 S. W. 767; *Pierce v. State*, 87 Cr. R. 379, 222 S. W. 565.

Bills of exceptions and statement of facts filed after adjournment, the record containing no order allowing it, cannot be considered. *Meador v. State*, 84 Cr. R. 1, 204 S. W. 433; *Burleson v. State*, 82 Cr. R. 269, 199 S. W. 1095; *Williams v. State*, 84 Cr. R. 496, 208 S. W. 515.

Where court's bill of exceptions preserving certain testimony in lieu of defendant's bill was filed after term expired, it cannot be considered. *McConnell v. State*, 82 Cr. R. 634, 200 S. W. 842.

Statement of facts and bills of exception, not filed within 20 days after adjournment of court as provided by statute, cannot be considered on appeal. *Leroy v. State*, 84 Cr. R. 157, 205 S. W. 990.

Failure to file bill of exceptions in term time would not affect bill of exceptions filed within the required time, though the bills were practically to the same effect. *Pierce v. State*, 87 Cr. R. 379, 222 S. W. 565.

See, also, notes to art. 845.

**Art. 844b. Duty of shorthand reporter to transcribe notes on appeal being taken; duplicate; fees.**

See *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096; notes to art. 844a. Cited, *King v. State*, 82 Cr. R. 145, 198 S. W. 782; *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

**Art. 844c. Party appealing may make statement from transcript filed by shorthand reporter; agreement of parties; shorthand reporter may make statement of facts; fees.**

**Sufficiency of statement of facts.**—See *King v. State*, 82 Cr. R. 145, 198 S. W. 782.

**Sending up original statement of facts.**—See notes to art. 844.

On appeal in misdemeanor cases, if there is a statement of facts, it must be copied in the transcript of the record, and certified, like all other orders and proceedings, and the original must not be sent up, but kept on file in the lower court; sending up original being permissible only in cases of felony. *Pierce v. State*, 84 Cr. R. 334, 206 S. W. 936; *Grayson v. State*, 84 Cr. R. 337, 206 S. W. 943.

Under this article, the mere copying of a statement of facts in the transcript in a felony case is insufficient, and a statement so copied in the transcript will be stricken from the record. *Narango v. State*, 87 Cr. R. 493, 222 S. W. 564.

Copying the statement of facts in the transcript has been the recognized procedure on appeal in misdemeanor cases the so-called Stenographers' Act not applying in toto to appeals in misdemeanor cases from county courts. *Godwin v. State*, 87 Cr. R. 632, 224 S. W. 896.

**Art. 845. Time for preparing and filing statement of facts and bill of exceptions; extension of time; failure to agree on statement of facts; duty of court; what constitutes filing within time.**

3. **Repeal of other statutes.**—Acts 31st Leg. c. 39, relating to time for filing bills of exceptions, not only repealed Acts 30th Leg. (1st Called Sess.) c. 24, but also all other laws in conflict therewith, including Acts 30th Leg. (1st Called Sess.) c. 7, as to district court procedure; and this article governs appeals in misdemeanor cases. *Gribble v. State*, 85 Cr. R. 52, 210 S. W. 215, 3 A. L. R. 1096.

4. **Time allowed for filing in general.**—All errors as to impanelling jury, which are relied upon must be reserved by bill of exceptions at time of impanelling jury, and otherwise there must be something shown in record excusing such diligence, and a mere statement connected with a ground of motion for new trial would not be sufficient. *Hays v. State*, 83 Cr. R. 398, 204 S. W. 229.

Bystanders' bill of exceptions to court's qualifications of the bill of exceptions, filed after the trial, is in time, under Civ. St. art. 2067, allowing such a bill if appellant is dissatisfied with that filed by the judge. *Williams v. State*, 84 Cr. R. 131, 205 S. W. 943.

In misdemeanor cases, the statement of facts must be prepared in 90 days, and if that is not done it must be filed before the transcript in the Court of Criminal Appeals, and cannot be sent up as an original paper. *Evans v. State*, 84 Cr. R. 577, 209 S. W. 147.

Where trial term of court adjourned October 25th, and a bill of exceptions and statement of facts were filed January 25th thereafter, they were filed on the ninety-

first instead of the ninetieth day, as limited by law, and too late for consideration. *Benson v. State*, 85 Cr. R. 126, 210 S. W. 538.

To constitute a bill of exceptions, it must be filed, either in term time or within such time as may be authorized by law. *Bargas v. State*, 86 Cr. R. 231, 216 S. W. 173.

Where the transcript was made out and certified by the clerk before the expiration of the period for filing bills of exception, bills of exception approved by the judge subsequent to the making out of the transcript, but within the time provided for the filing and the approval of the bills, will be considered. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

Bills of exception, taken on the trial of a criminal case, which were not filed within the 30 days granted by the court within which to file them, cannot be considered. *Thompkins v. State*, 87 Cr. R. 502, 222 S. W. 1103, motion to reinstate appeal denied 87 Cr. R. 502, 224 S. W. 687.

See, also, notes to art. 844a.

**5. Motion for new trial.**—The statement of facts heard on motion for new trial must be filed during term time. *McKinney v. State*, 85 Cr. R. 105, 210 S. W. 700; *Vestal v. State*, 83 Cr. R. 184, 202 S. W. 94; *Hart v. State*, 86 Cr. R. 653, 218 S. W. 1054.

A bill of exceptions purporting to preserve evidence on an assignment in the motion for new trial charging misconduct of the jury filed subsequent to the adjournment of the term at which accused was tried cannot be considered. *Garcia v. State*, 81 Cr. R. 456, 196 S. W. 181.

Although an order was entered authorizing the filing of statement of facts and bill of exceptions after court had adjourned, this would not apply to evidence taken on motion for new trial, exceptions to which must be filed during term time. *Thompson v. State*, 83 Cr. R. 18, 202 S. W. 91.

Evidence as to separation of jury cannot be considered where statement of facts was approved after adjournment, but to have such evidence considered it must be filed during term time. *Mason v. State*, 83 Cr. R. 528, 204 S. W. 331.

Where the term of court adjourned on December 15, 1917, a bill of exception containing a statement of the evidence heard in support of a motion for a new trial not filed until February 21, 1918, could not be considered, as the statement of such facts and the bill taken thereto must be filed during term time. *McKinney v. State*, 85 Cr. R. 105, 210 S. W. 700.

It is necessary to file a statement of facts and bills of exception with reference to matters developed on hearing of motion for new trial before adjournment of the term at which the motion was disposed of. *Hart v. State*, 86 Cr. R. 653, 218 S. W. 1054.

Statement of facts with reference to any ground of motion for new trial, to be considered on appeal, must have been filed during the term at which the case was tried. *Gray v. State*, 88 Cr. R. 1, 224 S. W. 513.

Statement of facts, not filed until after adjournment of the term of court at which the case was tried, cannot be considered in support of motion for new trial; the law requiring that facts adduced on issues raised on hearing of motion for new trial shall be filed during the term. *Holloway v. State*, 88 Cr. R. 126, 224 S. W. 1102.

Where questions of fact are raised by a motion for new trial, the evidence taken upon such grounds must be perpetuated either in the bill of exceptions or in a statement of facts filed during the term, and such matters cannot be considered if filed in vacation. *Salazar v. State* (Cr. App.) 225 S. W. 528.

A bill of exceptions on the ground that one juror made reference to defendant's failure to testify must be filed during the trial term to be considered on review. *Fowler v. State* (Cr. App.) 232 S. W. 515.

**8½. Failure of record to show time of filing.**—Where the caption of the record on appeal from a conviction fails to disclose the date upon which the term at which the case was tried terminated, the record cannot be considered, on account of the statute limiting the time in which the bills of exception and the statements of facts may be filed. *Mandosa v. State* (Cr. App.) 225 S. W. 169.

**9. Extension of time for preparation and filing.**—See notes to art. 844a.

Where accused was given 30 days to file his bill, and the time was extended 30 days, and, after the 60 days expired, he was given 5 days to file a bill of exceptions, his bill then filed was too late. *Martin v. State*, 82 Cr. R. 269, 198 S. W. 149.

Under this article, a statement of facts may be approved by the court within the permissive time after a term lasting less than eight weeks, although no order was made during the term authorizing filing thereafter. *Castoreno v. State*, 82 Cr. R. 621, 200 S. W. 1082.

Under arts. 744, 845, where time for filing bills of exception as extended had expired before last order extending time, bills filed within period allowed by last order cannot be considered. *Parker v. State*, 83 Cr. R. 81, 200 S. W. 1083.

Under this article, the limit to which extensions may be made is a total of 90 days after adjournment of the term. *Carpenter v. State*, 83 Cr. R. 87, 201 S. W. 996.

Bill of exception filed more than two months after adjournment of court will not be considered; there being no order in the record allowing it to be so filed. *Jones v. State*, 83 Cr. R. 444, 203 S. W. 1101.

Statement of facts, filed in clerk's office after expiration of time allowed by court for preparing and filing statement of facts and bill of exceptions, cannot be considered by Court of Criminal Appeals, where record contains no order extending time for filing. *Henton v. State*, 84 Cr. R. 606, 209 S. W. 409.

Where there was a 60-day order entered allowing filing of bills of exception, and an additional order of 30 days was entered by court, bills filed on ninety-first day were too late for consideration on appeal. *Jarrott v. State*, 84 Cr. R. 544, 209 S. W. 663.

The Court of Criminal Appeals cannot consider a bill of exceptions filed November

30th under an order of October 30th, extending the time 30 days from date, which expired November 29th. *Farris v. State*, 85 Cr. R. 86, 209 S. W. 665.

Where, the court adjourned July 20, 1918, after granting defendant 60 days from adjournment in which to file statement of facts and bills of exception, and before the expiration of such time granting an additional 30 days, a statement of fact and bills of exception filed October 19, 1918, were not within the 90-day period, and will not be considered. *White v. State*, 85 Cr. R. 23, 210 S. W. 199.

Where court adjourned in late August and appellant was given 30 days after adjournment for filing of bill of exceptions and statement of facts, and on September 16th was given an additional 30 days, and on October 11th secured order granting him "30 days additional from and after September 16th," bill of exceptions and statement of facts filed on November 4th will be considered; the final order, if literally construed, curtailing time granted by previous order. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

The court cannot, where defendant failed to file statement of facts and bills of exception within the time limited or to procure an extension, thereafter grant an extension, for an order granted after expiration of time is unavailing. *Hart v. State*, 86 Cr. R. 653, 218 S. W. 1054.

The motion of the Attorney General to strike from the files defendant's bills of exceptions, filed more than 90 days after the judgment, and which showed that the filing date had been corrected after the transcript was prepared for certification, will be denied where the corrected record showed that the time for filing the bills of exceptions had been duly extended, and that the bills were filed within such time, regardless of which filing date was correct. *Mathason v. State* (Cr. App.) 229 S. W. 548.

15. **Effect of failure to present and file in time.**—Bills of exception preserving facts relating to testimony heard on the motion for new trial, not being filed as required during the term, must be disregarded. *Miles v. State*, 82 Cr. R. 439, 200 S. W. 158; *Williams v. State*, 83 Cr. R. 26, 201 S. W. 188; *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014; *Bogus v. State*, 83 Cr. R. 356, 203 S. W. 597; *Hart v. State*, 87 Cr. R. 55, 219 S. W. 821.

Statement of facts introduced upon motion for new trial, where not filed during the trial term, will not be considered by the Court of Criminal Appeals under this article. *Cates v. State* (Cr. App.) 227 S. W. 953; *Flores v. State*, 81 Cr. R. 445, 195 S. W. 1150; *Cooley v. State*, 83 Cr. R. 340, 203 S. W. 356; *McClendon v. State*, 84 Cr. R. 259, 206 S. W. 686.

Under this article, the court is not authorized to consider bills of exception filed after the expiration of 90 days allowed by the court from the expiration of the term. *White v. State*, 84 Cr. R. 545, 210 S. W. 200; *Washington v. State*, 86 Cr. R. 327, 216 S. W. 869.

Bill of exception, disclosing facts on which rests contention that jury received evidence in its retirement, not having been filed during term, cannot be considered on appeal from conviction of murder. *Martinez v. State*, 81 Cr. R. 627, 197 S. W. 872.

Statement of facts containing testimony heard on motion for new trial and bill of exceptions based thereon, filed after adjournment of court, cannot be considered. *Gray v. State*, 82 Cr. R. 27, 197 S. W. 990.

A bill of exceptions, not filed in the time prescribed by this article, as extended by the district court by an order appearing in the record, must be disregarded. *King v. State*, 82 Cr. R. 145, 198 S. W. 782.

Where evidence heard on motions is contained in bill of exceptions filed after the term, it must be conclusively presumed it justified the court's action. *Bogus v. State*, 83 Cr. R. 356, 203 S. W. 597.

Under this article, a bill of exception filed more than two months after the court had adjourned for the term cannot be considered. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

A purported statement of evidence heard on motion for new trial, not agreed to by attorneys or approved by court, and not filed until nearly three months after court adjourned, cannot be considered on appeal. *Green v. State*, 84 Cr. R. 162, 205 S. W. 988.

Where the term at which the trial was had ended May 25th, and time was extended until June 24th to file bill of exceptions, a bill of exceptions filed September 6th will not be considered. *Howard v. State*, 84 Cr. R. 253, 206 S. W. 525.

A statement of facts in a misdemeanor case cannot be considered on appeal, where not approved or filed until October 12th; term having ended August 3d. *Grayson v. State*, 84 Cr. R. 337, 206 S. W. 943.

Where the court heard evidence on a motion, in a murder trial, to quash a special venire and denied the motion, to which appellant excepted, but did not file his bill setting up the evidence until long after adjournment of that court term it cannot be considered on appeal. (Per *Prendergast, J.*) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

A statement of facts, which was not filed until one year and a half after the adjournment of the court term, cannot be considered. *Erwin v. State*, 87 Cr. R. 71, 219 S. W. 827.

See, also, notes to art. 844a.

18. — **Striking statement or bill from record.**—Where bills of exception are not filed within the time allowed, and no additional time is granted, a motion to strike must be granted. *Harris v. State*, 83 Cr. R. 301, 202 S. W. 958; *Smith v. State*, 81 Cr. R. 534, 197 S. W. 589; *Lay v. State*, 82 Cr. R. 202, 198 S. W. 291.

Where the court adjourned August 25th, and the statement of facts and bill of exceptions were not filed until November 24th, the statement will be stricken, being filed 91 days after adjournment. *Sweeney v. State*, 84 Cr. R. 58, 205 S. W. 335.

19. — **Deprivation of statement of facts as ground for reversal.**—Showing as to cause of failure to have statement of facts held not to establish diligence, entitling accused to reversal. *Vastine v. State*, 84 Cr. R. 214, 206 S. W. 191.

Where, through no want of diligence, appellant, on appeal in a misdemeanor case,



is unable to obtain in due time a statement of facts from the judge, the judgment of conviction will be reversed. *Evans v. State*, 84 Cr. R. 577, 209 S. W. 147.

Where counsel for accused did not learn of the nonacceptance of his bill of exceptions by the court until five days after its presentment, or two days before adjournment, and was given no opportunity to have it authenticated by bystanders, such bill containing no indorsement of the court's refusal and no suggested corrections, accused was erroneously deprived of his bill, and the appellate court will either consider the original bill or reverse the case. *Kilpatrick v. State*, 85 Cr. R. 172, 211 S. W. 230.

**20. Diligence and matters excusing failure to file in time.**—An appellant in a murder trial who handed his statement of facts and bills of exception to the trial judge two days before the expiration of 90 days from the termination of the term, held not sufficient diligence to excuse appellant on the judge's failure to file the papers within the time required. *Carpenter v. State*, 83 Cr. R. 87, 201 S. W. 996.

Where stenographer, owing to shortage of help, failed to prepare statement of facts within required time, in order to bring accused within rule of diligence, he must have resorted to some means at hands of judge to compel stenographer to make out statement of facts within time. *Vastine v. State*, 84 Cr. R. 214, 206 S. W. 191.

Where stenographer fails to prepare transcript of evidence, necessary to enable defendant to prepare statement of facts and bills of exception, defendant should apply for mandamus to compel the preparation thereof, and if he does not do so, and the statement and the bills are not prepared within the time allowed, defendant has not exercised sufficient diligence. *Hart v. State*, 86 Cr. R. 653, 218 S. W. 1054.

Where the affidavits of accused that the statement of facts was presented to the trial judge within the time fixed by law for the approval and filing thereof were not controverted, the statement can be considered on appeal, though not filed until 18 months after adjournment of the term. *Erwin v. State*, 87 Cr. R. 71, 219 S. W. 827.

Where the statement of facts was not filed within the 90 days requisite in order to entitle it to consideration, and an affidavit of the trial judge assumed all responsibility for the delay on account of the pressure of business and sufficiently exonerated defendant from any want of diligence, and the statement of facts was agreed to and certified by the judge to be correct, it should be considered on appeal. *Davis v. State*, 87 Cr. R. 425, 222 S. W. 236.

In a prosecution for murder, where the evidence covers 37 pages of typewritten matter, in the absence of a contrary showing, it would appear that the evidence could have been prepared in a few hours and the absence of bill of exceptions showing the evidence is not thereby justified. *Fowler v. State* (Cr. App.) 232 S. W. 515.

### Art. 845a. [Superseded.]

**Explanatory.**—Superseded by Acts 1920, 36th Leg. 3d C. S., ch. 47, § 1, amending Acts 1911, ch. 119, § 8 (as such section was amended by Acts 1917, 35th Leg., ch. 189; Acts 1917, 35th Leg. 1st C. S., ch. 27; Acts 1918, 35th Leg. 4th C. S., ch. 79; Acts 1919, 36th Leg., ch. 111), so as to read as set forth in art. 1925, Civil Statutes, ante. The amendatory act makes no provision for a poverty affidavit, and hence that privilege seems to be taken away, except as to the Third, Thirty-Ninth and Fiftieth judicial districts, as to which districts there is a special act of a later date, set forth as art. 1925b, Civil Statutes, ante.

**Affidavit of inability to pay.**—Under Acts 32d Leg. c. 119, §§ 5, 8, 9, and 14 (Civ. St. arts. 1924, 1925, 2071, 1926, 1933), official court stenographer upon application of a defendant who had been defended by his own attorney alleging his inability to pay for transcript or to give security therefor would be directed to prepare a transcript of his notes and to file them with clerk of district court. *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

### Art. 845b. Duty of shorthand reporter to make transcript of evidence on request.

Cited, *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

### Art. 846. Shorthand reporter shall keep stenographic record; condensation, etc.

Cited, *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

**In general.**—Where a petition for mandamus shows that appellant in a murder prosecution at the proper time and in the proper way moved to have the judge of the trial court command the reporter to make out a proper report of the testimony, which the court refused, and to which defendant excepted, the petition will be granted. *Ellis v. State*, 85 Cr. R. 529, 213 S. W. 264.

If defendant does not avail himself of the official stenographic record of trial, which should show exactly his objection or exception, he should at least present to the trial court a bill so embodying the substance of the matter that in fairness and in compliance with the direction of the statute the trial judge may be able to compare it with the stenographic account, and decline to approve the bill and file a correct one in place thereof. *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

**Condensation.**—Statement of facts wholly in question and answer form will be stricken on appeal. *Kitchens v. State*, 83 Cr. R. 324, 203 S. W. 768; *Ferguson v. State*, 83 Cr. R. 272, 202 S. W. 733; *Roberts v. State*, 83 Cr. R. 511, 204 S. W. 366; *Thomas v. State*, 85 Cr. R. 42, 210 S. W. 201; *Emberline v. State*, 85 Cr. R. 399, 212 S. W. 952.

A statement of facts in question and answer form is not a statement of facts within art. 844c, and cannot be considered on appeal. *King v. State*, 82 Cr. R. 145, 193 S. W. 782.

## CHAPTER TWO

## ARREST OF JUDGMENT

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| <p>Art.<br/>847. Definition of "motion in arrest of judgment."<br/>848. Must be made in two days, etc.</p> | <p>Art.<br/>849. Shall be granted for what cause.<br/>851. Effect of arresting a judgment.</p> |
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**Article 847. [825] Definition of "motion in arrest of judgment."**  
Cited, *Victor v. State*, 86 Cr. R. 462, 217 S. W. 698.

**Art. 848. [826] Must be made in two days, etc.**

**In general.**—A motion in arrest of judgment must be filed within two days after conviction under this article. *Burnett v. State* (Cr. App.) 228 S. W. 239.

**Art. 849. [827] Shall be granted for what cause.**

**In general.**—Under this article, and art. 575, the validity of the statute creating the trial court cannot be attacked by motion in arrest of judgment. *Victor v. State*, 86 Cr. R. 462, 217 S. W. 698.

**Defects in indictment, information or complaint.**—It is too late after verdict on a motion to arrest judgment to complain that an indictment is bad for duplicity. *Smith v. State*, 81 Cr. R. 534, 197 S. W. 589.

Failure of indictment under Penal Code, arts. 1421, 1422, for swindling, to state the name of the particular person to whom the false representation was made, cannot be questioned after verdict, under this article. *Fruitt v. State*, 83 Cr. R. 148, 202 S. W. 81.

In a prosecution under the prohibition law, objection on motion in arrest of judgment, claiming that court did not have jurisdiction because date of prohibition election was not alleged in indictment, was too late. *Stone v. State*, 84 Cr. R. 280, 206 S. W. 940.

An objection to a complaint for misdemeanor because the body of the complaint states that it is made by a different person than the one named in the jurat, though sufficient on motion to quash, comes too late on motion in arrest of judgment; the mistake being amendable. *Stockton v. State* (Cr. App.) 225 S. W. 514.

A judgment need not be arrested for the failure of the complaint to state, "In the name and by the authority of the state of Texas," where the prosecution was on an information based on the complaint, and the information contained that statement, though, if the prosecution had been based on the complaint itself, it would have been fatally defective. *Bell v. State* (Cr. App.) 227 S. W. 317.

Where information and complaint under the Juvenile Act charged seven distinct felonies in as many counts without specifying in six of them that defendant was under 17 years of age, but there was no motion to quash and no steps taken in regard thereto until after judgment convicting defendant as a juvenile, a motion in arrest of judgment was too late. *Gordon v. State* (Cr. App.) 228 S. W. 1095.

Complaint and information charging misdemeanor theft without alleging that the property charged to have been stolen was "fraudulently" taken was defective in substance, and such defects may be raised by motion in arrest of judgment or in the Court of Criminal Appeals for the first time. *Phillips v. State* (Cr. App.) 231 S. W. 400.

**Variance between complaint and information.**—A variance between the complaint and information for a misdemeanor as to the time of the offense is a matter of substance and can be raised by motion in arrest of judgment. *Stockton v. State* (Cr. App.) 225 S. W. 514.

Where defendant's name in a criminal complaint was spelled "Estreada," and in the information first as "Estrada" and subsequently as "Esteada" and "Estreada," the variance was not such as to be the subject of a motion in arrest of judgment. *Estrada v. State* (Cr. App.) 226 S. W. 685.

**Art. 851. [829] Effect of arresting a judgment.**

See *Thompkins v. State*, 87 Cr. R. 502, 222 S. W. 1103.

## CHAPTER THREE

## JUDGMENT AND SENTENCE

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| <p>1. IN CASES OF FELONY</p> <p>Art.<br/>853. Definition of "judgment."<br/>854. Definition of "sentence."<br/>856. In cases of appeal, sentence shall be pronounced.<br/>862. Two or more convictions of same defendant at same term.</p> | <p>1½. INDETERMINATE AND SUSPENDED SENTENCES</p> <p>Art.<br/>865a. Indeterminate sentences of persons convicted of certain felonies.<br/>865b. Suspended sentence.<br/>865c. Testimony as to defendant's reputation and criminal history.</p> |
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<p>Art. 865d. Form of judgment; "good behavior" defined.</p> <p>865e. Conviction of other felony; pronouncement of sentence.</p> <p>865g. Pendency of other charge; extension of suspension period.</p>	<p>2. JUDGMENT IN CASES OF MISDEMEANOR</p> <p>Art. 867. Judgment when the punishment is fine only.</p> <p>868. Judgment when the punishment is other than fine.</p>
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### 1. IN CASES OF FELONY

#### Article 853. [831] Definition of "judgment."

See *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380; *Thompkins v. State*, 87 Cr. R. 502, 222 S. W. 1103.

Cited, *Woods v. State*, 26 Tex. App. 490, 10 S. W. 108.

**In general.**—Failure of judgment from which appeal is taken to contain requisites of final judgment, required by this article, is fatal to the appeal. *McCuin v. State*, 86 Cr. R. 497, 217 S. W. 1038.

**Form and requisites of judgment.**—Under subdivision 3 of this article, a judgment which fails to show the plea is void, and no sentence can be pronounced thereon. *Pate v. State*, 21 Tex. App. 191, 17 S. W. 461.

Where record showed, "We, the jury, find the defendant guilty and assess his punishment. \* \* \* G. Foreman"—followed by an order adjudging him guilty as found by the jury, etc., there was no such judgment shown to have been entered as is required by this article, where it failed to show that appellant entered any plea, or that a jury was impaneled, or any of such preliminary matters required by such statute. *Hellman v. State*, 87 Cr. R. 460, 222 S. W. 980.

The judgment reciting that defendant pleaded guilty and thereupon was admonished by the court of the consequences, but persisted in the plea, and, it plainly appearing that defendant is sane, the plea was accepted, sufficiently shows the court's finding that defendant was sane. *Taylor v. State* (Cr. App.) 227 S. W. 679.

One convicted under the Dean Act should be adjudged guilty of manufacturing, selling, etc., intoxicating liquor, not for medicinal, sacramental, or scientific purposes, and judgment and sentence should specify the particular acts for which the accused has been convicted, and a sentence and judgment for violating the "state-wide intoxicating liquor prohibition law" were defective, although Acts 4th Called Sess. 35th Leg. (1913) c. 24, is denominated by compiler as "State-Wide Intoxicating Liquor Prohibition." *Carr v. State* (Cr. App.) 230 S. W. 405.

**Conformity to indictment, verdict, or other parts of record.**—The objection that the verdict does not support the judgment is fundamental, in view of art. 837, subd. 9, and this article, and can be raised for first time on appeal without bill of exceptions. *Moore v. State*, 83 Cr. R. 302, 203 S. W. 51.

**Record of judgment.**—The appellate court acquires no jurisdiction of an appeal where the record does not show entry of a judgment in compliance with this article. *Hellman v. State*, 87 Cr. R. 460, 222 S. W. 980.

**Correction of judgment.**—If the proper place of confinement is not designated in a judgment finding one guilty of being a delinquent child, it may be corrected upon a motion for new trial or on appeal. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

**What constitutes final judgment.**—Under this article, where the record on appeal only recites the return of the verdict, and judgment thereon, it does not disclose a final judgment from which an appeal will lie. *Dowell v. State* (Cr. App.) 22 S. W. 407.

In view of Const. art. 5, § 5, and Code Cr. Proc. arts. 853, 894, judgment dismissing prosecution held not appealable on behalf of accused. *Ryan v. State*, 81 Cr. R. 632, 198 S. W. 582.

#### Art. 854. [832] Definition of "sentence."

Cited, *Ex parte Moseley*, 30 Tex. App. 338, 17 S. W. 418.

#### Art. 856. [834] In cases of appeal, sentence shall be pronounced.

See *Arcia v. State*, 26 Tex. App. 193, 9 S. W. 685.

Cited, *Moore v. State* (Cr. App.) 22 S. W. 40; *Ryan v. State*, 81 Cr. R. 632, 198 S. W. 582.

**Judgment including sentence prerequisite to appeal.**—See *Dowdell v. State*, 85 Cr. R. 472, 213 S. W. 649; *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380; *Thomas v. State* (Cr. App.) 230 S. W. 156, 157, 158, 159, 160; *Thomas v. State* (Cr. App.) 232 S. W. 826; notes to art. 929.

**Court of Criminal Appeals has no jurisdiction of appeal where no sentence has been pronounced.** *Carrell v. State*, 83 Cr. R. 536, 204 S. W. 334.

There is no right of appeal from a conviction if suspended sentence is awarded because of the want of a "final judgment," which is the sentence pronounced by the court upon the verdict. *Thomas v. State*, 87 Cr. R. 153, 219 S. W. 1100.

The "sentence" is the final judgment in a criminal case, and is necessary to the jurisdiction of the Court of Criminal Appeals over the appeal in a felony case, so that the appeal must be dismissed where the record does not show the sentence. *Thompkins v. State*, 87 Cr. R. 502, 222 S. W. 1103, motion to reinstate appeal denied, 87 Cr. R. 502, 224 S. W. 687.

**Art. 862. [840] Two or more convictions of same defendant at same term.**—When the same defendant has been convicted in two or

more cases, and the punishment assessed in each case is confinement in the penitentiary or the county jail for a term of imprisonment, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction, except that in the discretion of the court, the judgment in the second and subsequent convictions may either be that the punishment shall begin when the judgment and sentence in the preceding conviction have ceased to operate, or that the punishment shall run concurrently with the other case or cases, and sentence and execution shall be accordingly. [Acts 1883, p. 8; Acts 1919, 36th Leg., ch. 20, § 1.]

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

**Application and purpose of article.**—That accused has appealed from a previous conviction, and that the appeal has not been decided, does not prevent the imposition of a cumulative sentence on a subsequent trial for another offense as authorized by this article. *Alsop v. State*, 84 Cr. R. 208, 206 S. W. 345.

### 1½. INDETERMINATE AND SUSPENDED SENTENCES

#### Art. 865a. Indeterminate sentences of persons convicted of certain felonies.

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811; *Rogers v. State* (Cr. App.) 225 S. W. 57.

**Reformation of judgment in appellate court.**—Where the trial court on conviction for murder failed to apply this law, the judgment entering the sentence will be reformed so that it will provide for confinement in the state penitentiary within the period fixed by law as the minimum and maximum penalty for the offense. *Wright v. State*, 84 Cr. R. 352, 207 S. W. 99.

#### Art. 865b. Suspended sentence.

See *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536; *Williams v. State*, 83 Cr. R. 26, 201 S. W. 188; *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409; *Wilson v. State*, 85 Cr. R. 148, 210 S. W. 802; notes to arts. 865c, 865e.

**Time for application.**—The expression "when the trial begins" within this article, means the announcement of ready for trial by both parties. *Wilson v. State*, 85 Cr. R. 148, 210 S. W. 802.

Where attorney for defendant did not announce himself ready for trial, and did not know that court entered on his docket an announcement of ready for both parties, but began preparation of an application for a suspended sentence, the application should have been permitted, and the question submitted to the jury. *Id.*

**Right to suspension.**—The right of suspended sentence is a substantial one, and should not be taken from the defendant in any case where he reasonably brings himself within the terms of the law and presents his application. *Wilson v. State*, 85 Cr. R. 148, 210 S. W. 802.

**Crimes included in act.**—See *Ex parte Wilson*, 85 Cr. R. 554, 213 S. W. 984.

Under *Vernon's Ann. Code Cr. Proc.* 1916, arts. 1195, 1197, the suspended sentence law held applicable to juvenile delinquency proceedings. *Ex parte Gordon* (Cr. App.) 232 S. W. 520; *Hogue v. State* (Cr. App.) 220 S. W. 96.

"Accomplice to arson" is not "arson" within this article, and where the verdict on trial for "accomplice to arson" so directs, a suspended sentence should be granted. *Martin v. State*, 82 Cr. R. 199, 198 S. W. 956.

Under this article, it is only burglary of a private residence, and not burglary of a storehouse, which prevents the imposition of a suspended sentence. *Ditto v. State*, 83 Cr. R. 220, 202 S. W. 735.

Appellant having been convicted of murder, and the suspended sentence law not applying to that offense, the holding of the trial court that his application for submission of issue as to suspended sentence came too late could have resulted in no harm. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

There can be no suspended sentence following a murder conviction. *Grissom v. State*, 87 Cr. R. 465, 222 S. W. 237.

One being tried for being in unlawful possession of intoxicating liquor under the *Dean Act* is entitled to have the issue of suspended sentence submitted to the jury under this article. *Carr v. State* (Cr. App.) 230 S. W. 405.

**Effect of previous conviction or prosecution.**—Where trial took place in February, and accused sought to avail himself of this article, the court did not err in declining to submit such matter to the jury, where in October preceding the trial accused had been convicted of a felony, and his punishment fixed at two years in the penitentiary, with a suspension of sentence; it not appearing that there was any appeal from the prior conviction. *Carter v. State*, 88 Cr. R. 28, 224 S. W. 890.

Where defendant did not seek the suspension of his sentence, the pendency of another case against him alleged to have been founded on fictitious allegations, and the indictment found to prevent a suspended sentence, would be harmless, unless used against him, and the pendency of such indictment would be no impediment to his availing himself of the suspended sentence law. *Taylor v. State* (Cr. App.) 232 S. W. 525.

**Effect of suspension.**—Where a suspended sentence is awarded by the jury in a criminal case, there is no final conviction under Pen. Code, art. 1620, authorizing enhanced punishment for former convictions of like offenses. *Brittian v. State*, 85 Cr. R. 491, 214 S. W. 351.

### Art. 865c. Testimony as to defendant's reputation and criminal history.

See *Ex parte Coots*, 85 Cr. R. 334, 212 S. W. 173; notes to art. 865e.

**Necessity and sufficiency of application by accused.**—That failure to suspend sentence may be complained of on appeal, the record must show defendant's application for suspension necessary under this article. *Lozano v. State*, 83 Cr. R. 597, 204 S. W. 323.

**Waiver of application.**—An application for suspended sentence may be waived. *Gordon v. State* (Cr. App.) 228 S. W. 1095; *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

**Submission of matter to jury.**—Where defendant offers no testimony that she has never been convicted of felony, the refusal of the court to submit a charge on suspended sentence is proper under arts. 865b and 865c. *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536.

**Law accords accused right to have jury pass upon her plea for suspended sentence when filed in proper time.** *Fernandez v. State*, 82 Cr. R. 129, 198 S. W. 301.

**Proof as to prior reputation.**—See *Rogers v. State* (Cr. App.) 225 S. W. 57.

Where a plea for suspended sentence is filed and the defendant takes stand in her own behalf, the state may, on cross-examination, prove her character, and the number of times she has been arrested for different offenses. *Waters v. State*, 81 Cr. R. 491, 196 S. W. 536.

Testimony that general reputation of defendant in community in which he lived is that he sells intoxicants was admissible on issue of suspended sentence, in view of this article. *White v. State*, 82 Cr. R. 286, 199 S. W. 1117.

Under plea for suspended sentence, the accused's character at the time of trial being under investigation, evidence is not limited to time preceding offense, but may include evidence of character at the time of trial. *Williams v. State*, 83 Cr. R. 26, 201 S. W. 188.

Where one convicted of murder made plea for suspended sentence under arts. 865b, 865c, witnesses could testify to various misdemeanors of accused for which she was arrested. *Id.*

In prosecution for assault to murder, evidence that ten years before assault defendant had a difficulty in another state, shooting a man, was too remote and inadmissible on question of right to suspension of sentence and to impeach defendant's reputation for veracity. *Bolin v. State*, 83 Cr. R. 590, 204 S. W. 335.

Evidence that, four or five years before, defendant and another had a fight at a baseball game and that both pleaded guilty in justice court and paid a fine, was inadmissible for such purposes. *Id.*

In a prosecution for burglary in which automobile tires were taken from a garage, it was error to admit evidence as to the disappearance of another automobile tire at a different time and different place. *Sweeney v. State*, 84 Cr. R. 58, 205 S. W. 335.

In prosecution of bank president for having murdered state commissioner of banking, testimony of defendant, elicited by cross-examination as to his indictment in 19 cases charging him with forgery in another county, etc., held admissible. *Watson v. State*, 84 Cr. R. 115, 205 S. W. 662.

In a prosecution for burglary, evidence that there were found in defendant's possession various articles such as are kept in grocery stores, and that he stated part had come from the burglarized store, in so far as relating to other burglaries committed by defendant held admissible. *Hayes v. State*, 85 Cr. R. 433, 213 S. W. 664.

Defendant, being prosecuted for theft, by asking for a suspended sentence, put his reputation in issue, and there was no error in allowing the state to prove that he had been convicted for playing poker. *McCormick v. State*, 86 Cr. R. 366, 216 S. W. 871.

Where a defendant seeks to prove a good reputation as a peaceable, law-abiding citizen, the state may prove his bad reputation, and, if defendant becomes a witness, he puts in issue his reputation for truth and veracity, while, if he moves for a suspended sentence, he opens generally the issue of his reputation. *Alexander v. State*, 86 Cr. R. 606, 218 S. W. 752.

Where defendant filed his plea for a suspended sentence, and evidence was admitted on behalf of the state attacking defendant's reputation and tending to show him guilty of other offenses, the court erred in failing to limit the purpose for which such evidence was admitted. *Bride v. State*, 86 Cr. R. 535, 218 S. W. 762.

While this article allows the state to prove the general reputation of defendant, where the issue of suspended sentence is presented by him, it is to be proved, as before, not by specific acts of misconduct but by competent evidence to show whether his reputation is good or bad, and specific acts become available only when pertinent on cross-examination. *Baker v. State*, 87 Cr. R. 305, 221 S. W. 607.

In a murder trial, testimony by a witness that defendant in talking about honor said, "There is no such thing as honor, for any man will swear a lie if it is to his own interest," held inadmissible to show character. *Strahan v. State*, 87 Cr. R. 324, 221 S. W. 976.

Testimony by a witness that defendant refused to pay \$15 for the hire of a mule held inadmissible upon defendant's reputation under such plea. *Id.*

Evidence that defendant had accused a third party of stealing his corn, and that defendant said he went out two or three times to kill such third person, although he did not go, held inadmissible on the question of defendant's reputation and character on such plea. *Id.*

In prosecution for homicide evidence that defendant had cut the buggy tires of the deceased was admissible on defendant's plea for suspended sentence, such evidence of other offenses not being limited to those involving moral turpitude. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

Where defendant in homicide prosecution sought the benefit of the suspended sentence law, the inquiry as to defendant's reputation should relate to the time of the trial. *Wagley v. State*, 87 Cr. R. 504, 224 S. W. 687.

In a homicide prosecution, where six or seven acquaintances of defendant testified, and where the state in open court without limitation had admitted that defendant's reputation for peaceableness and veracity was good, court's refusal to hear further testimony as to defendant's reputation was not error, even though defendant had sought the benefit of the suspended sentence law. *Id.*

In such prosecution, exclusion of defendant's testimony that during the 2½ years subsequent to the killing he had been engaged in only legitimate occupations, had kept out of trouble and had provided for his family, held proper, such testimony being evidence of specific acts showing good conduct, and not merely his reputation. *Id.*

In murder prosecution, where defendant had filed a plea for suspended sentence, testimony that he had been in jail for shooting another negro, and had been convicted of aggravated assault, and had been connected with other misdemeanors, such as gambling, held admissible. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

Refusal of court to permit evidence on the issue of suspended sentence could not have harmed an accused, where the verdict assessed imprisonment exceeding five years, a penalty above the term that would permit the suspended sentence law to operate, under this article. *Cundiff v. State* (Cr. App.) 226 S. W. 412.

An essential element in the suspended sentence statute is that which requires that there be proof that the accused has not previously been convicted of a felony. *Id.*

An honorable discharge from service in the war with Germany signed by United States officers under whose command accused served is admissible in a proper case upon the issue of suspended sentence. *Id.*

Where defendant, charged with selling an automobile, applied for a suspended sentence, the testimony of the sheriff as to collecting and paying fines to another sheriff who was holding defendant for using the automobile without license numbers was not error, though the complaints, informations, or indictments were not introduced; it appearing that defendant knew of the charges, authorized the payment of the fines, and told the sheriff how much he owed, and the evidence having been limited to the question of suspension of sentence. *Clowers v. State* (Cr. App.) 228 S. W. 226.

It is a rule of practice in all cases to allow the accused to prove his general good character in the community in which he lives as a peaceable law-abiding citizen, and when application is made for suspended sentence such evidence is in terms made pertinent by this article, and in a prosecution for assault with intent to murder, where such application was made, the court erred in sustaining an objection to the question, "Are and were you acquainted with the general reputation of the defendant in the community in which he has lived for being a peaceable law-abiding citizen?" *Freddy v. State* (Cr. App.) 229 S. W. 533.

In a prosecution for manslaughter through killing of defendant's paramour, defendant's army discharge, containing no statement relative to his general reputation or prior conviction of felony, was properly excluded, when offered by him as evidence tending to prove good character, as affecting his application for suspended sentence. *Mobley v. State* (Cr. App.) 232 S. W. 531.

**Instructions.**—Although a charge was erroneous regarding recommendations for suspension of sentence, it was harmless where the sentence assessed was beyond the limit touched by art. 865d. *Morris v. State*, 82 Cr. R. 13, 198 S. W. 141.

An instruction concerning suspended sentence held not erroneous as placing an undue limitation upon testimony introduced with reference to defendant's reputation. *Gilbert v. State*, 84 Cr. R. 616, 209 S. W. 658.

Since law of suspended sentences authorizes jury to consider whether accused has borne a good reputation, it is proper for court to instruct jury that they might consider such reputation for that purpose, as otherwise they would not be aware of this phase of the law. *Id.*

**Recommendation by jury.**—Where the lower court has wrongfully refused to suspend sentence in accordance with the verdict, the sentence on appeal will be reversed, with instructions to enter judgment suspending the sentence and take accused's recognition and discharge him. *Martin v. State*, 82 Cr. R. 199, 198 S. W. 956.

Where one accused of hog theft pleads guilty and prays for a suspended sentence, whether such sentence will be awarded is exclusively within the discretion of the jury, whose decision will not be reversed. *Skelton v. State*, 84 Cr. R. 193, 206 S. W. 346.

**Reference to application in argument.**—In a prosecution for assault to murder, where the case was submitted solely on the question of aggravated assault, a statement by the prosecutor that, if defendant had not been guilty, his attorney would not have filed an application for a suspended sentence, is reversible error, when the court failed to instruct the jury to disregard the statement. *Tamaya v. State* (Cr. App.) 230 S. W. 146.

**Appealability of order for suspended sentence.**—There is no right of appeal from a conviction if suspended sentence is awarded because of the want of a "final judgment," which is the sentence pronounced by the court upon the verdict. *Thomas v. State*, 87 Cr. R. 153, 219 S. W. 1100.

**Conviction affecting competency as witness.**—While, under arts. 865b and 865e, trial court would have no authority to suspend sentence of accused, convicted of felony in seven separate cases, he, not having been sentenced, was not disqualified as a witness, under art. 788, as to disqualification after conviction of felony. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

**Art. 865d. Form of judgment; "good behavior" defined.**

See *Morris v. State*, 82 Cr. R. 13, 198 S. W. 141; *Ex parte Coats*, 85 Cr. R. 334, 212 S. W. 173; *Carter v. State*, 88 Cr. R. 28, 224 S. W. 890.

**Art. 865e. Conviction of other felony; pronouncement of sentence.**

See *Carter v. State*, 88 Cr. R. 28, 224 S. W. 890.

**Conviction affecting competency as witness.**—See *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409; notes to art. 865c.

**Effect of expiration of sentence.**—Under arts. 865c, 865e, and in view of arts. 865d, 865g, as well as Pen. Code, art. 2, one convicted of a felony, whose sentence is suspended, cannot, after the period of suspended sentence has expired, be imprisoned on that sentence because of a later charge of another felony, for that would violate the purpose of the statute. *Ex parte Coats*, 85 Cr. R. 334, 212 S. W. 173.

**Art. 865g. Pendency of other charge; extension of suspension period.**

See *Ex parte Coats*, 85 Cr. R. 334, 212 S. W. 173.

2. JUDGMENT IN CASES OF MISDEMEANOR

**Art. 867. [845] Judgment when the punishment is fine only.**

**Form and requisites of judgment.**—An appeal from a conviction of receiving stolen property of less than \$50 in value will be dismissed, where the record disclosed nothing except the verdict, for no appeal will be considered until final judgment has been rendered, and the mere verdict was not a "final judgment" in a misdemeanor case within arts. 867 and 868. *Donegan v. State* (Cr. App.) 230 S. W. 166.

**Attacking judgment on habeas corpus.**—The validity of a judgment of conviction of a misdemeanor imposing a fine, which omits to order the issuance of an execution as provided hereby cannot be assailed on habeas corpus proceedings brought by the defendant. *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076.

**Art. 868. [846] Judgment when the punishment is other than fine.**

See *Donegan v. State* (Cr. App.) 230 S. W. 166; notes to art. 867.

TITLE 10

APPEAL AND WRIT OF ERROR

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| <p><b>Art.</b><br/>894. Defendant may appeal.<br/>895. Appeals from district and county courts.<br/>895b. Appeals from criminal district court of Bowie county.<br/>896. [Superseded.]<br/>897. From justices to county court.<br/>900. Bail not discharged until verdict or judgment; in misdemeanors no discharge until overruling of motion for new trial.<br/>902. When defendant appeals and bail is allowed, he shall be committed to jail until he enters into recognizance.<br/>903. Form of such recognizance.<br/>904. Where defendant fails to enter into recognizance during term time, he may give bail in amount fixed by court, to be approved by sheriff.<br/>912. Where the defendant escapes.<br/>914. Appeal may be taken, when.<br/>915. Appeal how taken; entry of notice after term.<br/>916. Effect of appeal.<br/>918. Appeals in misdemeanor.<br/>919. Form of recognizance.<br/>920. Appeal shall not be entertained without sufficient recognizance.</p> | <p><b>Art.</b><br/>920a. Appeals to what courts; trial de novo; appeals how governed.<br/>921. Appeals from justices' and other inferior courts.<br/>922. When appeal bond provided for in preceding article is filed, appeal is perfected.<br/>923. When appeal bond or recognizance is defective, appellate court may allow appellant to file new bond.<br/>926. Original papers, etc., shall be sent up.<br/>928. Rules governing the taking, etc., of appeal bonds.<br/>929. Clerk shall prepare transcript in all cases appealed.<br/>931. Transcript, how forwarded.<br/>938. Judgment on appeal.<br/>939. Cases remanded, when.<br/>950. Appeal in habeas corpus.<br/>952. Habeas corpus, when heard.<br/>953. Shall be heard upon the record, etc.<br/>954. Orders in the case.<br/>960. Appeal from judgment on recognizance, etc.<br/>961. Defendant entitled also to writ of error.<br/>962. Same rules govern as in civil suits.</p> |
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**Article 894. [872] Defendant may appeal.**

Cited, *Gibson v. State*, 83 Cr. R. 435, 203 S. W. 893.

**Application in general.**—See *Ex parte McLoud*, 82 Cr. R. 299, 200 S. W. 394.

Arts. 894, 895, relating to appeals, being general, do not control the provisions of a

special law relating to appeals from one particular court. *Ex parte Bennett*, 85 Cr. R. 315, 211 S. W. 934.

**Nature of right.**—There is no such thing as a right of appeal, except as the same may be conferred by the body of laws made up by the Constitution and legislative enactments; and, being wholly derived therefrom, such right moves only in channels fixed by such legal direction. *Ex parte Bennett*, 85 Cr. R. 315, 211 S. W. 934.

**Decisions reviewable in general.**—In view of Const. art. 5, § 5, and Code Cr. Proc. arts. 853, 894, judgment dismissing prosecution held not appealable on behalf of accused. *Ryan v. State*, 81 Cr. R. 632, 198 S. W. 582.

In view of Const. art. 5, §§ 1, 22, Civ. St. arts. 903, 904, 921, and Code Cr. Proc. arts. 101, 894, 897, an appeal may be taken to county court from corporation court, upon conviction of violation of a city ordinance, nor constituting an offense defined by the Penal Code. *Taylor County v. Jarvis (Com. App.)* 209 S. W. 405.

One charged with the unlawful manufacture of intoxicating liquors who has entered a plea of guilty and has been assessed the lowest penalty is not in position to urge on appeal as a ground for reversal the insufficiency of the evidence to prove his guilt. *Grandberry v. State*, 86 Cr. R. 232, 216 S. W. 164.

**Finality of judgment.**—Under this article, the court has no jurisdiction of an appeal in the absence of final judgment, so that an appeal from a judgment nisi forfeiting bail bond must be dismissed. *Bostick v. State*, 81 Cr. R. 402, 195 S. W. 863.

Failure of judgment from which appeal is taken to contain requisites of final judgment required by art. 853, is fatal to the appeal. *McCuin v. State*, 86 Cr. R. 497, 217 S. W. 1038.

**Contempt proceedings.**—Under arts. 894 and 952, judgment punishing witness for violation of subpoena is not appealable; the only remedy being by habeas corpus. *Long v. State*, 82 Cr. R. 403, 199 S. W. 619.

**Abatement of appeal.**—Where, pending appeal from a conviction of a felony, defendant died, and that fact was made to appear by affidavit, the state's motion to abate the appeal will be granted. *Rutherford v. State*, 84 Cr. R. 503, 208 S. W. 917; *Burnett v. State*, 83 Cr. R. 511, 204 S. W. 328.

The death of one convicted of a felony pending his appeal from the conviction abates the appeal. *Ward v. State (Cr. App.)* 227 S. W. 947.

#### Art. 895. [873] Appeals from district and county courts.

See *Ex parte Bennett*, 85 Cr. R. 315, 211 S. W. 934; notes to art. 894.

**Juvenile delinquency proceedings.**—Appeal lies from conviction under juvenile delinquent law, directly to Court of Criminal Appeals. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

#### Art. 895b. Appeals from criminal district court of Bowie county.—

Appeals and writs of error may be prosecuted from said Criminal District Court [Criminal District Court of Bowie county, ante, art. 973 $\frac{3}{4}$ ] to the court of criminal appeals in criminal cases and to the court of civil appeals, in the same manner and form as from district courts in like cases. [Acts 1918, 35th Leg. 4th C. S., ch. 28, § 14; Acts 1919, 36th Leg. 2d C. S., ch. 8, § 14.]

**Explanatory.**—This provision will become ineffective after December 31, 1922, in view of the abolition of the court. See art. 973 $\frac{1}{2}$ .

#### Art. 896. [Superseded.]

**Explanatory.**—This article has been rendered inoperative by the amendment of art. 16, § 20, of the state Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, ante, Penal Code, arts. 588 $\frac{3}{4}$ –588 $\frac{1}{2}$ tt.

#### Art. 897. [874] From justices of the peace to county court.

**Appeal from corporation court.**—In view of Const. art. 5, §§ 1, 22, Civ. St. arts. 903, 904, 921, and Code Cr. Proc. arts. 101, 894, 897, an appeal may be taken to county court from corporation court, upon conviction of violation of a city ordinance, not constituting an offense defined by the Penal Code. *Taylor County v. Jarvis (Com. App.)* 209 S. W. 405.

#### Art. 900. Bail not discharged until verdict or judgment; in misdemeanors no discharge until overruling of motion for new trial.

**Right to liberty pending motion for new trial.**—The amendatory act permits defendant, by virtue of his appearance bond in misdemeanor case, to remain free from custody pending motion for new trial. *Ex parte Henderson*, 81 Cr. R. 609, 197 S. W. 714.

Where one indicted for assault with intent to murder was convicted of aggravated assault, a misdemeanor, his case came within this article, as amended, and, being on bail, he was entitled to remain at liberty, unless surrendered by his bondsmen, until his motion for new trial was passed on. *Ex parte Stevens*, 86 Cr. R. 557, 217 S. W. 1040.

#### Art. 902. When defendant appeals and bail is allowed, shall be committed to jail, until he enters into recognizance.

See *Westbrook v. State*, 88 Cr. R. 466, 227 S. W. 1104; *King v. State*, 83 Cr. R. 304, 203 S. W. 52; notes to arts. 903, 904.

**Failure to note on minutes.**—Where defendant did what he could to have recognizance, and entered into it, as judge certifies, in open court, neglect of one of the officers of court



to carry recognizance properly into minutes, will not deprive defendant of his appeal. *Roberts v. State*, 83 Cr. R. 139, 201 S. W. 998.

**Setting aside recognizance.**—Where accused on conviction gave notice of appeal and recognizance before he was sentenced, the court nevertheless had jurisdiction to set aside the recognizance and sentence accused and to require a new recognizance. *Ingram v. State*, 83 Cr. R. 215, 202 S. W. 741.

### Art. 903. Form of such recognizance.

See *Lawler v. State*, 86 Cr. R. 534, 217 S. W. 383; *Westbrook v. State* (Cr. App.) 227 S. W. 1104; *Cockrell v. State* (Cr. App.) 228 S. W. 1097; notes to arts. 904, 919.

Cited, *Joseph v. State*, 83 Cr. R. 522, 204 S. W. 320; *Watson v. State* (Cr. App.) 225 S. W. 753.

**Requisites of bond in general.**—A recognizance which binds defendant to appear before the trial court "from time to time," instead of "from term to term," as required by Acts 1892, p. 38, is insufficient to give the court of criminal appeals jurisdiction on appeal. *Forbes v. State* (Cr. App.) 25 S. W. 1072.

Under statute requiring an appeal obligation to fix the time, an appeal recognizance requiring appellant to appear "instanter" before trial court, to await judgment of Court of Criminal Appeals, was not more onerous than statute authorized. *Waites v. State*, 82 Cr. R. 501, 200 S. W. 380.

Under this article, recognizance on appeal failing to provide that defendant shall abide the judgment of the Court of Criminal Appeals, or to stipulate that obligation shall be joint and several as to sureties, or to show that accused was convicted of felony is insufficient. *Sanders v. State*, 83 Cr. R. 110, 201 S. W. 411.

An appeal in a felony case will be dismissed where the recognizance neither binds appellant to abide by the decision of the Court of Criminal Appeals, nor shows the court in which the accused was tried, nor follows the form prescribed by this article. *Lopez v. State*, 85 Cr. R. 402, 212 S. W. 954.

See, also, notes to art. 919.

**Statement of nature of offense and extent of punishment.**—Where recognizance failed to state punishment assessed against accused, his appeal must be dismissed. *Mosley v. State*, 82 Cr. R. 16, 198 S. W. 146; *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

Bond reciting appellant was charged with offense of a felony, and had been convicted of such offense, failing to specify offense of which he was charged and convicted, was insufficient. *McKey v. State*, 87 Cr. R. 228, 220 S. W. 549; *Singleton v. State*, 87 Cr. R. 302, 221 S. W. 610.

Under this article, omission from recognizance in prosecution for sale of intoxicating liquor contrary to law of statement that defendant had been convicted, naming offense, held fatal. *Goss v. State*, 83 Cr. R. 349, 202 S. W. 956.

Recognizance required of one convicted of felony and desiring to appeal, being prescribed by this article, and article 320, having reference only to form of recognizance in a felony case pending in district court, must state more than that appellant was charged with and convicted of a felony, and must give the name of the offense. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

The recognizance for appeal in a case of misdemeanor required by this article, must state the punishment. *Young v. State*, 87 Cr. R. 184, 222 S. W. 1103.

Where a recognizance is defective because not stating the offense of which appellant was convicted nor the punishment assessed, and is otherwise not in the form prescribed by decisions and this article, the appeal must be dismissed. *Godby v. State* (Cr. App.) 227 S. W. 192.

A recognizance held such as is required for the appearance of an accused under art. 315, but not the recognizance required upon appeal under arts. 902, 903, nowhere stating that accused has been convicted of any named offense. *Westbrook v. State* (Cr. App.) 227 S. W. 1104.

Recognizance on appeal should recite the punishment awarded. *Robert v. State* (Cr. App.) 228 S. W. 230.

Recognizance reciting that defendant "stands charged in this court with the offense by conversion, and who has been convicted of such offense," held insufficient, under this article, on appeal by a defendant convicted of theft by conversion. *Nugent v. State* (Cr. App.) 229 S. W. 855.

See, also, notes to art. 919.

### Art. 904. Where defendant fails to enter into recognizance during term time, he may give bail in amount fixed by court, to be approved by sheriff.

See *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105; *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

Cited, *Watson v. State* (Cr. App.) 225 S. W. 753.

**Approval of bond.**—Under this article, the appeal bond in a criminal case must be approved by the court as well as by the sheriff. *Chumley v. State*, 83 Cr. R. 54, 201 S. W. 176; *King v. State*, 83 Cr. R. 304, 203 S. W. 52; *Johnson v. State*, 83 Cr. R. 376, 203 S. W. 903; *Gray v. State*, 88 Cr. R. 1, 224 S. W. 513.

After adjournment of court in C. county, where defendant was convicted, judge, while holding court in another county, held authorized to approve bail bond on appeal. *Curfman v. State*, 81 Cr. R. 323, 195 S. W. 194.

An appeal bond filed in vacation must be approved by the district judge as well as the sheriff. *Hunt v. State*, 82 Cr. R. 471, 200 S. W. 1090.

Under this article, a convicted party may enter into recognizance during the term, or may enter into a bond during vacation to be approved by the sheriff and

the judge who tried the case, though he is holding court in a county other than that in which conviction was had. *Swim v. State*, 86 Cr. R. 576, 218 S. W. 761.

Appeal bond, taken in vacation, not indorsed and approved by the trial court, held defective. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

**Effect of giving appeal bond in term time.**—Appeal bond filed during term at which trial took place is not a compliance with art. 902, requiring a recognizance where case is appealed during term. *King v. State*, 83 Cr. R. 304, 203 S. W. 52.

Where defendant after conviction of felony and before expiration of the term gave an appeal bond which was approved by the sheriff and also by the district judge, the appeal must be dismissed, the appeal bond being without legal efficacy, and defendant having failed to enter into a recognizance under terms of statute. *Hale v. State*, 87 Cr. R. 119, 219 S. W. 1097.

**Time of giving recognizance.**—Under this article, and art. 903, a bail bond to a sheriff, executed during the succeeding term, held valid; it being unnecessary that such bond be executed in vacation, the words "and in vacation," within the statute, being words of inclusion, and not of limitation. *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

**Appeal bond after dismissal for defect in recognizance.**—Appeal being dismissed because of recognizance for appeal not complying with art. 903, appellant will be allowed to file an appeal bond substantially as prescribed by article 904, and doing so appeal will be held to have been perfected, and will be reinstated. *Willoughby v. State*, 87 Cr. R. 40, 219 S. W. 468.

### Art. 912. [880] When defendant escapes, pending an appeal.

**Effect of escape in general.**—Under this article, on defendant's escape from custody pending appeal, the appeal will be dismissed. *Stanton v. State* (Cr. App.) 227 S. W. 1104; *Neeley v. State*, 86 Cr. R. 204, 215 S. W. 857; *Eberhardt v. State*, 86 Cr. R. 230, 215 S. W. 966; *Gaines v. State* (Cr. App.) 231 S. W. 1097.

Where state moves to dismiss appeal from conviction on account of appellant's escape, and, accompanying motion, there is affidavit by sheriff, in compliance with art. 913, appeal will be dismissed pursuant to this article. *Clay v. State*, 81 Cr. R. 637, 197 S. W. 1106; *Johnson v. State* (Cr. App.) 218 S. W. 759.

Escape of an appellant in a criminal case deprives the appellate court of jurisdiction to pass on the merits of the case, and the appeal will be dismissed on motion of the state, accompanied by affidavit of the sheriff duly making the facts known. *Ross v. State* (Cr. App.) 229 S. W. 325; *Campbell v. State* (Cr. App.) 231 S. W. 105.

Under arts. 912, 913, appeal of defendant, convicted of burglary, who, pending such appeal, escaped from custody, with intention to escape permanently, held to be dismissed on motion of Attorney General. *Gibson v. State*, 83 Cr. R. 435, 203 S. W. 893.

Where appellant from conviction of murder, as appears by affidavit of deputy sheriff and jailer, made his escape from jail by overpowering jailer, and was later arrested and returned to custody, motion to dismiss appeal will be sustained. *Boyd v. State*, 83 Cr. R. 441, 203 S. W. 900.

**Return to custody.**—Where appeal was dismissed under arts. 912, 913, on account of the escape of appellant, recapture within ten days of his escape, while preventing a voluntary return, did not restore jurisdiction of the appeal. *Gilbert v. State*, 83 Cr. R. 348, 203 S. W. 892.

**Motion for reinstatement.**—See *Clay v. State*, 81 Cr. R. 637, 197 S. W. 1106; *Gilbert v. State*, 83 Cr. R. 348, 203 S. W. 892; *Gibson v. State*, 83 Cr. R. 435, 203 S. W. 893; *Boyd v. State*, 83 Cr. R. 441, 203 S. W. 900; *Johnson v. State* (Cr. App.) 218 S. W. 759; notes to art. 912.

On motion to reinstate appeal dismissed on account of escape of appellant, the only matters before the court are the matters involved in the escape, and the court cannot consider an issue in the trial court as to insanity. *Gilbert v. State*, 83 Cr. R. 348, 203 S. W. 892.

### Art. 914. [882] Appeal may be taken, when.

Cited, *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

### Art. 915. [883] Appeal how taken; entry of notice after term.

Cited, *Bostick v. State*, 81 Cr. R. 402, 195 S. W. 863; *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718; *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

**Necessity and requisites of notice in general.**—See *Lorance v. State* (Cr. App.) 20 S. W. 361; notes to art. 929.

Where record contains no notice of appeal, it will be dismissed. *Baldwin v. State*, 82 Cr. R. 243, 199 S. W. 468; *Thompson v. State*, 83 Cr. R. 18, 202 S. W. 91; *Williams v. State*, 86 Cr. R. 145, 215 S. W. 326; *Garlington v. State*, 85 Cr. R. 658, 215 S. W. 341; *Moore v. State*, 86 Cr. R. 549, 218 S. W. 366.

Without notice of appeal, the Court of Criminal Appeals has no jurisdiction under provisions of this article. *Jones v. State* (Cr. App.) 231 S. W. 122; *Montgomery v. State*, 81 Cr. R. 516, 196 S. W. 537; *Cato v. State*, 85 Cr. R. 659, 215 S. W. 301.

Under this article, an appeal must be dismissed in the absence of notice. *Williams v. State*, 87 Cr. R. 180, 220 S. W. 87; *Albrecht v. State*, 85 Cr. R. 519, 215 S. W. 327.

Under this article, notice of appeal is prerequisite to an appeal from judgment forfeiting bail. *Bostick v. State*, 81 Cr. R. 402, 195 S. W. 863.

Under this article, as amended, notice of appeal in criminal cases, must be given during the term. *Castoreno v. State*, 82 Cr. R. 621, 200 S. W. 1082.

Where there appears in the record no final judgment and no notice of appeal, the motion of the Assistant Attorney General to dismiss will be sustained, and the appeal dismissed. *Williams v. State*, 86 Cr. R. 145, 215 S. W. 326.

In order to perfect an appeal, it is imperative that a notice of appeal to the Court of Criminal Appeals be given by the appellant at the term at which his trial was had. *Sauzeda v. State*, 86 Cr. R. 461, 216 S. W. 1098.

A notice, given in open court, that defendant appeals to "the Court of Appeals" is insufficient, since there is no court of that name, and the appeal must be dismissed. *Danley v. State*, 88 Cr. R. 31, 224 S. W. 888.

An appeal from a criminal case must be dismissed, where the transcript discloses no order showing that the motion for new trial was ever acted on and shows no notice of appeal. *Powell v. State* (Cr. App.) 228 S. W. 1096.

An order overruling defendant's motion for new trial, reciting that he "gave notice \* \* \* to the Court of Criminal Appeals," is insufficient as notice of an appeal to that tribunal. *Donegan v. State* (Cr. App.) 230 S. W. 166.

Upon appeal from an order refusing bail in the absence of a notice of appeal, the jurisdiction of the Court of Criminal Appeals does not attach. *Ex parte Shearman* (Cr. App.) 230 S. W. 691.

**Entry of notice.**—In order to perfect an appeal, it is imperative that a notice of appeal be not only given by the appellant at the term at which his trial was had, but the same must also be entered in the minutes. *Sauzeda v. State*, 86 Cr. R. 461, 216 S. W. 1098.

The statement, "Notice of appeal given," at the conclusion of the order overruling the motion for a new trial in the record, is insufficient to give the Court of Criminal Appeals jurisdiction, such entry not showing to what court notice was given, nor that any notice of appeal was entered of record or carried into the minutes of the trial court. *Id.*

### Art. 916. [884] Effect of appeal.

Cited in dissenting opinion, *Sessions v. State*, 81 Cr. R. 424, 197 S. W. 718.

**Effect of appeal in general.**—See *Arcia v. State*, 26 Tex. App. 193, 9 S. W. 685.

Under arts. 916, 929, Court of Criminal Appeals in reviewing refusal of new trial for newly discovered evidence cannot consider testimony in another trial occurring in another county after term at which appellant was convicted. *Ballew v. State*, 82 Cr. R. 398, 199 S. W. 1109.

**Transfer of jurisdiction.**—In view of Const. art. 5, § 5, Court of Criminal Appeals has jurisdiction when final judgment of conviction is entered and notice of appeal given and entered, and must enforce performance by officers in trial court of ministerial duties imposed upon them by mandatory statute regulating the perfecting of appeals. *Ex parte Fread*, 83 Cr. R. 465, 204 S. W. 113.

Pending appeal the district court was powerless to transfer cause to criminal district court, created by Acts 35th Leg. 4th Called Sess. c. 28, in view of this article. *Walker v. State*, 85 Cr. R. 482, 214 S. W. 331.

Under this article, the trial court, after adjournment of the term, can make no further orders in an appealed case, except to correct or substitute records. *Cockrell v. State* (Cr. App.) 228 S. W. 1097.

**Art. 918. [886] When defendant appeals in misdemeanor, must give recognizance.**—When the defendant appeals in any case of misdemeanor from the judgment of the district or county court, he shall, if he be in custody, be committed to jail unless he enter into recognizance or bail bond as provided by law. If for any cause the defendant fails to enter into recognizance or bail bond during the term at which he was tried, but gave notice and took an appeal from such conviction, he shall be permitted to give bail and obtain his release from custody by giving, after the expiration of such term of court, his bail and bond to the sheriff with two or more good and sufficient sureties, in an amount to be fixed by the court, in which the defendant and his sureties shall acknowledge themselves jointly and severally indebted to the State of Texas in such sum, and upon the same condition as provided for in recognizance on appeal. But before the defendant shall be released on such bail bond the same must be approved by the sheriff or the judge trying the cause or his successor in office. When such bail bond is accepted and approved, the defendant shall be released from custody the same as though he had entered into recognizance during the term of court at which he was convicted. [O. C. 722; Acts 1919, 36th Leg., ch. 18, § 1.]

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

See *Sanders v. State* (Cr. App.) 20 S. W. 360; *Lawler v. State*, 86 Cr. R. 534, 217 S. W. 383; notes to art. 919.

Cited, *Miller v. State*, 21 Tex. App. 275, 17 S. W. 429.

**Necessity of recognizance.**—In order to give Court of Criminal Appeals jurisdiction of appeal from misdemeanor conviction, a recognizance must be entered into in open court before court adjourns for term at which conviction occurred, under this article. *Williams v. State*, 84 Cr. R. 255, 206 S. W. 684.

**Necessity that record show recognizance or defendant's imprisonment.**—Under Code Cr. Proc. 1879, art. 851, where recognizance is not given, the record must affirmatively

show that defendant is in jail pending the appeal, or the appeal will be dismissed. *Trimble v. State* (Cr. App.) 22 S. W. 688.

Where transcript contained copies of the appeal and recognizance, and clerk's certificate was to effect that it contained a correct transcript of trial proceedings, but where there was nothing to show an entry on the minutes of the court of the notice of appeal or the recognizance, as required by law, a motion to dismiss the appeal will be sustained. *Rogers v. State*, 85 Cr. R. 421, 213 S. W. 637.

Record on appeal, containing neither a recognizance, nor a showing that appellant was in custody nor a copy of the complaint on which the information was based, nor the final judgment, held defective. *Young v. State*, 86 Cr. R. 621, 218 S. W. 754.

Under this article, the record on appeal, to give the appellate court jurisdiction, must show either a recognizance or the affirmative fact that appellant has been continuously in jail since the overruling of his motion for new trial. *White v. State*, 87 Cr. R. 315, 221 S. W. 283.

A statement of the clerk in the transcript that the defendant is in custody of the sheriff is not sufficient to show that he has been continuously in jail since his motion for new trial was overruled. *Id.*

The amendment of this article by Acts 36th Leg. (1919) c. 18, does not change the rule that the record must show either a recognizance or continuous custody of defendant. *Id.*

Where there is no recognizance as required by art. 919, in the record, the Attorney General's motion to dismiss the appeal for want of a sufficient recognizance will be granted. *Mills v. State*, 87 Cr. R. 655, 224 S. W. 780.

**Appeal bond or recognizance.**—An appeal from conviction of a misdemeanor cannot be consummated by executing an appeal bond; the statute requiring a recognizance. *Stephenson v. State*, 84 Cr. R. 254, 206 S. W. 686; *Turman v. State*, 81 Cr. R. 320, 196 S. W. 181.

Where it does not appear affirmatively in the record that one convicted of a misdemeanor is in custody, an appeal bond is insufficient to give jurisdiction in the absence of a recognizance as prescribed by art. 919, under art. 920, relating thereto. *Welch v. State*, 82 Cr. R. 253, 199 S. W. 485.

Under this article, as amended, a defendant convicted of misdemeanor can secure release from custody pending the appeal by giving a bond conditioned as an appeal recognizance, and his release from custody under such bond will not affect the jurisdiction of the Court of Criminal Appeals. *White v. State*, 87 Cr. R. 315, 221 S. W. 283.

**Approval of bond.**—Under this article, as amended, it is sufficient where the sheriff approves the bond given on appeal from conviction of misdemeanor. *Howard v. State*, 86 Cr. R. 288, 216 S. W. 168.

### Art. 919. [887] Form of recognizance.

See *Curry v. City of Dallas* (Cr. App.) 21 S. W. 930; *Welch v. State*, 82 Cr. R. 253, 199 S. W. 485; *Mills v. State*, 87 Cr. R. 655, 224 S. W. 780; notes to art. 918.

Cited, *Ward v. White* (Civ. App.) 24 S. W. 312.

**Requisites in general.**—A recognizance which binds the principal to appear before the district court is fatally defective, where it fails to state the offense with which defendant is charged, and falls to require him to abide the judgment of the appellate court. *Short v. State* (Cr. App.) 25 S. W. 288.

Recognizance being fatally defective, motion of state to dismiss defendant's appeal will be granted. *Zarafonetis v. State*, 82 Cr. R. 120, 198 S. W. 938.

Under art. 920, the court cannot entertain an appeal from a conviction of aggravated assault, where the only record entry relative to the recognizance reads: "Recognizance fixed at \$1,000.00. Made and executed by G. J. [defendant], N. A. J., and G. T. S."—not a compliance with article 919, prescribing the form of recognizance in misdemeanor cases. *Jenkins v. State*, 86 Cr. R. 266, 216 S. W. 183.

**Statement of nature of offense and extent of punishment.**—See *Miller v. State*, 21 Tex. App. 275, 17 S. W. 429; notes to art. 921.

A recognizance executed under Code Crim. Proc. 1879, arts. 851-853, to secure the release from imprisonment, pending appeal, of one who has been convicted of a misdemeanor not constituting *eo nomine* an offense, must recite the essential elements of the offense; and hence a recognizance given by one convicted of selling liquor in violation of the local option law, which fails to state that an election was held in the county or one of its subdivisions to determine whether or not the sale of liquor should be prohibited, and that as a result of such election the sale of liquor was prohibited, is fatally defective, as these are essential elements of the offense. *Sanders v. State* (Cr. App.) 20 S. W. 360.

The recognizance failing to set out the amount of punishment, as required by the statutory form, but only reciting charge of aggravated assault, and conviction of simple assault, appeal will be dismissed. *Isler v. State*, 82 Cr. R. 211, 198 S. W. 958.

In a misdemeanor case where the recognizance fails to name the offense for which conviction was had, as indicated in the form set out in this article, or state the penalty assessed, the appeal will be dismissed. *Joseph v. State*, 83 Cr. R. 522, 204 S. W. 320.

An appeal will be dismissed where the recognizance does not recite that appellant was convicted and the punishment awarded. *Hayes v. State*, 83 Cr. R. 596, 204 S. W. 330.

Recognizance, on appeal, which fails to recite the amount of punishment assessed, is fatally defective. *Eaton v. State*, 85 Cr. R. 610, 215 S. W. 99, *Id.*, 85 Cr. R. 612, 215 S. W. 100; *Id.*, 85 Cr. R. 611, 215 S. W. 101.

Where recognizance on appeal in a criminal case does not set out the amount of punishment assessed, as required by statute, the appeal will be dismissed. *Durst v. State*, 85 Cr. R. 609, 215 S. W. 221.

Despite act giving criminal district court of Dallas county jurisdiction of misdemeanor cases, which provides practice shall be same as on trial of other cases over

which criminal courts of county have jurisdiction, under arts. 918, 919, appellant from conviction of misdemeanor should have set out in recognizance penalty assessed, instead of following form provided in felony convictions by article 903, and his appeal will be dismissed. *Lawler v. State*, 86 Cr. R. 534, 217 S. W. 333.

Under art. 923, a recognizance which fails to state the amount of punishment assessed by the jury is insufficient to give jurisdiction on appeal. *Erwin v. State*, 87 Cr. R. 71, 219 S. W. 827.

A recognizance for appeal from conviction of a misdemeanor which states the punishment merely as a fine of "one hundred" is insufficient, and the appeal must be dismissed. *Young v. State*, 87 Cr. R. 184, 222 S. W. 1103.

On appeal from conviction of being interested in a house and building where gaming tables and banks were kept and exhibited for purposes of gaming, defendant's recognizance, stating that he had been convicted of the offense of operating a gambling house, was insufficient; there being no such offense, *eo nomine*, and the recognizance not setting out the constituent elements of any offense known to the law. *Watson v. State* (Cr. App.) 225 S. W. 753.

Recognizance on appeal reciting that appellant stands charged with "violation of the liquor law" is not sufficient to describe the offense for which he stands charged. *Robert v. State* (Cr. App.) 228 S. W. 230.

**Statement of obligation.**—A condition of a recognizance reading, "If the said T. shall appear before this court from day to day and from term to term of the same, and not depart without leave of this court, in order to abide the judgment of the court of appeals of the state of Texas in this cause, then this recognizance to be valid, otherwise to remain in full force and effect," sufficiently complies with the statutory form. *Zidek v. State* (Cr. App.) 22 S. W. 143.

Where, the recognizance binds the appellant to "abide the judgment of the court of appeals," instead of to "abide the judgment of the court of criminal appeals," as required by Act 1892, § 32, the recognizance is fatally defective. *Powers v. State* (Cr. App.) 23 S. W. 795.

The appeal from a conviction for misdemeanor will be dismissed where the recognizance fails to comply with this article, in that it does not require defendant to appear before the trial court from day to day, and from term to term, in order to abide the judgment of the appellate court. (*Howard v. State*, 30 App. 680, 18 S. W. 790, followed.) *Spencer v. State* (Cr. App.) 24 S. W. 27.

Under the provision requiring recognizances to bind defendant who has been convicted in "this" court to appear before "this" court from day to day to abide the judgment of the court of appeals, a condition in the recognizance that he appear before "the" court is not sufficient. (*Howard v. State*, 18 S. W. 790, 30 App. 680, followed.) *Harris v. State* (Cr. App.) 24 S. W. 290.

**Joint or separate recognizance.**—It is not permissible for defendants, when jointly convicted, to enter a joint recognizance. *Haverbekken v. State*, 82 Cr. R. 633, 200 S. W. 524.

#### Art. 920. [888] Appeal shall not be entertained without sufficient recognizance.

See *Welch v. State*, 82 Cr. R. 253, 199 S. W. 485; *Jenkins v. State*, 86 Cr. R. 266, 216 S. W. 183; notes to arts. 918, 919.

Cited, *Sanders v. State* (Cr. App.) 20 S. W. 360.

**Effect of non-compliance.**—An appeal from a conviction for a misdemeanor will be dismissed where neither original nor additional recognizance is sufficient. *Reynolds v. State*, 82 Cr. R. 505, 199 S. W. 1092.

Where one convicted of misdemeanor entered into recognizance without sureties, but deposited money equal to amount of recognizance, appellate court has no jurisdiction of appeal, under this article, but may allow amendment by filing new bond or recognizance under article 923. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

#### Art. 920a. Appeals to what courts; trial de novo; appeals how governed.

**Right of appeal and court to which lies.**—Under Sp. Acts 30th Leg. c. 104, sections 131-144, creating a corporation court, Sp. Acts 31st Leg. c. 96, and Sp. Acts 33d Leg. c. 65, amending section 144, appellate jurisdiction from corporation court of Texarkana is taken away from county court, and where fine imposed does not exceed \$25, there is no appeal, but where fine exceeds \$25, exclusive appellate jurisdiction is in Court of Criminal Appeals. *Bennett v. State*, 83 Cr. R. 523, 204 S. W. 333.

Under Const. art. 5, §§ 5, 16, Legislature had right, in regulating appeals from corporation court of Texarkana, to restrict appeals to cases where fine imposed was more than \$25. *Id.*

#### Art. 921. [889] Appeals from justices' and other inferior courts.—

In appeals from the judgments of Justices of the Peace and other inferior courts to the County Court, the defendant shall, if he be in custody, be committed to jail unless he give bond with good and sufficient security, to be approved by the court from whose judgment the appeal is taken, in an amount not less than double the amount of fine and costs adjudged against him, payable to the State of Texas; provided, said bond shall not in any case be for a less sum than fifty dollars, said bond

shall describe the judgment appealed from with sufficient certainty to identify it, shall recite that in said cause the defendant was convicted on complaint, or information, charging him with a misdemeanor, and has appealed to the County Court, and shall be conditioned that the defendant shall well and truly make his personal appearance before the County Court of said county instanter, if said county court be then in session, and if said court be not in session then at its regular term, stating the time and place of holding the same, and there remain from day to day and term to term, and answer in said cause on trial in said Court. [Acts 1901, p. 291; Acts 1876, p. 167, secs. 37, 38; Acts 1918, 35th Leg. 4th C. S., ch. 21, § 1.]

Took effect March 21, 1921.

**Necessity and requisites of bond.**—The bond given on appeal in a criminal case from a justice of the peace need not state the offense of which appellant was convicted, as is required by art. 919, in bonds given on appeals from the county and district courts, since this article, relating to bonds given on appeals from justices of the peace, does not require such statement. *Miller v. State*, 21 Tex. App. 276, 17 S. W. 429.

**Art. 922.** When appeal bond provided for in preceding article is filed, appeal is perfected.

Cited *Zidek v. State* (Cr. App.) 22 S. W. 143.

**Necessity of notice of appeal.**—Under Code Crim. Proc. 1879, art. 939, an appeal in a criminal case from a justice's court was properly dismissed where the record did not show that notice of appeal was given and entered on the justice's docket. *Ball v. State*, 31 Tex. Civ. App. 214, 20 S. W. 363.

**Art. 923.** When appeal bond or recognizance is defective, appellate court may allow appellant to file new bond.

See *Erwin v. State*, 87 Cr. R. 71, 219 S. W. 827; notes to art. 919.

**Right to amend or file new recognizance.**—In view of this article, two defendants, jointly convicted, have the right to amend their recognizance, which was defective by reason of being joint. *Haverbekken v. State*, 82 Cr. R. 633, 200 S. W. 524.

Where one convicted of misdemeanor entered into recognizance without sureties, but deposited money equal to amount of recognizance, appellate court has no jurisdiction of appeal, under art. 920, but may allow amendment by filing new bond or recognizance under article 923. *Berry v. State*, 83 Cr. R. 210, 203 S. W. 901.

A motion to dismiss an appeal in a criminal case because of a defective appeal bond will be overruled, where it appears that after being notified of the condition of the appeal bond a new bond was made by accused in accordance with statute and was properly certified to and filed with the clerk of the appellate court. *Joiner v. State* (Cr. App.) 232 S. W. 333.

**Reinstatement of appeal.**—Appeal which has been dismissed because of an insufficient recognizance will be reinstated on the filing of a proper recognizance. *Singleton v. State*, 87 Cr. R. 302, 221 S. W. 610; *Godby v. State* (Cr. App.) 227 S. W. 192.

Where appeal was dismissed for defective bond, but appellant, within proper time after dismissal of appeal, filed motion to reinstate and cure the defects, the case will be reinstated. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

The Court of Criminal Appeals, having dismissed appeal because of a defective recognizance, will reinstate the appeal on a showing that a good and sufficient recognizance was entered into but was miscopied by the clerk. *Nugent v. State* (Cr. App.) 229 S. W. 855.

**Art. 926.** [892] Original papers, etc., shall be sent up.

Cited, *Byrd v. State*, 26 Tex. App. 374, 9 S. W. 759.

**Art. 928.** [894] Rules governing the taking, etc., of appeal bonds.

See *Scarborough v. State* (Cr. App.) 20 S. W. 584.

**Art. 929.** [895] Clerk shall prepare transcript in all cases appealed.

1. **What the record must contain or show in general.**—Where the record on appeal from conviction of forgery is before the Court of Criminal Appeals without any judgment or sentence, statement of facts, or notice of appeal, the appeal must be dismissed. *Moore v. State* (Cr. App.) 209 S. W. 407.

Court erred in permitting district attorney to put into record, over the objection of accused evidence heard upon issue of juvenility by the court at a former term; such evidence not being offered before the jury nor by the accused. *Lee v. State*, 86 Cr. R. 146, 215 S. W. 326.

Record on appeal, containing neither a recognizance, nor a showing that appellant was in custody, nor a copy of the complaint on which the information was based, nor the final judgment, held defective. *Young v. State*, 86 Cr. R. 621, 218 S. W. 754.

It is not necessary that the form of oath administered to the jury appears in the record otherwise than by appellant's bill of exceptions. *Crisp v. State*, 87 Cr. R. 137, 220 S. W. 1104.

Where special judge sits in criminal case, record must show that he was qualified or authorized to act therein, and that oath of office was administered to him, and, where it does not so show, conviction will be reversed. *Dawes v. State*, 87 Cr. R. 452, 222 S. W. 560.

Where the caption of the record on appeal from a conviction fails to disclose the date upon which the term at which the case was tried terminated, the record cannot be considered, on account of the statute limiting the time in which the bills of exception and the statements of facts may be filed. *Mandosa v. State* (Cr. App.) 225 S. W. 169.

Where the caption of transcript on appeal in a criminal case does not state year the case was tried or dates of the term of court, appeal will be dismissed. *Davis v. State* (Cr. App.) 225 S. W. 532.

**2. Indictment, information or complaint.**—Where indictment is basis of criminal prosecution, the record on appeal must contain it. *Turman v. State*, 81 Cr. R. 320, 196 S. W. 181.

Where the record presents neither complaint, information, nor indictment as a basis for the prosecution, the judgment of the lower court will be reversed, and the cause remanded. *Hester v. State*, 84 Cr. R. 496, 208 S. W. 515.

The record must show the loss and the substitution of the indictment, which is a judicial act necessarily of record. *Hollingsworth v. State*, 87 Cr. R. 399, 221 S. W. 973.

A record which shows an information, but no complaint, is fatally defective. *Winn v. State*, 87 Cr. R. 485, 223 S. W. 230.

**3. Verdict, judgment and sentence.**—See *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380. Under Code Cr. Proc. 1879, art. 791, where the record on appeal only recites the return of the verdict, and judgment thereon, it does not disclose a final judgment, from which an appeal will lie. *Dowell v. State* (Cr. App.) 22 S. W. 407.

Where no sentence or final judgment was shown in the record, the appeal will be dismissed. *Wilson v. State*, 81 Cr. R. 516, 196 S. W. 540; *Dowdell v. State*, 85 Cr. R. 472, 213 S. W. 649; *Thomas v. State*, 87 Cr. R. 153, 219 S. W. 1100; *Thompkins v. State*, 87 Cr. R. 502, 222 S. W. 1103, motion to reinstate appeal denied 87 Cr. R. 503, 224 S. W. 687; *Sopsay v. State* (Cr. App.) 227 S. W. 188; *Jones v. State* (Cr. App.) 229 S. W. 323; *Gumpert v. State* (Cr. App.) 229 S. W. 328.

The Court of Criminal Appeals has no jurisdiction of appeal from conviction for felony, where the record fails to show sentence. *Austin v. State*, 83 Cr. R. 45, 200 S. W. 1082; *Thomas v. State* (Cr. App.) 230 S. W. 156; *Thomas v. State* (Cr. App.) 230 S. W. 157, 158, 159, 160; *Keith v. State* (Cr. App.) 232 S. W. 321.

On appeal from a conviction for the theft of cotton seed of over the value of \$50, the court has no jurisdiction, and the appeal will be dismissed, where there is no sentence in the record. *Austin v. State*, 83 Cr. R. 45, 200 S. W. 1082.

Appeal will be dismissed, where record contains no sentence, and the judgment and the verdict therein recited leave blank the term of imprisonment. *Austin v. State*, 83 Cr. R. 44, 200 S. W. 1093.

Where there appears in the record no final judgment and no notice of appeal, the motion of the Assistant Attorney General to dismiss will be sustained, and the appeal dismissed. *Williams v. State*, 86 Cr. R. 145, 215 S. W. 326.

An appeal from conviction of misdemeanor on indictment for felony need not be dismissed because no sentence appears in the record, since the judgment performs the office of both judgment and sentence in misdemeanor cases. *Berdell v. State*, 87 Cr. R. 310, 220 S. W. 1101.

The appellate court acquires no jurisdiction of an appeal where the record does not show entry of a judgment in compliance with art. 853. *Hellman v. State*, 87 Cr. R. 460, 222 S. W. 980.

Conviction of manslaughter must be reversed, and the cause remanded, where the record, although it contains a verdict and a sentence, is silent as to whether there was a judgment entered upon the verdict; for, while the sentence is the final judgment authorizing appeal, without a judgment, sentence is unauthorized. *Brown v. State*, 83 Cr. R. 60, 224 S. W. 1098.

Where the record discloses there was no sentence of defendant convicted of forgery, his appeal must be dismissed. *Pior v. State* (Cr. App.) 226 S. W. 411.

An appeal from a conviction of receiving stolen property of less than \$50 in value will be dismissed, where the record disclosed nothing except the verdict, for no appeal will be considered until final judgment has been rendered, and the mere verdict was not a "final judgment" in a misdemeanor case within arts. 867 and 863. *Donegan v. State* (Cr. App.) 230 S. W. 166.

Under art. 856, a showing in the record that sentence was pronounced on defendant and notice of appeal given by him to the Court of Criminal Appeals is a prerequisite to entertaining the appeal. *Thomas v. State* (Cr. App.) 232 S. W. 826.

**4. Proceedings after verdict and judgment.**—In the absence of a showing in the transcript that notice of an appeal has been given and entered of record in the court below, as required by Code Crim. Proc. 1879, art. 848, the court of criminal appeals will not infer such facts, either from the filing of the transcript in that court, or from appellant's entering into a recognizance in the lower court to abide the judgment on appeal, and the appeal will be dismissed. *Lorance v. State* (Cr. App.) 20 S. W. 361.

Where record contains no notice of appeal, it will be dismissed. *Baldwin v. State*, 82 Cr. R. 243, 199 S. W. 468; *Thompson v. State*, 83 Cr. R. 13, 202 S. W. 91; *Williams v. State*, 86 Cr. R. 145, 215 S. W. 326; *Moore v. State*, 86 Cr. R. 549, 218 S. W. 366.

Where transcript contained copies of the appeal and recognizance, and clerk's certificate was to effect that it contained a correct transcript of trial proceedings, but where there was nothing to show an entry on the minutes of the court of the notice of appeal or the recognizance, as required by law, a motion to dismiss the appeal will be sustained. *Rogers v. State*, 85 Cr. R. 421, 213 S. W. 637.

In order to perfect an appeal, it is imperative that a notice of appeal be not only

given at the term at which his trial was had, but the same must also be entered in the minutes and so appear in the record sent to the appellate court. *Sauzeda v. State*, 86 Cr. R. 461, 216 S. W. 1098.

Recognizance, see *Trimble v. State* (Cr. App.) 22 S. W. 688; *Young v. State*, 86 Cr. R. 621, 218 S. W. 754; *White v. State*, 87 Cr. R. 315, 221 S. W. 283; notes to art. 918.

An appeal from a criminal case must be dismissed, where the transcript discloses no order showing that the motion for new trial was ever acted on. *Powell v. State* (Cr. App.) 228 S. W. 1096.

**6. Statement of facts and proceedings relating thereto.**—See notes to arts. 844, 844a, 845.

**7. Showing as to filing of papers.**—A bill of exception in the record cannot be considered; there being a failure to show its filing. *Bartlett v. State*, 82 Cr. R. 468, 200 S. W. 839.

Where the papers pertaining to the trial were not filed at a term of court shown to have been held as manifested by the caption of the transcript, the appeal will be dismissed. *Sherwood v. State* (Cr. App.) 225 S. W. 1101.

**11. Certification or other authentication of transcript.**—On appeal in misdemeanor cases, if there is a statement of facts, it must be copied in the transcript of the record, and certified, like all other orders and proceedings. *Pierce v. State*, 84 Cr. R. 334, 206 S. W. 936; *Grayson v. State*, 84 Cr. R. 337, 206 S. W. 943.

Where a transcript is not certified by the clerk, and the bills of exceptions are not approved by the judge, and the statement of facts is neither signed by the attorneys nor by the judge, an appeal must be dismissed, without passing upon the merits, under this article and Civ. St. art. 2114. *Ray v. State* (Cr. App.) 231 S. W. 396.

**11½. Conclusiveness and construction.**—It being a controverted issue, whether motion to quash was made before trial, so that it was timely, court on appeal will be governed by the record, showing that it was filed the day after conviction; appellant offering no evidence by affidavit. *Shipley v. State*, 84 Cr. R. 278, 208 S. W. 342.

Viewed in the light of testimony in the statement of facts held that the record, fairly construed, did not bear the interpretation that, as complained in bill of exceptions, the opinion of witness was taken as evidence. *Messimer v. State*, 87 Cr. R. 403, 222 S. W. 583.

**12. Correction or alteration of record.**—Defects in transcript of appeal may be cured and dismissed case reinstated, where defects were omissions of the clerk in failing to copy the necessary papers into the transcript. *Thompson v. State*, 83 Cr. R. 18, 202 S. W. 91.

Upon appeal from a conviction of desertion, where the Assistant Attorney General obtained from the proper authorities a duly certified copy of the complaint and had it filed with the record, the fact that there was no copy of the complaint incorporated in the record, is no ground for reversal or for dismissal of defendant's appeal. *Williams v. State* (Cr. App.) 232 S. W. 507.

**13. Certiorari to perfect record.**—Application for certiorari to perfect the record will be granted where based on defendant's having presented to the trial court a bill of exceptions for approval, which the court took, and, after keeping it awhile, qualified, and filed without notice to or consent of defendant, who filed exception accompanied by a bystander's bill showing the facts. *Walker v. State* (Cr. App.) 227 S. W. 308.

Where it is necessary, to entitle defendant to have his case considered by the Court of Criminal Appeals, that certain instruments and orders appear in the record, his application on sufficient showing for writ of certiorari to perfect the record in such respect will be granted. *Frazier v. State* (Cr. App.) 227 S. W. 324.

**17. Review dependent on scope of record.**—In prosecution for murder, where record did not disclose whether deceased's shoes had cut marks on them, held no harmful error was shown by their introduction. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

That failure to suspend sentence may be complained of on appeal, the record must show defendant's application for suspension necessary under art. 865c. *Lozano v. State*, 83 Cr. R. 597, 204 S. W. 323.

Exceptions to the charge need not be considered, where the evidence does not accompany the record. *Railey v. State*, 84 Cr. R. 241, 206 S. W. 523.

Where main charge appears to properly present law of case and there is no evidence before appellate court which would necessitate giving of such charge, appellate court will hold that requested charge was properly refused. *Hopson v. State*, 84 Cr. R. 619, 209 S. W. 410.

Matters presented by motion for new trial cannot be reviewed in the absence of the testimony, where they relate to and depend upon the facts. *Gonzales v. State*, 85 Cr. R. 6, 209 S. W. 742.

Court's refusal to quash indictment will not be considered on appeal, where record does not show whether motion to quash indictment was presented to the court. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

Where the record shows that the court overruled a motion for new trial, supported by several affidavits of newly discovered testimony, and that there was a contest thereon, and there were controverting affidavits, but does not show whether testimony was heard, such phase of the record need not be discussed. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

In prosecution for robbery, where fact that defendant had pleaded guilty to embezzlement in former prosecution was elicited on cross-examination of defendant, court's refusal to permit defendant on redirect examination to explain circumstances under which he pleaded guilty cannot be reviewed on appeal, in absence of the facts which were before trial court. *Boone v. State*, 85 Cr. R. 661, 215 S. W. 310.

Where the testimony did not accompany the record, the insufficiency of the evidence to constitute, under the law, the offense of murder cannot be reviewed. *Lacy v. State* (Cr. App.) 215 S. W. 453.



Appellate court exercises great latitude towards appellants in matters merely technical, but cannot disregard matters which are mainly statutory and go to the very foundation of the appeal or the jurisdiction of the trial court. *Young v. State*, 86 Cr. R. 621, 218 S. W. 754.

Where an affidavit containing alleged newly discovered evidence claimed to be attached to the motion for new trial did not appear in the record, denial of defendant's motion on the ground of newly discovered evidence will not be reviewed. *Shrum v. State*, 87 Cr. R. 486, 222 S. W. 575.

A conviction for forgery cannot be reversed for variance between the forged name as alleged in the indictment and the name signed to the instrument, where the record does not show what name was signed to the instrument. *Wallace v. State*, 87 Cr. R. 527, 222 S. W. 1104.

On appeal, only matters of fact and matters of law which appear in the record may be considered. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

Where there was a motion to quash the venire on the grounds that a jury commissioner was not a freeholder in the county and that the commissioners were not residents of different portions of the county, and there is no statement of facts or bills of exception, and no exception was reserved, and the grounds are not verified or established by evidence, so far as shown by the record, conviction will be affirmed. *Bowen v. State*, 87 Cr. R. 657, 224 S. W. 776.

Bill of exceptions to court's supposed refusal of a continuance is insufficient to warrant review where the record contains neither application for continuance nor court's order refusing it. *Lucas v. State* (Cr. App.) 225 S. W. 257.

A claim on appeal from a conviction as a juvenile held to present questions of fact incident to procedure on the trial, which the appellee court is bound to determine from the record and upon the presumptions as to the legality of judgments and cannot consider in the absence of bill of exception; record not affirmatively showing that court erred. *Gordon v. State* (Cr. App.) 228 S. W. 1095.

A bill of exceptions complaining of the court's action in overruling defendant's motion to quash the indictment cannot be considered where the record fails to show that any motion to quash was filed. *Andres v. State* (Cr. App.) 229 S. W. 503.

Where defendant's motion for a new trial on the ground of misconduct of a juror was overruled, and it appeared that the trial court heard evidence on the issue, its determination will be upheld, where such evidence was not preserved in the record. *Cone v. State* (Cr. App.) 232 S. W. 816.

18. **Presumptions in aid of record.**—In the absence of the testimony heard by the court before denying new trial for misconduct of the jury, the presumption is that the court ruled correctly. *Martin v. State*, 82 Cr. R. 269, 198 S. W. 149.

Where statement of facts is silent as to certain evidence and bill of exceptions does not state whether it was on direct or redirect examination, it will be assumed to be on redirect, where it would be reversible on direct, but proper on redirect. *Pickrell v. State*, 82 Cr. R. 68, 198 S. W. 303.

Court having ruled witness competent, bill of exceptions not showing that witness was not an expert sufficiently to have testified on subject, reversible error held not shown. *Zarafonietis v. State*, 82 Cr. R. 120, 198 S. W. 938.

Where evidence on motion to correct date of judgment is not preserved, held, that it will be presumed that the evidence justified the overruling of the motion. *Krauss v. State*, 82 Cr. R. 231, 199 S. W. 472.

When bill of exceptions is found in record with qualification by the trial court, consent of appellant to such qualification is presumed in absence of objection and exception to the qualification authenticated and brought up in record. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

In prosecution for assault with intent to commit rape, where the court submitted the issue of aggravated assault and the jury convicted of that offense, the presumption on appeal in the absence of the testimony is that the court properly submitted such issue upon evidence warranting its submission. *Miller v. State*, 84 Cr. R. 168, 206 S. W. 524.

Where Court of Criminal Appeals is not permitted to consider the evidence offered in support of a motion for a new trial it would conclude that trial court was justified in overruling it; the presumption in such case being in favor of correctness and regularity of trial court's action. *McKinney v. State*, 85 Cr. R. 105, 210 S. W. 700.

Where the record fails to show whether special charges requested were given or not, the legal presumption is that they were given. *Starnes v. State*, 86 Cr. R. 145, 215 S. W. 302.

Where no order on a motion to quash an indictment appears in the record, and the bill of exceptions only states that it was overruled, the presumption obtains that such motion was overruled by operation of law at the end of the term. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

Where there is nothing in the bill of exceptions complaining of admission of evidence, to indicate that the evidence was irrelevant, the appellate court, in support of the court's ruling, will presume that it was relevant. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

In absence of any statement in the bill of exceptions of the proceedings or attendant circumstances such as will enable the appellate court to know, as a certainty, that an error was committed, the court must presume that the trial court did not erroneously sanction the introduction of improper testimony, or permit prosecuting officer to transgress the rules controlling cross-examination of the appellant and his witnesses. *Watts v. State*, 87 Cr. R. 442, 222 S. W. 558.

On appeal from conviction of forgery, in the absence of bill of exceptions reserving and presenting the facts, question whether a strip of paper on which defendant had written certain names was inadmissible because at the time he was under arrest and unwarned is not before the Court of Criminal Appeals; it being necessary to bring up by exceptions facts sustaining contentions as to inadmissibility of evidence, in the ab-

sence of such bills the presumption being in favor of the legality of the action of the trial court. *Bird v. State* (Cr. App.) 225 S. W. 749.

Where the statement in the motion for new trial that defendant had filed a plea of insanity was traversed as authorized by art. 841, and the record recited that the court heard evidence on the issue, but such evidence was not brought up on appeal, it must be presumed that the evidence supported the denial of the motion. *Taylor v. State* (Cr. App.) 227 S. W. 679.

Unless bills of exceptions to the admission of evidence show what the answers of witnesses were, the appellate court will not understand that answers were made, and if it is stated that an objection was made, but no ground of objection appears, such court cannot presume or infer that any were stated and cannot consider the bill. *Lane v. State* (Cr. App.) 229 S. W. 547.

In the absence of evidence introduced on hearing of defendant's motion for new trial, the presumption is that the trial court was satisfied with the facts set up in the controverting affidavit by the state, and the Court of Criminal Appeals must uphold his ruling as correct. *Taylor v. State* (Cr. App.) 229 S. W. 552.

Where the assistant district attorney asked defendant on cross-examination how many times she had been charged in the county court with theft, where the record was insufficient to show that the question was improper, it cannot be presumed on appeal that he was purposely doing an improper thing in that there had been no legal charge filed against defendant. *Criner v. State* (Cr. App.) 229 S. W. 860.

An appeal in a felony case will not be dismissed, because the record shows neither a recognizance nor the fact that defendant is in jail; the presumption being, when the record does not contain a recognizance and bail bond, that defendant is in jail. *Thomas v. State* (Cr. App.) 230 S. W. 157, 159.

See, also, notes to art. 938.

19. **Consideration of matters not shown by record.**—Under arts. 916, 929, Court of Criminal Appeals, in reviewing refusal of new trial for newly discovered evidence, cannot consider testimony in another trial occurring in another county after term at which appellant was convicted. *Ballew v. State*, 82 Cr. R. 398, 199 S. W. 1109.

Remarks of prosecuting attorney in argument, made the basis of a sworn motion for new trial, will be taken on appeal as having occurred, there being no contest in regard to it, and no facts introduced on motion for new trial, notwithstanding affidavits of state's counsel and the trial judge which were forwarded to the appellate court after the record was filed. *Anderson v. State*, 85 Cr. R. 422, 214 S. W. 353.

Since the question whether defendant has been continuously in custody since his motion for new trial was overruled in a misdemeanor case affects the jurisdiction of the court of Criminal Appeals in the absence of a recognizance in the record, the court can consider an *ex parte* affidavit by the sheriff that defendant is not in custody. *White v. State*, 87 Cr. R. 315, 221 S. W. 283.

Affidavits filed after a trial, and after an order overruling a motion for new trial, are entitled to no place in the record, and to no consideration on appeal, and on rehearing will be ignored, the decision in the original hearing having been rendered without reference to the same. *Keith v. State* (Cr. App.) 232 S. W. 321.

### Art. 931. [897] Transcript, how forwarded.

In general.—Accused is not responsible for the record on appeal, it being the duty of the clerk of the trial court to make out and forward the transcript. *Young v. State*, 86 Cr. R. 594, 218 S. W. 505.

**Time for preparation and filing.**—A transcript, filed nearly 150 days after adjournment of trial court, is in plain violation of the duty enjoined on the district clerk by statute, requiring that transcripts be made out "at once" after adjournment, and forwarded to Court of Criminal Appeals. *Washington v. State*, 86 Cr. R. 327, 216 S. W. 869.

Where time for filing of bills of exception is extended, the transcript should not be made out until after the expiration of the extended period. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

### Art. 938. [904] Judgment on appeal.

Cited, *Bride v. State*, 86 Cr. R. 535, 218 S. W. 762.

1. **Scope of review in general.**—It is only through bills of exception, as required by art. 744, and the statement of facts when new trial is refused, as provided for by art. 844, that the court is apprised of occurrences at the trial, and, in view of art. 938, court can consider as ground for reversal only matters presented for review as so required. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

Where the evidence is sufficient to sustain the conviction, and no exceptions are taken to the charge, or to introduction of testimony, no question is raised on appeal. *Wallace v. State*, 84 Cr. R. 329, 206 S. W. 845.

In passing on the merits of application for continuance, the Court of Criminal Appeals will look to the whole record, to ascertain if the facts stated as expectant from the absent witness appear likely to be true; also if there is a reasonable probability to procure them, and if they are procured that the testimony would be likely to produce a different result. *Wilson v. State*, 87 Cr. R. 625, 224 S. W. 772.

When the law has been administered and followed in a case brought before the Court of Criminal Appeals, the court's duty ends, and it cannot consider a claim that there are large appeals to humanity in the case. *Barrientas v. State* (Cr. App.) 230 S. W. 418.

In testing the soundness of the trial court's position in refusing to continue or to grant a new trial on the ground of absence of witness, the evidence on the trial, controverting the entity of the alleged absent witness, is available. *Barnes v. State* (Cr. App.) 230 S. W. 986.

2. **Affirmance, reversal, or dismissal in general.**—Where appellant files an application to dismiss appeal, made in accordance with law, and showing appellant's desire for dis-

missal, appeal will be dismissed. *Kroschewski v. State* (Cr. App.) 215 S. W. 453; *Prater v. State* (Cr. App.) 219 S. W. 1096; *Flournoy v. State*, 87 Cr. R. 213, 220 S. W. 549; *Polk v. State* (Cr. App.) 228 S. W. 234; *McCowan v. State* (Cr. App.) 228 S. W. 936.

Where the conviction was had, and the appeal taken, prior to an amendment of the statute by Acts 35th Leg. c. 145, so as to reduce the minimum penalty for arson from five to two years, the fact that the appeal was heard after the statute became effective did not entitle accused to a reversal. *Johnson v. State*, 82 Cr. R. 82, 197 S. W. 995.

Where proceedings seem from transcript to have been regular, and there is no bill of exceptions or statement of facts, conviction will be affirmed. *Caraway v. State* (Cr. App.) 200 S. W. 401.

Relator, who was arrested for violating the anti-vice law and remanded in habeas corpus proceedings, having been discharged since notice of appeal was given to court on appeal, motion of Attorney General to dismiss appeal should be sustained. *Ex parte Stedham*, 84 Cr. R. 523, 208 S. W. 930.

The Court of Criminal Appeals has no power to direct that the day of sentence and term of imprisonment begin on the date of a defendant's conviction below. *White v. State*, 85 Cr. R. 28, 210 S. W. 199.

Where appeal from a conviction under Acts 35th Leg. 4th Called Sess. c. 8, creating offense of disloyalty, came up without any bills of exceptions or statement of facts in the record, and motion for new trial only questioned the sufficiency of evidence to support verdict, and court, on examination, finds that indictment appears to follow language of statute, and that language imputed to defendant, if uttered, violated the law, the conviction would be affirmed. *Meyer v. State*, 85 Cr. R. 168, 212 S. W. 504.

Where an appeal was dismissed because no judgment on the verdict or any order of the court directing the disposition to be made of the accused could be found in the record, the dismissal will be set aside when the record is perfected. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

Where, on an appeal from an order refusing to release appellant from custody upon the ground that the evidence before the examining court was insufficient to authorize his detention, it is duly made to appear that pending the appeal the grand jury has found an indictment, growing out of the same offense, the appeal will be dismissed. *Ex parte Scott*, 86 Cr. R. 591, 218 S. W. 366.

Under art. 837, § 2, stating grounds for new trial, error of court in requiring assault by deceased producing pain to have been calculated to produce passion in defendant's mind held ground for new trial, and conviction for murder with death penalty assessed will be reversed. *Mickle v. State* (Cr. App.) 227 S. W. 491.

A judgment on a plea of guilty would be reversed on appeal if it was brought to the attention of the appellate court that the evidence at the hearing to assess the punishment showed insanity, but that leave to withdraw the plea of guilty was refused. *Taylor v. State* (Cr. App.) 227 S. W. 679.

Where the trial judge after learning that counsel for accused had filed with the clerk bills of exceptions which the trial judge had previously refused, instead of preparing correct bills of exceptions as required by the statute, qualified the defendant's bills and had them refiled so that such bills could not be considered on appeal nor could accused have presented bystander's bills, the conviction will be reversed if the bills as tendered by accused presented questions which rendered the validity of the conviction doubtful. *Jones v. State* (Cr. App.) 229 S. W. 865.

Before the Court of Criminal Appeals will order a reversal of a cause and entail the delay and expense of another trial, it must believe that wrong has been done which can be righted on another trial. *Shields v. State* (Cr. App.) 231 S. W. 779.

**3. Presumptions in general.**—It will be presumed on appeal that rulings of trial court are correct, where not shown in some way to be incorrect. *Smith v. State*, 82 Cr. R. 158, 198 S. W. 298; *Vann v. State*, 84 Cr. R. 97, 206 S. W. 80; *Quinney v. State*, 86 Cr. R. 358, 216 S. W. 882; *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

Discretion of court as to admissibility of witnesses who have violated rule will be presumed properly exercised, the contrary not appearing. *Fitzgerald v. State*, 82 Cr. R. 130, 198 S. W. 315.

Appellate court indulges presumption that rulings of trial court are correct, and burden is upon appellant by some authenticated record, usually by bill of exception, to overturn presumption. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

It will not be presumed that grand jury found indictment without facts, especially where one of grand jurors testified to their investigation. *Moore v. State*, 84 Cr. R. 256, 206 S. W. 683.

Where the order overruling motion for new trial shows that the court heard evidence and thereon determined the motion should be overruled, the presumption in favor of the correctness of the court's ruling which is indulged on appeal implies that the evidence was sufficient to authorize the judgment rendered. *Wright v. State*, 84 Cr. R. 352, 207 S. W. 99.

Where a qualification by the trial judge of a bill of exceptions is criticized by appellant, but without taking an exception thereto, it will be presumed on review that the explanation was attached with appellant's approval; the law not requiring him to accept a qualified bill. *Bryant v. State*, 84 Cr. R. 343, 207 S. W. 930.

The utmost legal effect that can be given bills of exceptions which are not in themselves sufficient to show not only the objection, but also the facts showing the propriety of such objection, is to consider them in the light of general demurrers, from which it must follow that every reasonable intendment in favor of the legality of that to which objection is made must be indulged. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

The Court of Criminal Appeals cannot assume, from mere identity of names, that the maker of a complaint for adultery was the same person as the woman named in the complaint as the adulteress, to sustain defendant's contention that such woman was an accomplice, and therefore not a credible person, within art. 479; all presumptions favoring the legality of proceedings in trial courts. *Halbadier v. State*, 85 Cr. R. 593, 214 S. W. 349.

Upon a hearing to pass upon defendant's affidavit of juvenility, although the introduction of defendant's statement, while under arrest, may have been in violation of rules against the admission of confessions, the presumption obtains that there was sufficient legal testimony upon which the court based its judgment that defendant was more than 17 years of age. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

On appeal in criminal cases, charges of trial court must be considered as a whole, and the jury regarded as reasonable men, desirous of following instructions of the court in deciding cases according to their best judgment on their merits. *Zimmerman v. State*, 85 Cr. R. 630, 215 S. W. 101.

The Court of Criminal Appeals must presume that the jury followed an instruction. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Where defendant did not file motion in arrest of judgment upon ground that information was fatally defective until two days after conclusion of trial, court on appeal, in absence of showing to the contrary, will assume that the trial court, in considering and overruling motion, concluded that there was sufficient excuse for failure to file motion sooner. *Woodard v. State*, 86 Cr. R. 632, 218 S. W. 760.

An appellant complaining of the admission of testimony has the burden of showing that the court's ruling was wrong. *Williams v. State*, 86 Cr. R. 626, 219 S. W. 829.

Trial court having power granted by Const. art. 3, § 45, to change venue, failure to observe art. 626, requiring reason to be embraced in order, does not vitiate it in absence of abuse of discretion, which, to receive attention on appeal, must appear in recognized form, presumption trial court did not transcend its authority otherwise obtaining. *Baker v. State*, 87 Cr. R. 213, 220 S. W. 326.

In reviewing sufficiency of evidence to support the verdict, it will be assumed all controverted questions were decided for the state. *Reese v. State*, 87 Cr. R. 245, 220 S. W. 1096.

Where accused introduced no evidence and the jury found him guilty, the evidence introduced by the state must, on appeal, be accepted as true. *Jolly v. State*, 87 Cr. R. 233, 221 S. W. 279.

The overruling of a motion for new trial by the trial judge will not be arbitrarily overturned, but the burden rests upon accused to overcome the presumption favoring the correctness of the decision. *Bocknight v. State*, 87 Cr. R. 423, 222 S. W. 259.

On appeal, it must be presumed that all necessary steps were taken to make a special term of court legal, in the absence of any pleading or proof to the contrary in the court below. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

Finding of court in order changing venue of his own motion under art. 632, into county not adjoining that in which prosecution was commenced because of prejudice against the accused, is presumed to speak the truth. *Sapp v. State*, 87 Cr. R. 606, 223 S. W. 459.

Failure to support motion for new trial on ground of newly discovered evidence, by affidavits and testimony of witnesses who knew the newly discovered facts, or to account for the absence of such proof, renders it insufficient to overcome presumption that in refusing new trial the trial court did not abuse his discretion. *Holloway v. State*, 88 Cr. R. 126, 224 S. W. 1102.

Proof that defendant failed to appear in accord with a bail bond or recognizance is admissible against the accused, and it will be presumed that a jury understood that bail is simply a means to assure accused's presence and creates no presumption of guilt. *Cook v. State* (Cr. App.) 223 S. W. 213.

In a prosecution for murder, showing that defendant lived some 150 to 300 yards from the scene of the killing, was seen to start in the direction of his home and to reach it, was insufficient to overcome the presumption in favor of the correctness of the trial court's ruling in excluding statement on reaching home as not *res gestæ*. *Moore v. State* (Cr. App.) 228 S. W. 218.

Where accused complained that court abused its discretion in permitting a witness to testify who had remained in the courtroom after the rule had been called for, the burden was on him to reveal in his bill of exceptions circumstances from which an abuse would appear; there being a presumption in favor of the correctness of the ruling. *Shamblin v. State* (Cr. App.) 223 S. W. 241.

A claim on appeal from a conviction as a juvenile, held to present questions of fact incident to procedure on the trial, which the appellate court is bound to determine from the record and upon the presumptions as to the legality of judgments. *Gordon v. State* (Cr. App.) 228 S. W. 1095.

Where information and complaint under the Juvenile Act charged seven distinct felonies in as many counts without specifying in six of them that defendant was under 17 years of age, in aid of the presumption that the court below is correct, the judgment held to be sustained on the theory that the evidence supported the count which charged that defendant was under 17 years of age and that the court acted correctly in applying the facts to such count. *Id.*

In a criminal prosecution the burden is on the defendant appealing to show that a ruling admitting evidence was erroneous. *Mucker v. State* (Cr. App.) 229 S. W. 323.

Where an indictment charges that theretofore defendant was convicted of a similar offense, it will be presumed on appeal that the purpose of the pleader was to secure an increased punishment under Pen. Code, art. 1619. *Stevenson v. State* (Cr. App.) 230 S. W. 174.

There is a presumption in favor of the correctness of trial court's ruling that there was no misconduct of the jury. *Eason v. State* (Cr. App.) 232 S. W. 300.

In a prosecution for swindling, where the court overruled a motion to postpone trial until after the disposition of another pending case, on the ground the latter was founded upon fictitious allegations, and the indictment was found to prevent a suspended sentence in the swindling case, the presumption on appeal is that such allegations were not proved. *Taylor v. State* (Cr. App.) 232 S. W. 525.

In a prosecution for assault to murder, in the absence of a contrary showing, the presumption of the Court of Criminal Appeals necessarily would be in favor of the ad-

missibility of statements made by the defendant to another after the shooting, not shown to have been made to an officer or to any person who had appellant in custody, or under other circumstances which would make the same inadmissible. *Holden v. State* (Cr. App.) 232 S. W. 803.

See, also, notes to art. 929.

**4. Presumption as to proof of venue.**—Under this article, it will be presumed that venue was proved unless it was a question of serious import upon the trial or unless contested or verified in a bill of exceptions. *Sherman v. State*, 83 Cr. R. 205, 202 S. W. 93; *Bashara v. State*, 84 Cr. R. 263, 206 S. W. 359; *Bargas v. State*, 86 Cr. R. 217, 216 S. W. 172; *Cone v. State* (Cr. App.) 232 S. W. 816.

Under this article, to review the question as to whether venue was proved, the bills of exceptions must certify either that venue was not proved, or set out all the evidence bearing on the issue. *Allen v. State*, 199 S. W. 633.

Despite this article, where venue was one of contested issues and remained a part and parcel of main trial, it is not necessary to reserve bill of exceptions. *Phillips v. State*, 83 Cr. R. 16, 200 S. W. 1091.

Venue is a matter fixed and controlled by statute (arts. 234-258), and under this article, court of criminal appeals by statutory command accepts the presumption that venue in the trial court was proven, unless the matter was there made an issue and the contrary made to appear, which fact must be shown by bill of exceptions properly presented. *Haley v. State* (Cr. App.) 228 S. W. 208.

**5. Presumption as to impanelling and swearing of jury.**—Where the file mark and seal were left off the special venire list, and with the court's permission the omission was supplied, it will be assumed, on appeal, in the absence of contrary evidence, that the amendment was properly permitted. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

**9. Reformation and correction of judgment.**—Under this article, a judgment declaring the defendant guilty of both burglary and theft, where the evidence sustains the charge of burglary but not that of theft, will be reformed on appeal so as to make it a conviction for burglary alone. *Swartz v. State* (App.) 18 S. W. 415.

Judgment committing male delinquent under 17 to state industrial school for boys for 5 years, not conforming to verdict committing him to juvenile training school for 5 years, will be reformed on appeal. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

Where the trial court on conviction for murder failed to apply the Indeterminate Sentence Law (art. 865a), the judgment will be reformed so that it will provide for confinement in the state penitentiary within the period fixed by law as the minimum and maximum penalty for the offense. *Wright v. State*, 84 Cr. R. 352, 207 S. W. 99.

**10. Review of discretionary action.**—See *Lewis v. State*, 82 Cr. R. 285, 199 S. W. 1091; *Ballew v. State*, 82 Cr. R. 398, 199 S. W. 1109; *Patterson v. State*, 85 Cr. R. 643, 215 S. W. 308; *Barnard v. State*, 87 Cr. R. 365, 221 S. W. 293; *Gordon v. State*, 88 Cr. R. 17, 224 S. W. 894; notes to art. 837.

Generally speaking, the decision of the trial judge as to the qualification of an expert to give testimony is not reviewable. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

While leading questions are not generally permissible, ordinarily determination of their admissibility is within the discretion of the trial judge, reviewable only for abuse. *Dodd v. State*, 83 Cr. R. 160, 201 S. W. 1014.

When an application for continuance in a criminal case is overruled, the appellate court, in passing upon an alleged abuse of discretion, will look to the evidence adduced at the trial. *Keel v. State*, 84 Cr. R. 43, 204 S. W. 863.

In a prosecution for aggravated assault, under Pen. Code, art. 1024, the extent of the punishment where guilt is established rests in the discretion of the jury, unless the jury is waived, as it may be in misdemeanor cases, in which case it is in the discretion of the trial judge, and the appellate court will not review the exercise of such discretion. *Wagner v. State*, 87 Cr. R. 47, 219 S. W. 471.

**11. Law of the case.**—In a prosecution for incest, it was error to admit in evidence a letter written by prosecutrix to defendant, where such letter had been decided on a former appeal to be inadmissible. *Hollingsworth v. State*, 85 Cr. R. 248, 211 S. W. 454.

A ruling on former appeal that certain evidence was properly admitted, which was not challenged by motion for a rehearing, became the law of the case, and, unless it was clearly wrong and harmful, could not be reviewed on the second appeal. *English v. State*, 87 Cr. R. 507, 224 S. W. 511.

**14. Invited error.**—As to instructions, see art. 743, note 8.

In a robbery prosecution, where the state merely offered proof of the finding of a stolen watch in defendant's house, and defendant, to give support to his objection thereto, introduced evidence that the officers learned of the whereabouts of the watch from a person who in turn got the information from an accomplice, defendant cannot seek a reversal because of the admission of the latter evidence. *Fitzgerald v. State*, 87 Cr. R. 34, 219 S. W. 199.

That appellant invited error in requesting the court to limit the testimony of certain state witnesses did not condone error of court in limiting the testimony of another witness over the express specific objection of the appellant. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In prosecution for theft of automobile, where defendant asked a witness on cross-examination whether he swore defendant stole the car, he thereby invited the error in the witness' answer in the negative, but that he believed defendant stole it. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240.

**15. Harmless error.**—If witness was incompetent as having been in penitentiary, failure of defendant's bill of exceptions to show witness gave material testimony against him renders it impossible to determine supposed error was harmful. *Marshall v. State*, 82 Cr. R. 623, 200 S. W. 836.

Where an alleged accomplice made written statements before trial exculpating accused, and consented to give testimony inculcating him only on the day of trial, it was

harmless error not to allow accused to inspect the previous written statements, where he had the benefit of them on cross-examination for the purpose of affecting the credibility of the testimony; the bill not disclosing that the statements were desired for any other purpose. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

An accused cannot complain that trial court instructed entire panel of jury, upon general phases of procedure, prior to calling any cause for trial, where nothing was said calculated to prejudice his rights. *Hammett v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

Where defendant in a homicide case is regularly arraigned in the district court of the proper county, failure to arraign him in a county where venue was first made is an irregularity which does not require reversal. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

In capital cases, the court will assume more latitude in dealing with technicalities and distinctions than in ordinary felony cases, and, when in doubt as to whether the trial was affected by prejudice and feeling, such doubt will be resolved in favor of another trial under different circumstances. *Mickle v. State*, 85 Cr. R. 560, 213 S. W. 665.

In a prosecution for murder, failure of the trial court to require the district attorney to make an opening statement as directed by art. 717, held harmless, no injury being disclosed by the record. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

Rulings on questions relative to competency of defendant's witness because of conviction of felony are unavailing, in view of his having been allowed to testify. *Mayer v. State*, 87 Cr. R. 512, 222 S. W. 571.

When the evidence in a homicide case is fairly well balanced, errors which may not have been otherwise of a serious import become of a grave nature, in view of the presumption of innocence and the legal doubt of guilt. *Brookreson v. State* (Cr. App.) 225 S. W. 375.

Error in admitting testimony of a boy who was incompetent to testify requires reversal, where his testimony was essential to make out the state's case. *Anderson v. State* (Cr. App.) 226 S. W. 414.

Under art. 566, requiring submission to the jury after plea of guilty to determine the amount of the punishment for a felony where there is discretion as to the punishment, the assessment of the lowest punishment by the jury precludes questioning the sufficiency of the evidence, at least where there is legal evidence to support the judgment. *Gumpert v. State* (Cr. App.) 228 S. W. 237, 238.

In a prosecution for embezzlement, facts held insufficient to show that the refusal of a request that the state make an opening statement as to the nature of the accusation and the facts expected to be proved, as directed by art. 717, subd. 3, was injurious to defendant. *Wray v. State* (Cr. App.) 232 S. W. 808.

18. — **Denial of continuance.**—Complaint cannot be made of the overruling of a motion for continuance on the ground of absence of a witness, where the witness appeared and testified. *Davidson v. State*, 86 Cr. R. 243, 216 S. W. 624; *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

Where defendant in a manslaughter case applied for a continuance and thereafter the venue was changed, the court in granting the change stating that the order for continuance was vacated, any irregularity in the court's failure to make a formal and separate order setting aside the order of continuance was harmless error. *English v. State*, 85 Cr. R. 450, 213 S. W. 632.

Error in overruling an application for continuance was harmless, where matters which would be testified to by absent witness were placed before the jury by other witnesses. *Charles v. State*, 87 Cr. R. 233, 222 S. W. 255.

20. — **Remarks and other acts of judge.**—Court's statement, after a witness had testified to accused's statement that he would have excluded it, but that the question was already answered, was not reversible error, under art. 787, prohibiting the trial judge commenting on the weight of the evidence, where no prejudice is shown. *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595.

In view of Rev. St. art. 5722, providing that entry by county judge of fact of publication of result of local option election shall be sufficient prima facie evidence of such publication, a remark of judge that it is conclusive proof is harmless, where there is no contest about publication. *Smith v. State*, 81 Cr. R. 446, 196 S. W. 519.

Action of court in fining defendant's attorney \$25 for repeating a question the fourth time after court had directed him not to so do, where the trial was not unreasonably delayed thereby, and where the particular evidence sought was fully elicited from the witness by the various answers, held not prejudicial to defendant. *Redwine v. State*, 87 Cr. R. 387, 221 S. W. 605.

In a prosecution for rape by force where the testimony of prosecutrix was uncorroborated and she had made no immediate complaint after the offense, comment by the court disparaging the testimony of defendant's witness to show that he had never been convicted of a felony cannot be held harmless, where the jury imposed a penalty of five years' imprisonment instead of the suspended sentence which accused requested. *Rogers v. State* (Cr. App.) 225 S. W. 57.

Remarks of the judge before the trial of one accused of robbery that jury should pay close attention to the testimony, and thereby avoid controversy among themselves and reach a verdict more speedily and satisfactorily, were not reversible error, where the court on objection instructed the jury not to consider his statement as evidence, or as tending to show guilt or innocence, and the remarks were not calculated to prejudice the rights of the accused. *Williams v. State* (Cr. App.) 231 S. W. 110.

21. — **Misconduct of persons not connected with trial.**—In a prosecution for murder of mother-in-law, a conviction will not be reversed by reason of the fact that defendant's wife, whom defendant would not permit to testify, sat in the courtroom, but away from defendant and his relatives, during the argument. *Smith v. State* (Cr. App.) 232 S. W. 497.

22. — **Rulings as to jurors.**—If challenge for cause is well taken, and defendant, having exhausted peremptory challenges, is forced to take objectionable juror, he is entitled to reversal. *Fernandez v. State*, 82 Cr. R. 129, 198 S. W. 301; *Collins v. State*, 84 Cr. R. 228, 206 S. W. 688.

It appearing that the jurors summoned responded, and that, after eliminating those properly excused for good cause, there remained about 100 veniremen, and that in selecting the jury the appellant did not exhaust his peremptory challenges, and no objectionable juror having been forced upon him, there was no prejudicial error in overruling the motion to quash the venire. *Jones v. State*, 85 Cr. R. 538, 214 S. W. 322.

Where venireman was excused upon peremptory challenge, and the court offered to restore the challenge to accused, no error appeared, even though the juror was subject to challenge for cause. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

Where, although the environment of a juror was such as to have given him opportunity to have formed opinion touching the case, nothing was disclosed which would have made him subject to challenge for cause, and he was excused on peremptory challenge and no objectionable juror was forced on accused, and he failed to exhaust his peremptory challenges, no error was shown. *Id.*

Where four names on a copy of special venire served on defendant were misspelled or a wrong initial given, and such jurors were excused without the objection of defendant on trial for murder and without use of his challenges which were not exhausted, and he asked no attachment for them, such errors in names were immaterial. (*Per Prendergast, J.*) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

Error of court in failing to sustain challenge for cause does not require reversal, where the juror was excused on peremptory challenge of accused, and the court allowed an additional peremptory challenge. *Whittington v. State*, 86 Cr. R. 1, 215 S. W. 456.

Judgment will not be reversed for failure of court to require sheriff to amend return, so as to show efforts made to summon unsummoned juror, where it does not appear that accused suffered injury from failure of sheriff to amend return or from lack of diligence in executing writ. *Id.*

In a murder trial, error, if any, in overruling defendant's challenges to jurors, who stated that they had opinions regarding the case, held harmless, where defendant's peremptory challenges had not been exhausted. *Cotton v. State*, 86 Cr. R. 387, 217 S. W. 158.

Since an accused is entitled to that character of jury trial provided by law, it is reversible error to draw a jury in any other manner than that provided by law; the question of injury not entering into the case. *Johnson v. State*, 86 Cr. R. 566, 218 S. W. 496.

In a criminal prosecution where juror on his voir dire admitted that if selected he would enter the jury box with "a feeling against the defendant" and the challenge for cause was overruled and the juror excused on peremptory challenge, a bill of exceptions objecting thereto is not available when qualified by a statement that defendant failed to exhaust his challenges and no improper or prejudiced juror was forced on him. *Cook v. State* (Cr. App.) 228 S. W. 213.

As art. 691 gives the accused the right to 15 peremptory challenges in a capital case, the arbitrary denial of that right in a prosecution for rape which is punishable by death or imprisonment in the penitentiary is a denial of a fair trial, even though the prosecutor stated that he would not insist on the death penalty. *Kerley v. State* (Cr. App.) 230 S. W. 163.

In a homicide case, it was prejudicial error for the court of his own motion to stand aside a juror, where accused waived his ground of challenge. *McGowen v. State* (Cr. App.) 231 S. W. 763.

24. — **Refusal to place witnesses under rule.**—Court's action in permitting witnesses to remain in courtroom after the rule has been invoked, and permitting them, each in the presence of the other, to testify as to statement by defendant written by one and signed as witness by the other, was harmless, where defendant himself admitted having made the statement. *Clark v. State*, 85 Cr. R. 153, 210 S. W. 544.

25. — **Admission of evidence—Materiality and effect in general.**—Where defendant's theory was that he was insane at the time of the assault, but not at the time of the trial, he could not complain that a doctor, who testified on cross-examination that the eyes of defendant were red and glaring after the cutting, on further inquiry by the state testified that defendant's eyes did not look on the trial like they did the day of the crime; such testimony being favorable to the defendant. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

In prosecution of a father for refusal to support his minor children, testimony that he had paid his wife money for her support or that of children after complaint and information were filed would be in his favor, and would not tend to show any offense against him committed after prosecution was begun. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855.

Admission of hearsay, there being little without it, to establish the charge, was prejudicial error. *Woods v. State*, 81 Cr. R. 403, 195 S. W. 858.

Express records being admissible in prosecution for pursuing business of selling intoxicating liquors, it was not reversible error to permit witness to state that books showed entries in question. *Fisher v. State*, 81 Cr. R. 568, 197 S. W. 189.

Where witness fixed a date by reference to conversation with M., held, that there was no harmful error respecting his evidence that M. told him about defendant having a fight, or in permitting evidence of the date of M.'s service as a juror referred to in such conversation. *Hensley v. State*, 81 Cr. R. 620, 197 S. W. 869.

In a prosecution for embezzlement from fraternal order, admission of minutes of order showing accused's expulsion and offer of reward for his arrest held prejudicial error. *Green v. State*, 82 Cr. R. 420, 199 S. W. 622.

Assuming that undertaker was not qualified to state cause of deceased's death, admission of such evidence was not harmful, where the circumstances, as to the cause of the death of deceased, were conclusive. *Anselmo v. State*, 82 Cr. R. 595, 200 S. W. 523.

In prosecution for passing forged check, testimony by banker with whom check was deposited by defendant and who honored defendant's checks drawn on such deposit that he would not have given defendant the money was harmless, though erroneous as being in the nature of a conclusion. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

That defendant's witness, after testifying to his familiarity with signature of prosecuting witness, and that signature in question was that of prosecuting witness, testified on cross-examination that it appeared as if it was imitation of the genuine signature, was not error. *Id.*

Where the record plainly showed that deceased was interested in, and lived at, a house of ill fame, it was not prejudicial to refuse evidence that he received part of the money earned by the women of the house. *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84.

In prosecution for assault to murder, improper admission of former testimony of absent witness and improper admission of bloody coat of assaulted person's brother, in connection with record and verdict were error requiring reversal. *White v. State*, 83 Cr. R. 252, 202 S. W. 737.

In prosecution for theft, testimony of accomplice that he first met defendant in jail, that he himself was in jail, and that defendant was there to see about making bond for him, not himself in jail, was not error justifying reversal. *Smith v. State*, 83 Cr. R. 485, 203 S. W. 771.

In prosecution for murder, witness' statement that deceased was "all bunged up with rheumatism" was not one requiring reversal because the witness was not a medical expert. *Brown v. State*, 83 Cr. R. 451, 203 S. W. 898.

While evidence of sales of intoxicants subsequent to date alleged in indictment was inadmissible, where the same witnesses testified to numerous sales prior to such date its admission was without prejudice to defendant. (Per Gaines, Special Judge.) *Alexander v. State*, 84 Cr. R. 75, 204 S. W. 644.

In prosecution for rape upon girl under 15 where intercourse was clearly proven, and there was no issue as to her previous character or age, the admission of irrelevant evidence as to defendant's disgusting familiarity, in view of verdict awarding defendant 35 years, the minimum being 5, was reversible error. *Lloyd v. State*, 84 Cr. R. 112, 205 S. W. 661.

In a prosecution for keeping disorderly house, error in admitting testimony of police officers as to reputation of house when they had no adequate knowledge thereof is prejudicial, where proof of offense was not strong and defendant's testimony, if believed, explained all the circumstances against him. *Schwimmer v. State*, 84 Cr. R. 227, 206 S. W. 521.

In a prosecution for theft of an automobile, erroneous admission of a book kept by seller of tires, containing a record of a sale to the owner of a tire, the number of which corresponded to that of a tire of the same make found in defendant's possession, held prejudicial, considering its materiality and other evidence in the case. *Moore v. State*, 84 Cr. R. 527, 208 S. W. 918.

Admitting in evidence a slip of paper from data found upon cards originally attached to automobile tires which defendant had received in exchange for casings, the fruits of the burglary, without laying a proper predicate, held error of such importance as to require reversal. *Williams v. State*, 84 Cr. R. 524, 208 S. W. 924.

In a prosecution for desertion and failure to support a wife and child, evidence that defendant's wife married him when he was drunk and that she drank whisky tended to support the defense, and, if immaterial or incompetent, was harmless. *Matthews v. State*, 84 Cr. R. 622, 209 S. W. 660.

In a prosecution for unlawfully selling intoxicating liquor, the improper admission of testimony that men active in the prosecution, were persons of high character and prominent in the community, held prejudicial error. *Johnson v. State*, 85 Cr. R. 479, 213 S. W. 667.

In a murder trial, witnesses' testimony that at a point near where it is claimed deceased met defendant on the night of the alleged murder, and some two weeks subsequent to deceased's disappearance, they found tracks made by a woman's shoe similar to deceased's shoe, without stating such tracks were accompanied by a man's tracks, held impossible of injury to defendant, if wrongly admitted. *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

In a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that a prostitute occupied a room in the hotel was admissible to show the character of the place, and the fact that her conversation with a man in the lobby of accused's hotel relative to her occupying a room was or was not heard by accused was immaterial, where she in fact did occupy a room pointed out to her. *Dollar v. State*, 86 Cr. R. 333, 216 S. W. 1087.

Where evidence of an illegal character may have entered into the verdict, it will be error if it led to a conviction, when without the error conviction may not have been obtained, or if it led to a higher punishment than may have been given, but for the error. *Hurst v. State*, 86 Cr. R. 375, 217 S. W. 156.

In prosecution for murder of son-in-law, evidence that deceased and his wife had moved into same house as defendant because of the pregnancy of wife held prejudicial error, where defendant received three years in excess of the minimum punishment. *Id.*

In a prosecution for murder, resulting in conviction of assault on murder, the admission of the dying declaration of deceased was not reversible error on ground that such declarations are admissible only in homicide cases. *Gatlin v. State*, 86 Cr. R. 339, 217 S. W. 698.

Evidence that the brother of two women who were with accused at the time of the shooting intended to go after his sisters was of no consequence, and its admission was not prejudicial error. *Cundiff v. State*, 86 Cr. R. 476, 218 S. W. 771.

The admission in evidence of the statement of a witness to support him without sufficient predicate was harmless to defendant, where it related only to an uncontroverted phase of the case, namely, whether the stolen property charged to have been received by defendant was in his possession. *Grant v. State*, 87 Cr. R. 19, 218 S. W. 1062.



In a prosecution for murder, there was no reversible error in permitting the state to ask a witness if he did anything with reference to deceased's wound, and to permit the witness to answer that he never bothered with the wound at all, there appearing no intimation that the fact that the witness did nothing for the wounded man was in any way incited or caused by any action of accused. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

Where defendant introduced testimony to establish deceased's reputation as a violent and dangerous man and justified the homicide by claiming that the conduct of deceased created a reasonable apprehension of death, the admission of evidence that deceased was about 61 years old was not error, and, if error, was harmless where defendant knew deceased's age. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

In a homicide case, the admission of a declaration of one of accused's witnesses that deceased went to the home of accused for a certain purpose was harmless, if erroneous, where deceased's purpose in going to the home of accused was an established and undisputed fact. *Allen v. State*, 88 Cr. R. 32, 224 S. W. 891.

In a criminal prosecution the burden is on the defendant appealing to show that a ruling admitting evidence was erroneous and harmful. *Mucker v. State* (Cr. App.) 229 S. W. 328.

In a homicide case, where plea was self-defense, proof by son of deceased that his father had purchased the shotgun which he was using at the time of the homicide for another son held not of such importance as to require a reversal. *Medford v. State* (Cr. App.) 229 S. W. 504.

Where defendant's son, who did the shooting, twice asked a negro whether he saw deceased's pistol, whereupon the negro answered "Yes," and was informed that he must remember the same, if these statements of the son were inadmissible as *res gestæ*, its admission was error favorable to accused. *Henderson v. State* (Cr. App.) 229 S. W. 535.

In a prosecution for theft of an automobile parked on a certain street, testimony from the owner that it was his custom to park his car at the place from which it was stolen was harmless to defendant, even if incompetent. *Smith v. State* (Cr. App.) 230 S. W. 160.

In a prosecution for having in possession intoxicating liquors not for medical, etc., purposes, in violation of the Dean Act, where state's counsel exhibited to a witness two bottles, a funnel, and a glass jug, and asked him what was the size of the bottle at the mouth, and the witness answered, "Just a little bit larger than the little end of the funnel," such answer was not prejudicial, as conveying the impression that defendant was selling the liquor found in his possession; it being necessary that the possession of the accused be for some purpose other than that excepted by statute. *Rainey v. State* (Cr. App.) 231 S. W. 118.

In a prosecution for receiving goods stolen from a railroad company, the admission in evidence of a carbon copy of an expense bill relating to the property, if erroneous, was harmless, where it was undisputed in the record that the property was stolen from the railway freight warehouse while in the custody of the railroad agent. *Kluting v. State* (Cr. App.) 22 S. W. 305.

In a homicide case it was harmless, if error, to open a parcel containing the apron worn by deceased at the time of the killing for the purpose of identification by witnesses testifying to powder burns, where the court did not permit the apron to be displayed so that it could have been seen by the jury, and counsel for neither side requested that it be so displayed. *Smith v. State* (Cr. App.) 232 S. W. 497.

Where it was undisputed deceased made a threatening remark just before the killing, but the issue was closely drawn as to whether the remark related to defendant or to a dog which had been worrying hogs, and that was the main issue, a conclusion by deceased's wife that the remark referred to the dog was prejudicial. *Jones v. State* (Cr. App.) 232 S. W. 847.

While not every instance of admission of improper testimony requires a reversal, it is the duty of the court to reverse, where an issue is sharply drawn, and the incompetent evidence is upon that issue, and calculated to affect the minds of the jury adversely to accused. *Id.*

**27. — Error in admitting evidence cured by proper admission of other evidence of same fact.**—Erroneous admission of testimony is not cause for reversal if the same fact is proven by other testimony not objected to. *Utsler v. State*, 81 Cr. R. 501, 195 S. W. 855; *Smith v. State*, 81 Cr. R. 368, 195 S. W. 595; *Weige v. State*, 81 Cr. R. 476, 196 S. W. 524; *Barrett v. State*, 81 Cr. R. 496, 196 S. W. 824; *Zarafonets v. State*, 82 Cr. R. 120, 198 S. W. 938; *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222; *Davis v. State*, 83 Cr. R. 539, 204 S. W. 652; *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999; *Charles v. State*, 85 Cr. R. 534, 213 S. W. 266; *Curd v. State*, 86 Cr. R. 552, 217 S. W. 1043; *Burgess v. State* (Cr. App.) 225 S. W. 182; *Pyor v. State* (Cr. App.) 225 S. W. 374.

Where evidence on redirect is not materially different from that adduced by defendant on cross-examination, defendant cannot complain. *Pickereil v. State*, 82 Cr. R. 68, 198 S. W. 303.

In prosecution for murder, where defendant admitted that he pawned the watch introduced in evidence as belonging to deceased, testimony of witness that he was in jewelry business, employed by pawnbrokerage company; that he had seen watch introduced as deceased's and pawn ticket therefor; that ticket was issued by his firm, etc.—held to show no error. *Vestal v. State*, 83 Cr. R. 184, 202 S. W. 94.

Where several witnesses without defendant's objection spoke of deceased as a boy, and defendant proved by a witness that deceased was "a very heavy kind of a man," there was no reversible error in admitting evidence that deceased was 19 or 21 years old. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

Where a judgment was introduced in evidence showing that jury was legally organized, permitting district clerk to orally testify that such jury was organized was not reversible error. *Roberts v. State*, 83 Cr. R. 511, 204 S. W. 866.

Admission of testimony that prosecutrix exhibited to members of the grand jury

garments worn by her at time of alleged assault to rape was not error, such testimony, in substance, being in the record from other sources. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

Admission of hearsay testimony as to a statement by accused, was harmless, where it coincided with the testimony of the accused upon the same subject. *Funk v. State*, 84 Cr. R. 402, 208 S. W. 509.

In a prosecution for murder, resulting from a blow the admission of evidence that an eyewitness was asked if he knew who struck the blow, and stated he did, if hearsay, was not reversible error, where the same evidence came without objection from other sources, and the appellant in developing the case made it pertinent as bearing upon the credibility of witness, a reversal not being authorized by the admission of competent and relevant evidence coming out of its order. *Gilbert v. State*, 85 Cr. R. 597, 215 S. W. 106.

In a prosecution for unlawfully carrying a pistol, the erroneous admission of a hearsay statement made by the other participant in fight with defendant's sister who after being vanquished suggested a detour because defendant had a pistol, was harmless; there being abundant other testimony that defendant exhibited a pistol during the fight. *Williams v. State*, 86 Cr. R. 626, 219 S. W. 829.

In a prosecution for burglary, where certain shoes were fully identified as being those of an owner of the burglarized house taken at time of burglary, evidence for state that, when shoes were found in absence of defendant, they were identified as property of owner and as taken from the house, was not reversible error, though had the identification of the shoes been only that by officers, excluding identification on trial, it would have been reversible error. *Cummings v. State*, 87 Cr. R. 154, 219 S. W. 1104.

If testimony as to automobile numbers of a certain make as contained in a book was error, in a prosecution for theft of an automobile, it was harmless, in view of testimony of witnesses of their own knowledge to the facts sought to be established by the book. *Berry v. State*, 87 Cr. R. 559, 223 S. W. 212.

In a prosecution for manufacturing spirituous liquor the admission of testimony as to the analysis by a chemist of the contents of bottles of liquor, as against objection that it had not been proved that the analyzed liquor was in the same condition as when found in defendant's house, if error, was harmless, where it was proved that liquor admitted by defendant to have been found in his house contained more than 1 per cent. of alcohol. *Burciago v. State* (Cr. App.) 228 S. W. 562.

On trial for swindling by means of false bill of lading, testimony of a freight conductor, in connection with his statement that he did not pick up the car because it was empty, that he had orders from the agent issuing the bill of lading to pick up the car, will not work a reversal, the same fact having been proved by another witness. *Taylor v. State* (Cr. App.) 232 S. W. 525.

**28. — Error in admitting evidence of facts admitted by defendant.**—Court's action in permitting an interpreter to testify as to a confession of accused, although he had been in courtroom and heard testimony of other witnesses, was not reversible error, where his testimony and that of other witnesses was not as to same facts, and where the confession testified to was proved by other witnesses and admitted by accused. *Trevino v. State*, 83 Cr. R. 562, 204 S. W. 996.

In prosecution for keeping disorderly house, statement by witness for state that her objection to defendant's child playing with her child was due to her knowledge of defendant's bad reputation for chastity was harmless, where defendant had testified that she had been engaged in running an assignation house at several places and for a number of years. *Morse v. State*, 85 Cr. R. 33, 210 S. W. 965.

Defendant cannot complain of admission of testimony as to a certain fact where he had already himself testified as to such fact. *Smith v. State* (Cr. App.) 232 S. W. 497.

In a prosecution for aggravated assault, asking the defendant whether or not he had been indicted for incest was permissible as affecting his credibility, and proof of the contents of the indictment and the name of the party with whom the incest occurred was not injurious to the defendant, who had admitted that he had been indicted for incest with such party. *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

In a prosecution for the theft of a hog, which defendant had placed in his pen at the same time he placed therein another hog belonging to J., where the state's witness stated he had a conversation in which defendant told him that J. got the other pig, such testimony could not be more than harmless error, in view of the fact that defendant testified that J. did get the other pig. *Stone v. State* (Cr. App.) 232 S. W. 818.

**29/2. — Cure of error by instructions in general.**—Any error in admitting defendant's written confession was cured by charge, more favorable than law accorded defendant, that no act of his or statement made by him or confession of his was sufficient in law to warrant his conviction, etc., unless corroborated by other evidence. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

**30. — Error cured by withdrawal of evidence.**—The court cannot limit the effect of erroneous testimony by a charge. *Reynolds v. State*, 82 Cr. R. 443, 199 S. W. 636.

Defendant's bill of exceptions to testimony of witness that he went with defendant under arrest to scene of killing, etc., elicited by question which state finally withdrew after objection, did not present reversible error. *Coates v. State*, 83 Cr. R. 309, 203 S. W. 904.

Where immaterial matter was admitted in evidence, such error can be cured by a special charge of the court withdrawing such evidence from the jury. *Trevino v. State*, 83 Cr. R. 562, 204 S. W. 996.

Assuming that evidence that prosecutrix at time of alleged assault to rape had been pregnant for four and one-half months was inadmissible, it was not of such harmful character that error in its admission was not cured by its withdrawal from the jury by written instruction given shortly after its admission, one of the theories of defendant being consent. *Morris v. State*, 84 Cr. R. 100, 206 S. W. 82.

In prosecution for theft of cattle from father and son, where son testified he had

conversation with father, but defendant objected to showing conversation was about cattle, which was not elicited by state, and proceeded himself to show it, there was no reversible error, court having instructed not to consider evidence defendant developed. *Gomez v. State*, 84 Cr. R. 92, 206 S. W. 86.

In homicide prosecution, evidence of statement by defendant that he had intended to kill another person, made during a conversation in which he had threatened to kill the deceased, held harmless, where court withdrew from the consideration of jury the statement in so far as it related to the defendant's intention to kill the other person. *Redwine v. State*, 87 Cr. R. 387, 221 S. W. 605.

Error in admitting improper evidence may be generally corrected by a prompt and definite withdrawal, and an instruction to disregard it; but withdrawal will not cure error in the admission of material testimony, prejudicial to the accused, and any doubt as to evidence being prejudicial should be resolved in favor of accused. *Deckerd v. State* (Cr. App.) 225 S. W. 166.

In a prosecution for robbery, where evidence was admitted of other criminal acts and of obtaining money by false pretenses and fraudulent devices, the trial court on defendant's request should have charged the jury not to consider any testimony of other offenses, etc., and a charge attempting to limit such evidence to show defendant's system and methods, if any, was erroneous, as illegal testimony cannot be limited, and the prejudice thus diverted. *Cano v. State* (Cr. App.) 225 S. W. 1097.

Where a question asked defendant as to whether he had been in the penitentiary was not objected to on the ground that it was too remote, and, after the question was answered the jury was withdrawn, and it was ascertained that the imprisonment was in 1901, whereupon the court recalled the jury and instructed them not to consider the question and answer, there was no error. *Armstrong v. State* (Cr. App.) 227 S. W. 485.

In a prosecution for murder, where, after stating deceased seemed rational when a question was propounded to him, his wife was permitted to state, "I asked him if he was called on was he ready to go, and he said he was," the admission of such evidence was prejudicial to defendant, where it was not withdrawn at the request of state's counsel until after the state had rested. *Wade v. State* (Cr. App.) 227 S. W. 489.

31. — **Error in admitting evidence cured by verdict.**—Where lowest punishment was assessed against defendant, convicted of simple assault, if testimony was not res gestæ, and erroneously admitted, its admission held not such error as to justify reversal. *McHam v. State*, 81 Cr. R. 623, 197 S. W. 873.

Defendant cannot complain of owner of buggy taken being allowed to testify to its value, where punishment inflicted was that provided by Pen. Code, art. 1259a, for a minimum value. *Fitzgerald v. State*, 82 Cr. R. 130, 198 S. W. 315.

In prosecution for murder, where jury assessed lowest punishment, testimony with reference to accused's knowledge of his wife's whereabouts held, conceding that question was irrelevant and immaterial, not such vital error as to affect merits of case or accused injuriously. *McClendon v. State*, 84 Cr. R. 259, 206 S. W. 686.

In a prosecution for theft from a millinery store burglarized by defendant, testimony of the owner of the store that she controlled it, but her widowed mother and her sisters worked there and were entitled to part profits, held not reversible error; defendant having received the lowers punishment. *Brown v. State*, 86 Cr. R. 3, 215 S. W. 323.

In homicide prosecution, admission of testimony that defendant's son kissed defendant on going to the scene of the homicide held harmless, where defendant was convicted of manslaughter. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

In prosecution of posse member for murder of a negro whose wife other members of posse were assaulting in an endeavor to extort from her the whereabouts of a criminal, proof of the acts of defendant's companions while assaulting the wife of deceased held harmless to defendant, where the verdict of guilty of manslaughter was the most favorable authorized by charge or facts. *Brown v. State*, 87 Cr. R. 261, 222 S. W. 252.

Where the jury convicted only of manslaughter, the admission of evidence which tended to show that defendant was not affected with passion as claimed was immaterial. *Eason v. State* (Cr. App.) 232 S. W. 300.

Where jury convicted of manslaughter only, errors in matters affecting only that issue are not reversible. *Id.*

32. — **Cure of error in admitting opinion or expert evidence.**—In prosecution for keeping a disorderly house, testimony that one of the girls residing with defendant was a prostitute, if objectionable as a conclusion, was not reversible error, where witness was a policewoman, and testified that she had found the girl in bed with a man, and where defendant's testimony showed that the girl engaged in criminal intercourse with men at her house. *Morse v. State*, 85 Cr. R. 83, 210 S. W. 965.

Where a physician based his opinion that deceased died from strangulation or chloroform on what he had heard that another doctor had said about the condition of deceased's brain, and the latter doctor denied such statement, and the court both verbally at the time and later in writing instructed the jury to disregard such evidence, the error was cured. (Per *Prendergast, J.*) *Porter v. State*, 86 Cr. R. 23, 215 S. W. 201.

In prosecution for theft, the admission of testimony as to the value of the property when it was new held harmless, where witness also testified as to its value at the time it was taken, and where under such testimony the aggregate value of all the property taken at the time it was taken, was more than \$50. *Narango v. State*, 87 Cr. R. 493, 222 S. W. 564.

34. — **Prejudicial effect of evidence of other offenses.**—In theft prosecution, admitting testimony regarding previous convictions of accused constitutes reversible error, where accused did not testify. *Taylor v. State*, 82 Cr. R. 210, 199 S. W. 289.

Where, on prosecution for robbery, there was some evidence which had effect or might have had effect of leading jury to believe the defendant was under indictment for murder, and this affected the verdict, conviction will be reversed where the evidence is very weak. *Easley v. State*, 82 Cr. R. 238, 199 S. W. 476.

In a prosecution for violating the local option law, evidence that defendant had been

convicted before under the same statute in another case held prejudicial in view of art. 843, and of testimony by the jury that they had taken it into consideration. *Mann v. State*, 84 Cr. R. 109, 204 S. W. 434.

In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution, permitting D. to testify that in May of the previous year she had stayed at another hotel, and that defendant and her husband were in charge there, if error, held not harmful. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

In a prosecution for automobile theft, where police officers who had arrested defendant for theft of tool joints testified, court's failure to limit such testimony with reference to the extraneous crime was not reversible error, where defendant pleaded guilty and where the facts showed beyond question that defendant stole the automobile. *Parham v. State*, 87 Cr. R. 454, 222 S. W. 561.

In a prosecution for theft of an automobile, where an accomplice testified that he and defendant had stolen eleven other automobiles under the same conspiracy, the mere withdrawal of such testimony by the court did not cure the error, especially in view of the verdict inflicting the heaviest punishment permitted by law. *Hunt v. State* (Cr. App.) 229 S. W. 869.

Error in permitting evidence of the fact that accused was charged with the theft of other automobiles was not cured by the withdrawal of such proof in a prosecution for theft of an automobile. *Hunt v. State* (Cr. App.) 230 S. W. 406.

In a prosecution for burglary, admission of evidence as to defendant's guilt of other offenses held prejudicial to defendant, though the court, on discovery of his mistake in admitting such evidence, instructed the jury to disregard it. *Payne v. State* (Cr. App.) 232 S. W. 802.

35. — **Prejudice from admission of evidence as to flight.**—In a criminal prosecution, the state's evidence that defendant under bail to await the action of the grand jury did not appear for the return of an indictment, but went to another state, if erroneously admitted, was harmless, where defendant's witness testified to the same facts without objection. *Cook v. State* (Cr. App.) 228 S. W. 213.

36. — **Prejudice from erroneous admission of evidence as to acts and declarations of accused.**—In a prosecution for maiming, testimony of a witness that he saw defendant separate two men who were fighting a short time before his difficulty with prosecuting witness was immaterial, but not prejudicial to defendant. *Keith v. State* (Cr. App.) 232 S. W. 321.

In prosecution for homicide, where there was testimony that witness had carried defendant and another to a point near the scene of the homicide, on the night thereof, a short time before the killing, the admission of testimony that defendant, while in jail and without having been warned, talked to such other person over the telephone, held reversible error. *Brent v. State* (Cr. App.) 232 S. W. 845.

38. — **Prejudicial effect of error in exclusion of evidence.**—Materiality and effect of evidence.—Where prosecuting witness, whose testimony alone made state's case, testified that feeling between him and defendant was good, and that they had had no altercation since date of offense, it was reversible error to exclude testimony to contrary. *Baldwin v. State*, 82 Cr. R. 243, 199 S. W. 468.

Where defendant testified, and excluded witnesses would have testified that defendant was present where game was being played, exclusion of such witness' testimony held harmless, though they would have contradicted state's witnesses as to certain details of their testimony. *Renfro v. State*, 82 Cr. R. 343, 199 S. W. 1096.

Where state introduced witness who reproduced portion of testimony given by defendant in former prosecution growing out of same transaction, denying defendant right to show by same witness other facts testified to was reversible error. *Burnett v. State*, 83 Cr. R. 97, 201 S. W. 409.

In prosecution for passing forged instrument, where it was proven fact that signature of prosecuting witness was not alike to all documents bearing his admitted signature, accused cannot complain that he was not allowed to require prosecuting witness to point out particulars of dissimilarity between his signature on various papers and an affidavit. *Morgan v. State*, 82 Cr. R. 615, 201 S. W. 654.

Where it was undisputed that deceased was a quarrelsome and dangerous man, defendant was not harmed by exclusion of more evidence on such matter. *Houston v. State*, 83 Cr. R. 190, 202 S. W. 84.

In rape case, where the testimony unquestionably showed penetration to the extent required by law, exclusion of testimony of a physician that the hymen would have been ruptured if defendant had had intercourse with the complaining witness was harmless. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

Where witness gave no testimony as to the incidents of the homicide, but testified alone to facts which were established by other witnesses, excluding testimony tending to show her animus towards accused's witness will not justify reversal. *Wood v. State*, 84 Cr. R. 187, 206 S. W. 349.

In a prosecution of a town marshal for aggravated assault while making an arrest, there was no reversible error in rejecting evidence that the injured party had violated a traffic ordinance on a previous occasion; issue being whether a forcible resistance was being made. *Harper v. State*, 84 Cr. R. 345, 207 S. W. 96.

In prosecution for violating local option law, refusal to permit state's witness to answer question by defendant on cross-examination held not erroneous; witness, as shown by trial judge's qualification, testifying contrary to what defendant expected to prove by him. *Lopez v. State*, 84 Cr. R. 422, 208 S. W. 167.

In a homicide case, where defendant claimed that deceased had interfered to prevent a reconciliation between defendant and his wife, refusal to allow defendant to prove by a witness that in his observation of the relations between defendant and his wife they appeared pleasant was not reversible error, where it was undisputed that defendant did have a difficulty with his wife and had left her. *Roach v. State*, 84 Cr. R. 471, 208 S. W. 520.

Error in exclusion of evidence to show animus of a witness for the state cannot be held prejudicial, where ample evidence supports a conviction. *Batts v. State*, 87 Cr. R. 254, 220 S. W. 1094.

Defendant cannot complain that court refused to permit a witness to cut out paper with a stamp used for marking sheep's ears, where defendant's counsel in his argument to the jury was allowed to cut out paper with the stamp and the jury was allowed to take the stamp and cut paper with them in their retirement. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

The exclusion of evidence of defendant's intoxication, admissible under Pen. Code 1911, art. 41, in mitigation of punishment, was not harmless error. *Haag v. State*, 87 Cr. R. 604, 223 S. W. 472.

Where defense was insanity and it was testified that defendant's father's half-brother had been generally considered weak-minded, sustaining an objection to the question, whether a complaint was ever filed against him could not have injured accused, where the answer of the witness would have been, "Not that I know of." *Fruitt v. State* (Cr. App.) 225 S. W. 525.

Complaint cannot be made of refusal of the court to permit accused to prove an undisputed fact. *Gonzales v. State* (Cr. App.) 226 S. W. 405.

Where defendant accompanied a father, who was demanding an explanation concerning an insulting letter written to his daughter, and the circumstances were such that, if the alleged writer had been killed in an assault resulting, the issue of manslaughter would have been raised as to the father, held that it was harmful to exclude evidence as to the reason for the visit. *Barnett v. State* (Cr. App.) 230 S. W. 144.

In prosecution for forgery of a check, which defendant contended he received from the alleged maker, who denied executing it, the exclusion of expert evidence that the check was not written by defendant held prejudicial error. *Cone v. State* (Cr. App.) 232 S. W. 816.

39. — Error in exclusion of evidence cured by other evidence of same or other witness.—Accused could not complain of the exclusion of testimony of his own witness, where later such witness was fully examined with reference to the same facts. *Perez v. State*, 84 Cr. R. 184, 206 S. W. 192.

The exclusion of evidence was harmless, where the record shows the matter was elsewhere in substance admitted. *Bird v. State*, 84 Cr. R. 285, 206 S. W. 844.

A bill relating to the exclusion of testimony, which was subsequently admitted, disclosed no error. *Moore v. State*, 85 Cr. R. 403, 214 S. W. 344.

The objection that a witness was not permitted to answer a question, which was objected to as leading, is not well taken, where the answer sought was upon a matter that was fully detailed by the witness during the trial. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

In prosecution for theft of a hog, the sustaining of an objection to question asked purchaser from defendant as to whether he refused to surrender the hogs to claimant because of uncertainty of claimant's description cannot be considered as disclosing error where the purchaser elsewhere testified he did not delay the surrendering of the hogs because of any uncertainty or insufficiency of description. *Jackson v. State*, 86 Cr. R. 329, 216 S. W. 866.

On second trial of a homicide case, error in rejecting a contradictory statement of a deceased witness, whose former testimony was used, and which stated that no pistol was found on decedent, her husband, was harmless, in view of cumulative evidence, contradicting her, and failure of such contradictory evidence to justify defendant in striking deceased. *Mitchell v. State*, 87 Cr. R. 530, 222 S. W. 983.

Error in excluding defendant's testimony that he had weapons at his home, but did not take any when he went to where he met deceased, was harmless, where he later testified thereto, though on cross-examination. *Hollman v. State*, 87 Cr. R. 576, 223 S. W. 206.

Rejected testimony that defendant had no intention of having trouble when he went to the place of difficulty held sufficiently supplied by other evidence. *Id.*

Exclusion of testimony as to a fact proved by other testimony and not disputed could not have harmed accused. *Allen v. State*, 88 Cr. R. 32, 224 S. W. 891.

Where defendant admitted killing deceased with a shotgun exclusion of testimony as to a statement of defendant's mother that defendant had shotgun, if error, was harmless. *Perea v. State* (Cr. App.) 227 S. W. 305.

In a prosecution for robbery, error in the exclusion of evidence as to certain exculpatory statements made by defendant at the time of his arrest was of no weight where such evidence was fully placed before the jury by the arresting officer. *Patterson v. State* (Cr. App.) 231 S. W. 763.

It was not reversible error for the court to refuse to permit witness to answer questions where the witness subsequently testified fully about all the matters in question. *Smith v. State* (Cr. App.) 232 S. W. 497.

Action of court in not permitting witness to testify to a certain fact was not reversible error where many other witnesses testified to such fact. *Id.*

Error, if any, in sustaining an objection to a question, asked defendant, whether deceased had slandered defendant's wife, was not prejudicial, where the court qualified the bill by showing that later defendant was permitted to testify he had filed a complaint against deceased for slandering defendant's wife. *Jones v. State* (Cr. App.) 232 S. W. 847.

39½. — Error in exclusion of evidence cured by verdict.—The jury having found that the state of defendant's mind was such as to reduce his offense to manslaughter, exclusion of evidence of facts which might contribute to bring his mind to a state incapable of cool reflection was harmless. *Baker v. State*, 87 Cr. R. 305, 221 S. W. 607.

Refusal of court to permit evidence on the issue of suspended sentence could not have harmed an accused, where the verdict assessed imprisonment exceeding five years,

a penalty above the term that would permit the suspended sentence law to operate, under art. 865C. *Cundiff v. State* (Cr. App.) 226 S. W. 412.

39½. — **Prejudice from examination of witnesses in general.**—Action of prosecuting witness in exhibiting to his own witness on redirect examination a statement of her testimony on direct examination, for purpose of refreshing her memory, though she claimed that her memory of testimony formerly given was clear, held harmless. *James v. State*, 86 Cr. R. 598, 219 S. W. 202.

In prosecution for theft of automobile, where the trial court instructed not to consider a witness' volunteered statement that when he saw defendant in the car he thought he would stop him, as he was certain he was an automobile thief, such statement did not constitute reversible error. *Houser v. State*, 87 Cr. R. 296, 222 S. W. 240.

In prosecution for theft of automobile, unresponsive answer of witness to question as to how he came to recollect dates that it was because he knew defendant's lawyers would have an alibi framed up for him, so that he fixed for it, held harmless, in view of court's instruction not to consider it. *Id.*

In homicide prosecution, action of district attorney in asking witness if he could identify certain pistol was not reversible error, though it was not disputed that defendant did the shooting, where a pistol was not identified as the one with which defendant had shot deceased, and witness disclaimed any knowledge of the pistol or the fact that defendant had one. *Brown v. State*, 88 Cr. R. 55, 224 S. W. 1105.

40. — **Prejudice from asking of leading questions.**—Where the prosecutrix had testified fully as to all the essential elements of the offense of rape, and her testimony was corroborated by other eyewitnesses, permitting a leading question to be asked prosecutrix as to penetration was not prejudicial error. *Williams v. State* (Cr. App.) 225 S. W. 173.

In a prosecution for assault with a knife, where a witness had testified that accused threw his wife down, struck her with a knife, and that she got up and ran, and defendant again caught her and threw her down, accused cannot complain of leading questions to such witness, bringing out the same matter in substance. *Fruitt v. State* (Cr. App.) 225 S. W. 525.

41. — **Prejudice from improper cross and re-direct examination.**—See *Boone v. State*, 85 Cr. R. 661, 215 S. W. 310.

Where defendant had improper cross-examination of witness subsequently excluded on objection, with instruction not to consider it, was harmless error. *Beck v. State*, 82 Cr. R. 21, 198 S. W. 144.

Court's giving defendant right of cross-examination of witnesses as to reputation of defendant for veracity, to develop conclusions were not reached from general reputation, held too late to cure error. *Coleman v. State*, 82 Cr. R. 332, 199 S. W. 473.

In prosecution for assault to murder, resulting in conviction of aggravated assault, state's question to defendant as to whether he had been named as correspondent in divorce petition of assaulted person against wife held prejudicial. *Faubian v. State*, 83 Cr. R. 234, 203 S. W. 397.

In a prosecution for abortion, defendant was not prejudiced by cross-examination of his medical witnesses to effect that an abortion could be accomplished by other means than that charged in indictment, where no claim was made to jury or by prosecution that abortion was committed in any other way than that charged. *Hammitt v. State*, 84 Cr. R. 635, 209 S. W. 661, 4 A. L. R. 347.

In prosecution for offense of pandering, defined by Pen. Code, art. 506a, held, that cross-examination of defendant's husband, if not germane to direct examination, was harmless. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

Where defendant introduced the proceedings on a former trial and the motion for a new trial, the reference by counsel for the state in cross-examination to an affidavit used by defendant on the motion for a new trial, to which the court immediately sustained an objection and which it immediately withdrew from the jury, was no ground for reversal. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Where defendant gave in much detail his recollection of incidents occurring prior to a homicide, a question as to whether, on a second trial of the case, he did not ascribe his absence of recollection of the incidents of the first trial to the fact that his mental condition was impaired by syphilis and drink, held not an abuse of the right of cross-examination authorizing reversal, in view of his answer and the other features of the record. *Id.*

There was reversible error, where the state, in a homicide case, required defendant to state that his wife, in their marital relation at home, was continually nagging at him, and that she upbraided him for his real or supposed intimacy with other women, although the answers were given and the examination pursued against the court's ruling on defendant's objection. *Lovett v. State*, 87 Cr. R. 548, 223 S. W. 210.

In a prosecution for theft of sheep, where defendant's brother testified that he bought sheep marked as the state claimed were the alleged stolen sheep, which sheep he sold to defendant, and state on cross-examination asked him if he was present at the trial of his father upon a charge of receiving and concealing these alleged stolen sheep, and he was required to answer that he was present but did not testify, there was no error, where the court instructed the jury not to consider the testimony elicited by the state. *Wilson v. State*, 87 Cr. R. 538, 223 S. W. 217.

Examination of defendant, accused of murder, as to whether he had not killed another man, and on court sustaining objection thereto, and instructing jury not to consider the matter, as to whether he had not been indicted therefor, held not ground for reversal. *Haynes v. State*, 88 Cr. R. 42, 224 S. W. 1100.

In a prosecution for murder, cross-examination of defendant's witnesses as to whether they had not been indicted for perjury in the particular case, to which they answered in the affirmative, held error prejudicial to defendant, and not cured by withdrawal of the evidence. *James v. State* (Cr. App.) 228 S. W. 941.

In prosecution for swindling, action of prosecuting attorney in asking defendant if he

had not been confined in the reformatory as a delinquent child held harmless, where objection was sustained, defendant was given the lowest penalty, and it was not affirmatively shown that the prosecuting attorney knew that such evidence was not admissible. *Scott v. State* (Cr. App.) 223 S. W. 1099.

**42. — Error in question cured by answer.**—Error of prosecuting attorney in asking defendant if he did not know that he was lying was harmless, where defendant replied that he did not. *Redict v. State*, 83 Cr. R. 225, 202 S. W. 743.

In prosecution for rape, overruling an objection to a question on cross-examination as to whether defendant's wife had not slapped a couple of little girls because of his improper conduct toward them was harmless, where his answer was that he did not know of it. *Mirick v. State*, 83 Cr. R. 388, 204 S. W. 222.

In prosecution for murder, where accused answered question whether he had not stated that he did not want his wife as a witness "No," there was no injury to him from failure to sustain objection to question. *McClendon v. State*, 84 Cr. R. 259, 206 S. W. 686.

In prosecution for murder of son-in-law, examination of defendant's son as to whether he had not been present at time his father had kicked his mother was irrelevant, and prejudicial error, though son testified that he had not been present. *Hurst v. State*, 86 Cr. R. 375, 217 S. W. 156.

It was not prejudicial error to permit counsel to inquire of accused whether or not he made certain damaging statements, where the questions were answered in the negative. *Woods v. State*, 87 Cr. R. 354, 221 S. W. 276.

In a prosecution for assault upon wife, where a witness testified for defendant that he lived in the neighborhood, and that defendant was a law-abiding citizen, and his reputation was good, defendant could not have been injured by a negative answer to a question by the state as to whether he had ever heard that defendant had previously beaten his wife. *Pruitt v. State* (Cr. App.) 225 S. W. 525.

**43. — Error in question not answered.**—Erroneous cross-examination of accused's wife was harmless, where the judge, on his own motion, stopped the county attorney and did not permit the questions to be answered. *Ingram v. State*, 83 Cr. R. 215, 202 S. W. 741.

Although defendant had not put his character in issue except for truth and veracity, that state's attorney on cross-examination inquired of character witness as to defendant's reputation as a law-abiding citizen held not reversible error, the question not being answered. *Flewellen v. State*, 83 Cr. R. 568, 204 S. W. 657.

In prosecution for assault to murder, where prosecuting attorney improperly asked whether there were not a lot of people who wanted to mob defendant for what he had done, and whether or not practically every man in the town was outraged by what had happened, impropriety was cured by trial court's action in sustaining objection promptly, defendant not requesting instructions to disregard. *Simmons v. State*, 87 Cr. R. 270, 220 S. W. 554.

In prosecution for assault to murder, action of district attorney in repeating question seeking to elicit opinion of witness, the assaulted person, to which trial court finally sustained objections, and which was not answered, held harmless to defendant. *Id.*

In a prosecution for robbery with firearms, a conviction will not be set aside because accomplice was asked if it was not true that he and defendant had both been arrested and charged with robbery with firearms at a former time, where the court refused to permit an answer and instructed the jury not to consider such question. *Patterson v. State* (Cr. App.) 231 S. W. 763.

**44. — Prejudice from erroneous impeachment of witness.**—That state's attorney asked a witness if he did not wink at defendant while testifying at examining trial, held not to show reversible error. *Hamilton v. State*, 83 Cr. R. 90, 201 S. W. 1009.

In a prosecution for murder, where defendant's witness admitted he had been indicted for and acquitted of murder, and the state's counsel asked the ground of his defense, to which he replied "Self-defense," held not a material or pertinent question, but without injury to defendant; the witness' credibility only being involved. *Fowler v. State* (Cr. App.) 232 S. W. 515.

**45. — Prejudice from improper argument and other misconduct of prosecuting attorney.**—In prosecution for murder, held, that improper language of special prosecutor in argument was harmless. *Williams v. State*, 81 Cr. R. 416, 195 S. W. 860.

In homicide case, where defense was insanity, prosecuting attorney's argument, urging a conviction upon theory that accused's insanity could later be inquired into, held reversible error. *Weige v. State*, 81 Cr. R. 476, 196 S. W. 524.

In prosecution for incest held, that inadmissible and unproven evidence brought to jury's attention in argument of state's counsel by way of innuendo and apparently influencing their verdict of guilty was prejudicial. *Hollingsworth v. State*, 82 Cr. R. 337, 199 S. W. 626.

In prosecution for murder, argument of state's counsel, in response to argument of accused's counsel, appealing to jury as men created by God, as were other men named, whom accused was said to have killed, if error, was not prejudicial, where the conviction was for manslaughter. *Roberson v. State*, 83 Cr. R. 238, 203 S. W. 349.

District attorney's remark in argument disparaging alibi testimony held not reversible error, though defendant relied on alibi, which, as became apparent at hearing of motion for new trial, testimony of his witnesses could not establish. *Cooley v. State*, 83 Cr. R. 340, 203 S. W. 356.

It is not every improper remark that requires or justifies a reversal, but, when withdrawn, it is only those which are so obviously harmful that withdrawal by the court will not cure the injury produced by them that require a reversal. *Thomas v. State*, 83 Cr. R. 325, 204 S. W. 999.

Argument of state's counsel as to relation between defendant, a negro, and boys who testified for him, not outside of the record, held not reversible error, where minimum penalty was imposed. *Marshall v. State*, 85 Cr. R. 131, 210 S. W. 798.

Argument by the district attorney that defendant threatened the prosecuting witness with a pistol, having been withdrawn by the instructions of the court, cannot be deemed prejudicial, where the evidence was such as to at least raise an inference of the threat. *Adams v. State*, 86 Cr. R. 422, 216 S. W. 863.

In prosecution for pandering, defined by Pen. Code, art. 506a, remark by attorney for state in argument, "We want to get rid of such cattle as that," while improper, held not such as to authorize reversal, when the jury assessed the lowest penalty. *Dollar v. State*, 86 Cr. R. 398, 216 S. W. 1089.

Where a state's attorney's statement was tantamount to a statement that the fact sought by his question, which was objected to, was the truth, and that defendant's counsel knew it, and did not want the truth to come out, the question having assumed matters outside the record, his statement was improper and prejudicial, and the court will not speculate as to the amount of the injury. *Scitern v. State*, 87 Cr. R. 112, 219 S. W. 833.

On a trial for pursuing the business of selling intoxicating liquors in prohibition territory where detectives testified for the state, the argument of the county attorney that the state was justified in employing persons as witness to apprehend a defendant who had been so smooth as to violate the law and evade other means of apprehension was not injurious to defendant where the lowest punishment permissible was given. *Mann v. State*, 87 Cr. R. 142, 221 S. W. 296.

Improper argument of counsel for the state only requires a reversal where, in the judgment of the appellate court, the remarks complained of, in connection with the surrounding circumstances, probably resulted to the prejudice of accused. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

Statement of prosecuting attorney in argument that the hip-pocket defense was threadbare, and always interposed in homicide cases, held harmless, on the ground that the record presented neither self-defense nor manslaughter, and that the jury gave the minimum punishment for murder. *Gray v. State*, 88 Cr. R. 1, 224 S. W. 513.

Improper argument of prosecuting attorney, which the court told the jury to disregard, was harmless; there being sufficient evidence of guilt and nothing to the contrary. *Ealey v. State*, 87 Cr. R. 648, 224 S. W. 771.

Where improper argument may have brought about a conviction, or assisted in doing so, when without it there may have been an acquittal, and induced a punishment above the minimum, the judgment of conviction will be reversed. *Brookreson v. State* (Cr. App.) 225 S. W. 375.

Where defendant was convicted of murder and given 10 years' sentence, held that it was prejudicial error for the prosecuting attorney to tell the jury that if defendant was acquitted or awarded a suspended sentence it would be a stench in the nostrils of every citizen of the county. *Id.*

Prosecuting attorney's apostrophe to the various members of deceased's family who were present contributing to the sympathetic effect of his closing address, calculated to arouse the jury's sympathy, is improper in a murder trial, but where it contained no misstatement of any issue, and no objection was made thereto and no special charge on the subject requested, it does not constitute reversible error. *Lasater v. State* (Cr. App.) 227 S. W. 949.

In prosecution for statutory rape, where, when appellant asked the jurors on their voir dire if they had any prejudice against the crime of rape, the district attorney objected, saying he would not have a man on the jury who was not prejudiced against the crime of rape, but the trial court instructed the jury to disregard such statement, no injury resulted to accused, to whom the jury gave the lowest punishment allowed by law. *Young v. State* (Cr. App.) 230 S. W. 414.

The Court of Criminal Appeals will seldom disturb the conviction because of alleged improper arguments of prosecuting attorneys, trivial in their nature; but where the prosecutor departs from the domain of legitimate argument, and undertakes to supply testimony in argument to the jury, the judgment will be reversed. *Roach v. State* (Cr. App.) 232 S. W. 504.

Where the prosecuting attorney had unsuccessfully tried during examination of defendant to elicit the fact that he was living in a whorehouse, and defendant's counsel in argument referred to such unsuccessful attempt, the action of the prosecuting attorney during argument, stating as a fact that defendant did live in such a house and that he had no regular employment, and in referring to him as a "whorehouse gambler," held ground for reversal. *Id.*

47. — **Prejudice from misconduct of jurors.**—Conversation of juror with another person without court's permission, in violation of art. 748, will be presumed upon conviction to have been injurious to defendant, but such presumption can be overcome, burden being upon the state to satisfy court that no injury has resulted. *Mauney v. State*, 85 Cr. R. 184, 210 S. W. 959.

Where testimony other than that used during trial is received by the jury after it has retired to deliberate, in violation of art. 837, subd. 7, the accused, in order to obtain a new trial, is not required to show injury, but the state has the burden of showing that the fairness of the trial was not affected thereby. *Hallmark v. State* (Cr. App.) 230 S. W. 697.

That testimony other than that produced during trial is received by the jury after it has retired to deliberate is not ground for reversal, under art. 837, subd. 7, where the fairness of the trial could not have been affected thereby. *Id.*

In prosecution for burglary, in which defendant pleaded guilty and received the lowest punishment permitted by law for such offense and in which he sought suspension of sentence, evidence held to show that reference by juror during deliberation to defendant's connection with another theft did not affect the fairness of the trial. *Id.*

In a homicide case, where the jury found defendant guilty only of manslaughter, misconduct of a juror connected with that issue was harmless, the jury having found defendant guilty of the less offense, and hence is no ground for reversal. *Eason v. State* (Cr. App.) 232 S. W. 300.



In a prosecution for aggravated assault, where a juror stated that the defendant was guilty of incest and ought to be given 10 years, and was promptly reprimanded for the remark by the foreman, and upon the next ballot more of the jurors were in favor of an acquittal than before, held, that such remark was not shown to have prejudiced the defendant. *Rodriguez v. State* (Cr. App.) 232 S. W. 512.

**48. — Prejudice from error in verdict.**—If the jury errs in giving a verdict of guilty of a less degree of offense than defendant was really guilty of, defendant cannot complain. *Gallin v. State*, 86 Cr. R. 339, 217 S. W. 698.

If a verdict is within the law as stated in the charge, and gives no evidence of passion or prejudice against defendant, he cannot complain because the jury gave him the lowest punishment for the smallest degree of the offense submitted by the court. *Mobley v. State* (Cr. App.) 232 S. W. 531.

**48½. Court's opinion.**—While expressions in an opinion may be valuable and persuasive, the opinions are conclusive alone of the questions involved. *Patterson v. State*, 87 Cr. R. 95, 221 S. W. 596.

**49. Rehearing.**—Upon motion for rehearing the court will not consider matters not contained in the record. *Sharp v. State*, 81 Cr. R. 256, 197 S. W. 207.

One convicted of burglary could not for the first time on motion for rehearing contend that the agreed evidence of two state's witnesses who were absent was inadmissible on the ground that he was deprived of being confronted by the witnesses. *Robinson v. State*, 82 Cr. R. 570, 200 S. W. 162.

Insanity, or such mental condition as shows nonresponsibility for crime, first presented by affidavit on motion for rehearing, cannot be considered. *Avery v. State*, 83 Cr. R. 80, 200 S. W. 832.

Motion for rehearing, under the rules of the court, must be made not more than 15 days after rendition of judgment. *Kraft v. State*, 86 Cr. R. 484, 217 S. W. 1038.

Court of Criminal Appeals is not authorized to express an opinion on a question raised by motion for rehearing, where the question is not involved in the appeal. *Hewey v. State*, 87 Cr. R. 248, 220 S. W. 1106.

Though the court has jurisdiction over motions to reinstate appeals during the term, or, under the statute, for 15 days after the rendition of the judgment if the term expires in the meantime, a motion to reinstate the appeal, made more than a month after the judgment dismissing the appeal and a month after the adjournment of the term, is too late. *Thompkins v. State*, 87 Cr. R. 502, 224 S. W. 687, denying motion to reinstate appeal 87 Cr. R. 502, 222 S. W. 1103.

Defendant, who sends to the Court of Criminal Appeals with his motion for rehearing copy of a judgment of the county court entered since the appeal adjudging defendant insane, cannot thereby procure that the court shall withhold its mandate should the motion for rehearing be overruled; Pen. Code, art. 39, providing that one becoming insane after conviction cannot be punished, and the appellate court apprehending that on sufficient showing judgment will be held up and the case disposed of as provided in Code Cr. Proc. arts. 1017-1030. *Escue v. State* (Cr. App.) 227 S. W. 483.

### Art. 939. [905] Cases remanded, when.

**Reversal on the facts.**—Though the verdict must not be lightly annulled in any case it is the duty of the Court of Criminal Appeals, under this article, to set it aside and order another trial when the evidence, viewed in its strongest light from the standpoint of the state, fails to make guilt reasonably certain. *Jolly v. State*, 87 Cr. R. 288, 221 S. W. 279.

While the Court of Criminal Appeals, under this article, has the right to reverse conviction on account of insufficiency of the evidence, and it becomes its duty to do so if the guilt of accused is not made to appear with reasonable certainty, there is no fixed rule which will in all cases furnish a certain standard, and each case must in a measure be tested by its own facts. *Taylor v. State*, 87 Cr. R. 330, 221 S. W. 611.

In a prosecution for statutory rape, evidence held to show defendant's guilt beyond a reasonable doubt, so as not to warrant setting aside the verdict and remanding for new trial under this article. *Cook v. State* (Cr. App.) 228 S. W. 213.

**Remanding for new trial.**—On appeal from conviction as a juvenile delinquent where in the record there is found neither indictment nor information, in the absence of which a conviction must fall, but a complaint is found upon which it is possible that information may yet be filed, the prosecution will not be dismissed, but the judgment will be reversed, and the cause remanded. *Dias v. State* (Cr. App.) 230 S. W. 165.

### Art. 950. [916] Appeal in habeas corpus.

**2. Decisions reviewable.**—An appeal cannot be prosecuted from a refusal to grant a writ of habeas corpus. *Ex parte Smith*, 85 Cr. R. 649, 215 S. W. 299.

This article contemplates that the appeal shall be taken from a decision of the trial judge or court after a hearing. *Ex parte Lozano* (Cr. App.) 225 S. W. 59.

**5. Requisites of transcript.**—Under this article, a trial judge, who tries a habeas corpus case in vacation, where an appeal is taken, must himself certify to the record; it not being sufficient that it is certified to by the clerk. *Ex parte Young*, 87 Cr. R. 128, 219 S. W. 1102.

On motion to dismiss an appeal from a habeas corpus proceeding in vacation, in that the record was certified by the clerk, and not by the judge, as required by this article, a request of the accused that, if the state's motion is sustained, he be permitted to withdraw the transcript, in order that it may be certified to by the judge, will be granted. *Id.*

Where the record on habeas corpus appeal shows that relator was charged with murder and was held without bail to await indictment by the grand jury the omission of the formal commitment is immaterial. *Ex parte Townsley*, 87 Cr. R. 252, 220 S. W. 1092.

Under this article, where proceedings for habeas corpus are in vacation, the transcript, on relator's appeal from refusal to issue the writ, to be considered, must bear the certificate of the judge. *Ex parte Lozano* (Cr. App.) 225 S. W. 59.

Where the transcript in a habeas corpus proceeding showed the application for the writ, the answer of the officers and the order denying bail, but no notice of appeal, the court had no jurisdiction. *Ex parte Cates* (Cr. App.) 231 S. W. 396.

**7. Statement of facts and bills of exceptions.**—Contention of petitioner in habeas corpus that he objected to certain evidence is not available on appeal, it not being shown by bill of exceptions. *Ex parte Williams*, 84 Cr. R. 131, 206 S. W. 195.

**8. Effect of appeal.**—When notice of appeal in a habeas corpus case was entered, the Court of Criminal Appeals obtained jurisdiction of the subject-matter and of the person of the relator for disposition of his appeal. *Ex parte Davis* (Cr. App.) 225 S. W. 176.

#### Art. 952. [918] Habeas corpus, when heard.

Cited, *Ryan v. State*, 81 Cr. R. 632, 198 S. W. 582; *Long v. State*, 82 Cr. R. 403, 199 S. W. 619.

#### Art. 953. [919] Shall be heard upon the record, etc.

**Review in general.**—On appeal from an order denying bail to one charged with murder, the question is not whether the Court of Criminal Appeals would sustain a verdict inflicting capital punishment, but whether, in the opinion of such court a jury, in due administration of the law, would probably convict and inflict capital punishment. *Ex parte Young*, 87 Cr. R. 412, 222 S. W. 242.

Where there were two applications for a writ of habeas corpus based on different facts, and a general order was issued remanding relator to the custody of the sheriff, and it is not shown upon which application the order was made, nor whether any evidence was offered, the trial court's ruling will not be reviewed. *Ex parte Davis* (Cr. App.) 225 S. W. 176.

Under such record, it was unnecessary to review a separate paper filed in the appellate court showing that, after notice of appeal was given, the relator had been carried into another state. *Id.*

**Review of facts and comment on evidence.**—In habeas corpus proceeding, the Court of Criminal Appeals, on reversing judgment remanding petitioner to custody without bail, and granting such bail, will express no opinion as to the weight of the evidence, inasmuch as the case is to be tried before a jury. *Ex parte Beauchamp* (Cr. App.) 226 S. W. 634; *Ex parte Argenta*, 83 Cr. R. 41, 224 S. W. 391; *Ex parte Steen* (Cr. App.) 226 S. W. 684.

Where a judgment denying an application for habeas corpus seeking discharge on bond must be affirmed, statement of facts and reasons for such conclusion will not be given, and the facts will not be discussed. *Ex parte Smith*, 85 Cr. R. 652, 215 S. W. 299.

On appeal from an order denying bail to one charged with murder, the court will not make a detailed statement and analysis of the evidence. *Ex parte Young*, 87 Cr. R. 412, 222 S. W. 242.

#### Art. 954. [920] Orders in the case.

**Determination and disposition of case.**—If there is anything in the record requiring the Court of Criminal Appeals in a habeas corpus case to reverse the action of the trial court, the appellate court could enter such judgment or make such orders as necessary to enforce its jurisdiction and to compel enforcement of its orders. *Ex parte Davis* (Cr. App.) 225 S. W. 176.

The writ of habeas corpus is only for the purpose of relieving from illegal restraint, and where defendant's application was denied, and pending his appeal therefrom he was convicted of murder and sentenced to death, so that bail cannot be granted, the appeal will be dismissed. *Ex parte Crow* (Cr. App.) 230 S. W. 147.

**Reinstatement of appeal.**—Where relator seeking habeas corpus to procure bail appealed from denial of his application, and pending appeal he was convicted and sentenced for murder, and his appeal was dismissed it may be reinstated on rehearing pending his appeal from the conviction, and determined on the merits after reversal of the judgment of conviction. *Ex parte Crow* (Cr. App.) 230 S. W. 147.

#### Art. 960. [926] Appeal from judgment on recognizance.

**Right to appeal.**—Where defendant was charged with gaming, and a judgment nisi forfeiting his bail bond was entered, but there was no final judgment, there was nothing for review. *Bostick v. State*, 81 Cr. R. 404, 195 S. W. 862.

Since, under arts. 488-643, judgment nisi on forfeiture of bail bond is interlocutory, and does not become final, in view of arts. 490, 493-498, until citation is entered, dismissal of motion to set aside judgment nisi left such judgment in statu quo, and the order was not appealable, in view of arts. 504, 960, and Civ. St. art. 2073, providing that appeals lie only from final judgments. *Burgemeister v. State*, 83 Cr. R. 307, 203 S. W. 770.

Under arts. 960-962, sureties may take a default judgment against them on a bond to the appellate court for review either by direct appeal or by writ of error. *Finley v. State* (Cr. App.) 230 S. W. 420.

**Rules in civil cases apply.**—Under this and the following articles, appeals in scire facias cases on a bail bond must be prepared for submission, and briefs must be filed, as required by the rules in civil cases. *Mayer v. State* (Cr. App.) 24 S. W. 403.

#### Art. 961. [927] Defendant entitled also to writ of error.

See *Mayer v. State* (Cr. App.) 24 S. W. 403; *Finley v. State* (Cr. App.) 230 S. W. 420; notes to art. 960.

**Art. 962. [928] Same rules govern as in civil cases.**

See *Finley v. State* (Cr. App.) 230 S. W. 420; notes to art. 960.

**Transcript.**—Where transcript contains an indictment, order of transfer from district to county court, judgment nisi forfeiting bail bond, and bill of exceptions not approved by judge, but sworn to by bystanders whose affidavits were taken by defendant's attorney, and a certificate of commitment, the appeal will be dismissed. *Bostick v. State*, 81 Cr. R. 412, 195 S. W. 863.

**Briefs.**—Under arts. 497, 962, the failure of parties appealing from judgments on forfeited bail bonds to file briefs in the appellate court or in the trial court as required by District and County Courts Rule 102 (142 S. W. xxiv), and Civil Courts of Appeals Rule 29 (142 S. W. xii), requires dismissal of the appeal for want of jurisdiction. *Davis v. State* (Cr. App.) 226 S. W. 409; *Kennedy v. State* (Cr. App.) 226 S. W. 415.

Under arts. 891-893, appeals in scire facias cases on a bail bond must be prepared for submission, and briefs must be filed, as required by the rules in civil cases. *Mayer v. State* (Cr. App.) 24 S. W. 408.

On appeal from a judgment final on a forfeited bail bond, briefs must be filed by appellants in the lower court as well as in the Court of Criminal Appeals; such appeal being in the nature of a civil appeal. *Grammer v. State* (Cr. App.) 230 S. W. 165.

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## TITLE 11

### OF PROCEEDINGS IN CRIMINAL ACTIONS BEFORE JUSTICES OF THE PEACE, MAYORS AND RECORDERS

Chap.

1. General provisions.
2. Of the arrest of the defendant.

Chap.

3. Of the trial and its incidents.
4. The judgment and execution.

#### CHAPTER ONE

##### GENERAL PROVISIONS

**Article 968c. Complaint, how commenced and concluded; prosecution conducted by city attorney, etc:**

**County attorney—Notice of filing of complaint.**—The judge of a municipal court need not notify the district attorney of the filing of criminal complaints in his court. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

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#### CHAPTER TWO

##### OF THE ARREST OF THE DEFENDANT

Art.

972. When complaint is made shall be reduced to writing, etc.
973. What the complaint must state.

Art.

976. Justice may summon witnesses to disclose crime.

**Article 972. [937] When complaint is made shall be reduced to writing, etc.**

See *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

**Art. 973. [938] What the complaint must state.**

See *Halbadier v. State*, 87 Cr. R. 129, 220 S. W. 85.

**Art. 976. [941] Justices may summon witnesses to disclose crime.**

See *Dodson v. State* (Cr. App.) 232 S. W. 836.

**Use of statement at trial.**—This article was intended to aid the officers of the law to ascertain the facts, and, even if art. 795, declaring a wife cannot testify against her husband, does not prevent an examination of the wife under this article, it does prevent the use of the wife's statement at the trial of accused even for the purpose of impeaching the testimony of the wife given at the trial in behalf of accused. *Turner v. State* (Cr. App.) 232 S. W. 801.

**CHAPTER THREE**  
OF THE TRIAL, AND ITS INCIDENTS

**Article 1009. [974] Notice of appeal.**

**Sufficiency of notice.**—An entry on a justice's docket that "defendant then and there, in open court \_\_\_\_\_ of appeal to the county court, \* \* \* which notice is now here entered of record," was a sufficient compliance with this article. *Parker v. State* (Cr. App.) 21 S. W. 370.

**CHAPTER FOUR**  
THE JUDGMENT AND EXECUTION

**Article 1015. [980] Defendant may be discharged from jail, how.**

**When entitled to discharge.**—Relator, convicted of misdemeanor, fine and costs amounting to \$52.70, his father paying \$10 thereof, who remained in jail, except half day, for 19 days, being ordered by county judge to wait on lunatic in jail 5 or 6 days of time, held entitled to discharge under statute entitling him to \$3 for each day of confinement unless hired out as convict or required to work under statute. *Ex parte Chapman*, 82 Cr. R. 119, 198 S. W. 575.

**TITLE 12**

MISCELLANEOUS PROCEEDINGS

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| <p>Chap.<br/>1. Of inquiries as to the insanity of the defendant after conviction.</p> | <p>Chap.<br/>4. Of remitting fines and forfeitures, and of reprieves, commutations of punishment and pardons.</p> |
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**CHAPTER ONE**  
OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT  
AFTER CONVICTION

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| <p>Art.<br/>1017. Insanity after conviction.</p> | <p>Art.<br/>1021. Court shall appoint counsel, when.</p> |
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**Article 1017. [982] Insanity after conviction.**

See *Escue v. State* (Cr. App.) 227 S. W. 483.

Cited, *Gardner v. State*, 82 Cr. R. 38, 198 S. W. 312, L. R. A. 1918B, 1144.

**Inquiry after conviction.**—If it be claimed that defendant's mind is of such a character as to render him legally insane, the matter can be inquired into after as well as before trial for a criminal offense, and, on adjudication of the question in a lunacy proceeding, defendant can be sent to an institution for the insane, and not to the penitentiary. *Hunter v. State*, 86 Cr. R. 384, 216 S. W. 871.

**Art. 1021. [986] Court shall appoint counsel, when.**

**Duty to appoint counsel.**—It was not obligatory on the court to appoint counsel for one accused of crime, unless he be charged with a capital offense (art. 558), or it appear that he is insane (art. 1021), or that he desires an application to be presented for a suspended sentence. *Holden v. State* (Cr. App.) 232 S. W. 803.

## CHAPTER FOUR

OF REMITTING FINES AND FORFEITURES, AND OF RE-  
PRIEVES, COMMUTATIONS OF PUNISHMENT  
AND PARDONS

Art.

1051. Governor may remit fines, etc.

1052. May remit forfeitures.

1057a. Convicts paroled, when.

Art.

1057b. Paroled prisoners to remain under control of board of prison commissioners; retaking; warrants.

1057r. Governor shall appoint.

**Article 1051. [1016] Governor may remit fines, etc.**Cited, *Smith v. State*, 26 Tex. App. 49, 9 S. W. 274.

4. **Pardon.**—Under Const. art. 4, § 11, the Governor may exercise executive clemency in relieving persons convicted of felony of all or any part of the term of imprisonment to which they are sentenced, subject to no limitations by the Legislature other than the constitutional limitation. Ex parte Nelson, 84 Cr. R. 570, 209 S. W. 148.

7. — **Conditional pardon.**—The Governor, in exercising the pardoning power, may impose conditions upon the subject of it. Ex parte Nelson, 84 Cr. R. 570, 209 S. W. 148.

9. — **Operation and effect.**—One convicted of murder, released on parol by the Governor, might nevertheless be arrested and detained under a process issued on an indictment for another murder. Ex parte Nelson, 84 Cr. R. 570, 209 S. W. 148.

**Art. 1052. [1017] May remit forfeitures.**Cited, *Smith v. State*, 26 Tex. App. 49, 9 S. W. 274.**Art. 1057a. Convicts paroled, when.**

**Pardoning power not affected.**—Arts. 1057a and 1057b, relating to paroled prisoners, do not purport to limit or impose conditions on the Governor's pardoning power. Ex parte Nelson, 84 Cr. R. 570, 209 S. W. 148.

**Art. 1057b. Paroled prisoners to remain under control of board of prison commissioners; retaking; warrants.**

See Ex parte Nelson, 84 Cr. R. 570, 209 S. W. 148; notes to art. 1057a.

**Art. 1057r. Governor shall appoint.**—The Governor is hereby authorized to appoint two qualified voters of the State of Texas, and who shall perform such duties as may be directed by him consistent with the Constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as "The Board of Pardon Advisers," and shall be paid out of any money in the Treasury, not otherwise appropriated, a salary of Three Thousand Dollars each per annum on monthly vouchers approved by the governor. [Acts 1897, p. 49; Acts 1893, p. 98; Acts 1905, p. 68; Acts 1917, 35th Leg. 1st C. S., ch. 21, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 6, § 1.]

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**TITLE 13**
**OF INQUESTS****CHAPTER ONE****INQUESTS UPON DEAD BODIES**

**Article 1065. [1028] Testimony of witnesses to be reduced to writing, etc.**

Cited, *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165.

## TITLE 14 OF FUGITIVES FROM JUSTICE

<p>Art. 1088. Fugitive from justice delivered up, when.</p>	<p>Art. 1091. Complaint shall be sufficient, if it recites, etc.</p>
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1105. Reward shall be paid by state.

### Article 1088. [1051] Fugitive from justice delivered up, when.

2. **Who are fugitives from justice.**—One who was convicted under an indictment and was sent to prison and was paroled and broke the conditions upon which his freedom from confinement depended was in no better position than if he had escaped by force, and was subject to extradition. *Ex parte Carroll*, 86 Cr. R. 301, 217 S. W. 382, 8 A. L. R. 901.

Where a convict broke the conditions of his parole, and it was revoked by proper authorities, who directed his arrest, he could be extradited, although he remained in the state and did not flee to another state until his term of imprisonment would have ended; the lapse of time intervening before he left the state not satisfying the penalty against him. *Id.*

3. **Requisition.**—Where a Governor in his application for a requisition of a fugitive enumerates all documents attached thereto, and says, "which I certify to be authentic and duly authenticated according to the laws of this state," there is sufficient authentication of the complaint, affidavits and warrant, made in Arizona, included in the enumerated documents. *Ex parte Jones*, 82 Cr. R. 627, 199 S. W. 1110.

In extradition cases the test is the sufficiency in the demanding state of the affidavit filed with requisition. *Ex parte Nix*, 85 Cr. R. 307, 212 S. W. 507.

Where a requisition shows that an affidavit has been made against the accused in the demanding state, and that a demand has been made upon the Governor of the state of the forum, which certifies that the affidavit is authentic, the requirements of the law are met, and it is immaterial that the prosecuting attorney of a county of the demanding state was allowed to testify on habeas corpus that certain acts constitute an offense under the law of that state. *Ex parte Roselle*, 87 Cr. R. 470, 222 S. W. 248.

Under Act Cong. Feb. 12, 1793, on the subject of extradition, it is absolutely necessary and is an essential prerequisite that a requisition paper be accompanied by a certified copy of the affidavit or indictment. *Ex parte Gradington* (Cr. App.) 231 S. W. 781.

6. **Executive warrant.**—Where warrant recited that Governor of demanding state had made known to Governor of this state that relator is charged "with the crime of false pretenses," the warrant made a prima facie case in habeas corpus proceeding, in view of rule that offense may be designated by name in general terms, and the trial court did not err in holding that warrant was not fatally defective in that it charged relator with "false pretenses," not denominated an offense in demanding state. *Ex parte Nix*, 85 Cr. R. 307, 212 S. W. 507.

Where the Governor did not attach to the warrant the various papers which he recites therein as furnished to him as the basis for the issuance of the warrant, it devolved upon relator in habeas corpus proceeding to show that the papers before the Governor were insufficient to authorize the issuance of the warrant. *Id.*

The certificate of the Governor of this state, that the Governor of the demanding state had made it known to him that relator was charged by complaint, and that the demand for his surrender was "accompanied by a copy of the complaint duly certified as authentic by the Governor" of the demanding state, was sufficient to put upon relator the burden of proving that demand was not accompanied by a copy of complaint duly certified, and it was not necessary that Governor's warrant be accompanied by complaint charging the offense. *Id.*

The issuance of an executive warrant by the Governor, the sufficiency of which is not questioned, establishes prima facie the authority of the officer to hold an alleged fugitive. *Ex parte Carroll*, 86 Cr. R. 301, 217 S. W. 382, 8 A. L. R. 901.

The issuance of an executive warrant by the Governor on requisition by the Governor of another state, alleging that the alleged fugitive had broken his parole, implies that the warrant was rightfully issued, and it was incumbent on the fugitive to prove the terms of the parole and that he did not break the conditions thereof. *Id.*

In an extradition case, it is not necessary that there be a certified copy of the indictment or of the complaint accompanying the Governor's warrant. *Ex parte Roselle*, 87 Cr. R. 470, 222 S. W. 248.

12. **Presumptions and burden of proof.**—The burden is on one being extradited to show that he had not been in the state applying for his delivery, where the application and warrant state that he stood charged with crime in such state. *Ex parte Jones*, 82 Cr. R. 627, 199 S. W. 1110.

### Art. 1091. [1054] Complaint shall be sufficient, if it recites, etc.

**Sufficiency of complaint.**—An affidavit that defendant was a fugitive from justice from Arizona, where he obtained money under false pretenses in violation of the Penal Code of such state, and that he had fled from such state where he committed such offense, and is now in the state of Texas, and asking that a warrant be issued, was sufficient to support a warrant for extradition under this article. *Ex parte Jones*, 82 Cr. R. 627, 199 S. W. 1110.

### Art. 1105. [1068] Reward shall be paid by state.

See *Choice v. City of Dallas* (Civ. App.) 210 S. W. 753.

**TITLE 15**

**OF COSTS IN CRIMINAL ACTIONS**

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| <p>Chap.<br/>1. Taxation of costs.<br/>2. Of costs paid by the state.<br/>    1. Fees and compensation in general.<br/>    2. Compensation of clerk of district court, district attorney, county attorney, sheriff and constables in counties in which 3000 or more votes are cast.</p> | <p>Chap.<br/>2. Of costs paid by the state—Continued.<br/>    3½. Compensation of district attorneys in counties containing cities of 35,000 inhabitants or over, etc.<br/>    4. Accounts of officers.<br/>    5. Fees of witnesses.<br/>3. Of costs paid by counties.<br/>4. Of costs paid by defendant.<br/>    2. In the district and county courts.<br/>    3. In justices', mayors' and recorders' courts.</p> |
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**CHAPTER ONE**

**TAXATION OF COSTS**

**Article 1111. [1074] Bill of costs shall accompany case, when.**

Need not be itemized.—A bill of costs accruing in the district court, which accompanies an indictment in its transfer to the county court, need not be itemized. *Venn v. State*, 85 Cr. R. 158, 210 S. W. 535.

**CHAPTER TWO**

**OF COSTS PAID BY THE STATE**

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| <p>1. FEES AND COMPENSATION IN GENERAL<br/>Art.<br/>1117a. Fees in examining courts, etc.<br/>1117b. Fees allowed district attorneys of districts composed of two or more counties; assistant district attorney; salary; removal.</p> <p>2. COMPENSATION OF CLERK OF DISTRICT COURT, DISTRICT ATTORNEY, COUNTY ATTORNEY, SHERIFF AND CONSTABLES IN COUNTIES IN WHICH 3000 OR MORE VOTES ARE CAST<br/>1118. Fees to district and county attorneys.</p> | <p>3½. COMPENSATION OF DISTRICT ATTORNEYS IN COUNTIES CONTAINING CITIES OF 35,000 INHABITANTS OR OVER, ETC.<br/>Art.<br/>1131a. Compensation allowed district attorneys in counties containing cities of 35,000 inhabitants, or over.</p> <p>4. ACCOUNTS OF OFFICERS<br/>1132. Officer shall make out cost bill, and what it shall show.</p> <p>5. FEES OF WITNESSES<br/>1137b. Fees of witnesses; proviso.</p> |
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**1. FEES AND COMPENSATION IN GENERAL**

**Article 1117a. [1119 and 1137, Rev. C. C. P. 1911] [1092] Fees in examining courts, etc.**

Fees as "public money."—Fees of office received by district attorney out of state treasury under the provisions of Code Cr. Proc. arts. 1118, 1119, 1132-1134, are "public money," within Const. art. 3, § 51, prohibiting grant of public money to municipal corporations and others, but commissions on forfeitures of bail bonds, deducted under art. 1193, are not public money within such provision. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

Art. 1117b. [1120, Rev. C. C. P. 1911] Compensation allowed district attorneys of districts composed of two counties or more; assistant district attorney; salary; removal.—In addition to the five hundred dollars now allowed them by law, district attorneys in all judicial districts of this State composed of two counties or more shall receive from the State as compensation for their services, the sum of fifteen dollars for each day they attend the session of the district court in their respective

districts in the necessary discharge of their official duty, and fifteen dollars per day for each day they represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation; said fifteen dollars per day to be paid to the district attorneys, upon the sworn account of the district attorney, approved by the district judge, who shall certify that the attendance of said district attorney for the number of days mentioned in his account was necessary, after which said account shall be recorded in the minutes of the district court; provided, that the maximum number of days for such attendance and service for which the compensation is allowed shall not exceed one hundred and seventy days in any one year; and, provided further, that all fees in misdemeanor cases, and commissions and fees heretofore allowed district attorneys under the provisions of Article 1118 of the Code of Criminal Procedure, and in Chapter 5 of the General Laws passed at the Special Session of the Twenty-fifth Legislature, in districts composed of two or more counties shall, when collected, be paid to the clerk of the district court, who shall pay the same over to the State Treasurer; provided, the provisions of this bill shall not apply to district attorneys whose last preceding annual report of himself or his predecessor shows that he or his predecessor making such report received in fees, under the criminal laws, over two thousand four hundred and ninety-five dollars. Provided, further, that in districts composed of two or more counties, and in which said district there is a county containing a city of thirty-five thousand population or over, according to the last federal census, the district attorney in such district shall, with the approval of the county commissioners court of such county, be authorized to appoint one assistant district attorney, who shall receive a salary of not to exceed one hundred and fifty dollars per month, such salary to be paid by such county, payable monthly; and provided, further that such assistant district attorney, when so appointed, shall take the oath of office, and be authorized to represent the State in such county, and such authority to be exercised under the direction of the district attorney, and such assistant district attorney shall be subject to removal at the will of the district attorney. Such assistant district attorney shall be authorized to perform any duty devolving upon the district attorney and to perform and exercise any power conferred by law upon the district attorney when by him so authorized. [Acts 1909, p. 238; Acts 1907, p. 326; Acts 1915, 34th Leg., ch. 127, § 1; Acts 1919, 36th Leg., ch. 70, § 1.]

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

2. COMPENSATION OF CLERK OF DISTRICT COURT, DISTRICT ATTORNEY, COUNTY ATTORNEY, SHERIFF AND CONSTABLES IN COUNTIES IN WHICH 3,000 OR MORE VOTES ARE CAST

**Art. 1118. [1081] Fees to district and county attorneys.**

See *Bexar County v. Linden* (Civ. App.) 205 S. W. 478; notes to art. 1117a.

31½. COMPENSATION OF DISTRICT ATTORNEYS IN COUNTIES CONTAINING CITIES OF 35,000 INHABITANTS OR OVER, ETC.

**Art. 1131a. Compensation allowed district attorneys in counties containing cities of 35,000 inhabitants, or over.**—Hereafter in counties which contain cities of thirty-five thousand inhabitants, and over according to the last Federal Census, and also where Army Posts are now located, the District Attorney or the County Attorney, as the case may be, shall, in addition to the compensation as now provided by law, be paid the sum of fifteen dollars per day for not exceeding forty days during any one year, when engaged in prosecuting violators of the law.



All time spent by such District Attorney, or county Attorney, in assisting the grand jury in investigating violations of said Act, shall be included within the compensation herein allowed and be considered as that much time spent in such prosecutions. The compensation herein provided for shall be in addition to that heretofore provided as per diem or fees of office, and shall not be included within the limitations of the fee bill. Such compensation shall be paid in the same manner as the per diem and fees of District Attorneys and County Attorneys performing the duties of District Attorneys are now paid, provided that such additional compensation shall not be granted to any officer where the same will increase his entire compensation to more than five thousand dollars per annum. By the word Army Posts as herein mentioned an Army Post shall constitute a permanent Fort which has been established ten years or more. [Acts 1918, 35th Leg. 4th C. S., ch. 76, § 1.]

Took effect 90 days after March 27, 1918, date of adjournment.

#### 4. ACCOUNTS OF OFFICERS

**Art. 1132. [1087] Officer shall make out cost bill, and what it shall show.**

See *Bexar County v. Linden* (Civ. App.) 205 S. W. 478; notes to art. 1117a.

#### 5. FEES OF WITNESSES

**Art. 1137b. Fees of witnesses; proviso.**

**Right of policeman to fees.**—Salaried policeman may claim his fee as witness in misdemeanor case, the provision of this article, forbidding such fees to peace officers, applying only to felony cases in which state pays fees. *Lay v. State*, 33 Cr. R. 222, 202 S. W. 729.

### CHAPTER THREE

#### OF COSTS PAID BY COUNTIES

Art.	Art.
1142. Allowance to sheriff for prisoners.	1148. Account for keeping prisoners.
1143. Allowance for guards and matrons.	1149. Commissioners' court shall examine
1144. Sheriff shall pay what expenses, to	account, and order draft, etc.
be reimbursed by county.	1154. Fees of county judge.
1145. Sheriff shall present account to dis-	1155. How collected.
trict judge.	1162. Certificates for pay of jurors and
1146. Judge shall examine account, etc.	bailliffs.
1147. Judge shall give sheriff draft upon	1163. Drafts and certificates receivable for
county treasurer.	county taxes.

**Article 1142. [1097] Allowance to sheriff for prisoners.**—For the safekeeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges:

1. For each prisoner for each day, such amount as may be fixed by the Commissioners' Court provided the same shall be reasonably sufficient for such purposes and in no event shall it be less than forty cents per day for each prisoner, nor more than one dollar per day for each prisoner. Provided, however, that after January 1, 1923, the net profits shall constitute fees of office and be accounted for by the sheriff in his annual report as other fees now provided by law; and the sheriff shall in such report furnish an itemized verified account of all expenditures made by him for feeding and maintenance of prisoners, accompanying such report with receipts and vouchers in support of such items of expenditures and the difference between such expenditures and the amounts allowed by the Commissioners' Court shall be deemed to constitute the net profits for which said officer shall account as fees of office.

2. For necessary medical bills and reasonable extra compensation for attention to a prisoner during sickness, such an amount as the Commissioners' Court of the county where the prisoner is confined may determine to be just and proper.

3. The reasonable funeral expenses in case of death. [Act Aug. 23, 1876, p. 290, § 1; Act 1911, p. 107, ch. 64, § 1; Acts 1921, 37th Leg., ch. 19, § 2.]

Took effect 90 days after adjournment which occurred March 12, 1921.

**Compensation for part of day.**—Under Acts 32d Leg. c. 64, sheriff is entitled to full compensation for prisoner under his contract with commissioners' court, though prisoner is in custody only part of day. *Dallas County v. Reynolds* (Civ. App.) 199 S. W. 702.

Sheriff is entitled to per diem allowance of 40 cents per day for a prisoner under his contract with commissioners' court, where a prisoner is in jail for any substantial part of a day. *Harris County v. Hammond* (Civ. App.) 203 S. W. 451.

**Profit or loss.**—Under Civ. St. arts. 3881, 3888, 3889, 3894, 3895, 3897, 3903, and Code Cr. Proc. 1911, arts. 1142-1149, where commissioners' court within limitation prescribed, fixes allowance for support and maintenance of prisoners, sheriff must stand any loss, while any profit belongs to him. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Allowance as fees.**—Under Civ. St. arts. 3881, 3888, 3889, 3894, 3895, 3897, 3903, and Code Cr. Proc. 1911, arts. 1142-1149, held, that amounts allowed a sheriff by commissioners' court, within limitations prescribed by statute, for safe-keeping, feeding, and care of prisoners, cannot be included in estimating maximum amount of fees a sheriff may retain. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

Allowances made sheriff by commissioners' court for safe-keeping and maintenance of prisoners in jail are not "fees of office," within the maximum fee bill, and need not be reported or accounted for by him under provisions of said bill. *Harris County v. Hammond* (Civ. App.) 203 S. W. 451.

**Art. 1143. [1098] Allowance for jail guards and matrons.**—The sheriff shall be allowed for each guard or matron necessarily employed in the safe-keeping of prisoners two dollars and fifty cents for each day; and there shall not be any allowance made for the board of such guard, or matron, nor shall any allowance be made for jailer or turnkey, except in counties of forty thousand population or more. In such counties of forty thousand population or more the commissioners' court may allow each jail guard, matron, jailer and turnkey four dollars and fifty cents per day. [Act Aug. 23, 1876, p. 290; Act 1909, p. 98; Acts 1915, 34th Leg. 1st C. S., ch. 20, § 1; Acts 1917, 35th Leg., ch. 68, § 1; Acts 1921, 37th Leg., ch. 122, § 2.]

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

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Deputy sheriff as guard.**—Under this article, despite its amendments in 1909 and 1915, the sheriff of a county of less than 35,000 population is not liable for moneys paid to him by authorization of the commissioners' court for hire of a deputy sheriff as a guard at the county jail, though there was only one deputy sheriff kept at the jail, so that the county contended he was the jailer and not a guard; the commissioners' court being unauthorized to pay the salary of a jailer. *Cooper v. Johnson County* (Civ. App.) 212 S. W. 528.

**Art. 1144. [1099] Sheriff shall pay what expenses, to be reimbursed by county.**

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Art. 1145. [1100] Sheriff shall present account to district judge.**

See *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811; *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Art. 1146. [1101] Judge shall examine account, etc.**

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Art. 1147. [1102] Judge shall give sheriff draft upon county treasurer.**

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Art. 1148. [1103] Account for keeping prisoners.**

See *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Itemizing account.**—Sheriff's accounts for keeping prisoners, giving name of each prisoner, number of days in jail, etc., held sufficiently itemized, within this article. *Harris County v. Hammond* (Civ. App.) 203 S. W. 451.

**Art. 1149. [1104] Commissioners' court shall examine account, and order draft, etc.**

**Re-opening order.**—That sheriff, in presenting to commissioners' court his accounts, concealed actual cost of safe-keeping, etc., of prisoners, held not to authorize, on grounds of fraud and mistake, reopening of order in commissioners' court approving accounts. *Harris County v. Hammond* (Civ. App.) 203 S. W. 445.

**Art. 1154. [1109] Fees of county judge.**

**Dismissed actions.**—Under this article, the county judge is not entitled to the specified fee for actions dismissed without trial. *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

**Art. 1155. [1110] How collected.**

**Presentation of account as part of official duties.**—Since this article makes it the duty of the county judge to present his certified account to the commissioners' court for his fees, an indictment for demanding fees not allowed by law does not charge an act outside defendant's official duty. *Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

**Art. 1162. [1117] Certificates for pay of jurors and bailiffs.**

**Issuance of certificate to assignee.**—Under this and the following article, it was not the duty of the clerk of a district or county court to pass upon the validity of a transfer by a juror or bailiff of a claim against a county, and that the clerk could not be compelled by mandamus to issue to an assignee of such claim the certificate designated in the said statute, although evidencing only the right of the assignor to compensation. *Face v. Ortiz*, 72 Tex. 437, 10 S. W. 541.

**Art. 1163. [1118] Drafts and certificates receivable for county taxes.**

See *Face v. Ortiz*, 72 Tex. 437, 10 S. W. 541; notes to art. 1162.

**CHAPTER FOUR**

**OF COSTS TO BE PAID BY DEFENDANT**

**2. IN THE DISTRICT AND COUNTY COURTS**

- Art.  
1169. [Superseded.]  
1173. Fees of sheriff and other peace officers.

**3. IN JUSTICES', MAYORS' AND RECORDERS' COURTS**

- Art.  
1177. Fees of state's attorney.  
1179. In case of several defendants, and where defendant pleads guilty.  
1180. No fee allowed attorney, etc.

**2. IN THE DISTRICT AND COUNTY COURTS**

**Article 1169. [Superseded.]**

**Explanatory.**—This article, relating to fees of county attorneys in local option cases, is rendered inoperative by the amendment of art. 16, § 20 of the state Constitution, and by Acts 1919, 36th Leg. 2d C. S., ch. 78, ante, Penal Code, arts. 588¼-588½tt.

**Art. 1173. [1127] Fees of sheriff and other peace officers.**—The following fees shall be allowed the sheriff and other peace officer performing the same services in misdemeanor cases to be taxed against the defendant on conviction:

1. For executing each warrant of arrest or *capias*, or making arrest without warrant, two dollars;
2. For summoning each witness, seventy-five cents;
3. For serving any writ not otherwise provided for, one dollar;
4. For taking and approving each bond and returning the same to the courthouse, when necessary, one dollar and fifty cents;
5. For each commitment or release, one dollar;
6. Jury fee in each case where a jury is actually summoned, one dollar;
7. For attending a prisoner on *habeas corpus*, when such prisoner, upon a hearing, has been remanded to custody or held to bail, for each days' attendance, two dollars;
8. For conveying a witness attached by him to any court out of his county, four dollars for each day or fractional part thereof and his

actual necessary expenses by the nearest practicable public conveyance, the amount to be stated by said officer, under oath and approved by the judge of the court from which the attachment issued;

9. For conveying a prisoner after conviction to the county jail, for each mile, going and coming, by the nearest practicable route by private conveyance, ten cents a mile, or by railway, seven and one-half cents a mile;

10. For conveying a prisoner arrested on a warrant or *capias* issued from another county to the court or jail of the county from which the process was issued, for each mile traveled going and coming, by the nearest practicable route, twelve and one-half cents.

11. For each mile he may be compelled to travel in executing criminal process and summoning or attaching witness, seven and one-half cents. For traveling in the service of process not otherwise provided for, the sum of seven and one-half cents for each mile going and returning. If two or more persons are mentioned in the same writ, or two or more writs in the same case, he shall charge only for the distance actually and necessarily traveled in the execution of the same. [Act Aug. 23, 1876, p. 289, § 11; Acts 1895, p. 182; Acts 1921, 37th Leg., ch. 19, § 1.]

Took effect 90 days after adjournment which occurred March 12, 1921.

### 3. IN JUSTICES', MAYORS' AND RECORDERS' COURTS

#### Art. 1177. Fees of state's attorney.

**Validity and construction of ordinance.**—An ordinance of a town in Harris county, fixing the fees of the city attorney in criminal cases to be taxed against the defendant, but providing that no fees should be taxed unless the city attorney prosecuted in person, will not be construed as forbidding fees to be taxed in favor of the district attorney, allowed him under Civ. St. arts. 345a, 345b; Code Cr. Proc. arts. 1177, 1179, 1180. *Monk v. Crooker* (Civ. App.) 207 S. W. 194.

Although a city in Harris county could, under this article, provide that no fees should be allowed attorneys prosecuting criminal cases in the city court, it could not fix a fee to be taxed in cases prosecuted by the city attorney, and then deny the district attorney of the county a right to fees, in view of Civ. St. arts. 345a, 345b; Code Cr. Proc. arts. 1179, 1180. *Id.*

#### Art. 1179. [1131] In case of several defendants, and where defendant pleads guilty.

See *Monk v. Crooker* (Civ. App.) 207 S. W. 194; notes to art. 1177.

#### Art. 1180. [1132] No fee allowed attorney, etc.

See *Monk v. Crooker* (Civ. App.) 207 S. W. 194; notes to art. 1177.

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## TITLE 16

### COMMISSIONS ON MONEY COLLECTED

Art. 1193. Commissions allowed district and county attorneys.	Art. 1194. Commissions allowed sheriff or other officers.
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#### Article 1193. [1143] Commissions allowed district and county attorneys.

Cited, *Hedrick v. Sick*, 73 Tex. 616, 11 S. W. 862.

**Commissions as fees.**—The word "fees," in Rev. St. 1911, art. 3883, relating to limitation of compensation of district attorneys, includes commissions on forfeited ball bonds. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

**Commissions as "public money."**—Fees of office received by district attorney out of state treasury under the provisions of arts. 1118, 1119, 1132-1134, are "public money," within Const. art. 3, § 51, prohibiting grant of public money to municipal corporations and others; but commissions on forfeitures of ball bonds, deducted under art. 1193, are not public money within such provision. *Bexar County v. Linden* (Civ. App.) 205 S. W. 478.

#### Art. 1194. [1144] Commissions allowed sheriff or other officer.

Cited, *Hedrick v. Sick*, 73 Tex. 616, 11 S. W. 862.

## TITLE 17

## DELINQUENT CHILDREN

## STATE JUVENILE TRAINING SCHOOL

Art.

1195. Male persons under the age of seventeen accused of felony to be prosecuted as juvenile delinquents, etc.

## DELINQUENT CHILD, TO REGULATE THE CONTROL AND TREATMENT OF SAME

1197. Delinquent children.

1198. Jurisdiction of district and county courts; jury trial; entry of findings; name of court.

Art.

1199. Sworn complaint or information; requisites.

1200. Proceedings on complaint, notice to parent or guardian, etc.

1202. Probation officers; appointment, etc.

1203. Commitment of delinquent to care of proper person or institution or of probation officer, etc.

1206. Commitment of incorrigible boys to State Industrial School for Boys; petition by parent or guardian, etc.

## COUNTY JUVENILE BOARDS

1207e. Board for certain counties created.

## STATE JUVENILE TRAINING SCHOOL

**Article 1195. [1145] Male persons under the age of seventeen accused of felony to be prosecuted as juvenile delinquents, etc.**

See *Ex parte Little*, 83 Cr. R. 375, 203 S. W. 766.

2. **Validity of statute.**—Legislature in enacting criminal laws may take cognizance of the youth of offenders and make provisions modifying or exempting them from punishment, which classification is valid where it operates in a uniform manner upon the class. *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.

Juvenile delinquent law, providing that males under 17, guilty of what would otherwise be a felony, shall be committed to an institution only during minority, etc., is a proper exercise of legislative authority. *Ex parte Pruitt*, 82 Cr. R. 394, 200 S. W. 392.

Juvenile delinquent law, arts. 1195, 1196, construed with Const. art. 5, § 5, defining jurisdiction of Court of Criminal Appeals, and Code Cr. Proc. art. 894, giving the right to appeal, is not void because denying the right of appeal. *Ex parte McLoud*, 82 Cr. R. 299, 200 S. W. 394.

In view of arts. 1195, 1198, 1200, the law defining delinquent children held valid as against the contention that it deprives an accused of the fundamental right to a trial by jury and to be heard by counsel. *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

4½. **Construction and operation of statute in general.**—Acts 33d Leg. c. 112, § 1, amending this article, and providing that, when male under 17 is indicted for felony, and statement is filed showing him under 17, the judge, if satisfied that he is under such age, shall dismiss prosecution and try him as a juvenile delinquent, is mandatory. *McLaren v. State*, 82 Cr. R. 449, 199 S. W. 811.

Civ. St. art. 5229, as amended by Acts 33d Leg. (1st Called Sess.) c. 6, § 9, is not in conflict with mandatory provisions of Acts 33d Leg. c. 112, § 1. *Id.*

Acts 33d Leg. c. 112, § 1, repealing a former provision, leaving a transfer of case of juvenile charged with felony to juvenile court to trial judge's discretion, repealed Rev. Civ. St. art. 2200, containing a similar provision. *Id.*

Art. 1206, designating a procedure whereby a parent may cause the restraint of an incorrigible juvenile, is not exclusive, but art. 1197, as amended, and this article, also designate procedure which the courts may follow. *Ex parte Davis*, 85 Cr. R. 213, 211 S. W. 456.

6. **Indeterminate and suspended sentence.**—See *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

6½. **Practice and procedure in general.**—Necessity of complaint or information, see *Ex parte Ramseur*, 81 Cr. R. 413, 195 S. W. 864; *Ex parte Medrano*, 81 Cr. R. 388, 195 S. W. 865; notes to art. 1199.

Prosecution and conviction under juvenile delinquent law is criminal, and not civil, case. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

Much latitude must be given in the administration of the law concerning juvenile crimes, but the authorities cannot be too careful to see that no right is lost to one accused of a violation of the law through ignorance of the legal and constitutional guarantees of trial by jury and to be represented by counsel. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

The contention that even though there is a failure to follow the procedure named and bring to the court's attention the claim of one accused of a felony to be tried as a juvenile, the legislative policy should nevertheless be given effect by refusing to send such accused person to the penitentiary is untenable. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

7. **Trial of issue as to age.**—Question of juvenility, where an affidavit is filed in accordance with this article, is one for the trial court preliminary to the trial by the jury. *Lee v. State*, 86 Cr. R. 146, 215 S. W. 326; *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

The matter of defendant's age raised by his affidavit of juvenility being for the court alone, it was proper to refuse to tell the jury they could not convict if they believed him under 17 years of age at the time of the alleged offense, where there was no question as to his being of sufficient age to make him legally responsible. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

Where one called for trial presents an affidavit of juvenility in accordance with the provisions of this article, and tenders testimony in support of the facts therein stated, the court is bound to give him a hearing upon such issue; although upon a former trial a former affidavit had been filed, and testimony heard by the court and the issue decided adversely to the accused, the issuable matter being the age of accused when brought to trial. *Lee v. State*, 86 Cr. R. 146, 215 S. W. 326.

Under this and the following articles, accused, seeking to have the case transferred to the juvenile docket, has the burden of establishing to the satisfaction of the trial judge that he is under 17 years of age. *Flores v. State* (Cr. App.) 231 S. W. 786.

11. **Age at time of trial as controlling.**—One who commits a felony while under 17 years of age, can under this article be tried in district court in same manner as one who was more than 17 years of age when offense was committed, if he is more than 17 when brought to trial. *McLaren v. State*, 85 Cr. R. 31, 209 S. W. 669.

Where defendant was tried in district court for a felony committed while he was under 17 years of age, and for that reason appellate court, under this article, reversed and remanded case, district court on second trial, defendant having passed age of 17 years, properly refused to dismiss prosecution or send it to juvenile court, but correctly retained jurisdiction. *Id.*

Had the issue been suggested on trial that defendant appellant was under 17 years of age at the time of the seduction, for which he was convicted, he could not have been relegated to the juvenile law relating to youths of that age, where he was 19 years of age when tried, so that the juvenile act did not apply, and he could be convicted of the felony. *Stracner v. State*, 86 Cr. R. 89, 215 S. W. 305.

15. **Jury.**—In prosecution of defendant between 16 and 17 years of age as a juvenile delinquent, under this article, the court had power to impose sentence without a verdict of a jury; a jury having been waived, and the prosecution not being for a felony. *Lee v. State*, 86 Cr. R. 203, 215 S. W. 856.

16. — **Assessment of punishment.**—Juvenile delinquent law, fixing maximum and minimum punishment and giving right to trial by jury, requires that jury shall fix punishment, in view of art. 770, and commitment by the court was unauthorized and void. *Ex parte Pruitt*, 82 Cr. R. 394, 200 S. W. 392.

17. **Review.**—Appeal lies from conviction under juvenile delinquent law directly to Court of Criminal Appeals. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

Judgment committing male delinquent under 17 to state industrial school for boys for 5 years, not conforming to verdict committing him to juvenile training school for 5 years, will be reformed on appeal. *Id.*

The provision of this article, putting the burden of proof as to juvenility upon defendant and requiring that the judge be satisfied that accused is less than 17 years of age, places large discretionary power on the trial judge, and his decision will not be reviewed unless manifestly wrong. *Jefferson v. State*, 85 Cr. R. 614, 214 S. W. 981.

Where the evidence was conflicting as to whether defendant was under or over 17 years of age, the trial court's decision, based on sufficient evidence, is binding on review. *Flores v. State* (Cr. App.) 227 S. W. 320.

#### DELINQUENT CHILD, TO REGULATE THE CONTROL AND TREATMENT OF SAME

**Art. 1197. Delinquent children.**—The words "delinquent Child" shall include any male child under seventeen years of age, or any female child under eighteen years of age, who violates any law of this State, or who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons, or who knowingly visits a house of ill repute, or who knowingly patronizes or visits any place where any gambling device is or shall be operated, or who patronizes any saloon or place where any intoxicating liquors are sold, or who habitually wanders about the streets in the night time without being on any business or occupation, or who habitually wanders about any railroad yard or tracks, or who habitually jumps on or off of any moving train, or who enters any car or engine without lawful authority, or who is guilty of immoral conduct in any public place. Any such child committing any of the acts herein mentioned shall be considered a "delinquent child," and shall be proceeded against as such in the manner hereinafter provided and as otherwise so provided by law so as to effect the object of this law. Any juvenile found by the Court or Jury to be a delinquent child shall be committed to the place or institution provided by law for juveniles, for an indeterminate period not extending beyond the time when such juvenile will reach the age of twenty-one years. A disposition of any

child under this law or any evidence given in such case, shall not, in any civil, criminal, or other cause or proceeding whatever, in any court, be lawful or proper evidence against such child for any purpose whatever except in subsequent cases against the same child under this Act.

When an indictment is returned by the Grand Jury of any county charging any female juvenile under the age of eighteen years with a felony, the parent, guardian, attorney or next friend of such juvenile, or said juvenile herself, may file a sworn statement in court at any time before announcement of ready for trial is made in the case. When such statement is filed the judge of said court shall hear evidence on the question of the age of the defendant, and if he is satisfied from the evidence that said juvenile is less than eighteen years of age, said judge shall dismiss such prosecution and proceed to try the juvenile as a delinquent child, under the provisions of this Act.

If said juvenile be found to be delinquent, and sentence be not suspended as provided in the laws of this State in cases of felony on first offense, defendant on conviction shall be committed to the Girl's Training School, upon an indeterminate period not extending beyond the time that such juvenile will reach the age of twenty-one years, and the jury trying the case shall state in their verdict the time and place of commitment.

If a prosecution for misdemeanor is filed against a male under 17 years of age, or female under 18 years of age, the defendant or other person as named in Article 1195, may file affidavit, setting up her or his age, and on proof of such fact the prosecution shall be maintained against the defendant as a juvenile delinquent, without new charge.

Any proceeding under this Act begun by information and sworn complaint which states upon its face the age of the child as under seventeen years in the case of males and under eighteen years in the case of females, shall not be regarded as charging such child with a felony or a misdemeanor, but as a delinquent child, although such acts would otherwise charge a felony or a misdemeanor. A prosecution and conviction of a juvenile shall be regarded as a criminal, or a misdemeanor, case, and an appeal lies from such conviction directly to the Court of Criminal Appeals of Texas.

In any proceeding in any juvenile court under this Act the court or jury may substitute as a place of commitment any detention home, parental school, or school for girls or boys, established by any county, and the further disposition of the juvenile shall be governed as further provided for by the laws relating to delinquent children. [Acts 1907, p. 137, § 1; Acts 1913, p. 215, ch. 112, § 3; Acts 1918, 35th Leg. 4th C. S., ch. 26, § 1.]

Took effect March 22, 1918.

See *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380; *Gordon v. State* (Cr. App.) 228 S. W. 1095; *Scott v. State* (Cr. App.) 228 S. W. 1099.

**Validity.**—Provisions of the law defining delinquent and incorrigible children held not so incongruous and unintelligible that they cannot be understood or correctly enforced. *Ex parte Gordon* (Cr. App.) 232 S. W. 520; *Gordon v. State* (Cr. App.) 228 S. W. 1095.

Juvenile delinquent law, defining juvenile delinquents and providing for trial, procedure, penalty, commitment, etc., held not so uncertain and indefinite within Pen. Code, art. 6, as to be invalid. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 339.

**Construction and operation in general.**—Art. 1206, designating a procedure whereby a parent may cause the restraint of an incorrigible juvenile, is not exclusive, but this article, as amended, and art. 1195, also designate procedure which the courts may follow. *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

Under the provisions of the amendatory act of 1918, a female juvenile under 18 years of age charged with felony had the right to file a statement in court advising the judge of her claim that she was a juvenile, or to exercise her option to be tried under the indictment. *Slade v. State*, 85 Cr. R. 358, 212 S. W. 661.

Where the language of a statute relating to a female juvenile under the age of 18 years is the same as that relating to male juveniles under 17 years of age which had been previously construed, it must be presumed that the construction of such former statute indicates the legislative intent in the latter. *Id.*

Statutes defining delinquent children and creating juvenile courts, such as the amendatory Act of 1918, are beneficial and entitled to favorable construction. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

The Act of 1918, providing for commitment of a minor girl charged with violation of the law to a juvenile reformatory instead of to the penitentiary, at her option or at the suggestion of other parties, merely provides a different punishment, but does not relieve her from liability to prosecution for perjury, and therefore does not render her incompetent as a witness. *Williams v. State* (Cr. App.) 225 S. W. 173.

**What constitutes delinquency.**—Under this article, as amended by Acts 35th Leg. 4th Called Sess. (1918) c. 26, a child under 17 years of age who "violates any law of the state" is a delinquent child, and the fact that defendant child made an assault upon a female child calculated to inflict shame and disgrace brought the case within the Delinquent Child Act, whether the assault was aggravated or simple. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

"Incorrigible," used in the Act of 1918, in its general use means bad beyond correction or reform, but, in view of Pen. Code 1911, art. 10, it was not legislative intent that child to come within law must be bad beyond reform in absolute sense, but rather one whose reformation could not be effected by control to which he was subject. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

Boy under 17 who cut another person with a knife, unless he did so in self-defense, was guilty of simple or aggravated assault, a violation of law, and became a delinquent under the Act of 1918. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

**Procedure in general.**—See *Ex parte Gordon* (Cr. App.) 232 S. W. 520; notes to art. 1198.

Where the county court sitting as a juvenile court, tried a complaint that a certain person was a dependent child before a jury, and adjudged such person to be a dependent child and the ward of the court subject to its orders until finally discharged or until attaining the age of 21 years, the proceeding was one to appoint a guardian for the dependent child. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

On an information under the Act of 1918, charging defendant with being a delinquent child, and where a jury was demanded and impaneled and found defendant to be a delinquent child, the trial judge was without authority to fix the punishment, as defendant's guilt, as well as the amount of his punishment, was exclusively within the province of the jury. *Gebhardt v. State*, 87 Cr. R. 25, 218 S. W. 1047.

Consequences of conviction of a child of delinquency being to deprive him of liberty and withdraw it from paternal care, prosecutions are required, by the Act of 1918, to follow procedure in criminal cases. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

**Complaint and information.**—See *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386; *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96; notes to Art. 1199.

**Evidence.**—In proceeding under juvenile delinquent law, testimony of sheriff that he had had defendant in jail several times for petty theft, and that he did not know when cases were tried, or know that he ever stole anything, was admissible as tending to prove state's main case against him. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 339.

In prosecution of child as delinquent because of aggravated assault, evidence held sufficient to support finding defendant was guilty through having committed assault with a knife, a deadly weapon, and having inflicted serious bodily injury. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

In prosecution of defendant as a delinquent child for burglary, evidence of defendant's possession of cigars and tobacco of same kind as that stolen, but without identifying it as the particular cigars and tobacco stolen, held insufficient to support conviction. *Woods v. State* (Cr. App.) 225 S. W. 517.

**Sentence and judgment.**—A judgment in a juvenile prosecution committing a juvenile to a girls' training school without reciting the beginning or ending or duration of the confinement held void, under this article, as amended by the Act of 1918, requiring the judgment in a juvenile prosecution to specify both the time and place of confinement. *Ex parte Roach*, 87 Cr. R. 370, 221 S. W. 975.

A judgment of conviction of delinquency, showing that the minor appeared in person, that all interested persons received due notice, that a jury was waived, and that he entered a plea of guilty, held a sufficient compliance with the law, both in form and substance. *Guinn v. State* (Cr. App.) 228 S. W. 233.

**Application of suspended sentence law.**—See *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

In view of the Amendatory Act of 1918, children found delinquent are entitled to benefit of Suspended Sentence Law (art. 865b), and one proceeded against for first time should have been accorded privilege of having jury determine whether sentence should be suspended. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

**Review.**—For claimed error in trial under juvenile delinquent law appeal should be resorted to, and not habeas corpus. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 339.

Where the court had jurisdiction to render the judgment and the law affords a remedy by appeal under the Amendatory Act of 1918, the Court of Criminal Appeals on an original application for habeas corpus cannot inquire into questions of procedure or sufficiency of evidence. *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

Under this article, as amended by the Act of 1918, a juvenile convicted, no matter what the punishment, can appeal direct to the Criminal Court of Appeals. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

As the juvenile law contains no provision governing appeals, appeals should be taken under the usual procedure in cases of felony or misdemeanor, as the case may appear, although such act contains a provision seeming to sweep away the distinction between misdemeanor and felonies when presented by complaint and information. *Id.*

An appeal by one found guilty of being a delinquent cannot be entertained where the appellate court cannot find in the record any judgment on the verdict, or any order



directing the disposition to be made of the accused, under this article, as amended by the Act of 1918, and arts. 853-868. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

While the court ordinarily declines to permit the functions of an appeal to be impinged by a writ of habeas corpus, the rule does not apply to the case of a mere child whose parents were not notified of the proceedings and who had no opportunity to prepare for an appeal, notwithstanding this article, as amended by the Act of 1918. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

### Art. 1198. Jurisdiction of district and county courts; jury trial; entry of findings; name of court.

**Validity of law.**—In view of arts. 1195, 1198, 1200, the law defining delinquent children held valid as against the contention that it deprives an accused of the fundamental right to a trial by jury and to be heard by counsel. *Ex parte Gordon* (Cr. App.) 232 S. W. 520; *Gordon v. State* (Cr. App.) 228 S. W. 1095.

There is nothing in the Constitution inhibiting the Legislature from conferring on the county court the power to render a judgment as a juvenile court by this article, especially in view of Const. art. 5, § 1. *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

**Jurisdiction.**—Under this article, and Civ. St. art. 1798b, held, that the county court of Dallas county at law, No. 2, has jurisdiction to render judgment as a juvenile court. *Ex parte Fowler*, 85 Cr. R. 436, 213 S. W. 271.

**Waiver of jury trial.**—A trial by jury may be waived by infant prosecuted under Juvenile Delinquent Act. *Gordon v. State* (Cr. App.) 228 S. W. 1095.

The conviction of infant as a delinquent was not void, though the trial was without a jury, since delinquency is not a "felony" under this article, as amended by the Act of 1918, and since in cases other than felony a jury may be waived under art. 22. *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

### Art. 1199. Sworn complaint or information; requisites.

See *McLaren v. State*, 85 Cr. R. 31, 209 S. W. 669.

**Complaint or information—Necessity.**—Under arts. 1195, 1199, where 17 year old boy was indicted and pleaded he was under 17, and court dismissed criminal proceeding, and placed case on juvenile docket, judgment adjudging boy guilty, sentencing him to confinement in Industrial School, without complaint or information, was void. *Ex parte Ramseur*, 81 Cr. R. 413, 195 S. W. 864; *Ex parte Medrano*, 81 Cr. R. 338, 195 S. W. 865.

Under the statute, when indictment for felony is dismissed because defendant is under 17, he cannot be tried thereunder as delinquent, but complaint and information must be filed against him. *Ex parte Ellis*, 82 Cr. R. 641, 200 S. W. 840.

All prosecutions of a juvenile must be upon complaint and information, in view of Acts 35th Leg. 4th Called Sess. (1918) c. 26, amending art. 1197. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

**Requisites and sufficiency.**—Information charging defendant with being delinquent child within juvenile delinquent law, held not duplicious as charging felonies and misdemeanors. *Miller v. State*, 82 Cr. R. 495, 200 S. W. 389.

Complaint need not allege that the child is white or black because a separate place of confinement is provided for negro delinquents, under arts. 1195-1207, 853-868, and Acts 35th Leg. 4th Called Sess. (1918) c. 26. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

Information against female child under Acts 35th Leg. 4th Called Sess. (1918) c. 26, was sufficient in specifications she associated with named vicious and immoral persons, habitually wandered about streets at night without business or occupation, and had been guilty of immoral conduct through sexual intercourse in a specified public place with a named person, but insufficient in its bare charge she was an incorrigible child. *Hogue v. State*, 87 Cr. R. 170, 220 S. W. 96.

A complaint and information charging child to be "an incorrigible child" were too general; allegations of matters showing incorrigibility being necessary. *Guerrero v. State*, 87 Cr. R. 260, 220 S. W. 1095.

A complaint and information, charging one to be a delinquent child in "that he is guilty of immoral conduct in public places, to wit, the streets of San Antonio," were too general; allegations of matters showing immorality being necessary. *Id.*

Merely charging a juvenile with being a delinquent and incorrigible child is insufficient to constitute the basis of a valid judgment, under this article; an "incorrigible" being one who cannot be reformed. *Ex parte Roach*, 87 Cr. R. 370, 221 S. W. 975.

A charge that defendant, a minor, did habitually wander about the streets of a city in the nighttime without being on any business or occupation held a sufficient allegation of delinquency. *Guinn v. State* (Cr. App.) 228 S. W. 233.

Counts in information and complaint charging a felony were ineffective under the Juvenile Act where they did not specify that the party against whom they were filed was under 17 years of age. *Gordon v. State* (Cr. App.) 228 S. W. 1095.

### Art. 1200. Proceedings on complaint; notice to parent or guardian, etc.

**Validity of law.**—See *Gordon v. State* (Cr. App.) 228 S. W. 1095; notes to art. 1198.

**Notice to parent or guardian.**—In a prosecution of an infant as a delinquent, the parent or guardian of the child must be notified. *Ex parte Gordon* (Cr. App.) 232 S. W. 520.

**Setting time for hearing.**—Proceedings under the juvenile law are intended to follow the general course of a criminal case, and, after complaint is filed and warrant or capias issued, a time certain should be set for a hearing or trial, at which both parties shall have opportunity to present such pleas or evidence as might be desired, in view of this article. *Ex parte Cain*, 86 Cr. R. 509, 217 S. W. 386.

**Art. 1202. Probation officers; appointment, etc.**—The County Courts of the Several Counties of this State shall have authority to appoint any number of discreet persons of good moral character to serve as probation officers during the pleasure of said court, said probation officers to receive no compensation from the County treasury except as herein provided. It shall be the duty of the Clerk of the court, if practicable, to notify the said probation officers when any child is to be brought before the court; it shall be the duty of such probation officer to make investigation of such case; to be present in court to represent the interest of the child when the case is heard; to furnish to such court such information and assistance as the court or judge may require, and to take charge of any child before and after the trial as may be directed by the court. The number of probation officers to receive compensation from the county, named and designated by the County court shall be as follows:

In Counties having a population of less than Seventy-five thousand, one probation officer may be appointed by the Commissioners Court when in their opinion such officer is needed, who shall receive a compensation of not to exceed twelve hundred dollars per annum, provided that in counties having a population of not less than thirty-five thousand and not more than seventy-five thousand and containing a city of more than twenty nine thousand population, one probation officer may be appointed by the Commissioners Court when in their opinion the services of such officer is needed, who shall receive a compensation of not to exceed twenty-four hundred dollars per annum. Expenses may be allowed such probation officers by the county in a sum not to exceed two hundred dollars per annum. The County Judge shall select such probation officers from a list of three furnished by a nominating committee composed of three members as follows: The County Superintendent of Public Instruction and the Superintendents or Principals of the two largest independent school districts in such county.

In counties having a population of more than seventy-five thousand, the county judge shall appoint not fewer than two probation officers from lists furnished him by the nominating committee as provided above. The Chief probation officer shall receive a salary of not to exceed twenty-four hundred dollars per annum, and necessary expenses not to exceed two hundred dollars per annum. Other probation officers shall receive salaries not to exceed fifteen hundred dollars per year, and all necessary expenses not to exceed two hundred dollars per year.

In the appointment of all probation officers under the provisions of this act, the county judge may upon the nomination of the committee of three herein above provided for, select for such office any school attendance officer or officers of the county or of school districts in the county that may be provided for in any compulsory school attendance law now in force in this state, or that may hereafter be passed, and the salary and expenses of such joint probation officer or officers and attendance officer or officers shall be paid jointly by the county and school authorities upon any basis of division they may agree upon.

Probation officers receiving a salary or other compensation from the county, provided for by this act, are hereby vested with all the power and authority of police or sheriffs to make arrests and perform any other duties ordinarily required by policemen and sheriffs which may be incident to their office or necessary or convenient to the performance of their duties; provided that other probation officers may be vested with like power and authority upon a written certificate from the county judge that they are persons of discretion and good character and that it is the desire of the court to vest them with all the power and author-

ity conferred by law upon probation officers receiving compensation from the county.

Salaries or compensation of paid probation officers permitted by this act shall be fixed by the county commissioners not to exceed the sums herein mentioned, and in any bills for expenses not exceeding the sums herein provided for, shall be certified by the county judge as being necessary in and about the performance of the duties of the probation officer or officers. It shall be the duty of the commissioners court of the county to provide the necessary funds for the payment of salaries and expenses of the probation officers provided for in this act. The appointment of probation officers as herein designated shall be filed in the office of the clerk of the County Court. Probation officers shall take an oath, such as may be required of other county officers, to perform their duties, and file it in the office of the clerk of the county court.

Nothing herein contained however shall be held to limit or abridge the power of the county judge to appoint any number of persons as probation officers. And upon a vote of the county commissioners court the county judge may appoint as many additional salaried probation officers as the court may direct. As a basis for the reckoning of the population of any county, affected by this section of the last federal census shall be used. [Acts 1907, p. 139, § 6; Acts 1913, p. 216, ch. 112, § 8; Act 1919, 36th Leg., ch. 91, § 1; Acts 1919, 36th Leg. 2d C. S., ch. 51, § 1.]

Took effect 90 days after July 22, 1919, date of adjournment.

#### **Art. 1203. Commitment of delinquent to care of proper person, or institution or of probation officer, etc.**

**Term of commitment.**—In view of this article, and Rev. Civ. St. art. 5231, limiting term of commitment to five years, a judgment committing a juvenile until he became 21 years of age was absolutely void, where infant was only 13 years of age. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

Under Acts 35th Leg. (Fourth Called Sess. 1918) c. 26, boy under 17 who commits assault, simple or aggravated, is a delinquent child, and may be committed to training school for five years, though his older brother may be punished for offense only by fine, or fine and imprisonment in county jail. *Simpson v. State*, 87 Cr. R. 277, 220 S. W. 777.

**Requisites and sufficiency of judgment.**—Under Const. art. 5, § 17, juvenile delinquent law, construed with Pen. Code, art. 6, and Code Cr. Proc. art. 770, held, that order committing female delinquent child to Sister of order for an indefinite term, not beyond the age of 21, was void. *Ex parte McLoud*, 82 Cr. R. 299, 200 S. W. 394.

In view of this article, and Rev. Civ. St. art. 5231, a judgment committing a juvenile should state the length of time he is to be detained, and that he is not to be detained beyond the time he reaches the age of 21. *Ex parte Brooks*, 85 Cr. R. 252, 211 S. W. 592.

The word "person," in this article, requiring order or judgment of commitment to prescribe length of time and conditions of commitment, refers to institutions as well as persons, in view of Pen. Code, tit. 1, c. 2. *Id.*

Commitment to girls' training school, see *Ex parte Roach*, 87 Cr. R. 370, 221 S. W. 975; notes to art. 1197.

Civ. St. art. 5221, designates state institution for training of juveniles located at Gatesville as "the State Juvenile Training School," to be designated as "the Training School," and a judgment punishing a delinquent by designating such place of confinement and the term as an indeterminate period not to exceed five years or beyond the time when he shall have reached the age of 21, complies with the law. *Guinn v. State* (Cr. App.) 228 S. W. 233.

**Correction of judgment.**—If the proper place of confinement is not designated in a judgment finding one guilty of being a delinquent child, it may be corrected upon a motion for new trial or on appeal. *Tippins v. State*, 86 Cr. R. 205, 217 S. W. 380.

**Effect of commitment to probation officer.**—Where the court, acting upon a petition charging a certain person with being a dependent child, decreed the child to be dependent and issued an order of commitment to the probation officer of the county until further order, the effect was to make such probation officer the guardian of the dependent, in view of Rev. St. arts. 2184, 2189, and 2190. *Ex parte Grimes* (Civ. App.) 216 S. W. 251.

#### **Art. 1206. Commitment of incorrigible boys to State Industrial School for Boys; petition by parent or guardian, etc.**

**Remedy not exclusive.**—This article designating a procedure whereby a parent may cause the restraint of an incorrigible juvenile, is not exclusive, but article 1197, as amended by Acts 35th Leg. (4th Called Sess.) c. 26, and article 1195, also designate procedure which the courts may follow. *Ex parte Davis*, 85 Cr. R. 218, 211 S. W. 456.

## COUNTY JUVENILE BOARDS

**Art. 1207e. Board for certain counties created.**—In any county of this State having a population of one hundred thousand or over and containing a city having a population of seventy thousand or over, according to the last United States census, the judges of the several District Courts of such county, together with the County Judge of such county, are hereby constituted a Juvenile Board for such county. [Acts 1917, 35th Leg. ch. 16, § 1; Acts 1917, 35th Leg., ch. 58, § 1; Acts 1921, 37th Leg., ch. 139, § 1.]

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

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[END OF VOLUME 2]